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|--|---|-------------------------------|
| IN RE: <b>PETITION FOR SPECIAL HEARING</b> | * | BEFORE THE                    |
| <b>(639 Plymouth Road)</b>                 |   |                               |
| 1st Election District                      | * | OFFICE OF                     |
| 1st Council District                       |   |                               |
| Virginia S. Kenney, deceased, by           | * | ADMINISTRATIVE HEARINGS       |
| Harry Kenney, Executor                     |   |                               |
| Legal Owner                                | * | FOR BALTIMORE COUNTY          |
| <br>                                       |   |                               |
| <b>Petitioner</b>                          | * | <b>Case No: 2021-0037-SPH</b> |

\* \* \* \* \*

**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings (“OAH”) as a Petition for Special Hearing filed by Harry Kenney, Executor of Estate of Virginia S. Kenney (“Petitioner”) for the property located at 639 Plymouth Rd., Catonsville (the “Property”). The Special Hearing was filed to continue to use the Property as six (6) dwelling units, two (2) dwelling units on the first floor, two (2) dwelling units on the second floor, and two (2) dwelling units on the third floor as a legal non-conforming use.

Due to the COVID-19 pandemic, a public WebEx hearing was conducted virtually in lieu of an in-person hearing. The Petition was properly advertised and posted. Harry Kenney appeared in support of the Petition along with Ben Frederick and Will A. Cannon, III of Ben Frederick Realty, brokers and real estate agents, who assisted the Petitioner. There were no Protestants or interested citizens at the hearing. Zoning Advisory Committee (“ZAC”) comments were received from the Department of Planning (“DOP”) and Development Plans Review (“DPR”) who did not oppose the requested relief.

The Property is 11,250 square feet and is zoned density residential (DR 5.5). A location survey dated January 15, 2021, shows a 3-story stucco and frame building with a macadam driveway, detached garage and concrete walkways. (Pet. Ex. A). The building was built in 1927.

Photographs of the building and the other homes along Plymouth Rd. were provided revealing fire escapes on either side of the building. (Pet. Exs. C, D, G-1, G-2). Mr. Frederick narrated photographs of the interior which showed 2 mailboxes in the lobby, original architectural details, vintage radiators and hardwood floors, dated block foundation walls, 7 electric meters, 7 gas meters, vintage bathroom fixtures and tile work, a caretaker's basement bathroom and a basement incinerator which has been closed. (Pet. Exs. G-2 through G-10).

Mr. Kenney, who is 61 years old, testified that he grew up less than 1 mile from the Property. His grandparents, Harry and Sarah Schneider, bought the Property in 1942. Mr. Kenney remembers from as early as 4 years old going after Church on Sundays to visit his grandmother at the Property. His grandmother lived in Apartment B-2 and managed the apartment building. Mr. Kenney testified that there have always been 6 apartments in the building and a caretaker, Sam Ballard, who lived in, and worked the incinerator, in the basement.

In the 1980s, Mr. Kenney testified that his grandmother came to live with his family until she died in 1990. Upon his grandmother's death, his mother, Virginia Kenney, inherited the Property. Mr. Frederick provided a chain of title showing the ownership of the Property has been in Mr. Kenney's family since 1942. (Pet. Ex. E). The family intends to sell the Property. However, the County has no record of the apartment use or building permits. The apartments have not been registered as rental units with Baltimore County. With this Petition, Mr. Frederick is hoping to confirm the non-conforming use and thereafter register the apartments units with the County prior to sale.

Admittedly, the apartment building, the garage and the driveway need improvement. Indeed, a written comment was received from an interested citizen (as contained in the file) which complains that the Property has not been maintained and needs improvement. Mr. Frederick

testified that, unlike Mr. Kenney who has inherited the Property, a buyer who is in the rental property business will improve and maintain the Property.

Importantly, Mr. Kenney testified that apartment building use has continued uninterruptedly and was not abandoned or discontinued for a period of one year or more. In fact, he stated that, other than typical lease vacancies, the Property has always been used as a 6 apartment building since it was constructed.

### SPECIAL HEARING

A hearing to request special zoning relief is proper under BCZR, §500.7 as follows:

The said Zoning Commissioner shall have the power to conduct such other hearings and pass such orders thereon as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations, subject to the right of appeal to the County Board of Appeals as hereinafter provided. The power given hereunder shall include the right of any interested person to petition the Zoning Commissioner for a public hearing after advertisement and notice to determine the existence of any purported nonconforming use on any premises or to determine any rights whatsoever of such person in any property in Baltimore County insofar as they are affected by these regulations.

"A request for special hearing is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore County*, 163 Md. App. 194, 877 A.2d 1166, 1175 (2005). A valid and lawful nonconforming use is established if the owner can demonstrate that *before and at the time* of the adoption of a new zoning classification/ordinance, the property was being used in a lawful manner that, by later legislation, became non-permitted. *Trip Assoc., Inc. v. Mayor and City Council of Baltimore*, 392 Md. 563, 569 (2006).

In Baltimore County, the law regarding nonconforming uses is set forth in BCZR, §104.1, provides:

A nonconforming use (as defined in Section 101) may continue except as otherwise specifically provided in these regulations, provided that upon any change from such nonconforming use to any other use whatsoever or any abandonment or discontinuance of such nonconforming use for a period of one year or more, the right to continue or resume such nonconforming use shall terminate.

The definition of non-conforming use in BCZR, §101.1 is:

**NONCONFORMING USE** — A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use.

The two questions to be resolved in this case are: (1) Whether or not the use of the Property existed prior to the inception of a zoning regulation prohibiting that use; and (2) If so, whether that use continued uninterruptedly and not abandoned or discontinued for a period of one year or more. As to the first, I find the date when the zoning regulation prohibited six (6) dwellings on a lot less than 1 acre in size was 1971, when the countywide zoning map reclassified the Property to DR 5.5. (Bill 100-70). Prior to 1971, there was no evidence that there was any prohibition on the use of the building as an apartment.

Based on the evidence presented, the building was constructed in 1927 and has been used as an apartment building since that time. I find that the photographs corroborate Mr. Kenney's testimony that the building has continuously and uninterruptedly been used as an apartment building since at least since 1942 when his grandparents bought it, and I find that use has not been abandoned or discontinued for a period of 1 year or more. Specifically, the photographs confirm vintage fixtures such as 6 mailboxes, 6 gas meters and 6 electric meters; there is no need for the aforementioned fixtures if the building was not an apartment use. Additionally, Mr. Kenney's grandmother, Sarah Schneider, lived in Apartment B-2 and also managed the building. Mr.

Kenney vividly recalls that on a regular basis during his childhood, he and his family would visit his grandmother at the building, and therefore he could testify as to its use since prior to 1971 when the DR 5.5 zoning was created and was applied to the Property. Moreover, there would be no reason to have a caretaker living in the basement or to have fire escapes if the use was a single family home.

Having met the burden of proof required for a non-conforming use, I find that the requested relief is within the spirit and intent of the BCZR and will not harm the public health, safety, or welfare.

THEREFORE, ORDERED this 18<sup>th</sup> day of **May, 2021** by this Administrative Law Judge, that the Petition for Special Hearing to continue to use the premises as six (6) dwelling units, two (2) dwelling units on the first floor, two (2) dwelling units on the second floor, and two (2) dwelling units on the third floor as a legal non-conforming use is hereby **GRANTED**.

The relief granted herein shall be subject to the following:

1. Petitioner may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioner is hereby made aware that proceeding at this time is at their own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If for whatever reason this Order is reversed, Petitioner would be required to return the subject property to its original condition.
2. Petitioner must comply with the DOP ZAC comment, a copy of which are attached hereto and make a part thereof.
3. Petitioner must comply with the DPR ZAC comment, a copy of which are attached hereto and make a part thereof.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.



MAUREEN E. MURPHY  
Administrative Law Judge  
for Baltimore County

MEM/dlw