

The Dorchester County Board of Appeals met in regular session on Thursday, July 20, 2017 in Room 110 of the County Office Building at 7:00 PM. Present were, Catherine McCulley, Chairperson, Elizabeth Hill, Vice Chair, Wendell Foxwell, Walt Gunby, Attorney, Steve Dodd, Director of Planning and Rodney Banks Deputy Director of Planning. Absent: Lin Spicer

An introduction was made by Chairperson McCulley, explaining the procedures of this meeting to the audience. She then asked Mr. Banks to read the first case.

Case # 2614 Lowin Farms LLC
Steve Whitten - Applicant

To request, as a special exception, a sum total area of accessory structures greater than the building footprint of the principal residential structure, or as allowed by Code. Sum total of accessory building request is 6,039 sq. ft. Property is located at 6420 Cabin Creek Road Hurlock, MD 21643. Containing 139.4 acres. Zoned AC - Agricultural Conservation.

Steve Whitten, applicant, Fink, Whitten & Associates, 108 Dorchester Avenue, Cambridge, MD, and any other person who would be testifying in this case, were sworn in.

Mr. Banks read the case and all pertinent information into the record. Mr. Banks noted that the owners are in the process of a lot line revision that will create a 2 acre lot encompassing an existing dwelling and two existing accessory structures. The two accessory structures exceed the footprint of the existing dwelling.

Ms. McCulley advised the applicant of his two options, to rely on his written responses to the criteria or comment on the responses. Mr. Whitten advised that he would rely on his written responses and further explain the request.

Mr. Whitten reviewed the site plan. Mr. Whitten noted that through the lot line revision, he is creating a non-conforming situation requiring a special exception. He also advised that through this request, the owners are asking for additional square footage to allow for an addition or replacement of the larger agricultural building built in 1937. The new building would be 60 x 80 sq. ft. and would be used to store agricultural equipment. There is water at the existing barn and there would be a hose bib at the new building. Mr. Foxwell asked when the lot line revision would be completed. Mr. Whitten advised that the application has been submitted to Planning and Zoning but without this special exception, the lot line revision cannot be approved.

Mr. Banks read agency comments into the record. The State Highway Administration advised that the subject property is along county road 329 which is not within the jurisdiction of the State Highway Administration, therefore SHA has no comment. The Department of Public Works had no comment or objection to the special exception. A stormwater management plan and erosion sediment control plan will need to be submitted for review and approval prior to new construction in excess of 5,000 sq. ft. The Planning Commission stated that based on the information provided, they had no objection to this request.

No one spoke in favor of this request and no one was opposed.

Ms. McCulley announced the end of testimony and the Board began their deliberations.

At this time, each Board member explained his decisions regarding the criteria.

After all testimony, Ms. McCulley called for a motion regarding this case. Ms. Hill made a motion to approve the request with the stipulation that the subdivision process be completed. Mr. Foxwell seconded and the motion unanimously carried.

**Case # 2615 Frosty Freezer LLC- Harry Phillips- Owner
Steve Whitten- Applicant**

To amend previously approved special exception to allow Seafood Processing in the Village Zone by revising building size from 3,400 Sq. Ft. to 3,500 Sq. Ft. Property located 2810 Hoopers Island Road Fishing Creek, MD 21634. Containing 1.74 acres.

Steve Whitten, applicant, Fink, Whitten & Associates, 108 Dorchester Avenue, Cambridge, MD, and any other person who would be testifying in this case, were sworn in.

Mr. Banks read the case and all pertinent information into the record. Mr. Banks noted that the Board of Appeals originally approved this case #2610 at their April, 2017 meeting. Since then, the applicant has decided to increase the size of the freezer storage building by 100 sq. ft.

Ms. McCulley advised the applicant of his two options, to rely on his written responses to the criteria or comment on the responses. Mr. Whitten advised that he would rely on his written responses and explain further.

Mr. Whitten advised that the original request had a 10 x 10 sq. ft. area that would allow trucks to back in for loading/off-loading. At final site plan approval, the owner determined that this area would not be needed, so it will now be a squared up portion of the proposed building.

Mr. Banks read agency comments into the record. The Health Department had no objection to the special exception. It should be noted that the existing septic tank that served the house must be properly abandoned and filled. The Department of Public Works had no comment or objection to the request. A stormwater management plan and erosion sediment control plan will need to be submitted for review and approval prior to new construction in excess of 5,000 sq. ft. The Planning Commission stated at their July meeting that based on the information provided, they had no objection to this request. Mr. Banks noted that at their July meeting the Planning Commission approved the site plan, but it is pending approval of the revised special exception.

No one spoke in favor of this request and no one was opposed.

Ms. McCulley announced the end of testimony and the Board began their deliberations.

At this time, each Board member explained his decisions regarding the criteria.

After all testimony, Ms. McCulley called for a motion regarding this case. Mr. Foxwell made a motion to approve the request with the stipulation that the applicant obtain all required permits for the construction of the building. Ms. Hill seconded and the motion unanimously carried.

Case # 2611 Thomas Spicer- Owner
William McAllister Jr. – Applicant

To request a variance from the Flood Protection Elevation as defined by the Dorchester County Code, permitting the elevation of the residence located at 3525 Golden Hill Road, Church Creek, to remain at an elevation of four and a half feet (4.5') above natural grade elevation, and to also request a variance from the front yard setback of sixty feet (60'). Containing 16 acres. Zoned AC - Agricultural Conservation.

William McAllister, Jr., applicant, McAllister, DeTar, Showalter & Walker, 300 Academy Street, Cambridge, MD, Thomas Spicer, Sr., 3486 Golden Hill Rd., Church Creek, MD, and any other person who would be testifying in this case, were sworn in.

Mr. Banks read the case and all pertinent information into the record. Mr. Banks noted the applicant has made numerous improvements to the residence without permits. The County Zoning Inspector sent a violation letter to the applicant on 7-21-16, with no response from the owner. A second violation notice was sent on 10-13-16. Mr. Dodd, Director of Planning, sent a notice of violation letter with an enforcement notice to Mr. Spicer on 2-6-17.

Ms. McCulley advised the applicant of his two options, to rely on his written responses to the criteria or comment on the responses. Mr. McAllister advised that he would incorporate by reference the exhibits to the narrative and would also present additional information.

Mr. McAllister also advised that for the record, depending on the position of the county, if it is decided that the four general criteria apply also, there would be a total of 22 criteria that would need to be addressed to make a determination on the elevation variance. He stated that he wants to make sure that all criteria are addressed so that they are not deficient on addressing the necessary criteria.

Mr. McAllister stated for the record that there are two variances before the Board tonight, the building code violations Mr. Banks referenced are not part of these requests. The first is whether the elevation can remain at 4.5 ft. above grade, the county standard being 6 ft. The second is to permit the side and front yard porch to remain where it is, requiring a 60 ft. variance from the road. Mr. McAllister gave a brief description of the house, land, and history of ownership.

Mr. McAllister passed out six exhibits. He reviewed exhibits A and B, pictures of the house in 2015 and 2017 noting the elevation before and after. He also reviewed exhibit D, the SDAT sheet with valuation of the house as of Jan. 1, 2015 (\$16,300). He stated that the importance of this valuation is because the house needed to be raised to

6 ft. only if there is new construction or substantial improvement. Mr. McAllister reviewed the existing FEMA guideline for substantial improvement. He stated that at the time the structure was raised in July, 2015, it was not an improvement that came close to 50% of the value of the house. He suggested that as improvements were made after the elevation, the value increased triggering the 50% substantial improvement and need for a variance from the 6 ft. standard. Mr. McAllister noted that the first improvement was the elevation and was done by the family. He did note that FEMA guidelines require the fair market values to apply even if the owner does the work. Mr. McAllister referred to exhibit E, a proposal from Glenn Ruark, dated July, 2015 to elevate the house at a cost of \$7,650. He noted that the proposal is still less than 50% of the SDAT valuation.

Mr. McAllister advised that the variance is not from the FEMA elevation requirements, noting that FEMA standards are 4 ft. above the base flood elevation. He pointed out that the county is requiring the house be elevated to 6 ft. because it participates in the National Flood Insurance Program that requires an additional 2 ft. elevation. Ms. McCulley advised that the NFIP is a vital program in Dorchester County because many areas are susceptible to flooding. This program lowers the cost of insurance to homeowners in these areas. Mr. McAllister noted that this property is not near tidal water and has never flooded. Ms. McCulley asked how the owners made the determination to raise the house 4 ½ ft. Mr. McAllister explained that the house was raised to this height to access new plumbing and electrical service.

Mr. Gunby asked Mr. Spicer why he had proceeded with the work without permits. Mr. Spicer advised that he had asked Planning & Zoning if he needed a permit to raise the house, but no one told him he would need to raise the house to the 6 ft. elevation even if substantial improvements were not done at that time. Mr. Dodd, Director of Planning went on record to clarify the statement made by Mr. Spicer. Mr. Dodd advised that he had one conversation with Mr. Spicer and at that time, he told Mr. Spicer the house must be raised to the 6 ft. flood protection elevation. Mr. Dodd also stated that Mr. Spicer had a conversation with Rhonda Mills, Permit Technician, which he had repeated to Mr. Dodd at a later date, asking her if he needed to elevate the house to the 6 ft. elevation and Ms. Mills stated that he would or permits could not be obtained for any work. Mr. Spicer was asked why he did not elevate to the required height. Mr. Spicer stated that the house has never flooded in all the years it has been standing since 1939, and it has never flooded during any of the hurricanes that hit the area. He also argued that when he elevated the house, it was not a substantial improvement.

Mr. McAllister referred to §155-37.F of the zoning code. He advised that there are 12 specific criteria that apply to the floodplain management variance, six variance criteria and four general criteria that must be met. Mr. McAllister stated that he does not believe the four general criteria apply to this request, however the applicant will address this criteria as well since the county is requiring it.

Mr. McAllister began addressing §155-37.F(3) (a-1) of the Dorchester County Zoning Code. Ms. McCulley stated that it is difficult to consider granting a variance from the floodplain elevation of 6 ft. when permits were not obtained for any of the work performed. She also noted that the Board of Appeals has never granted a floodplain variance of this type before. Mr. McAllister noted that with new construction a

floodplain variance of this type would never be granted, however there is a gray area to debate what does and does not constitute substantial improvement. He also pointed out that the Board must take into consideration the 22 criteria when making their decision.

Ms. Hill noted that the floodplain criteria the Board has does not match the criteria Mr. McAllister has been referencing. Mr. McAllister reviewed the criteria, §155-37.F(1)(a-d) four general criteria, §155-37.F(3)(a-l) floodplain variance criteria and §155-37.F(4)(a-f) variance criteria. Ms. McCulley suggested Mr. McAllister base his testimony on the Board's forms. Mr. McAllister stated that he would be addressing the questions directly from the zoning code, pointing out that as an attorney he cannot ignore the statutory requirements. Mr. Dodd agreed Mr. McAllister should address the 22 criteria.

Mr. McAllister continued addressing the questions noting that the variance criteria does indicate that there is good cause, based on the physical characteristics of the property, for the Board to conclude that reducing the county's 2 ft. freeboard 18" to FEMA requirements is justified since there is no history of flooding. Ms. McCulley asked the Board members if they had read the FEMA publication "Floodplain Management Bulletin, Variances and the National Flood Insurance Program, included with the Board's information packet. She summarized the bulletin noting that it enumerates items to be taken into consideration when granting a variance from the floodplain requirements. She pointed out that this bulletin would be helpful to the Board in making their decision.

Mr. Dodd advised that as the house stands now, it does not meet the current FEMA standard because there are no flood vents in the foundation walls and there is a small room in the back of the house with mechanical equipment at grade. Ms. Hill noted that it was her understanding that the owners had agreed to elevate the mechanical equipment and install flood vents bringing the house into compliance with FEMA standards. Mr. McAllister advised that they acknowledge that these two issues will need to be brought into compliance should the variance be granted and this could be a condition of the variance approval.

Mr. Gunby and Mr. McAllister had a lengthy discussion on the concept of self-created hardship and whether Mr. Spicer had created his own hardship. Mr. Spicer addressed the question as to whether it would be a hardship to raise the house another 18" putting it into compliance. Mr. Spicer advised that basically everything that had been done to the house would need to be undone.

Mr. Dodd advised that a determination of substantial improvement was never made and the Board of Appeals does not have the authority to make this determination, the local permitting official does this. Mr. Dodd also noted that if the applicant disagrees with the decision, it is appealable to the Board. The exhibit submitted was never given to the Planning and Zoning office for a determination of substantial improvement.

Mr. Dodd entered FEMA exhibit entitled "Substantial Improvement/Substantial Damage" adopted by the County as part of the Floodplain Ordinance. He read from the section entitled "Unauthorized Work". Mr. Dodd noted that all work on this house was

unauthorized, and it is wrong to say that the project can be looked at on the day that elevation occurred. He pointed out that all work done must be considered, to include elevation of the house, deck, new windows, siding, roof and interior work. Mr. Dodd stated that because of this document, substantial improvement is cumulative.

Mr. Dodd entered another exhibit, a worksheet used by Planning and Zoning to review every permit involving construction in the special flood hazard area, noting that this is the form that would have been used to evaluate Mr. Spicer's permit application to elevate the house. He also noted that there is a formula used to determine substantial improvement. Mr. Dodd stated that the point is, this hearing cannot be a referendum on the Board determining whether substantial improvement occurred. The Board does not have that authority. They do have the authority to grant the variance if all the criteria is met.

Mr. Banks submitted research done on Board of Appeals cases from 1981 to 2017 for flood elevation variances that were requested for remodel of single family homes. There were two cases during this time period and both were denied. Building permits were also reviewed from January 2011 to March 2017 for substantial improvements to existing single family homes within the floodplain that were required to elevate to the flood protection level, 44 dwellings were required to elevate.

Mr. McAllister reviewed the variance criteria for the deck variance. He handed out a picture of the location of the property with setbacks. He noted that the setback from Golden Hill Road goes through the middle of the dwelling and the porch is also inside the setback from the road. He read §155-5.E.5 of the zoning code and spoke about how the setback requirement was calculated. The setback is 85 ft. from the centerline of the road. Mr. McAllister stated that a permit was not obtained for the deck because it was caught up in the elevation dispute. He also advised that someone from Planning & Zoning requested the Spicer's have a structural engineer look at the porch. He handed out a certification of structural integrity for the deck dated December 21, 2016. Mr. Banks noted that the original application for the deck showed the deck to be on the back of the house only, placing it outside the required setback.

Mr. McAllister answered the criteria questions specific to the deck variance. Mr. McAllister finished by stating the Board has a statutory express ability to make exception.

Mr. Banks read agency comments into the record. The Department of Public Works stated they had no issue with the setback variance requested, but do have comments regarding the flood protection request. Application appears to be seeking a variance for an existing elevation that doesn't meet the required flood protection elevation, while no work is proposed on the residence. There are no issues with such a variance. However, should the homeowner wish to make improvements that total 50% or more of the value of the home, they will need to bring the structure into compliance with regard to the flood protection elevation or seek another waiver at that time. The Planning Commission stated that based on the information provided, they suggest that the Board hear the case and act accordingly. Mr. Banks summarized a letter June 20, 2017 from Kevin Wagner, Natural Resources Planner, Maryland Department of the

Environment. Mr. McAllister responded to this letter stating that he believes that all the items enumerated in this letter have been addressed.

No one spoke in favor of this request and no one was opposed.

Mr. Gunby asked Mr. Spicer if he has dealings with Dorchester Lumber Company and the owner Elizabeth Hill. Mr. Spicer advised he has dealings with the company and Ms. Hill but not on a regular basis. He also knows the family. Ms. McCulley made a motion to close the meeting to consult with counsel. Ms. Hill seconded and the motion unanimously passed. The meeting was closed at 10:21 pm.

Ms. McCulley announced the end of testimony and the Board began their deliberations.

At this time, each Board member explained his decisions regarding the criteria.

After all testimony, Ms. McCulley called for a motion regarding this case. Mr. Foxwell made a motion to approve the requests with the stipulation that flood vents be installed in the foundation and all mechanical and electrical equipment be elevated in compliance with the floodplain ordinance. Ms. Hill added that the applicant must obtain all required permits that had not been obtained and seconded the motion. The motion carried with Ms. McCulley opposing.

A motion was made by Ms. Hill to approve the minutes of the June 22, 2017 meeting. Seconded by Mr. Foxwell and unanimously carried.

With no further business, a motion was made by Mr. Foxwell to adjourn. Seconded by Ms. Hill and unanimously carried. Time of adjournment: 11:15 PM.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rodney Banks", with a large, stylized flourish extending from the end of the signature.

Rodney Banks
Executive Secretary