

## BOARD OF APPEALS

June 20, 2016

6:00 PM

**ATTENDANCE:** Board Members: Tim Thompson, Michael Salmon, Bill Malesh, Wayne Kommalan, Town Attorney Fred Sussman, Planning and Zoning Director Mary Ann Skilling and Planning and Zoning Coordinator Dianna Battaglia.

Mr. Malesh called the hearing to order at 7:00 p.m.

### APPROVAL OF MINUTES:

**Motion** made by Mr. Salmon and seconded by Mr. Kommalan to approve the November 16, 2015 meeting minutes as written. **All in Favor. Motion Passed.**

### NEW BUSINESS:

**SE2016-01 Special Exception**-convert 1<sup>st</sup> floor vacant commercial space to residential apartments:

Mr. Fred Sussman explained it would be appropriate for staff to put into the record the advertising that was done in compliance with the requirements of the Zoning Ordinance.

Ms. Battaglia stated I don't have the information with me but this hearing was advertised in the Cecil Whig two times in June, two Fridays, and the property was posted. (Public Notice, Cecil Whig, June 3<sup>rd</sup> and June 10<sup>th</sup>.)

(Mr. Thomey and Mr. Georg were sworn in.)

Mr. Dwight Thomey introduced Mr. Georg, who with his spouse owns the entity which is the subject of this request, 636 Broad Street, Tax Map 801, Parcel 239, zoned Town Center. As was presented to you the application is to use the entire building as an apartment building which requires a Special Exception. The current use of the building, the two top floors are an apartment building, the bottom is set aside for commercial use which is an allowed use in town center but if you want to have an apartment building then you have to have a Special Exception. I filed a site plan with the application to add as Exhibit 1, to mark one of the large ones. Mr. Georg, that is the plan for the building that you had prepared and presented to me and the members of the board here have a reduced size of that, it shows the various units in the building and where the building is located for the parking, etc., is that correct?

Mr. Georg responded yes.

Mr. Thomey continued with Mr. Georg confirming information provided. The lot area is 1.602 acres, or 69,752 square feet with proposed open space of 22,050 square feet. Twenty five percent (25 %) is supposed to be recreational open space and you've provided 22,050 square feet on your plan, which is far in excess of what is required. And then the required lot width is 25 feet and your lot width is 180 feet, lot depth is 100 feet and your lot depth is 372 feet. Setbacks required: front is 25 feet and yours is 32 feet, side yard is 20 feet and you have 30 feet, rear yard setback is 40 feet and yours is 230 feet. Parking spaces required if all 9 apartments are approved with 2 1/2 spaces per unit would be 48 spaces and you have 64 spaces and handicap spaces required are 3 spaces but provide 4. Why are you requesting this Special Exception to place apartments on the 1<sup>st</sup> floor rather than commercial?

Mr. Georg responded the commercial business is not viable down here in Perryville. The bank space has been empty for 9 years and I've had 3 or 4 active real estate companies soliciting on the multiple listings for commercial space and rentals and to no avail, I have not had anything but that one time I did have the school. The High Roads School was here for the last 7 years and they left last year, October of last year.

Mr. Thomey stated so that's the only thing other than the residential use, the only use other than the school, was the residential use.

Mr. Georg replied right now I use the space for my construction company. The 5,000 square foot that the school had and also the bank 2,000 square foot has been vacant for the last 9 years and before, the 3<sup>rd</sup> floor was vacant also. I made an effort to locate other commercial, institutional users for the 1<sup>st</sup> floor, had multiple real estate companies trying to solicit to bring in businesses but have had no success for either commercial or institutional uses.

Mr. Thomey asked does there seem to be a market for apartments, and have you been successful in renting the apartments?

Mr. Georg responded all of the new ones we just finished have been rented. They were started in January of this year, I finished them May of this year and all 8 are occupied.

Mr. Thomey asked are the apartments generating the revenue like the restaurant or the school.

Mr. George replied probably way less.

Mr. Thomey continued (Mr. Georg confirming) you have adequate space for parking, open space and recreational space on this parcel and no difficulty with anyone leaving the property in vehicles. The Planning Commission (had concerns) and the primary concern has to do with they want this commercial and residential mixed use in downtown and I can understand that. It is our position that this particular property, for whatever reason, has not been successful as a commercial venue but it has been successful as a residential venue and our position is it makes more sense to make use of it residential. The more residents you get downtown the more likely the other commercial uses down here will succeed and survive rather than close down. Because once commercial businesses leave, and you need the people. When I look at my office building in Elkton, one of the problems with Elkton is there aren't enough people who actually live in Elkton. You have the hospital and you have the court house and you have a lot of offices there but when they leave on weekends it's like a ghost town. So ironically they're trying to do the opposite of what you are trying to do. They improved a couple apartment complexes in downtown Elkton to try to get residents there all the time. I would also suggest to you that since this is a Special Exception use that is allowable under your ordinance, Maryland law spells out the criteria for whether or not you should approve the Special Exception request. It was first set out in the case Schultz vs. Pritts and what the Court of Appeals said in that case I don't remember, I actually had a Special Exception case that came out the same time and the Court of Appeals first decided my case one way and they came out with this decision and they re-decided my case, basically upon what they came up with and they've stuck with this ever since. It says "the appropriate standard to be used in determining whether a requested Special Exception use would have an adverse effect and therefore should be denied is whether there are facts and circumstances that show that the particular location proposed would have any adverse effects above and beyond those inherently associated with such Special Exception use irrespective of its location within the zone and stated somewhat differently were the facts and circumstances indicate the particular Special Exception use and location proposed would cause an adverse effect upon adjoining and surrounding properties unique and different and kind of degree then inherently associated with such use to cause its location in the zone. What we're going to suggest to you is using this building as an apartment building doesn't really create any negative effects except for the fact that I know your planner and the Planning Commission are concerned about the fact they have this plan in their mind that they're going to have all these buildings, the old style towns where you have the commercial on the first floor and residential on the floors above them. But that would be true wherever you put this building. It would be something that's not consistent with that plan but the fact of the matter is this particular parcel has the room. It doesn't create any adverse effects, it has room for the parking, it has room for the open space, it has room for active open space, and it has all of the stuff that you need, it has good access in and out of the property, he's never created any problems. It's not creating those negative effects and therefore by law it should be approved. And I know the Planning Commission recommended 2 things, they recommended that the front part remain commercial, but the façade of the building will remain the same. The other thing I want to point out to you, so they don't want anything in that front but that's on the interior, the exterior is going to remain the same anyway. There's nothing there now, it's just vacant. And the other

thing I would point out to you is they wanted to require that he provide some parking spaces for businesses in town and I would suggest to you that that's an illegal exaction and I would point to you the case of Weems vs. Calvert County and I'll give you a page out of that case, it's a Court of Appeals case also, and with that case Calvert County basically told, parking is on a wharf and they told this guy you have a nice wharf here in town and we're going to tell you in order for you to do and in his case it was a subdivision, you're going to have to let the public use your wharf to go to and from the water. And he contested that and the Court of Appeals said that's an illegal exaction, you can't require somebody to make their private property available to public use unless you're going to pay for them. You can't provide public parking, or public wharfs or public anything on somebody else's private land unless you're going to pay them for it. And the Town basically wants him to provide public parking on his property without paying for it. That's a nice idea but it's not legal. Now if he was doing a subdivision and said we want you to put a parking lot for your residents that you're creating for this subdivision, they can require that. Mr. Georg understands he's going to have to provide parking for his residents and recreational area space for his residents but to ask him to provide parking to the rest of town; it's not legal to do that. I feel pretty strongly that under the laws of the State of Maryland and applied with your code Mr. Georg should be entitled to make his building an apartment building so that the whole building can be used and he should not have to provide parking for other businesses in town with inadequate parking. Unless the Town wants to make some sort of arrangement to pay for a portion of his property for the businesses or to make some sort of shared arrangement that's something that could be done voluntarily. I think that's a fairly direct application of your rules and Maryland law for this application and the application should be approved as presented. They (Planning Commission) had something about a front entrance so it doesn't change the look of going in and out and Mr. Georg you said you could deal with that to make a second entrance not coming out on the front of the building.

Mr. Georg stated that helps a little bit because I would take the front entrance out of the building, there wouldn't be any front entrances at all, there would just be side and back.

Mr. Malesh commented basically we're dealing with our Town development plans for our commercial area and the Special Exception has to be to the section 4 that allows apartments in a commercial district but we don't allow apartments on the 1<sup>st</sup> floor, and hopes would develop this as a commercial district. You just stated that seven out of the last eight years the 1<sup>st</sup> floor has been rented as commercial and you said the back corner that was the bank hadn't been rented but the majority of the 1<sup>st</sup> floor has been a commercial rental. When original Town Center plans were made it was to bring businesses into the town, and it's been slow, but we're seeing development in the county and the economy rolling around a little bit that allows some potential to do that. And the particular façade of your building is very attractive for commercial businesses. Things are slow but as we develop the park a little bit more, when we get a concert hall and get people down here, I have a hard time with this, to go against what we set up to develop our town because I think there is potential to do what we need to do here. This is my personal opinion but it's the way I read the regulations right now. You have ten apartments in the building, that's a lot of apartments on the 2<sup>nd</sup> and 3<sup>rd</sup> floor, and the idea of taking up the entire 1<sup>st</sup> floor for apartments which I doubt would be reconverted to commercial space later if the Town booms because once this is done it's permanent. That particular thing is not going to give us the Town Center that we had envisioned to develop.

Mr. Sussman advised at this stage of the proceeding the board will have an opportunity to comment at the end of the proceeding but according to procedures and the agenda it is really an opportunity for staff to make their presentation and I would like to make comment about Mr. Thomey's commentary about Schultz vs. Pritts and the Maryland standard. He is right in one respect. The adverse impact test he referred to from Schultz vs. Pritts is essentially the standard in some cases. What we have here in Perryville, in the Zoning Ordinance, is that Perryville has adopted its own requirements that need to be demonstrated in order for a Special Exception to be granted and those are over and above the Schultz vs. Pritts standard. And I believe when staff makes their presentation it will present to you the staff report and review of its analysis of the compliance or lack of compliance with the proposal in terms of the Town's Zoning Ordinance criteria. You can't just say the Schultz vs. Pritts standard is the only standard that applies, certainly it does apply but it applies in conjunction with the Town standards that have to be evaluated. So I think it would be appropriate at this point for the board to allow staff to make their presentation and then engage in discussion, analysis, evaluation, and the applicant may have some response to the staff report.

Ms. Skilling entered the Staff Report into the record. The Table of Permissible Uses, apartments are permitted as a Special Exception with conditions in Town Center. The owner is proposing 9 additional one bedroom apartments on the 1<sup>st</sup> level of the building. It was recommended to the Planning Commission that the six proposed in the back could be there but it was really paramount to save the space in the front area as commercial. Exhibit 4 is a historic picture of the old building which was historically commercial and it's my understanding also its State law, in downtown revitalization, to maintain some of these historic areas. Now granted this building has changed substantially but the main part of this building is still standing. In Section 57 there are standards that need to be addressed: No Special Exception may be approved by the Board of Appeals unless such Board shall find, and I'm going to go through these because I think these are important:

1. The building has maintained a commercial presence for many years. With renovations commercial was always on the 1<sup>st</sup> floor, it was a restaurant, a convenience store in the front part of that building. Converting the entire building to residential units would be detrimental to the order and general welfare of the district in retaining the historic main street. That's what we're trying to establish for revitalization. This is in our revitalization plans and historically has been part of our main street.
2. I believe if you did apartments all the way on that 1<sup>st</sup> floor it could be a disadvantage in the area and could be devalued because that means potentially other commercial sites in the Town, that we would use in our revitalization of our downtown, could be rental and once we set a precedence here, that's what our zoning did not want to do, it was to maintain that commercial presence on that 1<sup>st</sup> floor. It's the main central property on our Main Street in that area of Broad and Aiken Avenue. Its value for potential retail and services for citizens, visitors and workforce in downtown Perryville is paramount. The frontage on Broad Street provides opportunities for small businesses that are essential to the revitalization of the downtown. This area is supported in Perryville's application for Sustainable Communities designation which we have received, and Transit Oriented Development (TOD) Plan which we have a plan to use our transit as potential in our downtown for people to live near to get to work by using the train. The Town Center zoning was created to facilitate mixed use revitalization in our downtown which is defined and supported in Perryville's Comprehensive Plan.
3. The building was originally designed as a mixed use building. It previously housed a restaurant, convenience store, bank and a school. And also had on the 2<sup>nd</sup> floor real estate offices. Changing the use entirely to residential would change the architectural appeal and functional plan for the immediate neighborhood. In fact, State and local funding has supported revitalization of two commercial buildings in adjacent locations. Maintaining a commercial presence in this location will only encourage growth that will maintain property values and support needed services in the Town Center.
4. We worked with Mr. Georg; the Town approved the use of the upper levels of the building for apartments. The building has the required utilities to service the apartments and we worked with him for water and sewer which was put in the system and it does have sprinkler system. It is our understanding that a laundry room will be provided on site in support of laundry services since the apartments are not equipped with washers and dryers. More than adequate parking is provided.
5. We know adequate ingress and egress has been provided and circulation noted on the site. It was commercial before and that's why it does have adequate ingress and egress because the commercial relevance of this building was already planned for the entire use.
6. The intent of the Town Center district is to provide for a mix of land uses including residential, commercial, recreational within the historic downtown center. The integration of uses is important in this district. Section 204 (correction: 205) 4. allows apartments in a commercial district except that no apartment is situated at street level. This was specifically added to maintain a commercial presence at street level to restore the historic character of downtown Perryville. The vision of Aiken and Broad as part of the Town Center was important for revitalization in the Comprehensive Plan and Riverside Center provides a major focus when entering the town. The mixed use concept for the building was established with the various past uses. By eliminating the potential for commercial use at street level would be contrary not only to the Comprehensive Plan (Chapter 2, Land Use, Vision) but also to the goals and objectives for revitalization in the downtown as stated in Perryville's Sustainable Communities Plan.
7. Town staff has worked with the owner in supporting apartments on the upper levels of the building. We did actually go and review these and looked at them. Changing the use on the 1<sup>st</sup> floor to all apartments

does not conform to the goals and objectives and intent of the Town Center district as defined in Article IX (4).

8. Conditions and guarantees, the Planning Commission and town staff looked at this plan and the apartments for this 1<sup>st</sup> floor. The original intent of this building was mixed use, apartments above, 1<sup>st</sup> floor commercial. But there are conditions of Special Exceptions that I think the Board of Appeals may want to consider and I'm going to read all of these:
  - a. At a minimum the three (3) proposed apartments at street level on Broad Street be retained for commercial use and the six (6) remaining proposed be used as apartments or areas to accommodate the needs of the residents (e.g., workout, laundry or residential storage areas).
  - b. There shall be no access to the apartments from the front of the building. As Mr. Georg has mentioned he has worked out how that can happen.
  - c. Shared parking shall be provided for visitors and businesses in the area and marked as such. The number of spaces is to be determined. I understand Mr. Thomey's comments but we do actually in our code talk about shared parking in the downtown. He has excess parking; I'm not saying he has to pay for everything, just asking as a recommendation the possible use for shared parking in the evenings by other businesses, who also support Mr. Georg, the individuals who want to live there and potentially for other types of activities in our downtown.
  - d. A landscaped/streetscape enhancement buffer shall be provided between the building and Broad Street, façade enhancements, planting area or plantings across the front.

In the exhibits I've provided streetscape type enhancements and as a sustainable community could help Mr. Georg provide some of these types of enhancements. I also want you to look at some of these towns, very typical of Eastern Shore towns, not any different from what Perryville actually had.

Mr. Thomey commented I just want to respond to the points provided in the staff report. First of all, two things, the Planning Commission after they heard everything their recommendation was to approve the six apartments on the 1<sup>st</sup> floor and leave the front commercial and for the apartments to have no access from the front of the building. They did not approve the other recommendations. I would just want to say to you, this whole landscaping, if you look at the pictures of the other towns, I've been to all these towns. In one respect if you want to retain this look of buildings and façades along the street then you don't block it with all the landscaping. None of the other towns do. Everything comes right out to the sidewalk, there's no landscape buffer. And I want to emphasize the exterior of the building, except for the residents coming in and out, won't change. The structure will look the same so I don't see how we're violating anything; we're not changing the structure of the building. So we get down to whether some of these other points are met or not and the only other thing I can say to you is the Schultz vs. Pritts case does not say you only apply it to certain things, it says you take a look at the local regulations and then you try to determine whether or not you applied those regulations and why you don't apply the standard. By that standard, whether you put this building here or anywhere else in your Town Center you have the same plan from the planning staff. And I would suggest to you if this gentleman thought he could get commercial there and do better that way we wouldn't be sitting here. He's tried that on a number of occasions with different iterations and just hasn't succeeded. It seems to me it makes more sense for the town to have residents. Ms. Skilling talks about having this transportation hub type thing for people living in town, well let's give them a nice apartment building where they can live and walk to the train station and go to work. What's bad with that? If you have enough of those then there will be little businesses that will crop up in various places, maybe even in his building someday. There's nothing to say he couldn't change an apartment or two down the road. You have to have that critical mass to make it work. And the only way to have the critical mass is to get enough people living downtown. He's done a good job. I think it's very fair of him; they put nice apartments in there to attract the right type of people to live downtown. The more people you have who live downtown the more the likelihood that the restaurant next door might at least succeed for once rather than fall on their face again. So that's kind of our response and at a minimum I don't see how you can at least do what the Planning Commission recommended, to take the back because that doesn't do anything to out front. To have six apartments back there and just change the front entrance and go on. It doesn't make any sense to require somebody to struggle like this financially and to have a space he couldn't use.

Ms. Skilling indicated a really important comment about this building vs. a lot of others, when you come down Aiken Avenue this is a key building. You see it and as I mentioned in my comments, it's paramount that this

building stay commercial on the 1<sup>st</sup> floor. It's paramount for many reasons as well as potentially providing some nice commercial, and yes some residential too but I think it is key to our downtown and some of the other buildings that are right around that whole area.

Mr. Malesh stated I'm just one vote up here and you must have read my mind. That's the first building you see, it is paramount and I've been here in town for forty years and I feel we're just starting to bloom now and I'd hate to turn this into all apartments. I realize you now have nine apartments that you didn't have years ago so you've already produced some income for the building.

Mr. Thomey commented those he had an absolute right to have.

Mr. Malesh responded I realize that and it is mixed use, that is the mixed use, he's got it. As I said I am one vote. I've been through many small towns today and most of the rentals tend to be upstairs. We have a ton of people renting in this town already. A lot of these buildings are rentals already and I think yours are a little nicer than some and may draw a little more money and better personnel that will be a plus but my gut feeling is doing what you can on the top and leaving the 1<sup>st</sup> floor commercial.

Mr. Salmon asked Mr. Georg, you're the one who built the clock tower? And one of the questions I have who had the old newsstand in town, across from Perry Villas? It went out of business 20 years ago and that's now apartments and that was a first floor commercial site that is now residential.

Ms. Skilling responded that was before the current code became effective.

Mr. Salmon replied I understand but there is some precedent for this.

Ms. Skilling stated there are some precedence but there are also uses there that can be retained or go back to commercial on the 1<sup>st</sup> floor.

Mr. Salmon indicated that could be done with Mr. Georg's property. If a trio of doctors came he would be happy to revert those back to commercial or offices. It's not irreversible. If we get a critical mass of commercial activity in town Mr. Georg would be delighted to change the whole apartment building to commercial.

Ms. Skilling responded if it was done prior to our code that is grandfathered status there, we're following the current code for Town Center and it is conditioned. New town center regulations were based on the efforts of the Mayor and Commissioners, the Town Planning Commission and many members to support revitalization in the downtown.

Mr. Salmon stated I'd like to make another point: it seems to me that Mr. Georg is the last person who is invested in the new commercial real estate in town center and we're going to punish him for that. Doesn't that discourage somebody else from developing commercial property in town center the fact that we are so inflexible on this? It seems to me that we're shooting ourselves in the foot.

Ms. Skilling replied I think we've been very flexible. It was recommended to allow the whole back part of that 1<sup>st</sup> floor as apartments which isn't part of this historic structure. And we're recommending the space in the front, which is part of the historic building, to remain as commercial.

Mr. Salmon stated I think he is invested in the town and I don't tend to agree with you. I don't see any evidence of that.

Mr. Thompson commented you can't set a precedent and another thing, I had a friend in private practice in therapy and she tried to find an office in that building and couldn't get a response. She called every number on that billboard up there, this was 3 years ago and no one responded. She tried repeatedly and finally ended up in North East, right in downtown North East. She is in private practice now and is making quite a bit of money and that could have been here in downtown. Whoever you had as a real estate agent didn't do a very good job.

Her name was Jane McGowan; she's a therapist, a good friend. No one called her. You may want to check all those numbers out on that board.

Mr. Kommalan commented Mr. Georg said that he tried to get people to come in for the commercial space on the 1<sup>st</sup> floor with no help, no response. Has the town ever tried to help him?

Ms. Skilling responded we talked with tourism and they told us his lease rate was too high. We've talked to a couple of people who said in comparison with other places around the Perryville area and in some of the other areas they looked they thought it was high. The Town even looked at the space for potential rental of space and it was a little higher than what we could pay, and compared to in other areas around town. Tourism was one of the big ones we were trying to get in our downtown and they chose to go to Elkton. Yes, we have tried to help and we would be more than happy to continue to help. We do have an economic development person here and we do have the potential with sustainable communities funding, revitalization funding, that would help him in doing some things on the façade. The investment across at the Ercole building, that was revitalization funding that helped fix that building. So there is potential funding to assist with these commercial sites, to work with them and to market those sites.

Mr. Georg commented tourism wanted to rent for free. And the other stuff, the coffee shops and that kind of thing where the people want those small entities, they only want to pay about 500, 600 bucks for a space. And that mortgage over there is way more than that. An apartment gets 800, 900 bucks. This is my only building; I have a couple of houses, a condo and a house.

Motion made by Mr. Salmon to approve the Special Exception as presented with nine apartments on the 1<sup>st</sup> floor. No second. Motion failed.

Motion made by Mr. Thompson and seconded by Mr. Kommalan to approve the Special Exception with six apartments in the rear and leaving the three in the front for potential commercial. 2 in favor (Thompson, Kommalan), 2 opposed (Salmon, Malesh). Motion did not carry.

Mr. Sussman stated that would then be no decision and the request is denied.

Discussion continued Mr. Georg would accept the recommendation by the Planning Commission rather than end up with nothing.

Mr. Sussman suggested redo the motion.

**Motion** made by Mr. Thompson and seconded by Mr. Kommalan to accept the Planning Commission's recommendation to approve the Special Exception with six apartments in the rear and leaving the three in the front for potential commercial. **3 in favor (Thompson, Kommalan, Salmon) and 1 opposed (Malesh). Motion Carried.**

Mr. Sussman stated I will prepare the resolution for the board to consider based upon the vote tonight. You will have to approve the resolution for the action to be final, so you can review that the resolution reflects your intent.

## **ADJOURNMENT:**

Without objection the meeting was adjourned at 7:50 p.m.

Respectfully submitted,

Dianna M. Battaglia  
Planning & Zoning Coordinator