

IN THE MATTER OF  
BEAR CREEK PROPERTIES, L.L.C.

\* BEFORE THE  
\* BOARD OF APPEALS  
\* OF  
\* BALTIMORE COUNTY  
\*  
\* Case No. CBA-10-158-SPHA  
\*

Legal Owner/Petitioner

601 Wise Avenue  
Baltimore, MD 21222  
SW Corner of Wise  
15<sup>th</sup> Election District  
7<sup>th</sup> Council District

RE: Petition for Parking Variance

\* \* \* \* \*

**OPINION**

This case comes to the Board on appeal of the final decision of the Zoning Commissioner of Baltimore County in which the Zoning Commissioner granted a Petition for Variance seeking relief from Section 409.6 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) to allow 60 parking spaces in lieu of the required 88 spaces. A public hearing was held before this Board on October 27, 2010. The Petitioner, Bear Creek Properties, L.L.C. (the “Petitioner”) was represented by Arnold E. Jablon, Esquire and Venable, L.L.P. The Protestants, Willard McJilton, William Lambdin, George McClelland, Mike Pennington, Anne Tempera, and Marlene Cox were *pro se*. A public deliberation before this Board was held on January 6, 2011.

At the time of the public hearing, Board Member Lawrence Stahl served as Chairman of the Board Panel. After the hearing but before the public deliberation, Chairman Stahl was appointed to another position in Baltimore County government and resigned from the Board. The Parties agreed to have the remaining Board Members who also heard the case decide the matter.

**Factual Background**

The Petitioner is the legal owner of the property located at 601 Wise Avenue, Baltimore, MD 21222 located in Eastern Baltimore County (the “Property”). The Property is zoned

**Case No. CBA-2010-0158-SPHA /Bear Creek Properties, LLC. – Petitioner**

commercially as “BL” and sits on the south side of Wise Avenue. The Property is surrounded on two (2) sides by Bear Creek and is approximately 0.83 acres +/- (36,360 sq. ft.). It is improved with a restaurant and has historically been used as either a restaurant or bar.

The zoning maps and aerial photographs which were admitted into evidence confirm that the Property has had a commercial use since 1955. (Pet. Ex. 8, 9, 10A, 10B, 10C and 11). The restaurant/bar is a use permitted as of right and not by special exception in the BL zone. To the East of the Property along Wise Avenue toward North Point Blvd are properties zoned commercial and which have commercial uses. (Pet. Ex. 1). To the East of the Property along Bear Creek are residential properties zoned D.R. 5 (Pet. Ex. 1). To the North of the Property is a draw bridge that crosses into Wise Avenue and hangs over the parking lot for the Property.

Within the Property’s boundary lines, there is a beach area to the west side of the restaurant, adjacent to Bear Creek. In its original Petition for Variance, the Petitioner included this beach area in its parking calculations because it had been used for dining and/or as an area for bar customers. However, the Petitioner has since removed all tables and chairs to eliminate all food and drink being served on the beach.

In or about 2000, the Petitioner added a bulk head along Bear Creek when it became clear that the Property was in danger of sliding into Bear Creek. Also installed at that time was a floating pier with 16 boat slips for customers who come to the restaurant by boat. In addition to the floating pier, there are 9 pier slips for boat customers to use.

The restaurant is 3490 sq. ft; the bar area is 450 sq. ft; and the wooden deck is 1400 sq. ft. Based on these measurements, BCZR §409.6 requires that the bar area have 9 parking spaces, the restaurant area have 55.8 parking spaces; and the deck area have 22.4 parking spaces. The total number of spaces required is 88 spaces (87.2 spaces exactly).

David Billingsley, President of Central Drafting and Design, Inc., was accepted by the Board (without objection from the Protestants), as an expert in site plans as well as in the application of the BCZR to site plans. In this case, Mr. Billingsley prepared the Site Plan (Pet. Ex. 1) which proposes 60 parking spaces as follows: 51 spaces can be provided on site and 9 additional spaces can be provided at 692 Wise Avenue (another property owned by Steven Goff who is a member of the Petitioner). Of the 51 spaces located on site, 19 spaces are fixed along Wise Avenue, 16 spaces are fixed along the restaurant and the remaining 16 spaces would be provided by valet service. According to Mr. Billingsley, valet parking satisfies BCZR, §409.6.

Mr. Billingsley testified that the Petitioner has made substantial renovations to the interior of the restaurant which included a reduction of the bar area and expansion of the restaurant area. However, the total square footage of the building has not changed. The Petitioner removed the circular bar inside as well as the dance floor and band area. Goff also testified on the issue of the renovations made to the building and explained that they were necessary to change the nature of the Property from a bar to a restaurant. Mr. Goff acknowledged that the past reputation of the bar was a continuous problem for the neighborhood. Previously, the bar became a nightclub and was popular location for a younger crowd. The crowd often parked their vehicles along Waterview Road in the residential neighborhood. However, the new restaurant will not have any live bands. It is now traditional table dining with only 12 to 15 bar stools. As a result of the renovations to the Property and change from a bar to restaurant, Mr. Billingsley provided his opinion that if the request for variance was granted, there will be no adverse impact on the neighborhood. Indeed, he suggested that the renovations will be better for the neighborhood.

As to the “uniqueness” of the Property, Mr. Billingsley testified that it is unique because it is a commercial property which is bound on two (2) sides by water, along with a bulk head

**Case No. CBA-2010-0158-SPHA /Bear Creek Properties, LLC. – Petitioner**

which was added by the Petitioner to prevent the restaurant from sliding into Bear Creek. The location of the Property on Bear Creek subjects it to the Chesapeake Bay Critical Area regulations which limits building or disturbance of land. The Property is unique as to its shape being neither a true rectangle or true triangle but rather an odd shape.

Mr. Billingsley noted that there is a property across Wise Avenue that should be comparable to this Property. That other property is zoned BL. However, because it has a residential use, it is not actually comparable. This fact adds to the uniqueness of the subject property. While there are other commercial properties in the area on the water, he testified that this is the only property with water on 2 sides. This is the only site in a BL zone on the south side of Wise Avenue.

Because it is a water front restaurant, he explained that many of its patrons come to the Property by boat. There are 25 boat slips available. Therefore, many patrons will not use the parking lot. This restaurant has seasonal use and the deck is not open unless the weather is warm outside. On the north side of the property where the parking spaces are located, the draw bridge which extends from Merritt Blvd. to Wise Avenue, hangs overtop of the Property. In Mr. Billingsley's opinion, this fact also makes the Property unique.

The Petitioner, through photographs, presented evidence that the restaurant does not support the need for the required 88 parking spaces. (Pet. Ex. 13A – G; 14A-H; 15A –H; 16A-I). These photographs were taken on June 25, 2010, July 3, 2010, October 25, 2010 and September 19, 2010 respectively. The Petitioner added that because the parking lot is never full even during its busiest months, no cars have actually used the valet service.

Other factors which add to the uniqueness are the size of the lot which is less than 1 acre and the topography of the land which slopes from the parking lot toward the water's edge. This later fact makes the bulk head even more important for the stability of this Property.

As to practical difficulty, Mr. Billingsley emphasized that since the Property has historically operated as a restaurant/bar since 1981 and has had a commercial use since 1955, if the parking variance is not granted, the business will close. As a result, the BCZR disproportionately impacts the longevity of this business because there are no other viable alternatives available to the Petitioner. Mr. Billingsley opined that only 5 residences at most could be developed on the site. However, given the proximity of the draw bridge to the Property, it is not a desirable location for a residence and therefore, is not feasible.

In reviewing other possible options for uses in a BL zone, Mr. Billingsley stated that any other commercial use will have the same parking issue and will require a variance. Because parking is based on the type of use, he added that another type of commercial use may require even more parking.

On cross examination, Mr. Billingsley stated that he did not believe that the area underneath the deck should be included in calculating the area for the required number of parking spaces. Of the 1,400 sq. ft. assigned to the deck, 300 sq. ft. was attributed to the bar area. He confirmed that the steps inside the building on first floor need not be included in the calculations. On redirect, he explained that the addition could not be removed in order to create more parking spaces because the Property is subject to the Chesapeake Bay Critical Area regulations which prevents disturbance of the Property.

Mr. Goff testified that he is a member of the Petitioner. To prevent patrons from parking in the neighborhood, he placed a “No Parking” sign near the entrance to the Property. Since March of 2010, the Property has operated as a family restaurant. They have eliminated all live bands and the bar area is similar to a lounge where people wait to be seated for dinner. The interior renovations cost more than \$100,000.00. When he purchased the Property in 1998, the addition was already present. He confirmed that the parking lot has never been full. Since the

**Case No. CBA-2010-0158-SPHA /Bear Creek Properties, LLC. – Petitioner**

opening of this new restaurant in March of 2010, there have been no complaints filed with the police department.

Mr. Goff indicated that the restaurant has 15 to 20 employees and they park at 692 Wise Avenue. Without a parking variance in this case, Mr. Goff confirmed that there are no viable alternatives for the site and the business will have to close.

In opposition to the request for parking were Protestants William Lambdin and Willard McJilton. Mr. Lambdin, a former employee of Baltimore County Public Works who now works for Maryland Capital Planning, submitted aerial photographs from 1953, 1972 and 1992 to show that a parking lot was once located in the area of the addition and the beach. They also submitted an overlay of the Petitioner's site plan superimposing where parking could be made available. The Protestants testified that the hardship was self inflicted by either the Petitioner or by the Petitioner's predecessors in title because the addition and beach area removed the available parking spaces.

Mr. Lambdin was greatly concerned with parking that will occur on Waterview Road in the future. Waterview Road is only 17 to 20 feet wide. There are no sidewalks. With parking from the restaurant on the sides of Waterview, there is no room for emergency vehicles to pass. The Protestants also focused much of their testimony on past problems associated with the nightclub.

**Off Street Parking Regulations – BCZR**

The BCZR, §409.6 requires the following off-street parking for a restaurant and bar facility

Fast-food and standard restaurants: general rule	16 per 1,000 square feet of gross floor area with at least 10 spaces required in all cases, except that no parking spaces are required for restaurants in the C.T. District of Towson or for buildings contributing
--	---

	<p>to the historic character of an area, if such buildings have been designated on the National Register of Historic Places and are located within a C.T. or B.L.-C.C.C. District and if such buildings will be adapted for reuse for a restaurant.</p> <p>[Bill No. 110-1993; 3-2003]</p>
--	--

<p>Nightclub, tavern, striptease business, catering hall or drive-in restaurant</p>	<p>20 per 1,000 square feet of gross floor area with at least 10 spaces required in all cases, except no spaces required for nightclubs or taverns in the C.T. District of Towson or for buildings contributing to the historic character of an area, if such buildings have been designated on The National Register of Historic Places and are located within a C.T. or B.L.-C.C.C. District and if such buildings will be adapted for reuse for a nightclub, tavern or striptease business.</p>
---	--

**Law on Variances**

In order for a parking variance to be granted, this Board must be convinced that the Petitioner has met its burden of proof as to both “uniqueness” and “hardship”. Section 307.1 of the BCZR states, in pertinent part, as follows:

"...(T)he County Board of Appeals, upon appeal, shall have and they are hereby given the power to grant variances from height and area regulations...only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship.... Furthermore, any such variance shall be granted only if in strict harmony with the spirit and intent of said height, area...regulations, and only in such manner as to grant relief without injury to public health, safety, and general welfare...."

This Board is guided by the holding provided by the Court of Special Appeals in *Cromwell v. Ward*, 102 Md. App. 691, 698 (1995), wherein the Court writes:

...The Baltimore County ordinance requires "conditions ...peculiar to the land...and...practical difficulty..." Both must exist. ...However, as is clear from the language of the Baltimore County ordinance, the initial factor that must be established before the practical difficulties, if any, are addressed, is the abnormal impact the ordinance has on a specific piece of property because of the peculiarity and uniqueness of that piece of property, not the uniqueness or peculiarity of the practical difficulties alleged to exist. It is only when the uniqueness is first established that we then concern ourselves with the practical difficulties...."

In requiring a finding of "uniqueness", the Court of Special Appeals in *Cromwell* referred to the definition of "uniqueness" provided in *North v. St. Mary's County*, 99 Md. App. 502, 514 (1993):

In the zoning context the "unique" aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. "Uniqueness" of a property for zoning purposes requires that the subject property has an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects in bearing or parting walls....

*Id.* at 710.

If the Property is determined to be "unique," then the issue is whether practical difficulties also exist. Toward this end, the Board acknowledges that a variance may be granted where strict application of the zoning regulations would cause practical difficulty to the Petitioner and his property. *McLean v. Soley*, 270 Md. 208 (1973).

However, the law is clear that self-inflicted hardship cannot form the basis for a claim of practical difficulty. Speaking for the Court in *Cromwell, supra*, Judge Cathell noted:

Were we to hold that self-inflicted hardships in and of themselves justified variances, we would, effectively, not only generate a plethora of such hardships but we would also emasculate zoning ordinances. Zoning would become meaningless. We hold that



practical difficulty or unnecessary hardship for zoning variance purposes cannot generally be self-inflicted.

*Id.*, at 722.

### Decision

After reviewing all of the testimony and evidence presented, the Board has determined that the Petitioner has met its burden of proving that the Property is unique and that the Petitioner will suffer practical difficulty and unreasonable hardship if the variance is not granted.

As to uniqueness, the Board finds that this Property has inherent characteristics which are not shared by other properties in the neighborhood. These features include: the location of the site; its odd shape; the topography of the site sloping from the parking lot to the water which encouraged the installation of a bulkhead; the location of the water on 2 sides of the Property as opposed to other commercial properties which are bound by the water on only 1 side; the location of the draw bridge hanging over some of the parking spaces along Wise Avenue; as well the fact the use of this Property is a seasonal restaurant which caters to boaters who dock their boats along the floating pier and along the west side of the restaurant. Thus, this Property's access to navigable waters and its historic use as a restaurant or bar for 50 years makes it dependent upon boat traffic more than motor vehicle traffic for its business. These facts add to the uniqueness of the Property under *Cromwell, supra*.

The Board further finds significant that there are no other commercial properties like this one along the south side of Wise Avenue and for that matter, no other properties in the neighborhood which are comparable to this one. The one BL property on the other side of Wise Avenue which should be similar, is used for residential purposes. *Id.* The *Google Map* submitted by the Protestants (Prot. Ex. 6) gives a snapshot of the Property located on a point, with a draw bridge to the north, residences to the east and water to the south and west.

Contrary to the Protestants' suggestion, the Board does not find that the Petitioner's case was based solely on the size and configuration of the building. Without repeating the same factors set forth above here, the evidence presented addressed the uniqueness of the site location, its topographic conditions and access to navigable waters. The testimony about the interior renovations to the building went to the parking calculations and to rebut Protestants' arguments about the restaurant's history of disrupting the neighborhood. As a result, *North v. St. Mary's County, supra*, is not dispositive here.

As to the issue of practical difficulty, the Board finds, based on the evidence presented, that strict compliance with the 88 parking space requirement in BCZR §409.6 would result in both practical difficulty and unreasonable hardship because this Property has always had a commercial use as a restaurant and, given the factors above which make it unique, there are no other viable uses for the Property. There was no evidence presented by the Protestants by way of expert testimony as to any feasibility study or other evidence which would suggest another viable use for the Property.

The Protestants did testify that the request for variance was a self imposed hardship because either the Petitioner or the Petitioner's predecessors in title added onto the building without proper permits and filled in areas on site which had been used for parking cars. Their argument was that the Petitioners imposed this hardship of lack of parking on themselves by their actions and therefore, the law should not now provide them a way around the parking requirements.

To support their position, the Protestants created an overlay to show that if the addition and deck areas were removed, 29 additional parking spaces would be available to the Petitioner. The overlay shows that a total of 64 spaces could be provided on site. The Board finds several problems on this point. First, the overlay was created by the Protestants (Prot. Ex. 5), not by a

**Case No. CBA-2010-0158-SPHA /Bear Creek Properties, LLC. – Petitioner**

professional land surveyor nor was it drawn to scale. The Board can neither verify the measurements of the widths or lengths of the parking spaces nor the property boundary measurements which are referenced on the overlay. Therefore, this piece of evidence was not given significant weight.

Second, the Property is subject to the Chesapeake Bay Critical Area requirements which would prohibit the disturbance of the land to create parking spaces between the building and the water. In addition, there was no evidence presented by the Protestants that the weight of additional vehicles in the proposed parking spaces between the building and the water, would not negatively impact the bulkhead or the already sloping topography. Because of the environmental factors, the Board has a concern about the stability of land with the weight of vehicles in the areas suggested by the Protestants.

Finally, if it were accepted that 64 spaces could be found on site as the Protestants suggest on their overlay (Prot. Ex. 5), they are still short 24 spaces and a variance would still be required.

The testimony of Mr. Goff was that the Petitioner purchased the Property in 1998. In or around 2000, the Petitioner obtained building permits to rebuild the bulkhead and to construct the floating pier. The addition was built prior to the purchase by the Petitioner. The aerial photo (Pet. Ex. 10C) from 1952-53 shows the site with the existing building, the addition and deck superimposed on the photo. There was no sufficient evidence presented by the Protestants, other than speculation, as to when the addition was built.

BCZR §409.6 disproportionately impacts this Property over other commercial sites in the area. Because of the unique features of the Property, the evidence supports the Petitioner's request for 60 parking spaces in lieu of the required 88 spaces, subject to the following conditions which the testimony articulated were already being followed by the Petitioner:

**Case No. CBA-2010-0158-SPHA / Bear Creek Properties, LLC. – Petitioner**

1. Petitioner/owner may apply for any required building permits and be granted same upon receipt of this Order; however, Bear Creek Properties, LLC is hereby made aware that proceeding at this time is at its own risk until the 30-day appeal period from the date of this Order has expired. If an appeal is filed and this Order is reversed, the relief granted herein shall be rescinded.

2. All outdoor lighting shall be directed towards the interior of the subject site and away from adjacent properties. The outside beach area as designated on the site plan shall not be used for tables, lounge chairs, serving of food or alcoholic beverages.

3. There shall be no bands, dancing or other live entertainment permitted. All recorded music in the deck area of the restaurant shall terminate at 11:00 PM Monday through Friday, and at 12:00 AM Saturdays and Sundays.

4. Petitioner shall employ an attendant to park customer vehicles and attend to the valet parking areas as required by B.C.Z.R. Section 409.4.B.1.

5. Petitioner shall post no parking signs at the entrance to the residential community and encourage patrons, employees and subcontractors not to park on Waterview Road.

6. The variance relief granted herein is personal to Bear Creek Properties, LLC and its current managing members, Steven R. Goff and Randy R. Holofcener. In the event of the sale, lease or transfer of the business, the new owner/operator shall petition for special hearing relief to amend this restriction and the parking approval granted.

7. The legal owner, its successors and assigns shall permit a representative of the Code Enforcement Division of the Department of Permits and Development Management reasonable access to the property and restaurant/tavern to insure compliance with this Order.

**ORDER**

**THEREFORE, IT IS THIS** 9<sup>th</sup> day of February, 2011, by the  
County Board of Appeals of Baltimore County

**ORDERED** that the Petition for Variance seeking relief from §409.6 of the Baltimore County Zoning Regulations for 60 parking spaces in lieu of the required 88 spaces be, and the same is hereby **GRANTED**; subject to the following conditions:

1. Petitioner/owner may apply for any required building permits and be granted same upon receipt of this Order; however, Bear Creek Properties, LLC is hereby made aware that proceeding at this time is at its own risk until the 30-day appeal period from the date of this Order has expired. If an appeal is filed and this Order is reversed, the relief granted herein shall be rescinded.

2. All outdoor lighting shall be directed towards the interior of the subject site and away from adjacent properties. The outside beach area as designated on the site plan shall not be used for tables, lounge chairs, serving of food or alcoholic beverages.

3. There shall be no bands, dancing or other live entertainment permitted. All recorded music in the deck area of the restaurant shall terminate at 11:00 PM Monday through Friday, and at 12:00 AM Saturdays and Sundays.

4. Petitioner shall employ an attendant to park customer vehicles and attend to the valet parking areas as required by B.C.Z.R. Section 409.4.B.1.

5. Petitioner shall post no parking signs at the entrance to the residential community and encourage patrons, employees and subcontractors not to park on Waterview Road.

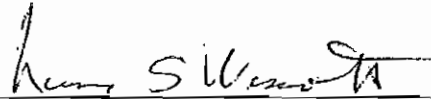
6. The variance relief granted herein is personal to Bear Creek Properties, LLC and its current managing members, Steven R. Goff and Randy R. Holofcener. In the event of the sale,

lease or transfer of the business, the new owner/operator shall petition for special hearing relief to amend this restriction and the parking approval granted.

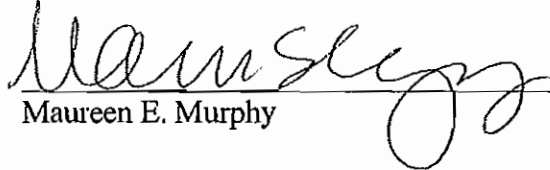
7. The legal owner, its successors and assigns shall permit a representative of the Code Enforcement Division of the Department of Permits and Development Management reasonable access to the property and restaurant/tavern to insure compliance with this Order.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**COUNTY BOARD OF APPEALS  
OF BALTIMORE COUNTY**



Lawrence Wescott, Panel Chairman



Maureen E. Murphy