

RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
8301 Wilson Avenue; E/S Wilson Avenue;	*	BOARD OF APPEALS
NE cor b/w Wilson & Woodside Avenues	*	
4 <sup>th</sup> Election & 6 <sup>th</sup> Councilmanic Districts	*	FOR
Legal Owner(s): Christopher Malstrom	*	BALTIMORE COUNTY
Petitioner(s)	*	
	*	10-094-SPH

\* \* \* \* \*

**FINAL DECISION AFTER REMAND BY THE BOARD OF APPEALS**

The original hearing on this matter before the Board of Appeals occurred on July 27, 2010 as an appeal by the Office of People's Counsel from an Opinion and Order from the Zoning Commissioner for Baltimore County, dated December 12, 2009. In that Opinion the Zoning Commissioner granted a waiver of the requirement to have a permit for renovation on the second floor of a home that had been constructed in a 100-year riverine floodplain.

The Petitioner, Christopher Malstrom, was represented by Victor W. Fuentealba, Esquire and People's Counsel for Baltimore County, Peter Max Zimmerman, participated.

Mr. Malstrom sought to make renovations to his home located at 8301 Wilson Avenue. He did not apply to Baltimore County for a permit to undertake the renovations. The renovations consisted of the enlargement of the second floor living space from 500 square feet to 900 square feet, to be accomplished by removing and replacing the walls and roof on the second floor of the house.

On June 6, 2008, after notice to cease construction was issued by Baltimore County, Mr. Malstrom applied for a permit to allow for the renovations he had done to his house. The permit application was filed before the Baltimore County Department of Permits and Development management. Mr. Malstrom's application was to disseminated to various County Agencies for their review and comment as a normal part of the permit approval process. The Department of

Public Works (DPW) notes that the property was located within a 100-year riverine floodplain. Based upon the Floodplain location of the property, the Department of Permits and Development Management (DPM) advised Mr. Malstrom that a building permit could not be issued to him as a matter of right. Additionally, by letter dated October 5, 2009, the Director of Public Works suggested he would not oppose the waiver if there was no community opposition and the property was brought into strict compliance. "Strict compliance" meant "move all HVAC and electrical equipment out of the basement, provide flood vents in the basement area and remove all materials subject to flood damage, verify elevation to the first floor with respect to the flood protection elevation".

Mr. Malstrom was further advised that he could apply to the Office of the Zoning Commissioner for a "waiver" from the County Code provisions applicable to development in a 100-year riverine floodplain. Mr. Malstrom did so and received a waiver from the Zoning Commissioner. People's Counsel appealed that decision.

Before the Zoning Commissioner and this Board, Counsel for Petitioner Malstrom moved to have the matter dismissed arguing that his client was exempted from the necessity of obtaining a waiver from the development requirements in a floodplain; citing Section 3112.0 of the Baltimore County Building Code "CONSTRUCTION IN AREAS SUBJECT TO FLOODING", which states:

"1. General – Selected Definitions

Substantial Improvement – any repair, reconstruction, alteration, or improvement of a structure, the cost of which equals or exceeds 50% of the market value of the structure (less land value) either: (A) before the improvement or repair is started; or (B) if the structure incurred substantial damage and has been restored, before the damage occurred."...

People's Counsel opposed the position of the Petitioner stating basically that prior to a waiver being issued in a 100-year riverine floodplain, all applicable conditions of Section 32-8-207 of the Code Title pertaining to building permits and the building code must be met.

During the hearing before the Board, Mr. David Thomas, an Engineer and Assistant to the Director of Public Works for Baltimore County testified before the Board on behalf of People's Counsel. He stated that in his experience in working with the Department of Public Works, there was a policy or practice, which the Department used to determine whether or not a particular construction is a "substantial improvement".

In its decision dated December 2, 2010, the Board held that the test for exception to the general rule concerning construction in areas subject to flooding, as contained in Section 3112.0 of the Baltimore County Building Code should be applied to the Building Permit Application filed by Mr. Malstrom before the test for granting a waiver is applied.

Based on the testimony of Mr. Thomas, the Board determined that the matter should be remanded to the Building Engineer at the Department of Permits and Development Management to determine, in accordance with their policy and practice, whether or not Mr. Malstrom has constructed a "substantial improvement" within the meaning of Section 3112.0 of the Baltimore County Building Code and Section 32-8-101(dd) of the Floodplain Management Section of the Baltimore County Code in order to require a building permit.

The Board then issued an Order of Remand and held the matter *sub curia* until such time it received clarification from the Building Engineer.

Subsequent to the Board's decision on December 2, 2010, People's Counsel filed a Motion for Reconsideration, which was received on December 13, 2010. After the Public Deliberation on the Motion to Reconsider, the Board issued a denial of that Motion on January 20, 2011 and Ordered that a hearing date be set before the Board of Appeals for the sole purpose

of taking testimony from the Building Engineer, with respect to the question of constructing a substantial improvement and the method for determining substantial improvement as set forth in the Building Code.

On March 8, 2011 a hearing was held before the Board for the purpose of taking testimony from the Building Engineer. The County Attorney's Office by Nancy C. West, Assistant County Attorney entered its appearance at the hearing. Peter Max Zimmerman, People's Counsel for Baltimore County and Victor W. Fuentealba, Esquire, Counsel for the Petitioner, Christopher Malstrom, were present at the hearing.

At the hearing, Mr. Donald E. Brand, the Baltimore County Building Engineer testified with respect to the question of substantial improvement. Mr. Brand stated that he had reviewed plans that had been submitted to him by Petitioner Malstrom and he had determined that based upon a value of \$52.00 per square foot for the renovation work, that the value of the improvements being constructed by Mr. Malstrom were under fifty percent (50%) of the cost of the building. Therefore, they were not considered a substantial improvement under the Code.

The Board then held a Public Deliberation on March 24, 2011 in the above matter. At that time the Board determined that based upon the testimony of the Building Engineer that the renovations did not constitute a substantial improvement within the meaning of the Building Code. Therefore, Petitioner Malstrom should be granted a waiver from the requirement for construction in a flood plain in accordance with Section 32-8-101(aa), (dd) and 32-8-207 of the *Baltimore County Code* (BCC).

In granting this waiver, the Board finds that there is good and sufficient cause since the addition would not be a substantial improvement. Failure to grant the waiver would result in exceptional hardship of having to tear down the second floor of the house. In addition, the waiver will not increase flood heights, impact public safety, incur public expense, create

nuisances, cause fraud , or victimization of the public or conflict with existing local and state laws and ordinances. This finding is based on the fact that the addition is on top of the existing footprint of Petitioner's home and does not seek to expand the footprint outside of the four walls of the existing footprint.

In addition, in making this waiver, the Board is not excusing the Petitioner from meeting the requirements of any other Sections of the Building Code, such as the requirement for electrical and plumbing installations.

**ORDER**

THEREFORE, IT IS THIS 1<sup>st</sup> day of April, 2011 by the Board of Appeals for Baltimore County

**ORDERED** that the Petition for Special Hearing in Case No.: 10-094-SPH, seeking approval of a waiver pursuant to Section 500.6 of the Baltimore County Zoning Regulations (BCZR); Sections 32-4-107(a)(2), 32-4-414, 32-8-301 and 32-8-303 of the Baltimore County Code (BCC) and Section 3112.0 of the Baltimore County Building Code to provide a second story addition built above an existing single family dwelling located in a 100-year floodplain in accordance with Petitioner's plans be and is hereby granted subject to compliance with other Sections of the BCC with regard to plumbing, electrical codes, etc.

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*.

BOARD OF APPEALS  
OF BALTIMORE COUNTY

  
Lawrence Wescott, Chairman

  
Andrew M. Belt

  
Wendell H. Grier