

IN THE MATTER OF
MOHAMMAD AKRAM

Legal Owner/Petitioner

202 Fox Haven Court
Reisterstown, MD 21136
4th Election District
4th Council District

RE: Petition for Variance To Permit Raising/Cooping
of Pigeons

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. 11-101-A

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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 denied a Petition for Variance seeking relief from Section §100.6 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) to permit the cooping and raising of pigeons on a lot of less than one (1) acre.

A public hearing was held on March 31, 2011. The Petitioner, Walayad Khan (“Mr. Khan”) was *pro se*. The Petition for Variance was signed by the legal owner of the Property, Mohammad Akram. A Public Deliberation was held on April 12, 2011.

Factual Background

The Petitioner is the son of the legal owner of the property located at 202 Fox Haven Court, Reisterstown, MD 21136 in Baltimore County (the “Property”). The Property contains 0.25 acres in area (10,890 square feet) more or less. It is zoned D.R. 2. The Property is improved with a two-story, single family detached dwelling which was built in or about 1996. (PC Exh. 3). The home was purchased by Mr. Akram in 2005. (PC Exh. 3). Mr. Khan resides in the Property with his parents.

At issue in this case is Mr. Khan's desire to continue his life long hobby of cooping and raising "high-flying" Pakistani pigeons. ¹ In the rear of Mr. Akram's house is a pigeon coop measuring 6' x 14'. (Pet. Exh. 1 – Zoning Commissioner's Pet. Exh. 1). Mr. Khan testified that he currently has 60 to 80 pigeons in his coop. He explained that these birds do not make noise and therefore do not disturb the neighborhood. He has the pigeons vaccinated every year, routinely cleans the coop and even showers and baths the birds. He testified that he does not race the birds. To protect them from the hawks nearby, he only lets some of the birds out of their coop on Sundays and only during 3 months of the year.

Mr. Khan received permission from the US Department of Agriculture to bring the pigeons to the United States from Pakistan. He presented letters from his neighbors who have no objection to his hobby. (Pet. Exh. 1 – Zoning Commissioner's Pet. Exh. 2). Mr. Khan is a member in good standing of the American Racing Pigeon Union, Inc. (Pet. Ex. 2). He educated the Board about raising homing pigeons by providing informational packets. (Pet. Exhs. 3 and 4).

Decision

BCZR §100.6 requires minimum lot sizes for the stabling and pasturing of certain animals. While the law does not limit the number of chickens, ducks, turkeys, geese or pigeons that can exist on a lot, it does require a minimum lot size of 1 acre for those birds. Similarly, small and large livestock require a minimum of 3 acres.

In regard to Mr. Khan's request for a variance from BCZR §100.6 to allow the raising and cooping of pigeons on a lot of less than 1 acre, the Board has considered all of the evidence presented as it applies to law on variance. In order for the Petitioner to obtain a variance for

¹ This case originated as a result of a Code Enforcement citation (CO-0080794) filed by a neighbor, David Nelson who resides at 211 Fox Haven Court.

cooping and raising pigeons, this Board needs to be convinced that the Petitioner has satisfied §307.1 of the BCZR which 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 an area 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). To prove practical difficulty for an area variance, the Petitioner must produce evidence to allow the following questions to be answered affirmatively:

1. Whether strict compliance with requirement would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome;
2. Whether the grant would do substantial injustice to applicant as well as other property owners in the district or whether a lesser relaxation than that applied for would give substantial relief; and
3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Anderson v. Bd of Appeals, Town of Chesapeake Beach, 22 Md. App. 28 (1974).

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.

In this case, there was no evidence presented by Mr. Khan that the Property itself is unique to warrant the granting of a variance from §100.6 of the BCZR. Having no such evidence as to “uniqueness” the Board has no option but to deny the variance relief.

However, in the interest of judicial economy, the Board grants permission for Mr. Khan to orally amend his Petition for Variance to a Petition for Nonconforming Use. Having reviewed the original County Council Bill No. 63-09 (PC Ex. 4), it is clear that in 2009, the County Council amended §100.6 to add “pigeons” to the list of “fowl and poultry.”

§101.1 provides the definition of “nonconforming use:”

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.

Also applicable to non-conforming use law is §104.1 which permits the nonconforming use to continue as follows:

§104.1 Continuation of nonconformance; exceptions.

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.

Maryland courts have found that nonconforming uses do limit the effectiveness of land use control, contribute to urban blight, imperil the success of the community plan, and injure property values. *County Council of Prince George’s County v. E.L.P. Gardner, Inc.*, 293 Md. 259 (1982). As a nonconforming use is inconsistent with the land use pattern established by the zoning regulations, the nonconforming user is required by the majority of court decisions to prove the essential elements of his or her right to continue the nonconformity. Therefore, a nonconforming user must prove that his or her use existed prior to the enactment of the restrictive ordinance, and will not be sustained where evidence in support of the prior use is insufficient or contradictory. *Kasterndike v. Baltimore Association for Retarded Children*, 267 Md. 389 (1972).

As applied to the facts of this case, based on the testimony, the Board finds that Mr. Khan has been cooping and raising pigeons since 2005 and therefore, he has a legal, nonconforming use under BCZR, §§ 101 and 104. There was no evidence presented that Mr. Khan started raising pigeons at the Property on some other date. Thus, the Board is satisfied that Mr. Khan has proven that his use existed prior to the enactment of Bill No. 63-09. As a result, the Board finds that he may continue with the raising and cooping of pigeons at the Property provided that he does not change the use to another hobby, and further provided that if he abandons or discontinues the use for a period of one year or more, the use will terminate. Mr. Khan also acknowledged on the record before this Board that he agreed to limit the number of pigeons to 50.

ORDER

THEREFORE, IT IS THIS 10th day of May, 2011, by the
County Board of Appeals of Baltimore County

ORDERED, that the Petition for Variance seeking relief from Section §100.6 of the Baltimore County Zoning Regulations to permit the raising and cooping of pigeons on the property located at 202 Fox Haven Court, be, and the same is hereby **DENIED**; **HOWEVER**, it is further,

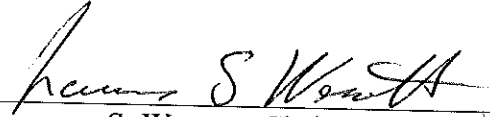
ORDERED, that the Petition for Nonconforming Use to permit the raising and cooping of pigeons on the property located at 202 Fox Haven Court, be, and the same is hereby, **GRANTED, SUBJECT TO:**

- 1) The requirements of B.C.Z.R., §104.1 regarding the prohibition against changing the use to another use.
- 2) The requirements of B.C.Z.R., §104.1 regarding the prohibition against the abandonment or discontinuance of such nonconforming use for a period or one year or more.


3) The Nonconforming Use shall be limited to raising and cooping of 50 pigeons of any kind or type on the Property.

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*.

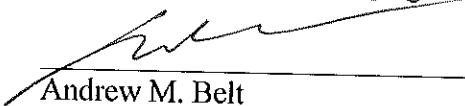
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Lawrence S. Wescott, Chairman



Maureen E. Murphy



Andrew M. Belt