IN THE MATTER OF CAROL REED/LEGAL OWNER - APPLICANT W/s Deer Park Rd; 740' NW of c/l of Dolfield Rd. (4800 Deer Park Road) 2nd Election District, 4th Councilmanic District	*	BEFORE THE BOARD OF APPEALS OF
RE: Petition for Special Hearing Petition for Variance	*	BALTIMORE COUNTY
	*	CBA Case No.: 11-081-SPHA

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OPINION

This case comes to the Board on an appeal from People's Counsel for Baltimore County, from a decision of the Zoning Commissioner (ZC) on a Petition for Special Hearing and Petition for Variance filed by Legal Property Owner, Carol Reed, which was granted with certain conditions. Petitioners sought relief pursuant to Section 500.7 of the Baltimore County Zoning Regulations (BCZR) to approve an existing in-law apartment within an existing accessory structure; and relief pursuant to Section 400.3 of the BCZR to permit the existing accessory building with a height of 22 feet, in lieu of the maximum allowed 15 feet.

A *de novo* hearing was held before the Board on April 12, 2011. Petitioner, Carol Reed was represented by Donna M.B. King, Esquire. People's Counsel participated and was represented by Deputy People's Counsel Carole S. Demilio. Oral argument was taken on April 12, 2011 at the close of the hearing and no closing briefs were submitted. A Public Deliberation was held on May 24, 2011.

Background

The property in question is located on the west side of Deer Park Road, north of Dolfield Road, south of Soldiers Delight in Owings Mills. It is an irregularly shaped property and contains approximately 2.764 acres, more or less, zoned RC 4.; located in Baltimore County.

Carol Reed is the property owner. Ms. Reed purchased the property in 2006 for the purpose of allowing her daughter (Harley) and son-in-law (Mark) to live in the main house with her family and for Ms. Reed to live on the same property in an in-law apartment that had existed in the accessory building on the property when it was purchased. The dwelling house is an old structure, having been built in 1907. The accessory building is also old, but not as old as the original home. Initially, it appears that the accessory building was a barn or a large garage. When Ms. Reed purchased the property, the accessory building contained an apartment on the second floor.

Testimony and Evidence

In April of 2008, Ms. Reed received a building permit to make alterations to the accessory building. The building permit stated:

> "change of occupancy from detached garage to residential storage/workshop. Alteration to remove existing garage doors and install windows and doors 770 SF. Not for commercial use."

When she purchased the property, Ms. Reed was told that there was a one bedroom apartment above the garage and that the previous owners had been renting it to the brother of the wife of the couple. Ms. Reed then stated that approximately two (2) years ago, she moved from the apartment above the garage to the first floor, because of the number of steps that were required to get to the second floor apartment. Ms. Reed stated that she was 65 and had no pension plan, only Social Security. It was her intention to live in the apartment to be near her family and that she would help take care of the children, run errands, and take care of the dog. Ms. Reed takes her meals with the family every evening.

Ms. Reed testified that the main house has three (3) bedrooms and two (2) baths and that the basement has a dirt floor and is unfinished. The attic has stairs going to it but is not suitable for living accommodations. She stated that there is only 4,000 square feet in the primary structure and there is not enough room for her to live in the primary structure.

No one lives upstairs in the apartment in the accessory building, but a friend of her son-in-law did live there for about a year, although he did not pay rent. She said that there is no plan to rent the upstairs apartment or her apartment.

Holly Washington, Ms. Reed's daughter testified on behalf of her mother and re-affirmed the testimony of Ms. Reed. She stated that her mother has medical issues and had been in the hospital for 4 or 5 days. She also stated that the attic was not suitable for a living space since a person could only stand up in the middle of the attic, where the roof peaked.

James Garland, a Baltimore County Building Inspector, testified on behalf of People's Counsel. He stated that he received a complaint in June of 2010 that a new garage was being built without a permit; and that someone was living in the upstairs of the accessory building. He visited the property and saw a large building near the main building with steps going up the outside leading to the upstairs. Mr. Garland inspected the building and issued a correction notice to file for a building permit and follow the zoning regulations, which led to the instant case.

On cross-examination, Mr. Garland stated that the accessory building is in the shape of a barn. He stated that the law allows a single family dwelling as well as a barn on the property. He had checked the records and there was no indication of permits for construction from 1989 forward. He stated that the owner had made an application after 1989, but that application was denied.

David Green of the Office of Planning also testified on behalf of People's Counsel. He stated that he had reviewed the current Petition and the position of the Office of Planning was that it was opposed to the apartment being occupied in the accessory building as well as the height of 22 feet, in lieu of the 15 feet that was sought in the Variance. He stated that the RC 4 zone allows for one family unit per property and if there were two (2) family units on a property, it could be detrimental to the drinking water in Baltimore County. He stated that an accessory use under the BCZR did not include the use of an apartment in an accessory building.

Closing Arguments

In closing argument, Ms. King argued that Ms. Reed was a member of the family unit. She stated that the family includes a parent or grandparent and that Ms. Reed helps with the children and functions as a member of the family unit.

She stated that it is clear that the accessory structure called a barn or a garage is on the same lot as the principal structure and contributes to the comfort, convenience or necessity of the occupants of the principal structure within the meaning of Section 101.1 of the BCZR. She stated that the wood siding on the main house and the accessory structure were similar and that the structure is included in the use of the main house. The structure was utilized for the comfort of the family and enabled the family to have their grandmother close to them to assist the family. She stated that it is long precedent in Baltimore County for permitting in-law apartments in structures within the County.

In support of her position, Counsel submitted for Petitioner, a number of decisions of the Zoning Commissioners. She also stated that the Mueller decision upon which the Zoning Commissioner based his decision was before the Court of Special Appeals now and should be

considered by the Board. She requested that the Board grant the Special Hearing and the Variance.

People's Counsel stated in her closing argument that two (2) principal uses are not permitted on the same property in the RC 4 zone by the BCZR. Unless a use is specifically authorized, it is not permitted. Two (2) separate dwelling units are present here. This is not one family detached unit.

People's Counsel cited two Decisions of this Board; case number 07-332 and 08-132, in support of her position. She stated that to her knowledge, the Board has never allowed an apartment to be occupied in an accessory building. Ms. Demilio cited BCZR Section 1A03.4B.5 that states:

> "Dwelling units per lot. No more than one dwelling unit shall be located on any lot in an R.C.4 Zone, except that tenant dwellings may be approved if the Land Preservation Advisory Board certifies that:
>
> a. Any such proposed dwelling is required for the operation of the farm for the use of bona fide tenant farmers; and
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> b. That any such dwelling, in the location proposed, will not interfere with the operation of the farm."

Ms. Demilio cites Kowalski v. Lamar 25 Md App. 493 and the Marzulla case at 366 Md 158 in suuport of her position. She also stated that with respect to the Variance, the Petitioner had not proved that the proeprty was unique within the meaning of *Cromwell v. Ward,* 102 Md.App. 691, 651 A.2d 424 (1995).

Decision

Section 101 of the Baltimore County Zoning Regulations (BCZR) sets forth the definition of Accessory Use and Accessory Building as follows:

"ACCESSORY BUILDING

One which is subordinate and customarily incidental to and on the same lot with a main building. A trailer shall not be considered an accessory building. A structure connected to a principal building by a covered passageway or with one wall in common shall not be considered an accessory building.

ACCESSORY USE OR STRUCTURE

A use or structure which: (a) is customarily incident and subordinate to and serves a principal use or structure; (b) is subordinate in area, extent or purpose to the principal use or structure; (c) is located on the same lot as the principal use or structure served; and (d) contributes to the comfort, convenience or necessity of occupants, business or industry in the principal use or structure served; except that, where specifically provided in the applicable regulations, accessory off-street parking need not be located on the same lot. An accessory building, as defined above, shall be considered an accessory structure. A trailer may be an accessory use or structure if hereinafter so specified. An ancillary use shall be considered as an accessory use; however, a use of such a nature or extent as to be

> permitted as a "use in combination" (with a service station) shall be considered a principal use."

An accessory building or structure customarily contributes to the comfort and convenience of the priary building and serves the occupants thereof. Such examples are a garage, a tool shed, a swimming pool, etc.

Section 1A03.4B.5 states as follows:

> "Dwelling units per lot. No more than one dwelling unit shall be located on any lot in an R.C.4 Zone, except that tenant dwellings may be approved if the Land Preservation Advisory Board certifies that:
>
> a. Any such proposed dwelling is required for the operation of the farm for the use of bona fide tenant farmers; and
>
> b. That any such dwelling, in the location proposed, will not interfere with the operation of the farm."

The property in question is 2.764 acre(s). It does not qualify as a 'farm'. The burden of proof for compliance with Section 500.7 is on the Petitioner. After a review of the evidence and testimony taken in this matter, the Board has determined that Petitioner has not met that burden of proof. An additional dwelling unit is prohibited by the Baltimore County Zoning Regulations and therefore the Special Hearing request to allow the additional dwelling unit in an accessory structure on Ms. Reed's property will be denied.

In support of its position, the Board cites its decision in the matter of Gary and Barbara Mueller, Case No.: 08-471-SPH. Reversed by the Baltimore County Circuit Court, Case No.:

03-C-09-07062, March 15, 2010, currently before the Court of Special Appeals, Case No.: 00304.

We also cite our decisions in the matter of Brian P. and Robin L. Znamirowski, Case No.: 07-332- SPHA, decided November 20, 2007 and in the matter of Christopher and Charlotte Oktavec, Case No.: 08-132-SPHA, decided January 20, 2009, affirmed by the Court of Special Appeals, Unreported, September Term 2009. The Board notes that the Mueller case involves property zoned RC 4, like the property in the instant case. The Znamirowski and Oktavec cases involve property zoned RC 5.

BCZR Section 1A03.4B.5 pertains to the RC 4 Zones. BCZR Section 1A04.3B.5 pertains to RC 5 Zones. Both Sections proscribe no more than one (1) dwelling unit per lot. In all three cases, the Board prohibited the use of a garage or separate building accessory structure as a second dwelling unit on a single lot.

All of the cases cited by Petitioners were cases decided by the Zoning Commissioners and were not appealed to the Board. They involved in-law apartments that were attached to the principal dwelling, or were in-law apartments in accessory structures granted by the Zoning Commissioner where there were no protestants at the hearings. The one North Carolina case cited by Petitioners involved a local ordinance which allowed accessory buildings to be inhabited or used by the owners of the property or its employees. The Court found that the inhabitants of the accessory building, the son and family of the owner of the property, were within the definition of "owners" within the meaning of the ordinance and allowed them to occupy the accessory building.

Since the Special Hearing is denied the issue with respect to the Variance is moot and will be denied.

ORDER

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

ORDERED that the Petitioners Request for Special Hearing relief filed pursuant to to Section 500.7 of the Baltimore County Zoning Regulations (BCZR) to approve an existing in-law apartment within an existing accessory structure be and the same is hereby **DENIED;** and it is further

ORDERED that the Petitioners requested relief pursuant to Section 400.3 of the BCZR to permit the existing accessory building with a height of 22 feet, in lieu of the maximum allowed 15 feet is **DENIED**, since the request is **MOOT** with respect to the accessory structure.

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

Edward W. Crizer, Jr.