

**IN RE: PETITION FOR SPECIAL
HEARING**

4009 Blair Point Road
(The Subject Property)

15th Election District
6th Councilmanic District

Petitioners/Appellees
Thomas Baird
Victoria Baird

*
*
*
*
*
*
*
*
*
*

**BEFORE THE
BOARD OF APPEALS
OF
BALTIMORE COUNTY**

Case No.: 14-283-SPH

* * * * *

OPINION

Upon consideration of the evidence and testimony in a de novo appeal held on December 9, 2014 and upon public deliberations held on January 22, 2015, the Board of Appeals of Baltimore County (the “Board”) enters the following Opinion and Order upon the Petition for Special Hearing and other relief.

BACKGROUND

Thomas Baird and Victoria Baird (the “Petitioners”) are the owners of 4009 Blair Point Road, Baltimore County, Maryland (the “Subject Property”). Petitioners seek approval by way of special hearing to permit the construction of a proposed replacement dwelling on a lot size of 1.078 acres in lieu of the required 1.5 acres pursuant to Section 1A04.3.B.1.b of the Baltimore County Zoning Regulations (B.C.Z.R.). In addition, pursuant to B.C.Z.R. Section 1A04.3.B.2.b, the Petitioners seek approval for a side yard setback of 18 feet; in lieu of the required 50 Feet, and an open projection side yard setback of 12 feet; in lieu of 37 Feet.

The Subject Property at issue and requested relief is more particularly described on the site plan submitted and marked into evidence as Petitioners' Exhibit 3. The Subject Property is located in the Bowleys Quarters area of Baltimore County and is zoned R.C. 5 (Rural Residential). In an Opinion and Order dated August 28, 2014, Administrative Law Judge John E. Beverungen,

pursuant to a Petition for Special Hearing under Section 500.7 of the B.C.Z.R., granted the Petitioners' requests to deviate the Subject Property's lot size and setbacks subject to certain conditions. Wade Henninger, the co-owner of 4013 Briar Point Road, appealed Judge John E. Beverungen decision.

The Subject Property is a waterfront property located in Bowleys Quarters and has a lot size of 1.078 acres. Said lot is long and narrow. Its dimensions are approximately 110 feet in width and 541 feet in depth. The Petitioners purchased the Subject Property in April of 2014. There is an existing dwelling on the Subject Property, which was damaged by hurricane Isabel, and as a result of the damage, has been unoccupied for a number of years. The Petitioners intend to raze the existing dwelling and build a single family dwelling in its stead. The Petitioners do not intend to construct the new dwelling in the same footprint as the existing dwelling. Wade Henninger, the co-owner of 4013 Briar Point Road, and Frank Orzolek, owner of 4005 Briar Point Road (collectively sometimes referred to as the "Protestants") objected to the Petitioners' proposed replacement dwelling claiming that the location of the proposed dwelling would block their "panoramic view" of the Chesapeake Bay.

FACTS

Mr. Baird, a Petitioner, testified that he and Victoria Baird, his wife, purchased the Subject Property at public auction in April of 2014. On the Subject Property there exists a two-story brick colonial house, with an attached garage, and sunroom. Near the existing house is a concrete patio and a detached shed. Mr. Baird testified that he intends to raze the existing dwelling and build a new two-story home with a car garage below the livable space. The livable space of the new home is approximately 3200 square feet.

Without objection, Mr. Baird submitted into evidence 14 photographs of the Subject

Property and adjoining areas that depicted the current condition of the existing dwelling, several views of the immediate area, the waterfront and other neighboring lots. See, Petitioners' Exhibits 1A through 1M. The Photographs showed the Petitioners' existing red brick dwelling on the Subject Property and other properties and lots viewed from the Subject Property. The photographs showed mature trees on Mr. Henninger's property and his home, a tan rancher. The photographs also showed views from the Subject Property to Mr. Orzolek's house, several mature trees and his yellow shed. One photograph shows that from the Petitioners' existing dwelling you will see Mr. Henninger's mature trees and Mr. Orzolek's shed in front of the waterfront. Mr. Baird submitted a photograph that showed another neighbor to the left side of the Subject Property, the Wetzberger property, who had situated his house closer to the waterfront than Mr. Orzolek's house. Mr. Baird also submitted a photograph that showed a second neighbor to the right side of the Subject Property, the Murphy property, who had situated his house closer to the waterfront than Mr. Henninger's house.

Without objection, Mr. Baird submitted into evidence four photographs of the proposed dwelling. See, Petitioners' Exhibits 2A through 2D. The photographs show how the dwelling; including the side porch, will look after it is completed. The Photographs also show the proposed elevations of the proposed dwelling. Mr. Baird testified that copies of the elevation drawings have been provided to the Department of Planning.

There was no cross examination of Mr. Baird by the Protestants.

The Petitioners called Bernadette Moskunas as a witness. Ms. Moskunas is the Project Manager for Site Rite Surveying ("Site Rite"). Site Right prepared the site plan for the Subject Property. Ms. Moskunas testified that she has worked for Site Rite for 20 years. It was proffered that she has previously testified before this Board, as an expert witness, concerning Baltimore

County Zoning Regulations and as a project manager for Site Rite. Without objection, Ms. Moskunas was offered by the Petitioner as an expert witness who would be offering her opinion on the management of the project and the application of the Baltimore County Zoning Regulations as they related to the Subject Property.

Ms. Moskunas testified that the Site Plan for the Subject Property was prepared by Site Rite under her supervision and that the Site Plan was prepared by a professional land surveyor in the state of Maryland. Ms. Moskunas reviewed the Site Plan, Petitioners' Exhibit 3, and testified that the size of the Subject Property from side property line to side property line is 100 feet and the eastern border of the Subject Property is 440 feet and the western border of the Subject Property is 540 feet. She testified that the Subject Property is rectangular in shape. Ms. Moskunas testified that because the Subject Property is located in an RC5 Zoning district and is only 100 feet wide, you could not build a house on it with a 50-Foot setback as prescribed by Baltimore County Zoning Regulations.

Ms. Moskunas testified that the proposed replacement dwelling will be a two-story dwelling that will be located 113 feet from the waterfront bulkhead and the covered porch will be located 95 feet from the waterfront bulkhead. Ms. Moskunas testified that the dwelling and the covered porch are allowed within the buffer management area. She testified that the Subject Property is with the Chesapeake Bay Critical Area ("CBCA") because the Subject Property is within 1000 feet of the Chesapeake Bay. Any property within the CBCA requires a buffer management of 100 feet from the waterfront bulkhead to a dwelling so as to protect the Chesapeake Bay and its tributaries. Ms. Moskunas testified that the proposed dwelling complies with CBCA's buffer management requirements and no variance will be required to build the proposed dwelling in the location set forth in the Site Plan. Ms. Moskunas testified that the proposed dwelling

complied with the fifteen-percent (15%) lot size area in a CBCA. Ms. Moskunas also testified that the proposed dwelling, as identified in the Site Plan, does not violate any Baltimore County or State of Maryland environmental laws or regulations. Ms. Moskunas testified that the proposed dwelling will not require the issuance of a zoning variance and that such dwelling, as proposed, complies with Baltimore County Zoning Regulations.

Ms. Moskunas reviewed and testified about a copy of the Environmental Map (the "Map"), Petitioners' Exhibit 4, that she obtained from the "My Neighborhood" website which shows an aerial view of the existing dwellings that are adjacent to the Subject Property. Ms. Moskunas testified that she identified each house on the Map and by using information obtained from Maryland's State Department of Taxation and Assessment ("SDAT") she determined when each home on the Map was built. She testified that Murphy Property, 4017 Briar Point Road, was rebuilt in 2004 and that the owners obtained a variance from Baltimore County. She also testified that other houses identified on the Map that were rebuilt had been granted variances from Baltimore County. Ms. Moskunas testified that the lot of record for the Subject Property was created in 1965.

On cross examination, Ms. Moskunas testified that the existing dwelling on the Subject Property was unoccupied at the time Site Rite performed the survey. Ms. Moskunas also testified that she was unaware of any landfill extensions to the Subject Property near the waterfront bulkhead; however, pursuant to the property description contained in the deed, the Subject Property has lost land mass due to erosion.

Counsel for the Petitioners', without objection, introduced into evidence Petitioners' Exhibit 5 (Letter from David Lykens, Department of the Environment and Sustainability ("DEPS"), to Managing ALJ Office of Administrative Hearings dated August 19, 2014) and

Petitioners' Exhibit 6 (Sewer Profile in Miami Beach and Bay Drive dated July 18, 2002). Counsel for the Petitioners, without objection, proffered that Exhibit 6 listed three comments relevant to the proceeding state that (1) the Subject Property is within the buffer management area of the CBCA, (2) the Subject Property is restricted from impervious structures or surfaces within 100 feet landward from the mean high water line of tidal waters or tidal wetlands (the "100 Foot Buffer") and that the plan [Site Plan] indicates that the proposed lot area coverage is below the 15% limit and (3) that DEPS concluded that Petitioners' requested side and front setbacks, and the lot coverage areas for the proposed dwelling are consistent the land use polices, provided that the Petitioners meet and Land Development Area ("LDA") or Buffer Management Area ("BMA") requirements applicable to the proposal. As such, the Petitioners' request, if granted, will avoid environmental impacts. The Department of Planning ("DOP") reviewed the Petitioners' request for a special hearing and the Site Plan. The DOP did not oppose the Petitioners' request.

Frank Orzolek, co-owner of 4005 Briar Point Road (the "Orzolek Property"), a pro se Protestant, testified that he does not currently live at the Orzolek Property but intends to move in there once the house renovated in the coming spring; however, he and his family have enjoyed the use of the property for many years. Mr. Orzolek testified that the properties in the area are unique because of their beautiful views from both the bay side and road side. He testified that he wants to keep the current panoramic views of the Chesapeake Bay and that the Petitioners should build their new dwelling in the existing footprint of the existing house to ensure that his view of the Chesapeake Bay will not be obstructed. Mr. Orzolek testified that because the Petitioners are building a new home, they should adhere to the existing standards of the area by building in the footprint of the existing dwelling. Mr. Orzolek testified that Wade Henninger, a Pro Se Protestant, will lose most of his view of the Chesapeake Bay if the Petitioners build their dwelling in the

proposed location.

On cross examination, Mr. Orzolek admitted that if he looks in the direction of the Subject Property, a shed located on his property, which is 30 feet long and 10 feet wide, impedes his view of the Chesapeake Bay. Mr. Orzolek testified that although he and his sister, a co-owner of the Orzolek Property, visit the property regularly, no one lives there permanently. Mr. Orzolek testified that on each side of the Orzolek Property there are ten mature trees. Mr. Orzolek testified that he was unfamiliar with any easement, covenant or other written instrument that provides him with any legal right to use or look across the Subject Property.

Wade Henninger, the co-owner of 4013 Briar Point Road (the "Henninger Property"), testified that he does not object to the Petitioners building a new home so long as it does not block his views. Mr. Henninger, with objection, submitted into evidence several photographs which depict the views from the Henninger Property and surrounding area. See, Protestant Henninger's Exhibits 1A through 1H. Among other things, the photographs show a view of Hart Miller Island, several trees on the Orzolek Property, views of the Chesapeake Bay and a clear line of sight from the Henninger Property across the Subject Property to the Chesapeake Bay. Mr. Henninger testified that he would like to keep the properties open so that all residents can have a wide-open view of the Chesapeake Bay. Mr. Henninger testified that if the Petitioners were allowed to build their new dwelling as proposed, at a distance of 100 feet from the waterfront bulkhead, their home would be closer to the water than any other house in the immediate area. Mr. Henninger testified that he is concerned that in the event of a storm the Petitioners' new dwelling will suffer water damage because it will be too close to the waterfront bulkhead. Mr. Henninger testified that in addition to impeding his view, the Petitioners new dwelling, if built, will decrease the value of the Henninger Property. He further testified that he believes that he lost a sale for the Henninger

Property when a potential buyer lost interest after he informed him that the proposed location of the Petitioners' new dwelling would be in front of his home and block the view.

On cross examination, Mr. Henninger testified that he and his wife have lived on the Henninger Property for two and one-half years and it is their primary residence. He testified that his residence was on the market for sale from July to November of 2014. He testified that his home is a one-level brick ranger and that he did lose the sale of his home due to his inability to obtain flood insurance. He testified that he currently has a flood insurance policy for his home. Mr. Henninger testified that he has a concrete patio adjacent to his home but no elevated deck. Mr. Henninger testified that trees on the Subject Property and the Orzolek Property affect his westward view of the Chesapeake Bay. He further testified that the dwelling on the Murphy Property is closer to the water than his home and the dwelling on the Murphy Property also impede his view of the water. Mr. Henninger testified that he was unfamiliar with any easement, covenant or other written instrument that provides him with any legal right to use or look across the Subject Property.

Counsel for the Petitioners called Ms. Moskunas as a rebuttal witness. Ms. Moskunas testified that since the year 2000 the properties along Briar Point Road now are served by public water and sewage. Prior to the year 2000, the properties were served by wells and septic systems. Ms. Moskunas opined that the houses built along Briar Point Road were built closer to the road so that gravity could accommodate the private septic systems built in the rear of the houses. She further proffered that because of the abandonment of the private septic systems and the introduction public water and sewage newer homes could be built closer to the water. Ms. Moskunas testified that Petitioners' Exhibit 6 (Sewer Profile in Miami Beach and Bay Drive dated July 18, 2002) shows the configuration of the public water and sewage and private septic systems

for properties along Briar Point Road and that the Subject Property is served by public water and sewage.

DISCUSSION

The facts show that the lot for 4009 Briars Point Road, (the "Subject Property") was created in 1965 in a section of Baltimore County known as Bowleys Quarters. The Subject Property is not in a subdivision. The Subject Property is currently zoned RC 5 (Rural Residential). The Petitioners purchased the Subject Property, at public auction, in April of 2014.

The current lot area size of the Subject Property is approximately 1.078 acres and, it is 110 feet in width and 541 feet in depth. Pursuant to uncontroverted expert testimony, due to the narrow rectangular shape of the property, with its 110-foot width from side to side, it is not possible to build a residential dwelling on the Subject Property and also comply with the 50-foot side yard setback requirement enumerated in B.C.Z.R. Section 1A04.3.b.2.b.

Although the Protestants do not object to the mere building of the proposed dwelling or the side yard setbacks, they are opposed to the proposed location of the Petitioners' dwelling, as indicated in the Site Plan, because the dwelling will impede their views of the Chesapeake Bay. The Protestants acknowledged that there is no easement, covenant or other written instruments that provide them any legal right to use or look across the Subject Property. The Protestants admitted that in some cases their views of the Chesapeake Bay were obstructed by trees, the dwelling on the Murphy Property, which was rebuilt pursuant to a variance granted in 2003, and other structures, such as Mr. Orzolek's shed.

Section 1A04.3.B.1.a of the B.C.Z.R. states that "A lot having an area of less than 1.5 acres may not be created in an R.C.5 zone." Section 1A04.3.B.1.b of the B.C.Z.R. states that "the owner of a single lot of record that is not in a subdivision and that is in existence prior to September 2,

2003, but does not meet the minimum acreage requirement, or does not meet the setback requirement of Paragraph 2, may apply for a Special Hearing under Article 5 [Section 500.7 of the B.C.Z.R.] to alter the minimum lot size requirement. However, the provisions of Section 1A04.4 (Performance Standards) may not be varied.”

The evidence shows that the lot of the Subject Property was created in 1965 and it not a part of a subdivision. The evidence also shows that the Petitioners would not be able to build a residential dwelling on the Subject Property and also comply with the 50-foot side yard setback requirement enumerated in Baltimore County Zoning Regulations applicable to R.C. 5 zones. The Petitioners purchased the Subject Property so that they could build their new principal residence and have submitted their Site Plan to DOP which did not oppose the Petitioners’ request for relief pursuant to a special hearing. With respect to Section 1A04.4 of the B.C.Z.R. (Performance Standards), in a letter dated August 6, 2014, the DOP indicated how the proposed construction complied with the R.C. 5 requirements as it relates to the building material and the compatibility of the proposed dwelling to existing dwellings in the area in terms of size and architectural detail; including, the general designs of the proposed dwelling. In addition, DOP was aware that the Site Plan called for the replacement dwelling to be moved approximately 125 feet closer to the water. Furthermore, Section 1A04.4 of the B.C.Z.R does not, in and of itself, restrict the placement of a dwelling to a particular location on a lot.

The Subject Property is within 1000 feet of the Chesapeake Bay and therefore, is located within the Chesapeake Bay Critical Area (“CBCA”). Also, the Subject Property is located within a Buffer Management Area (“BMA”). The BMA requirements state that there shall be no impervious structures or surfaces within the 100 Foot Buffer and that the proposed lot area coverage is below the 15% limit. After reviewing the Site Plan, DEPS determined that the

Petitioners complied with the BMA requirements.

The Protestants do not oppose the Petitioners' request for a reduced lot size or reduced side yard setbacks. Instead, they oppose the location of the proposed dwelling, as depicted in the Site Plan, because they believe the proposed dwelling will block their panoramic views of the Chesapeake Bay. The Protestants admit that neither of them has the benefit of an easement, covenant nor other written instrument to permit them make use of or look across the Subject Property. Without such an easement, covenant or government restriction that protects the viewing site lines of an individual, the Protestants cannot prevent the placement of the proposed dwelling at the proposed location on the Site Plan. The law does not guarantee one's right to an unobstructed view of the water, unless the owner has obtained specific rights by way of a "view easement" or similar grant. Chesley v. City of Annapolis, 176 Md. App. 413 (2007).

ORDER

IT IS THIS 10th day of March, 2015, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing relief requested be approved as follows:

1. Pursuant to Section 1A04.3.B.1.b of the Baltimore County Zoning Regulations (B.C.Z.R.), the Petitioners are permitted to construct a proposed replacement dwelling on a lot size of 1.078 acres in lieu of the required 1.5 acres, in accordance with Petitioners' Exhibit 3, the Site Plan;
2. Pursuant to Section 1A04.3.B.2.b of the Baltimore County Zoning Regulations (B.C.Z.R.), the Petitioners are permitted to establish side yard setbacks of 18 feet and 12 feet in lieu of 37 feet, in accordance with Petitioners' Exhibit 3, the Site Plan; and
3. Petitioners shall comply with the August 19, 2014 Zoning Advisory Committee

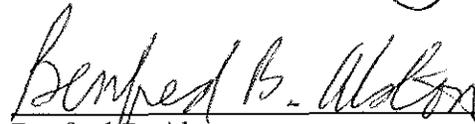
Comments of DEPS, DOP and DPR which are incorporated herein and attached hereto.

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*.

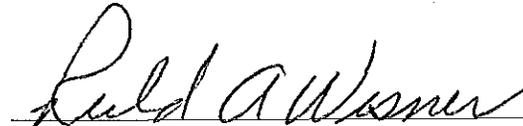
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Maureen E. Murphy, Panel Chairman



Benfred B. Alston



Richard A. Wisner



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

March 10, 2015

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Wade C. Henninger
4013 Briar Point Road
Baltimore, Maryland 21220

RE: *In the Matter of: Thomas and Victoria Baird*
Case No.: 14-283-SPH

Dear Mr. Schmidt and Mr. Henninger:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

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*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all **Petitions for Judicial Review** filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,


Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: Thomas and Victoria Baird
Bernadette Moskunus/Site Rite Surveying, Inc.
Frank Orzolek
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Arnold Jablon, Director/PAI
Andrea Van Arsdale, Director/Department of Planning
Nancy West, Assistant County Attorney/Office of Law
Michael Field, County Attorney/Office of Law