



# 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

October 24, 2016

J. Neil Lanzi, Esquire  
Wright, Constable & Skeen, L.L.P.  
102 W. Pennsylvania Avenue, Suite 406  
Towson, Maryland 21204

David F. Mister, Esquire  
13604 Brookline Road  
Baldwin, Maryland 21013

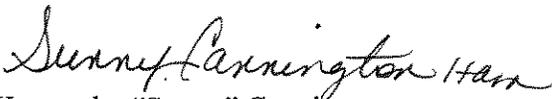
RE: *In the Matter of: Ellen McBarron Burger and Kirsten Burger, Trustees of the  
Ellen McBarron Burger Revocable Trust – Legal Owners*  
Case No.: 16-158-SPHA

Dear Counsel:

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: Ellen McBarron Burger  
Kirsten Burger  
Bruce E. Doak/Bruce E. Doak Consulting, LLC  
Lawrence M. Stahl, Managing Administrative Law Judge  
Andrea Van Arsdale, Director/Department of Planning  
Arnold Jablon, Deputy Administrative Officer, and Director/PAI  
Nancy C. West, Assistant County Attorney/Office of Law  
Michael E. Field, County Attorney/Office of Law

John and Maria Pycha  
Judith Wilson  
Richard Edmunds  
Office of People's Counsel

IN THE MATTER OF  
Ellen McBarron Burger and Kirsten Burger,  
Trustees of the Ellen McBarron Burger  
Revocable Trust, Legal Owner/Petitioner  
13607 Brookline Road  
Baldwin, MD 21013

\* BEFORE THE  
\* BOARD OF APPEALS  
\* OF  
\* BALTIMORE COUNTY  
\* Case No. 16-158-SPHA

Re: Petition for Variance pursuant to  
BCZR §1A04.3B.2.b and Petition for  
Special Hearing BCZR §1A04.3B.1

\* \* \* \* \*

**OPINION**

This case comes to the Board on appeal of an Opinion and Order of the Administrative Law Judge (“ALJ”) dated March 1, 2016 dismissing as moot the Petition for Special Hearing filed pursuant to BCZR §1A04.3B.1 and denying the Petition for Variance filed pursuant to BCZR §1A04.3B.2.b, as well as an Opinion and Order on Motion for Reconsideration dated April 22, 2016, denying the Motion for Reconsideration but permitting a single family dwelling to be constructed under BCZR §304, provided the height and setback requirements are met.

A *de novo* public hearing was held before this Board on September 14, 2016. Petitioners, Ellen McBarron Burger and Kirsten Burger, as Trustees of the Ellen McBarron Burger Revocable Trust were represented by J. Neil Lanzi, Esquire and Wright, Constable & Skeen (hereinafter, the “Petitioners”). David F. Mister, Esquire represented himself as a Protestant, as well as Maria Pycha, Judith Wilson and Richard Edmunds (hereinafter, the “Protestants”). A public deliberation was held on October 6, 2016.

**Factual Background**

Petitioners are the Trustees of a revocable trust which owns the property located at 13607 Brookline Road, Baldwin, MD 21013 in the northeastern section of Baltimore County, in a subdivision known as Carroll Manor (the “Property”). (Pet. Ex. 3). The Property, identified as Lot

No. 11, consists of 1.04 acres and is unimproved, except for an old stone foundation wall. (Pet. Ex. 1). The Property is zoned RC 5.

**Evidence**

At the hearing, the Parties represented to the Board that they had reached a settlement agreement as to all outstanding issues between them. As a result, the Petitioners proceeded by way of a proffer on some facts and by way of direct testimony on other facts, without dispute or evidence to the contrary presented by the Protestants.

Mr. Lanzi proffered that the Petitioners desire to sell Lot 11 but need the relief requested in order to build a house which is consistent with the other homes in the neighborhood and which meets the Performance Standards for homes in the RC5 zone. Mr. Lanzi indicated that the requests here had the support of the community and that the settlement agreement reached would be made a part of an Order by this Board so that it would be binding on all parties in the future.

Mrs. Ellen Burger testified at the hearing and explained that she purchased 13609 Brookline Road, also known as Lot No. 12, in the 1960s. The Deed dated June 7, 2012 and recorded in the Land Records of Baltimore County at Liber 32196, Folio 466, indicates that Mrs. Ellen Burger and her husband Edward D. Burger, purchased Lot 12 on December 21, 1962. Lot 12 is improved with a single family home, is located next to Lot No. 11. Mrs. Burger explained that Lot No. 12 was used by her family as their home. Another Deed dated May 28, 1965, Liber 4464, Folio 302, indicates that Mr. and Mrs. Burger also purchased Lot 11. During the time that the family resided on Lot 12, they used Lot No. 11 for recreational purposes.

Mrs. Burger introduced and explained a series of photographs of both Lots. (Pet. 5A-5N). Several of the photographs depict the old stone wall which Mrs. Burger described was the foundation for a bank barn. (Pet. Ex. 5D, 5I-5N). There is a concrete or asphalt basketball court contained within the stone walls. (Pet. Ex. 5J, 5N). Mrs. Burger stated that the stone walls were a

unique feature of the Property. She also stated that Lot No.11 was the last available lot in Carroll Manor and thus, it was very desirable on the buying market.

Bruce E. Doak, a registered land surveyor, prepared the Site Plan and Redlined Site Plan. (Pet. Exs. 1 and 2). Mr. Doak opined that the Property was unique due to the old stone walls which measure 8' in height; due to the topography; and due to the septic reserve area located in the front of the Property. He testified that the stone walls - while old - are not historic and need to be removed in order to build a house that is consistent with other homes in the neighborhood. Without a variance, any potential house would have to be rotated to meet the RC5 setbacks but would then encroach on the septic reserve area in the front. The septic reserve area is particularly large and cannot be moved to the back of the Property. If the house is rotated to meet the RC5 setbacks, the front door would not face Brookline Road but would face 13605 or 13609. The Redlined Site Plan shows the proposed home located in a place even with, and similarly oriented to, the homes located at 13605 and 13609. (Pet. Ex. 2). Without the relief, he indicated that the Petitioners would not be able to meet the Performance Standards in BCZR §1A04.4.

Mr. Doak described the topography of Lot 11 as being different from the topography of the neighboring homes. The topography of Lot 11 slopes down more in the rear of the Property than the other properties in the area. The Site Plan shows how the topography lines differ between the Properties. (Pet. Ex. 1). Accordingly, we find that it would not be possible to build the home in the rear of the Property.

Mr. Doak further stated that if the relief requested is granted, the home to be built would not be detrimental to the neighborhood. He advocated that the RC5 regulations, which went into effect after the Petitioners owned the Property, impact this Property disproportionately from other properties in the neighborhood because the other homes in Carroll Manor were built with different setbacks and without any required Performance Standards. The RC5 regulations, he suggested,

make it more difficult to build a home on this Property. Without the relief here, the home would alter the essential character of the neighborhood for the reasons he described.

Also testifying on behalf of the Petitioners was Laura Thomas, a licensed Maryland architect. Ms. Thomas testified that in her opinion, the property was extremely unique and presented unusual challenges as a building lot. If the front door did not face Brookline Road, the proposed home would change the fabric of the neighborhood. In order to meet the setbacks, the home would be long and narrow and therefore inconsistent with the orientation of the neighboring homes. Although she was amenable to using the stone walls in the design or as an outdoor area, she did not want retention of the stone walls remaining to be a condition in our Order.

As previously indicated, the Protestants did not offer any evidence. Mr. Mister represented that he and the other Protestants executed the Settlement Agreement and that it should be incorporated into our Order. (Pet. Ex. 4).

### Law

In order for an area variance to be granted, this Board must be convinced that the Petitioners have met their 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...."

The *Cromwell* Court explained the legal concept of "uniqueness" by stating:

'Uniqueness' of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e. shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstruction) or other similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

The *Cromwell* Court connected the variance law in Baltimore County with the law in Maryland and emphasized that:

We conclude that the law in Maryland and in Baltimore County under its charter and ordinance remains as it has always been a property's peculiar characteristic or unusual circumstances relating only and uniquely to that property must exist in conjunction with the ordinance's more severe impact on the specific property because of the property's uniqueness before any consideration will be given to whether practical difficulty or unnecessary hardship exists.

*Id.* at 710.

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/her property. *McLean v. Soley*, 270 Md. 208 (1973); *Trinity Assembly of God v. People’s Counsel*, 407 Md. 53 (2008).

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.

*Mclean* at 214-215.

### **Decision**

In this case, the Petitioners are seeking Special Hearing relief to use a lot having an area of less than 1½ acres (1.04 acres) as required in BCZR §1A04.3B.1.a and for a variance from the Building Setbacks in BCZR §1A04.3B.2.b which reads in pertinent part as follows:

- b. Any principal building hereafter constructed in an RC5 Zone shall be situated...at least 50 feet from any lot line other than a street line...

As to the lot size, BCZR, §1A04.3B.1.b.(1) permits the Petitioners to request a Special Hearing to alter the minimum lot size because the Lot in this case was in existence prior to

September 2, 2003 and does not meet the minimum acreage requirement or the minimum building setbacks. The only condition to requesting the Special Hearing is that the Petitioners may not alter the Performance Standards set forth in BCZR §1A04.4 for RC5. Based on the Deeds submitted, we find that the Petitioners have owned Lot 11 since May 28, 1965. (Pet. Ex. 3).

Accordingly, the Petitioners are required to comply with the Performance Standards in BCZR §1A04.4. In order to meet the Performance Standards, the Petitioners need a variance from the 50' setbacks. Applying the holdings above to the facts of this case, we find that a variance request should be granted.

Under *Cromwell and Trinity Assembly, supra*, the Board finds, based on the undisputed testimony of Bruce Doak, and the photographs submitted by Mrs. Burger, that the Property is 'unique' because, unlike the properties in the area, this Property contains the remnants of an old stone foundation upon which a barn once stood; the topography of this Property slopes to the rear and the septic reserve encompasses a large portion of the front of the Property.

The evidence produced revealed that the other properties in the neighborhood do not have an old stone barn foundation. The evidence further revealed that the topography of the neighboring properties do not slope toward the rear to the same extent as this Property. Finally, the evidence showed that the septic reserve area cannot be moved from the front to the rear, thus limiting the area where a proposed home could be located.

As a result of these 'unique' features, we also find that strict compliance with BCZR §1A04.3B.2.b would result in practical difficulty and unreasonable hardship. Applying the factors in *McLean, supra*, we first find that strict compliance with the RC5 area setbacks would unreasonably prevent the use of the property for the permitted purpose of building a home because the Petitioners could not meet both the 50' setbacks and the Performance Standards.

As to the second factor, we find that the grant of the area variance applied for would do substantial justice to the Petitioners as well as the Protestants because the proposed home would be more consistent with all the other homes in the neighborhood. The intent of the Performance Standards is to “ensure that rural residential development conforms with a quality of design that maintains and reflects the rural character of the County.” (BCZR §1A04.4B.1.) The photographs of the other homes on this neighborhood reflect the well-maintained, 1960s two-story ranch style homes, with large front yards set back from Brookline Road, lined up with one another, and with front doors facing that road. If this proposed home is set within the 50’ setbacks, it would be rotated such that it would encroach on the septic reserve area and would be out of character with the positioning of the homes on neighboring lots.

Finally, we find that the variance relief can be granted here such that it is within the spirit of the building setback regulations and Performance Standards and that public safety and welfare would still be secured. We find in this case, that the orientation and location of the proposed home on this lot, located on this road, as it will be situated among existing homes of similar style, are significant factors here when evaluating whether the spirit of the regulation has been met.

We note that the Protestants entered into a Settlement Agreement which is attached and incorporated into the Site Plan (Pet. Ex. 1). Both the Settlement Agreement and Site Plan will be incorporated into our Order.

For the foregoing reasons, the Petitioner’s Special Hearing request and Petition for variance is granted.

**ORDER**

THEREFORE, IT IS THIS 24<sup>th</sup> day of October, 2016, by the Board of Appeals of Baltimore County,

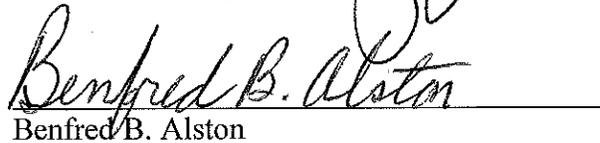
**ORDERED**, that the Petition for Special Hearing filed pursuant to BCZR §1A04.3B.1 to allow a property area less than 1 ½ acres (1.04 acres), and a density less than 0.5 for existing lots that were created prior to 1979 and a Petition for Variance filed pursuant to BCZR §1A04.3B.2.b to allow a setback of 30 feet in lieu of the required 50 feet from any lot line other than a street, be, and the same is hereby **GRANTED**; and it is further,

**ORDERED**, that the Settlement Agreement dated July 8, 2016 (Pet. Ex. 4) and the Site Plan attached thereto, be and the same are hereby incorporated into and made a part of 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*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
Maureen E. Murphy, Chairman

  
Benfred B. Alston

  
Meryl W. Rosen



Wright, Constable & Skeen, L.L.P. | Attorneys at Law

102 W. Pennsylvania Avenue - Suite 406 - Towson - Maryland - 21204 · Phone: 443-991-5917

J. NEIL LANZI

Writer's Direct Dial / Email:  
(667) 206-4610 /nlanzi@wcslaw.com

July 8, 2016

David F. Mister, Esquire  
Winter & Bartlett, LLC  
30 E. Padonia Road, Suite 404  
Timonium, MD 21093

Re: Proposed Letter Agreement

Dear David:

This letter proposal is in response to the counter-proposal presented by you on behalf of certain neighbors on July 1, 2016 regarding the Burger property known as 13607 Brookline Road and the pending appeal with the Baltimore County Board of Appeals, Case No. 2016-0158-SPHA. This proposal is made without prejudice and shall remain open until July 15, 2016, after which time Petitioners intend to file for undersized lot approval and dismiss the appeal.

1. Petitioners/Owners. Ellen McBarron Burger and Kirsten Burger as Trustees of the Ellen McBarron Burger Revocable Trust dated January 18, 2000.
2. Protestants/Interested Parties. David F. Mister, Esquire, 13604 Brookline Road, Baltimore, Maryland 21013; John and Maria Pycha 13612 Brookline Road, Baltimore, Maryland 21013; Judith Wilson, 13612 Devonfield Drive, Baltimore, Maryland 21013; and Richard Edmunds, 13609 Brookline Road, Baltimore, Maryland 21013.
3. Property. Lot 11, Block D as shown on the Plat entitled, "Section 1, Carroll Manor", currently known as 13607 Brookline Road consisting of 1.04 acres currently zoned RC5.
4. Zoning Relief Requested.
  - A. Variance to allow a setback of 40 ft. in lieu of the required 50 ft. from the two side property lot lines.
  - B. Variance to allow a property area of 1.04 acres in lieu of 1.5 acres and a density less than 0.5 for existing lots created before 1979 per Section 1A04.3.B.1(a) of the B.C.Z.R.
5. Proposed Residence Location. As shown on the site plan attached as Exhibit 1, the front of the proposed residence will be oriented to face Brookline Road. The front setback from the

Petitioner  
CBA Exhibit

# 4

middle of Brookline Road to the front building envelope shall be 95 ft. and the front of the proposed residence shall be in line with the two adjoining houses. The side setbacks on either sides of the building envelope shall be a minimum of 40 ft. The rear yard setback from the proposed building envelope to the rear property line shall be 40 ft.

6. Driveway. The proposed driveway shall be either on the right or left side of the septic reserve area as shown on the attached site plan. The final location shall be at the discretion of the purchaser of the Property subject to the recommendation of the purchaser's builder taking into consideration Section 8B (retaining vegetation to the fullest extent possible) of this Agreement and determining the most practical location for the driveway connection between the public road and the garage for any proposed residence on the Property. The edge of paving of the final location of the driveway shall be a minimum of 10 feet from the property line.

7. Proposed Residence Details. The proposed residence shall be subject to the Baltimore County performance standards for properties located in the RC5 zone, specifically Section 1A04.4 of the B.C.Z.R. The residence shall be a minimum of 2,000 sq. ft. with a maximum of 4,000 sq. ft. and a height of less than 35 ft. per the B.C.Z.R.

8. Design. The design of the proposed residence shall be in keeping with the neighborhood and in accordance with the RC5 performance standards, specifically, the following:

A. Reflect the traditional rural character of the area in architectural form, scale, materials, detailing and landscaping context.

B. Retain the existing quality vegetation of the site to the fullest extent possible and protect the root systems of the remaining vegetation during construction.

C. Integrate, where possible, significant features of this site, such as distinctive buildings, vistas, topographic features, specimen trees, tree stands, hedgerows, monuments, landmarks and gardens, into the site design, and retain the existing character of the features and their settings.

D. Coordinate building design, site layout and grading so that grade transitions are gradual and respect the existing topography.

E. Provide for smooth transitions between the proposed development and the surrounding rural area by arranging and orienting the proposed buildings and site improvements to complement those in the surrounding vicinity.

F. Provide varietal transitions between proposed buildings and site improvements with respect to setbacks, street patterns and building-to-street grade relationships.

G. Integrate, where possible, building and design features that will limit the amount of impermeable surface and minimize storm water run-off.

H. Provide landscaping which includes tree and shrubbery plantings that are water loving and are highly water absorbing in nature.

9. Site Plan/Building Permit. Petitioner will present the site plan attached as Exhibit 1 to the Baltimore County Board of Appeals subject to the conditions listed above. Protestants/Interested Parties agree to support the site plan and proposed zoning relief as described above at the hearing before the Baltimore County Board of Appeals and/or Administrative Law Judge. Protestants/Interested Parties further agree to not directly or indirectly take any steps to delay or hinder Petitioners' application for building permit approval.

10. Binding Agreement. This Agreement and the conditions thereon, including any resulting Zoning Order from the Administrative Law Judge and/or the Board of Appeals, shall attach to and run with the land to any contract purchasers of the subject property. This Agreement shall be binding on the parties hereto, their successors, personal representatives and assigns.

11. Use of Property. The land shall be used only for residential uses as allowed in the RC5 zone or any subsequent residential zone applied to the property.

12. Conditions. The obligations of the Petitioners/Owners shall not become effective and binding upon the Petitioners/Owners unless the requested zoning relief has been granted in accordance with the Petitioners/Owners' request and no appeals filed by anyone.

13. Miscellaneous.

A. Notwithstanding anything to the contrary, the provisions of this Agreement shall terminate and be of no further force and effect in the event any of the Protestants/Interested Parties (or any other third party not a party to this Agreement) object or in any way impede Petitioners' application for zoning relief and/or building permit application for a proposed residence on the property.

B. If any Party to this Agreement or its successors and/or assigns is required to institute legal action to enforce the terms of this Agreement and is successful (whether by judgment or settlement) in obtaining enforcement of the Agreement, that party or its successors or assigns, shall be entitled to recover reasonable attorney fees and other reasonable costs of the action from the person or entity against whom the enforcement is obtained.

C. This Agreement may be executed in counterparts and contains the entire understanding of the Parties. Electronic signatures shall be accepted as originals.

D. Each Party warrants it has carefully read and understands the agreement and has had ample time to consult with counsel of its choice.

In the event you agree with the terms provided above, please sign below.

Very truly yours,



J. Neil Lanzi

July 8, 2016  
Page Four

I have read the above Letter Agreement and now execute confirming my acceptance of its terms.

DATE:

7-27-2016

7/27/2016

PETITIONERS/OWNERS:

Ellen McBarron Burger, Trustee  
Ellen McBarron Burger, Trustee

Kirsten Burger, Trustee  
Kirsten Burger, Trustee

PROTESTANTS/INTERESTED PARTIES

David F. Mister, Esquire  
David F. Mister, Esquire

Maria Pycha  
Maria Pycha

John Pycha  
John Pycha

Judith Wilson  
Judith Wilson

Richard Edmunds  
Richard Edmunds

