

IN RE: <b>PETITIONS FOR SPECIAL HEARING</b>	*	BEFORE THE
<b>AND VARIANCE</b>		
(17-19 & 21-23 Wade Avenue)	*	OFFICE OF
1 <sup>st</sup> Election District		
1 <sup>st</sup> Council District	*	ADMINISTRATIVE HEARINGS
Warshaw One, LLC		
<i>Owner</i>	*	FOR BALTIMORE COUNTY
Petitioner	*	<b>Case Nos. 2017-0206-SPHA</b>
		<b>&amp; 2017-0207-SPHA</b>
* * * * *		

**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings (OAH) for consideration of Petitions for Special Hearing and Variance filed on behalf of Warshaw One, LLC, legal owner (“Petitioner”). This is a unique case, in that it involves two groups of “duplex” or semi-detached homes (in total, 4 living units) constructed in 1904. The above-captioned cases were combined for hearing, and in both variance relief is sought for lot width and side yard setback requirements as set forth in what is known as the “small lot table.” B.C.Z.R. §1B02.3.C.1. The property is zoned D.R. 5.5.

The more complex issue concerns the special hearing request. At present, each of the duplexes (i.e., 17-19 Wade Ave. & 21-23 Wade Ave.) is situated on a separate lot. Special hearing relief is requested to “create an undersized lot” for each of the living units. Counsel indicated Petitioner intends to apply for a minor subdivision to subdivide each of these lots, thereby creating four lots total. In that scenario, each of the living units would be situated on a separately deeded lot, which is Petitioner’s ultimate goal.

Appearing at the public hearing in support of the requests was Arthur and David Warshaw. Lawrence E. Schmidt, Esq. represented the Petitioner. There were no protestants or interested citizens in attendance. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. A substantive Zoning Advisory Committee (ZAC) comment was received from the Department of Planning (DOP). That agency did not oppose the variance requests, but questioned

whether the Administrative Law Judge (ALJ) is authorized in a special hearing case to “create an undersized lot.”

SPECIAL HEARING

There is merit to the DOP’s ZAC comment. That is, I agree the Zoning Commissioner is without authority to “create” a lot (undersized or not) in the context of a zoning case. That is a development matter subject to the rules and regulations found in Article 32, Title 4 of the County Code. In an unreported court of special appeals opinion, *Kehoe v. Arthur*, (Sept. Term, 2013, No. 1448), the court held the ALJ was authorized under BCZR §500.7 to determine whether a proposed reconfiguration of parcels would violate County zoning regulations. In a similar vein, I believe in this case the ALJ is authorized to consider whether creation of the proposed lots would violate the Regulations.

Of course, the *Kehoe* court noted the petitioner would still have the obligation to “obtain whatever subdivision approvals, and obtain whatever other permits their proposed uses would require.” *Id.* at p. 14. While *Kehoe* provides authority for the ALJ to determine the purely legal question of whether a proposed and reconfigured lot is in compliance with the B.C.Z.R., I do not believe it entitles the ALJ to “create” a lot or lots, as requested in the Petition. *Friends of the Ridge v. BGE*, 352 Md. 645, 651 (1999) (zoning regulations do not create lots). In this case Petitioner indicated it has filed with the county applications for minor subdivisions of these lots, and it is through that process that the lots will be “created.” B.C.C. §32-4-106(b)(1).

In light of the above, I believe the relief sought in this case can only be obtained through the variance process, and that a “special hearing” is not necessary and/or sufficient. While the ALJ is permitted in an R.C.5 zone to grant a special hearing to “alter the minimum lot size requirement” (B.C.Z.R. §1A04.2.B.1.b) an analogous provision does not exist for the D.R. zones. Petitioner also cannot use the “Undersized Single-Family Lots” provision in Section 304. That section is applicable

when the only deficiencies relate to lot width and/or area; here, side yard setbacks for the proposed lots are also deficient. As such, the special hearing request in this case shall be considered a request for a variance of the minimum lot size in a D.R. 5.5 zone (i.e., 6,000 square feet).

### VARIANCES

A variance request involves a two-step process, summarized as follows:

- (1) It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
- (2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

*Cromwell v. Ward*, 102 Md. App. 691 (1995).

Petitioner has met this test. The site improvements were constructed in excess of 100 years ago, which renders the property unique. Petitioner would experience practical difficulty if the regulations were strictly interpreted because it would be unable to convey each of the dwellings separately. Finally, as demonstrated by the lack of County and/or community opposition, I do not believe granting the requests would have a detrimental impact upon the community. No exterior construction or site improvements of any sort are proposed or contemplated at this time, and the dwellings will appear unchanged. The relief will improve the marketability of the properties and promote homeownership, which are policies the law should foster.

THEREFORE, IT IS ORDERED this **28th** day of March, **2017**, by this Administrative Law Judge, that the Petition for Special Hearing filed pursuant to § 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R) as follows: # 17 Wade Avenue: to create an undersized lot with an area of 4,882 sq. ft. in lieu of the required 6,000 sq. ft., pursuant to a proposed minor subdivision. #19 Wade Avenue - to create an undersized lot with an area of 4,894 sq. ft. in lieu of the required 6,000 sq. ft., pursuant to a proposed minor subdivision, # 21 Wade Avenue -to create an undersized lot with an area of 5,148 sq. ft.

in lieu of the required 6,000 sq. ft., pursuant to a proposed minor subdivision; and #23 Wade Avenue - to create an undersized lot with an area of 5,317 sq. ft. in lieu of the required 6,000 sq. ft., pursuant to a proposed minor subdivision, be and is hereby DISMISSED without prejudice.

IT IS FURTHER ORDERED that the petition for variance seeking: # 17 Wade Avenue: to approve a lot with an area of 4,882 sq. ft. in lieu of the required 6,000 sq. ft., to permit a lot width of 24.85 ft. in lieu of the required 55 ft. and an 8 ft. side yard in lieu of the required 10 ft. setback; #19 Wade Avenue: to approve a lot with an area of 4,894 sq. ft. in lieu of the required 6,000 sq. ft., to permit a lot width of 25.15 ft. in lieu of the required 55 ft. and an 8 ft. side yard in lieu of the required 10 ft. setback; #21 Wade Avenue : to approve a lot with an area of 5,148 sq. ft. in lieu of the required 6,000 sq. ft., to permit a lot width of 25.87 ft. in lieu of the required 55 ft. and an 8 ft. side yard in lieu of the required 10 ft. setback; and #23 Wade Avenue : to approve a lot with an area of 5,317 sq. ft. in lieu of the required 6,000 sq. ft., to permit a lot width of 24.13 ft. in lieu of the required 55 ft. and an 8 ft. side yard in lieu of the required 10 ft. setback, be and is hereby GRANTED.

The relief granted herein shall be subject to and conditioned upon the following:

1. Petitioner may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioner is hereby made aware that proceeding at this time is at its own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If for whatever reason this Order is reversed, Petitioner would be required to return the subject property to its original condition.
2. Maintenance agreements and access easements shall be executed for the shared driveway and parking area shown on the plan.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

JEB/sln

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Signed  
JOHN E. BEVERUNGEN  
Administrative Law Judge  
for Baltimore County