

IN RE: PETITIONS FOR SPECIAL HEARING	*	BEFORE THE
AND VARIANCE		
(13217 Cherwin Avenue)	*	OFFICE OF
15 th Election District	*	ADMINISTRATIVE HEARINGS
6 th Council District	*	FOR BALTIMORE COUNTY
Craig Kestner, <i>Legal Owner</i>	*	Case No. 2019-0402-SPHA
Petitioner	*	
* * * * *		

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 Craig Kestner, legal owner (“Petitioner”). The Special Hearing was filed pursuant to Section 500.7 of the Baltimore County Zoning Regulations (“BCZR”) to confirm that a merger did not take place between the 155 & 156 lots, the adjacent lots at Lots 157, 158, 159, 160 otherwise known as 6903 Gunder Avenue. In addition, a Petition for Variance was filed pursuant to BCZR Sections 1B02.3.C.1 and 303.1: (1) to permit a proposed dwelling on a lot with a width of 50 ft. in lieu of the required 55 ft.; and (2) to permit a front average setback of 25 ft. in lieu of the required 40 ft. in the DR 5.5 zone. A site plan was marked and accepted into evidence as Petitioner’s Exhibit 1.

Craig Kestner, the property owner, and Bruce Doak, surveyor, appeared in support of the requests. The adjoining neighbor, John Dawson, appeared as a Protestant. The Petition was advertised and posted as required by the BCZR. A substantive Zoning Advisory Committee (“ZAC”) comment was received from the Department of Environmental Protection and Sustainability (“DEPS”).

Mr. Doak proffered the following: The subject lots (155 and 156) are part of the Twin River Beach development plat. This is an older development with lots that are only 25 feet wide. Mr.

Kestner purchased the two lots in question in 2014 as part of a purchase that also included four other lots (157, 158, 159 and 160) along with the single family home at 6903 Gunder Avenue. The Title Deed was offered into evidence as Exhibit 2. Mr. Kestner subsequently sold the house and the other four lots but retained lots 155 and 156. He now wishes to sell those two lots as a buildable lot and therefore needs the requested relief.

With respect to the issue of merger the Petitioner submitted the tax bills for lots 155 and 156 as evidence that these lots are separate and apart from the other four lots and from each other. He testified that these two lots were never used in connection with the residence at 6903 Gunder Avenue and that there have never been any structures on these two lots. There was no evidence to the contrary. In fact, the Protestant, Mr. Dawson, testified that he believed these lots were merely the back yard of the house at 6903 Gunder and that there had not been any use of the lots, at least since he moved in.

In regards to his request for variance relief the Petitioner explained that the subdivision was originally laid out with 25 foot wide lots and that because of the subsequent change in the zoning it is now impermissible to build a residence even if you own two of the original 25 foot wide lots due to the current 55 foot minimum lot width. Mr. Doak stated that he has been involved in approximately forty cases arising out of this change in the zoning and that the variance relief is almost always afforded because otherwise the property owner cannot build on their property. Doak further expressed that the Petitioner needs the front yard setback variance in order to build even a modest “modern” house on the property. The site plan (Exhibit 1) shows that the setbacks on the neighboring houses are 76 feet and 58 feet. Therefore a 40 foot setback is required under BCZR Sec. 303.1 in this DR5.5 zone. Doak submitted a neighborhood plat from the County’s My

Neighborhood webpage which identifies several other variance cases in the vicinity. (Petitioner's Exhibit 7).

The Protestant, John Dawson, testified that he and his wife purchased the house next door in March of 2017. He opposes the variance relief for several reasons. First, if a house is built on those lots it will greatly obstruct his view of the river. Further, because the property is in a floodplain any structure built will have to be up on pilings, which will make it even more obstructive. In addition he explained that there is, in fact, substantial flooding on the lots during heavy rains, causing water to run off onto his and the other adjoining properties. He submitted a series of photographs that document the views from his home, and the flooding problem. (Protestant's Exhibit 1A thru 1K). He also submitted a letter of opposition from the Twin River Beach Protective and Improvement Association, Inc., which was signed by nineteen neighborhood residents. The letter expresses the community's concerns, stating in relevant part that:

“The area of the requested variance is known to flood due to rain and tidal waters. At our meeting tonight, community members including contractors overwhelmingly agreed that the creation of an impervious structure and/or the change of grade on this natural drainage area could result in damage to adjacent properties and create a more hazardous driving/living situation due to a negative affect on water drainage.”

In sum, both the next door neighbor, Mr. Dawson, and the Community Association are opposed to the requested variance relief.

SPECIAL HEARING

Based on the evidence presented I find that there has been no merger between the two lots in question – 155 and 156- and the other four lots – 157 thru 160 that were sold along with the home at 6903 Gunder Avenue. The Special Hearing relief in the Petition will therefore be granted.

VARIANCE

Two variances are requested. The first seeks to allow a dwelling to be built on a 50 foot wide lot when the minimum lot width is 55 feet. The second asks for a front yard setback of 25 feet in lieu of the applicable 40 foot setback. As to the variances, a two-step analysis is required, 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).

In addition to these factors, the variance relief must also be in harmony with the spirit and intent of the BCZR and not be detrimental to the public health, safety or welfare.

In the instant case, these lots are essentially identical to all the other 25 foot wide lots in the original Twin River Beach development. As such, the property is not unique. I am aware that in previous cases “uniqueness” has sometimes been found in the fact that the lots were created before the 55 foot minimum regulations were enacted. And perhaps in a case with no opposition, no other requested variance relief, and no other conflict with the BCZR this strained analysis would be appropriate. But in this case, in addition to the width variance the Petitioner is also seeking a front yard setback variance that will directly impact his neighbor Mr. Dawson. Further, the Community Association has also opposed the requested variance relief for the reasons stated in the letter quoted above, which are the same concerns voiced by Mr. Dawson.

In sum, I do not find the property “unique” within the plain meaning or the legal meaning of the word. As a result I do not reach the second prong of the analysis. However, even if the evidence satisfied both prongs of the analysis I would still find, based on the documented flooding issues, that the addition of more impervious surface on this property would be detrimental to the

health, safety and welfare of the Twin River Beach community and would not be in strict harmony with the spirit and intent of the BCZR. I am mindful that this decision limits Petitioner's uses of the property. I regret that fact but it is my duty to fairly apply the law.

THEREFORE, IT IS ORDERED this 23rd day of **October, 2019**, by this Administrative Law Judge, that the Petition for Special Hearing to confirm that a merger did not take place between the 155 & 156 lots, the adjacent lots at Lots 157, 158, 159, 160 and 6903 Gunder Avenue, be and is hereby GRANTED.

IT IS FURTHER ORDERED that the Petition for Variance: (1) to permit a proposed dwelling on a lot with a width of 50 ft. in lieu of the required 55 ft.; and (2) to permit a front average setback of 25 ft. in lieu of the required 40 ft. in the DR 5.5 zone, be and is hereby DENIED.

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

Signed
PAUL M. MAYHEW
Managing Administrative Law Judge
for Baltimore County

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