

IN RE: <b>PETITION FOR SPECIAL HEARING</b>	*	BEFORE THE
<b>(5401 Campbell Blvd.)</b>		
15 <sup>th</sup> Election District	*	OFFICE OF
6 <sup>th</sup> Council District		
Whitemarsh Associates, LLC	*	ADMINISTRATIVE HEARINGS
<i>Legal Owner</i>	*	FOR BALTIMORE COUNTY
<b>Petitioner</b>	*	<b>Case No. 2019-0453-SPH</b>

\* \* \* \* \*

**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings (“OAH”) for consideration of a Petition for Special Hearing filed on behalf of Whitemarsh Associates, LLC., legal owner (“Petitioner”). The Special Hearing was filed pursuant to Section 500.7 of the Baltimore County Zoning Regulations (“BCZR”) to approve a waiver of Section 125.1 of the Baltimore County Building Code, and to request a floodplain waiver under Baltimore County Code Section 32-4-107 in order to permit development of a site in a riverine floodplain and, more specifically, to allow grading, paving, landscaping and other site work, as well as construction of a commercial building, parking and a road within the floodplain and to allow a zero foot freeboard line building setback (DPW plate D-9). A site plan was marked and admitted as Petitioner’s Exhibit 1.

Jack Gease of Whitemarsh Associates, LLC, the property owner, appeared in support of the petition. Edward J. Gilliss, Esq. represented Petitioner. There were interested citizens in attendance. The Petition was advertised and posted as required by the BCZR. Substantive Zoning Advisory Committee (“ZAC”) comments were received from the Department of Planning (“DOP”), the Department of Environmental Protection and Sustainability (“DEPS”), the Bureau of Development Plans Review (“DPR”), the Department of Public Works (“DPW”) and the State Highway Administration (“SHA”).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioner wants to construct a Wawa convenience store and gas station on the parcel in question, which is partially located in a riverine floodplain. They are, therefore, seeking a waiver of the provisions in the Baltimore County Code (BCC) and the Baltimore County Building Code, which prohibit such development. As will be explained, I do not believe the Hearing Officer has the authority under the BCC to grant the requested waiver.

Note 16 on the site plan acknowledges that “the site lies partially within flood zone AE and the 0.2% annual chance flood hazard as shown on F.I.R.M. # 2400100430G, Panel # 430 of 580 dated May 5, 2014.” The boundaries of the 100 year floodplain are depicted on the site plan, and Petitioner’s hydrology engineering expert, Theodore Scott, testified that approximately  $\frac{3}{4}$  of an acre of the proposed development site lies in the riverine floodplain. Mr. Scott testified that in his professional opinion the proposed development would have “zero impact” on the floodplain because of improvements that have been made to the drainage capacity under the CSX bridge downstream, and also because of the proposed “compensatory storage” that would be provided per the site plan. According to Mr. Scott, this compensatory storage area, which is downstream and to the east of the proposed Wawa structure, would, in conjunction with the proposed stormwater management facility, offset the additional impervious surface area of the proposed Wawa gas station and convenience store and all the surrounding parking and infrastructure.

A detailed report titled “2015 Refined Proposed Flood Study, Maryland Rte. 7 and Mohrs Lane (Updated September 2019)” was prepared and submitted by Mr. Scott and was admitted as Petitioner’s Exhibit 7. The report details a hydrology study of the site and its surrounding area which was performed by Mr. Scott’s firm, Stormwater Maintenance & Consultants (SMC). The report concludes, in relevant part, that “[t]he 2015 refined HEC-RAS model floodplain analysis

for the current proposed Wawa development results in no *increase* for the 100-year water surface elevation for each river section compared to the existing floodplain.” (emphasis added). Mr. Scott’s testimony, and the calculations described within this study are, to some extent, beyond a layman’s comprehension. However, a fair summary of the study’s conclusions and of Mr. Scott’s testimony is that the proposed development project – because of the stormwater management and proposed grading improvements – will not adversely impact the existing state of the floodplain. In short, as the report concludes, the development would purportedly not *increase* the floodplain elevations. But Mr. Scott did not testify, nor does the study conclude, that the site is not currently in a riverine floodplain, or that it would no longer be in a riverine floodplain if the proposed development were built. And that is the problem.

BCC Sec. 32-4-107(a)(1) states in relevant part that “[a]t the *request* of a department director, the Hearing Officer *may grant a waiver of any or all requirements of Subtitles 3, 4, or 5* of this this title if the Hearing Officer finds that:

- (i)
  1. The size, scope, and nature of a proposed development does not justify strict compliance with this title;
  2. A waiver would be within the scope, purpose, and intent of this title; and
  3. All other county laws and regulations have been complied with; or
- (ii) Compliance with this title would cause unnecessary hardship.”

(emphasis added)

However, subsection 32-4-107(a)(2) states that “[a] waiver can be granted only in accordance with Title 8 of this article.” (emphasis added). Read together, these Code sections give the Hearing Officer discretion to grant floodplain waivers of any or all of the requirements of Subtitles 3, 4 or 5, but *only* to the extent Title 8 is complied with.

Petitioner submitted a letter dated August 26, 2019 from Steve Walsh, the Director of the Department of Public Works to the former Administrative Law Judge, John E. Beverungen, Esq. (Petitioner's Exhibit 8). This letter references Mr. Scott's engineering studies and Scott's conclusion that the proposed project "will have zero adverse impact on the floodplain." Mr. Walsh then states that "[i]n light of the engineering studies, the Department of Public Works has no objection to the requested waiver." First, though perhaps a matter of semantics, I do not believe this letter is a "request" from Director Walsh that the waiver be granted. The letter merely states that DPW has no objection. And, Mr. Walsh then equivocates by stating that an indemnification agreement would need to be provided by the Petitioner against potential liability "should additional flooding occur in contravention of the already submitted engineering studies." Second, even if Director Walsh had made an express and unequivocal request that the waiver be granted, I do not believe the BCC permits a waiver here. To the contrary, BCC Sec. 32-8-304, entitled "**Waivers Prohibited**" states, point blank, that "*Waivers may not be granted for the following: (2) New buildings in the riverine floodplain.*"<sup>1</sup> (emphasis added). As noted above, although BCC Sec. 32-4-107(a)(1) provides that waivers can be granted from the provisions of Subtitles 3, 4, and 5; subsection 107(a)(2) then states that "a waiver can be granted only in accordance with Title 8 of this article." It is therefore clear that the requested waiver cannot be granted because it is undisputed that the proposed Wawa development is within a riverine floodplain. Again, Petitioner's engineering expert, Mr. Scott, testified that this proposed project will not adversely impact the existing floodplain conditions but he acknowledged that the property lies within a riverine floodplain.

---

<sup>1</sup> Petitioner's Exhibit 1 is the site plan that was introduced at the hearing. This site plan does not depict the proposed Wawa or its surrounding infrastructure. Although it was not introduced by Petitioner at the hearing, there is a site plan drawing in the file that depicts the proposed Wawa store and infrastructure and they are located within the floodplain.

Within Petitioner's Exhibit 7 (the hydrology study and report) is a letter dated September 18, 2019 from Eugene Fleagle, PE of Stormwater Maintenance & Consulting (SMC) to Terry W. Curtis, Jr., an Engineer III in DPW. This letter states that it is "in response to your review letter dated July 15, 2019," and that it will address the comments in DPW's letter.<sup>2</sup> Mr. Fleagle's letter responds to five different comments made by DPW, presumably in regard to the site plan and floodplain waiver requests that are at issue in this case. Comments 4 and 5, and SMC's response thereto, pertain directly to the question of whether a floodplain waiver is permitted under the circumstances in this case. Those comments and responses are as follows:

**"4. Comment:** The engineer must submit a Conditional Letter of Map Amendment or revision (CLOMA or CLOMR; to The Federal Emergency Management Administration (FEMA) at the developer's expense. Upon completion of the development, the engineer must submit a Letter of Map Amendment or Revision (LOMA or LOMR) to the Federal Emergency Management Administration (FEMA) at the developer's expense. Failure to do so could result in forfeit of public works and/or utility agreement funds. *A waiver to Baltimore County Code Section 32-4-414 and 32-8 will not be supported by the Department of Public Works until we have a copy of the CLOMR approval.* This must be done before our office can accept the report for filing and copies of documents must be added to the report.

**Response:** Whitmarsh Associates, LLC is aware a CLOMA or CLOMR and a LOMA or LOMR is required for the proposed development. As per discussions with Steven Walsh, PE and attorney Edward J. Gillis this comment will be addressed, assuming approval of a floodplain development waiver, when the proposed development is presented.

**5. Comment:** The engineer must submit a Joint Permit Application with the Army Corps. Of Engineers and the Maryland Department of the Environment. A copy of the application and a response letter from the Maryland Department of the Environment must be submitted to this office before approval of study. All other government permits and waivers must be filed and are the responsibility of the engineer. *This must be done before our office can accept the report for filing and copies of documents must be added to the report.*

**Response:** Whitmarsh Associates, LLC is aware a Joint Permit Application with the Army Corps. Of Engineers and the Maryland Department of the Environment is required. As per discussion with Steven Walsh, PE and attorney Edward J. Gillis this comment will be addressed, assuming approval of a floodplain development waiver, when the proposed development is presented." (emphasis added).

---

<sup>2</sup> This DPW letter is not contained in the file that OAH was provided, nor was it introduced at the hearing.

I am not conversant with the intricacies of FEMA's flood map amendment process. However, it does appear that at minimum a Conditional Letter of Map Amendment (CLOMA) or Conditional Letter of Map Revision (CLOMR) is required in order to even begin the process of attempting to develop a site which is currently within a FEMA floodplain map, as is the site in question here.

### CONCLUSION

For the reasons stated above, the Baltimore County Code and Building Code do not permit a floodplain waiver for new development within a riverine floodplain. In the final analysis I do not believe this case, in its current posture, is even the proper subject of a Special Hearing under BCC Sec. 500.7 because it appears to me that the Hearing Officer has no authority under the County Code to grant the requested relief, at least not before a CLOMA or CLOMR is issued by FEMA. Therefore, under the circumstances, rather than denying the requested Special Hearing relief the case will be dismissed, without prejudice.

THEREFORE, IT IS ORDERED this **5th** day of **December, 2019** by this Administrative Law Judge, that the Petition for Special Hearing to approve a waiver of Baltimore County Building Code Section 125.1, and BCC Sections 32-4-107, 32-4-404, 32-4-414 and 32-8-301 to permit development of a site located in a riverine floodplain and to allow grading, paving, landscaping and other site work and construction of a building, parking and road within the floodplain and to allow a zero foot freeboard line building setback (DPW plate D-9), be and is hereby **DISMISSED, WITHOUT PREJUDICE.**

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

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

PMM:sln