

IN RE: **PETITION FOR ADMIN. VARIANCE** * BEFORE THE
N/side of Forge Road, 365' NE of c/line of * ZONING COMMISSIONER
Kerries Court * OF
(5022 Forge Road) * BALTIMORE COUNTY
11th Election District *
5th Council District *
Jason W. and Herbert Tart, Jr., *Legal Owners* * **Case No. 2010-0057-A**
Petitioners

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of a Petition for Variance filed by the owners of the subject property, Jason W. Tart and Herbert Tart Jr. The Petitioners seek relief from Section 1B02.3.C.1 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit an existing dwelling on a lot [zoned D.R.1H] of 37,461 square feet in area, in lieu of the minimum required 40,000 square feet. Additionally, as amended in open hearing, the Petitioner requests relief from that section to allow a lot width of 125 feet in lieu of the minimum required 150 feet. The subject property and requested relief are more particularly described on the site plan submitted which was accepted into evidence and marked as Petitioners' Exhibit 1.

The Petition was filed through the administrative variance process, pursuant to Section 32-3-303 of the Baltimore County Code. That Section allows an individual to seek variance relief for an owner-occupied residential property without the need for a public hearing. Under the Code, the property in question is posted for a period of 15 days during which time any property owner residing within 1,000 feet of the property may demand a public hearing for a determination as to the merits of the request. Additionally, the Zoning Commissioner/Deputy Zoning Commissioner can schedule the matter for a public hearing if deemed appropriate. In

this case, the Petitioners have filed the supporting affidavits as required by Section 32-3-303 (a)(2)(i) of the Baltimore County Code.

On September 14, 2009, Paul J. Frey, an officer of the Enclave at Perry Hall Homeowner's Association, a community association in the neighborhood, filed a formal demand for public hearing. The hearing was subsequently scheduled for Friday, October 16, 2009 at 10:00 AM in Room 104 of the Jefferson Building, located at 105 West Chesapeake Avenue, Towson, MD.

Appearing at the requisite public hearing in support of the request were Jason W. Tart, one of the property owners, and Brian McCloskey, of the McCloskey Group, LLC, a homebuilder. Also appearing and testifying at the hearing was Dwight Little, of Little and Associates, Inc., an engineer who reviewed the site plan. The Petitioners were represented by Lawrence E. Schmidt of Gildea & Schmidt, LLC. John F. Franke, Esquire and Paul J. Frey, on behalf of the homeowner's association, also appeared and participated at the hearing.

This most unusual case relates to an existing lot with improvements thereon known as 5022 Forge Road in the Perry Hall/Honeygo community of northeastern Baltimore County. An understanding of the history of the lot, including its creation and the improvements thereon, is vital to an understanding of the case and the reasons for the filing of the Petition. The property owned by Herbert and Jason Tart (father and son) was originally a portion of an overall tract, approximately 3.5 acres in area. Under the zoning in effect at the time, the property could have been subdivided into three (3) single-family dwelling lots. In 1989, a conveyance of 0.9 acres was made and that lot is now owned by Richard and Marie Berencz. The Berenczes' lot is improved with an existing single-family dwelling in which they reside, which fronts Forge Road and known as 5018 Forge Road. A second lot was conveyed from the original tract in 1993. This lot is one acre in size and is now owned by William and Kathleen Long and is also improved with a single-family dwelling known as 5020 Forge Road. The third lot remained

undeveloped and was approximately 1.35 acres in area. In or about 1999, the third lot was subject to a conveyance by the then-owner Kristen A. Belzner to the Tarts' predecessor in title. The deed for that conveyance contained certain *saving and excepting* language that permitted the existing owner to convey 0.86 acres and retain 0.49 acres. This deed might be viewed as creating an illegal subdivision, as it was not approved by Baltimore County. After this conveyance, the two (2) resultant properties were transferred though a series of conveyances, so that the 0.86-acre property (the subject property) is now owned by Messrs. Tart, and the 0.49-acre property is owned by Carlos and Katherine Edwards.¹ Neither the Tarts nor Edwardses were in any manner involved in that conveyance, as they were subsequent purchasers well down the chain of title.

The Tart lot has been improved with an existing single-family dwelling. The Edwardses' lot is presently unimproved. This history and its impact on the use of these properties was ultimately discovered when the Edwardses applied for a building permit in order to construct a dwelling on their lot, to be known as 9811 Kerries Court. The permit would not be issued due to the unresolved zoning and subdivision issues created by the *savings and excepting* subdivision. In an effort to resolve the difficulties which resulted from the prior conveyances, a request was made during the 2008 Comprehensive Zoning Map Process (CZMP) to rezone the Edwardses' 0.49 acre lot. The request was favorably considered by the Baltimore County Council, which rezoned the Edwardses' lot to D.R. 3.5H. The balance of the original tract remains zoned D.R.1H. The result of this rezoning was to essentially "cure" the underlying density issues. Under the present zoning classifications, the tract could be developed with four (4) single-family

¹ The Protestants testimony notes admitted into evidence as Protestants' Exhibit 1 contained a further history of this lot.

dwelling units, which are indeed built or proposed to be built on the property (i.e., Berencz lot, Long lot, Tart lot and Edwards lot).

Although the density issue has been resolved by action of the County Council, the Tart lot (as existing) does not meet certain area requirements under the B.C.Z.R. The lot is slightly deficient in terms of its acreage and width at the building line. Thus, the instant zoning variances were requested to legitimize the existing house which is on the property. Without this zoning relief, the house would need to be razed, and the property would be an unbuildable lot. It is to be noted that the Edwardses' lot does not require any zoning relief in that the lot size, proposed building envelope, etc. meets all current standards. Thus, the case presents a rather interesting issue in that the proposed construction is permissible by right and requires no variances; while the existing house (through no fault of its current owner) is deficient in terms of the lot area and lot width requirements.

It is obvious that the County Council foresaw the potential for complex and difficult litigation if the rezoning did not occur. As noted above, both the Tart and Edwards lot have been through a series of owners since the conveyance in 1999. Obviously, the County Council intended to resolve this issue to the extent possible by rezoning to avoid that litigation. Similarly, I sympathize with the plight of Messrs. Tart and Mr. and Mrs. Edwards. Based upon the circumstances as they are presented here, including the unusual configuration of these properties and history, I am persuaded to grant the relief requested to legitimize the existing single-family detached dwelling on the Tart lot. Thus, the zoning variances shall be approved.

Notwithstanding the grant of this relief, two (2) issues remain. First, it is clear that in addition to the zoning issues, the development on the properties at issue needs to be approved pursuant to the Development Review regulations in Article 32 of the Baltimore County Code (B.C.C.). At the hearing, counsel for the Petitioners acknowledged this and described the zoning

variance request as a prerequisite to development plan approval. It is not the role of the Zoning Commissioner to determine through what process this “development” shall be subjected. Whether the project is “exempt”, a “minor subdivision”, or a “major subdivision” is an issue which will be decided by the Department of Permits and Development Management under its authority in due course. These regulations have been relegated by the County Council to the Director of Permits and Development Management and the Development Review Committee.

See, Long Meadow Association, Inc., et al v. Druid Ridge, LLP et al Court of Special Appeals No. 1801 (2005) and County Council Bill Nos. 54-05 and 58-09. Thus, I will not mandate specific action to be taken; however, I will require that the Petitioners address and resolve the “development issues” as a condition of the grant of the zoning variance.

The second issue relates to concern expressed by Messrs. Frey and Franke at the hearing. As noted above, they are members of the homeowner’s association for the development known as the Enclave at Perry Hall. A number of the lots, which are owned by members of that association, abut Kerries Court and will be immediately across the street from the Edwardses’ lot. It is to be noted that the Berenczes’ lot, the Long lot and the Tart lot all have Forge Road addresses. Thus, they do not visually appear to be a part of the Enclave at Perry Hall; however, the Edwardses’ lot does face Kerries Court, and the potential dwelling thereon would have the appearance of being a part of that subdivision. Mr. Frey, particularly, did not express opposition to the grant of the relief, but would like Mr. and Mrs. Edwards to join the homeowner’s association and be bound by the terms of the restrictive covenants which apply to the Enclave at Perry Hall. This is a difficult issue, in that the Petition before me is filed for the property known as 5022 Forge Road, and owned by Jason and Herbert Tart. Mr. and Mrs. Edwards are not parties to the proceedings before me and were not present at the hearing. It was indicated that

although they are aware of the issues presented, they were out of the country at the date of the hearing.

Mr. McCloskey will be the builder of the dwelling to be located on the Edwardses' lot, and as noted, appeared at the hearing. He indicated that the Edwardses' would be agreeable to a restriction in this decision that the house to be constructed on that lot by the McCloskey Group will be consistent with houses in the Enclave at Perry Hall, and in compliance with any of the restrictive covenants regarding dwelling construction. Thus, he proposes a house that will be entirely compatible and similar to the existing houses in the neighborhood. As this condition was "volunteered" at the hearing, I will adopt it. Insofar as further development activity on the Edwardses' lot, I do not feel it is appropriate to encumber individuals who are not a party to these proceedings before me with restrictions. It is my hope that the Edwardses' will voluntarily cooperate with their neighbors to maintain and use their property in the future in a manner consistent with the covenants and restrictions applicable to the other 16 dwellings at the Enclave at Perry Hall. However, I have no authority to mandate that they do so, or force non-parties to assume the financial responsibilities attendant with joining the homeowner's association as advocated by Messrs Frey and Franke.

In sum, I will grant the variances requested and hereby make the necessary finding that the requirements of Section 307.1 of the B.C.Z.R. are satisfied. More importantly, a grant of the relief will hopefully resolve the zoning issues attendant with these properties. Messrs. Frey and Franke, as association officers and community leaders, raised no objection to the existing dwellings on the Berencz, Long and Tart lots. They, however, want the construction of a compatible dwelling on the Edwardses' lot. Moreover, given Mr. McCloskey's representation that the Edwardses' house will be similarly constructed to those in the community, the proposed development will be compatible with the locale. As noted above, I will mandate that the

Petitioners obtain whatever form of development approval is required from the Department of Permits and Development Management, and that the Edwardses' lot be developed in a manner compatible to and consistent with the covenants with the homeowner's association.

Pursuant to the advertisement, posting of the property and public hearing held, and after considering the testimony and evidence offered, the relief requested shall be granted.

THEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County this 2nd day of November, 2009 that the Petition for Variance seeking relief from Section 1B02.3.C.1 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit an existing dwelling on a lot with the area of 37,461 square feet in lieu of the required 40,000 feet, and a lot width of 125 feet in lieu of the required 150 feet, in accordance with Petitioners' Exhibit 1, be and are hereby GRANTED, subject to the following:

1. Petitioners must obtain any and all development approvals as required by the Department of Permits and Development Management pursuant to Article 32 of the Baltimore County Code; and,
2. The dwelling on the Edwardses' lot must be constructed in a manner compatible to and consistent with the covenants imposed by the Enclave at Perry Hall Homeowner's Association.

Any appeal of this Order shall be taken in accordance with Baltimore County Code (B.C.C.) Section 32-3-401.

____SIGNED_____
WILLIAM J. WISEMAN, III
Zoning Commissioner
for Baltimore County

WJW:dlw