

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
W/S Mary Hill Court, 300' S of c/line of		
Velvet Hill Drive	*	ZONING COMMISSIONER
(12 Mary Hill Court)		
4 th Election District	*	OF
2 nd Council District		
	*	BALTIMORE COUNTY
Max L. Cohn		
Petitioner	*	Case No. 2010-0077 SPH

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for Baltimore County for consideration of Petition for Special Hearing filed by the owner of the property, Max L. Cohn, through his attorney Arnold Jablon, Esquire. The Petitioner requests a special hearing for a waiver pursuant to Section 500.6 of the Baltimore County Zoning Regulations (B.C.Z.R.), Sections 32-4-107(a)(2), 32-4-414, 32-8-301 and 32-8-303 of the Baltimore County Code (B.C.C.), and from Section 3112.0 of the Baltimore County Building Code, to permit and confirm existing additions to a single-family dwelling in the 100-year floodplain. The subject property and requested relief are more particularly described on the site plan submitted and accepted into evidence as Petitioner’s Exhibit 1.

Appearing at the requisite public hearing in support of the request were Max L. Cohn, property owner, David Flowers, land planner, who is familiar with the site and took part in the preparation of the site plan, and Arnold Jablon, Esquire, the Petitioner’s attorney. Mr. Flowers has been recognized and accepted as an expert witness by this Commission on land use and zoning cases, including waivers as permitted by Sections 32-4-107 and 32-8-303 of the B.C.C., and was accepted as an expert in the instant matter, specifically as to *waivers* involving Sections 32-4-107 and 32-8-303 of the B.C.C. and of 3112.0 of the Baltimore County Building Code.

There were no Protestants or other interested parties present. There were no adverse Zoning Advisory Committee (ZAC) comments received from any of the County reviewing agencies, however, it is noted that the Department of Public Works (DPW) in its response, dated November 9, 2009, withheld its approval. The Director suggested "relocating the easement line to exclude the existing dwelling and entirely contain the 100-year floodplain plus one-foot vertical freeboard . . .". Additionally, a letter was received from Ms. Shelley Zipper, residing at 15 Mary Hill Court, an adjacent neighbor. In her letter to the undersigned Commissioner, she stated her concern was initiated by the Petitioner's construction of an in-ground swimming pool in December of 2008. While this concern was alleviated when the location of the pool was moved, she indicated the purpose of her correspondence was to insure that the proposed relief was examined carefully and that "there can be an amicable solution for all..."

Testimony and evidence offered revealed that the requested relief involves the property on which Max Cohn resides in a one-story, single-family dwelling built in 1982 which he purchased in 1987. The property consists of 0.654 acres, more or less, zoned D.R.2 and is located in Owings Mills. As illustrated on the site plan, the subject property known as Lot 19 in the subdivision of Velvet Hills is an irregular shaped parcel at the end of a cul-de-sac. The grade or topography of the property slopes from the front to the rear, the highest elevation being in the front, the lowest in the rear of the property. Petitioner's house consists of approximately 3,000 square feet and is more particularly described on the numerous photographs received as Petitioner's Exhibit 8. The front of the house is setback 40 feet from Murry Hill Court and is at its highest elevation.

The Velvet Hills subdivision, of about 100 single-family dwellings, was constructed in or about 1980. A separate subdivision, Worthington Woods, was built to the northwest of the

subject property, and has its storm water management (SWM) facility constructed adjacent to the northwest property line with the subject property. A second subdivision, Worthington Glen, was built adjacent to Worthington Woods, just to the southwest to the subject property. It also had its SWM facility constructed to the northwest side of the subject property. Drainage from both of these SWM facilities merge into one spillway with a swale that outfalls onto the Petitioner's property as well as onto the Zipper property immediately adjacent and south of Mr. Cohn's. As a result of these facilities and spillway, a drainage and utility easement was created, which extends only the length of three properties located off of Mary Hill Court— Lots 15, 12 and 10. *See* Petitioner's Exhibit 1. Testimony and evidence that was presented revealed that there exists a 100-year floodplain on the subject property. The drainage and utility easement that was created is partly within the floodplain and partly outside. *See* Petitioner's Exhibit 5, a floodplain study prepared by KCI Technologies, Inc (KCI). The Petitioner's house borders the easement area but its additions, which are the focus of the requested relief, are partly within the easement area but outside of the floodplain. *See* Petitioner's Exhibits 1 and 5. The only source of water is from the SWM facilities via the spillway. There is no stream on the subject property.

In or about 1996, the Petitioner built, with all appropriate permits, an addition onto the northwest rear of the house, a portion of which was constructed within the easement area (but, as indicated above, out of the floodplain). In 2000, the Petitioner replaced an existing open, wood deck, also in the rear of the house. Permits were obtained prior to construction. The deck was also in the easement, but not within the floodplain. In 2002, a garage was added to the side of the house, which is not within either the easement area or the floodplain and a roof was constructed over the open, wood deck, referred to above, to create an enclosed sunroom. This enclosure is partly within the easement area. *See* Petitioner's Exhibit 3, building permit No.

B485229, for the garage and sunroom. In 2004, the sunroom was completed, *See* Petitioner's Exhibit 4, building permit No. B550827. All the additions are shown on Petitioner's Exhibit 1, as well as where the easement and the floodplain areas are delineated. Approximately 500 square feet of these additions (sunroom and deck) are within the easement area. All were constructed pursuant to valid building permits issued by the County. These existing conditions shown on Petitioner's photographic exhibits show a beautifully landscaped rear yard. They also show that the rear of the house is elevated and is supported by stilts. The area below is entirely open and contains no living area. In sum, the Petitioner is requesting a waiver to permit the additions that are within the easement area and constructed pursuant to valid building permits issued by the Department of Permits and Development Management (DPDM).

Section 32-4-107(a)(1)(i) of the B.C.C. permits the granting of waivers of any of the requirements of Subtitles 3, 4, and 5 of Title 32, if the Zoning Commissioner finds that:

1. The size, scope and nature of a proposed development does not justify compliance with title 32;
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

Compliance with title 32 would cause unnecessary hardship.

Mr. Jablon proffered and Mr. Flowers confirmed that in Mr. Flowers' opinion, the Petitioner did everything he was supposed to have done. He applied for the appropriate permits, all of which were reviewed and approved by each of the County's reviewing agencies. All before construction began.

The Petitioner's nightmare began when he applied and received permits for an in-ground swimming pool and commenced construction. Unbeknownst to him then, the proposed pool was

directly within the floodplain. It was as a result of Ms. Zipper's concern, expressed to DPW, that caused Mr. Cohn to retain KCI, an engineering consultant, to prepare a floodplain study, submitted as Petitioner's Exhibit 5. The floodplain and easement areas were delineated and it was confirmed the proposed pool was within the floodplain but outside of the easement area. The Petitioner then relocated the pool outside of the floodplain. However, the study also confirmed that portions of the additions described above, were located within the easement area, although not within the floodplain. Petitioner wanted to insure compliance with the requisite regulations, thus this request for a waiver is made.

Waivers are authorized by Section 32-8-301 of the B.C.C., which provides in relevant part:

- (a) *In general.* As provided in Section 32-4-107 . . . waivers of the provisions of Section 32-4-414 . . . may be granted as specified . . . :
- (c) *General standards.* Waiver actions shall be consistent with sound floodplain management and the number of waiver actions shall be kept to a minimum.

Section 32-4-414 of the B.C.C. prohibits development in a riverine floodplain.

Section 32-8-303(a) of the B.C.C. permits waivers upon:

- (1) A showing of good and sufficient cause;
 - (2) A determination that failure to grant a waiver would result in exceptional hardship, but not economic hardship, to the applicant; and
 - (3) A determination that the granting of a waiver will not increase flood heights, safety, incur extraordinary public expense, create nuisances, cause fraud or victimization of or conflict with existing local and state laws and ordinances.
- (b) Minimum necessary. The waiver action shall be the minimum necessary, consider hazard, to afford relief.

In support of the waiver requested, Petitioner's attorney, Mr. Jablon, argued and Mr. Flowers confirmed, through testimony that the subject property has several unusual

characteristics that drive the need for the waiver. Most notable as shown on the site plan are the size, shape and location of the subject property, the close proximity of the SWM facilities of the adjacent subdivisions to the subject property, the locations of the floodplain and of the easement area, both of which exist only in the rear of the property. Mr. Flowers emphasized that the additions at issue here are 5 to 13 years old and all were done with the requisite permits.¹

In terms of unnecessary hardship, as the photos reflect, Mr. Flowers testified to remove the additions would cause serious damage to the house and to the landscape of the subject property. To do so would cause an exceptional hardship. Mr. Flowers stated that the granting of the waiver will not increase flood heights, impact public safety, incur extraordinary public expense, create a nuisance, cause fraud or victimization of the public, or conflict with existing local and state laws and ordinances. He testified that the property does not flood, thus there is no issue as to the potential for increase in flood heights. The only source of water is via the spillway from the SWM facilities and, as shown on photos, this water is diverted across the property by a swale to the appropriate outfall. Mr. Flowers further testified that the living area in the rear of the house is above grade and supported by stilts. The area below is not used for any purpose. And, of course, testimony and evidence submitted underscores that the current conditions have been longstanding. The additions have not caused or exacerbated flooding and,

¹ While admittedly not on point, I believe it analogous to refer to Section 5-114, of the *Courts and Judicial Proceedings Article*, Annotated Code of Maryland, Setback Line Restrictions. Specifically, Section 5-114(b)(3) provides:

...notwithstanding any other provision of State or local law to the contrary, a building permit that was otherwise validly issued, except that the permit wrongfully permitted the building or structure to violate a setback line restriction, shall be considered a valid building permit.

Sections 5-114(b)(1) and (2) prevent either a person or a governmental entity from initiating an action or proceeding arising out of a failure of a building or structure to comply with a setback line restriction more than 3 years after the date on which the violation first occurred if the building or structure was constructed or reconstructed.

It is, therefore, logical to analogize the location of portions of the Petitioner's additions within the easement to setback requirements.

indeed, have never been or caused a problem. He opined that there would be no impact on public safety should the waiver be granted. Certainly no public expense at all is proposed should the waiver be granted. He further concluded that the additions, which have been longstanding, since 1996 to 2004, do not create any nuisance nor do they cause fraud or victimization of the public. The County knew of the additions, where they were located, was required to inspect to insure compliance with the Building, Electrical and Plumbing Codes. Mr. Flowers further notes the extensive landscaping, as shown on the photos, which, if the additions had to be removed, would by necessity, have to be removed as well. *See* Petitioners Exhibit 8, the photos which graphically and succinctly show the existing conditions of the house, the additions, and the landscaping on the subject property.

In his proffer, Mr. Jablon stated that Mr. Flowers would further testify that it was his opinion that there would be no adverse impact on the community if the waiver requested were to be granted and there would be no detriment to the health, safety or general welfare of the locale. Mr. Flowers would testify that it was his opinion that the strictures of Sections 32-4-107 and 32-8-303 of the B.C.C. were satisfied and that the Petitioner has shown good and sufficient cause that to comply with Section 32-4-414 of the B.C.C. would cause unnecessary hardship.

The Director of Public Works' comment of November 9, 2009 suggests relocating the easement line to exclude the dwelling and entirely contain the 100-year floodplain plus one-foot vertical freeboard. However, testimony and evidence submitted by the Petitioner confirm that while 500 square feet of the additions are within the easement area, they are outside of the floodplain. It does not appear from the comment that Mr. Adams is aware of the particular permit history of the subject property, which I believe forms the basis for the waiver request, but his comment confirms that the Petitioner's waiver request results solely from Petitioner's intent

to place a swimming pool in his rear yard. But for the pool, and Petitioner's own subsequent, and voluntary, actions to bring his property into compliance, there would be no further action noted.

Finally, all of the testimony and evidence submitted confirms that the additions are not in the floodplain. While in the easement area, I believe that the cost of relocating the easement area would far exceed the necessity of doing so. This in itself would cause unnecessary economic hardship.

Considering all the testimony and the evidence presented, I find special circumstances or conditions exist that would cause unnecessary hardship to the Petitioner. Clearly, the Petitioner had every right to believe that the additions he had designed by architects and built pursuant to all State and County laws were proper. Permits were issued legally and the Petitioner had every right and expectation to believe that his additions were in compliance with all appropriate laws and regulations. The additions have existed for a significant period of time. The additions have not caused a problem. I further find that the strict application of limitations imposed by Sections 32-4-107(a)(2), 32-4-414, 32-8-301, and 32-8-303 of the B.C.C. and 3112.0 of the Building Code would cause unnecessary hardship. Further, the Petitioner has shown good and sufficient cause for the waiver. Based on the evidence and testimony, I determine that failure to grant the waiver would result in unnecessary hardship to the Petitioner and, further, determine that the granting of the waiver will not increase flood heights, impact public safety, incur extraordinary public expense, create nuisances, cause fraud or victimization of the public, or conflict with existing local and state laws and ordinances.

I find that the waiver requested is the minimum necessary to afford relief. Thus, I find that the waiver can be granted in such a manner as to meet the requirements of Sections 32-4-

107(a) (2), 32-4-414, 32-8-301 and 32-8-303 of the B.C.C. and Section 3112.0 of the Baltimore County Building Code.

Pursuant to the advertisement, posting of the property and public hearing on this Petition held, and after considering the testimony and evidence offered by the Petitioner, I find that the Petitioner's special hearing relief should be granted.

THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore County this 1st day of December 2009, that the Petitioner's request for special hearing for a waiver pursuant to Sections 32-4-107, 32-4-414, 32-8-301, and 32-8-303 of the Baltimore County Code (B.C.C.) and Section 3112.0 of the Building Code, in accordance with Petitioner's Exhibits 1, 5, and 8, be and is hereby GRANTED.

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

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