

IN RE: <b>PETITION FOR SPECIAL HEARING</b>	*	BEFORE THE
E/S Wilson Avenue @ SE Corner of Wilson		
Avenue & Woodside Avenue	*	ZONING COMMISSIONER
<b>(8301 Wilson Avenue)</b>		
4 <sup>th</sup> Election District	*	OF
6 <sup>th</sup> Council District		
	*	BALTIMORE COUNTY
Christopher James Malstrom		
Petitioner	*	<b>Case No. 2010-0094 SPH</b>

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter comes before the Zoning Commissioner for consideration of a Petition for Special Hearing filed by the owner of the property, Christopher J. Malstrom. 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 allow and approve a second story addition built above an existing single-family dwelling that is located in a 100-year floodplain. The subject property and requested relief are more particularly described on the site plan and floodplain study submitted and accepted into evidence as Petitioner’s Exhibits 2 and 3, respectively.<sup>1</sup>

Appearing at the requisite public hearing in support of the request were Chris Malstrom, property owner, his parents and long-time residents in the area, William J. and M. Gerardine Malstrom, an adjacent neighbor, Matthew “Ted” Braid, III (8303 Wilson Avenue), Douglas W. DuVal, land surveyor, who is familiar with the site and prepared the site plan, and Victor W. Fuentealba, Esquire, the Petitioner’s attorney. Mr. DuVal has been recognized and accepted as an expert witness by this Commission on land use and zoning cases, including waivers as

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<sup>1</sup> The subject property is a *corner lot* defined in Section 101 of the B.C.Z.R. as: “a lot abutting on and at the intersection of two or more streets”. As will be discussed, it is the 1950’s County designed box culvert that runs under Woodside Avenue that drives the instant request for a waiver.

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 persons 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 October 5, 2009, withheld its approval. The Director suggested “relocating the HVAC and electrical equipment out of the basement . . . and all material subject to flood damage . . .”.

In response to DPW’s comment and at the onset of the hearing, Mr. Fuentealba moved to have the undersigned dismiss this matter. He argues that the Petitioner’s alterations do not subject him to the provisions of the B.C.C. concerning floodplains. The basis of this motion is as follows:

Title 8 “Floodplain Management” of the B.C.C. in subtitle 1, Definitions 32-8-101(dd) defines “Substantial Improvements” . . . “any repair, reconstruction or improvement of a structure, the cost of which equals or exceeds 50% of the market value of the structure, less land value either (i) before the improvement or repair is started; or (ii) if the structure has incurred substantial damage and been restored before the damage occurred”.

Section 3112-0 of the Baltimore County Building Code “Construction in Areas Subject to Flooding” states as follows:

1. General Selected – Definitions

Substantial Improvement – Any repair, reconstruction, alteration or improvement of a structure, the cost of which equals or exceeds 50% of the market value of the structure (less land value) either: (A) before the improvement or repair is started; or (B) if the structure incurred substantial damage and has been restored, before the damage occurred.

Subsequent paragraphs of Section 3112 consistently refer to “Substantial Improvements” in determining what requirements must be met, such as paragraph 1(B) which states: “Whenever substantial improvements to existing buildings, *including additions*, are constructed, or building experiencing repetitive loss are located in areas subject to tidal flooding as established by the Flood Insurance Study (FIS) and FIRM (Flood Insurance Rate Map) of Baltimore County or more restrictive criteria as established by the County, the building’s lowest floor shall not be lower than the flood protection elevation”. (Emphasis Added) *See* also paragraph 7 which states: “For all new or substantially improved structures in the floodplain area, the owner must have a professional land surveyor, property line surveyor, or professional engineer submit a fully executed elevation certificate to the County at the time of framing inspection” and paragraph 8 “New or substantially improved non-residential structures may be floodproofed to the flood protection elevation. Under this option, the owner must have a professional engineer or architect submit a fully executed floodproof certificate to the County prior to the approval of the construction by any building official of Baltimore County.”

*See* also Section 3112.2, paragraph 2: Areas Subject to Inundation by Riverine Surface Waters Within the 100-Year Floodplain. “Reconstruction or repair of existing buildings shall be governed by Section 115.0 ‘Unsafe Structures and Equipment’ ”. All substantial improvements to existing buildings shall be permitted only on the basis of an approved waiver in accordance with Section Article 32, Title 8, Subtitle 3 of the Baltimore County Code, 2003 “Waivers”, and shall be subject to all applicable conditions of Section 32-8-207 of the Baltimore County Code, 2003, “Development in the Floodplain Area” and Section 3112.1 of this Building Code “Areas subject to tidal flooding”.

Mr. Fuentealba asserts that the above sections of both the Baltimore County Code and Building Code clearly exempt alterations and improvements which do not equal or exceed 50% of the market value of the structure, less land value. The assessed value of his client's home, excluding the land, as of January 1, 2009 was \$111,300.00, 50% of which amounts to \$55,650.00. According to Mr. Malstrom's sworn testimony, the cost of the materials that he used did not exceed \$15,000.00 and he performed all of the work himself. Even if one would attach a value to the Petitioner's labor, the cost would not amount to 50% of the value of his home.

While I accept the merits of counsel's argument and the basis upon which it is premised, I do not believe it necessary to reach a conclusion on this issue. In my opinion, it would not provide the Petitioner with the requisite authority needed to obtain his building permit – which is being withheld pending the results of this hearing.

On behalf of the Petitioner, Mr. DuVal offered testimony and evidence regarding the subject property which is 60' wide x 90' deep on the southeast corner of Wilson Avenue and Woodside Avenue in Parkville. The property known as Lot No. 8301 in the Parktowne subdivision contains an area of 5,400 square feet, zoned D.R.5.5 and improved with a modest 1-½ story cape code style home (25' wide x 30' deep) built in 1948 that fronts on Wilson Avenue. Other improvements on the site include a shed positioned in the rear yard. *See* Petitioner's Exhibit 5 – photographs of existing conditions. As shown on the site plan, the property is located adjacent to the Stemmers Run – a stream, which flows along the rear southeastern property line and into a 14' x 4' box culvert that runs under Woodside Avenue at ground elevation 276'. Mr. Malstrom purchased the home in 2001 and stated he was never made aware that it was within the 100-year floodplain. In this regard, the Federal Emergency Management

Agency (FEMA) Flood Insurance Rate Map (September 2008) corroborates Petitioner's testimony and was submitted as Petitioner's Exhibit 3 showing that the subject property at elevation 283' is more than 4,000 feet from any Flood Hazard Area.

Following the home's purchase, Malstrom began updating many of the utilities replacing the oil fired boiler system and water heater in the basement with a gas fired FHA system. These utilities are located on an elevated pad in a "utility closet" which is integrated with a french drain system and sump pump. Next, he began improvements to the second floor by adding an addition to the existing "half story" essentially producing a two-story dwelling rather than the original 1-½ story that had existed for many years. It should be pointed out as Mr. Fuentealba made clear that none of the improvements changed anything at the ground level. The home's footprint remains the same. All improvements are above the first floor. Malstrom's nightmare, however, began early in May when a Building Code Inspector visited the site and issued a "Stop Work Order" informing the Petitioner to obtain a building permit and an elevation survey since his house was in a flood prone area.<sup>2</sup> The Petitioner now comes before me seeking relief as set forth above so that the improvements can be completed. In this regard, Mr. Braid testified that he has lived next to the subject property for years, has never observed flooding from the Stemmers Run stream behind his home and that he has no issue with the improvements as Mr. Malstrom is a professional craftsman and that all work has been of high quality. Mr. Braid's testimony was corroborated by the Petitioner's parents who have lived in this area for some 56 years. They stated that they do not recall the stream (Stemmers Run) ever having backed up at the culvert's

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<sup>2</sup> On behalf of the Petitioner, Douglas DuVal offered Building Permit No. B696144, FEMA – Flood Insurance Map No. 2400100270F and the July 2009 floodplain study "Property Plan" and "Drainage Area Map" prepared by Richard Truelove, P.E. that show the extent of the area of flooding. See Exhibit 3A through 3D.

location under Woodside Avenue. They recounted, however, flooding that was caused by storm drain backups at Harford Road that would sometimes run down Woodside Avenue but never from the stream itself.

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, considering the flood hazard, to afford relief.

In support of the waiver requested, Petitioner's attorney, Mr. Fuentealba, argued and Mr. DuVal 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 box culvert, and the location of the floodplain area, which circles around the property from the rear. Mr. DuVal emphasized that when the County approved the design of the box culvert running under Woodside Avenue in the 1950's – it was designed for a 50-year storm event. The area of flooding shown by Richard

Truelove, P.E. illustrates the extent of the area of flooding from the *now required 100-year design storm* as it is forced through the 1950's designed culvert. As stated earlier, the improvements that Mr. Malstrom made do not in any way impact on any of the purposes outlined in B.C.C. Section 32-4-414. The improvements are all above the first floor and no changes were made or are being contemplated to be made to the structure's footprint at ground level. If there would ever be a flood, which is unlikely since the chances of a flood in the 100-year floodplain are 1% a year, these improvements could not possibly contribute to any danger that might occur. The Petitioner purchased his house in 2001. Since the purchase, he states that he has weathered numerous severe storms without any reportable water migration. He further states that he will install a double-submersible pump system in the basement which would be powered by a non-electric generator system designed to run in circumstances where the power is disturbed and electricity is not provided to the site for any reason.

In terms of unnecessary hardship, as the photos reflect, Mr. Malstrom testified that to remove the addition would cause serious damage to the house. To remove all utilities and items subject to flood damage that have existed in the basement location for over 60 years would cause unnecessary and exceptional hardship. Mr. DuVal 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, and, of course, testimony and evidence submitted underscores that the current condition has been longstanding. The addition will not cause or exacerbate flooding. Mr. DuVal 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.

Considering all the testimony and the evidence presented, I find special circumstances or conditions exist that would cause unnecessary hardship to the Petitioner. There is no adverse impact on the community and the addition does not create any nuisance or detriment to the health, safety or general welfare of the locale. Mr. DuVal testified 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. and 3112.0 of the Building Code would cause unnecessary hardship. 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 Petitioner and, further, determine that the granting of the waiver will not increase flood heights, impact public safety, incur extraordinary public expense or conflict with existing local and State laws and ordinances. I find that the waiver requested is the minimum necessary to afford relief.

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 for Baltimore County this 14<sup>th</sup> day of December 2009, that the Petition for Special Hearing seeking approval of 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 provide for a second story addition

above an existing single-family dwelling in the 100-year floodplain, in accordance with Petitioner's Exhibits 2 and 3, respectively, be and is hereby GRANTED.

- The Petitioner may apply for his building permit and be granted same upon receipt of this Order; however, Petitioner is hereby made aware that proceeding at this time is at his own risk until the thirty (30) day appeal period from the date of this Order has expired. If an appeal is filed and this Order is reversed, the relief granted herein shall be rescinded.

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