

IN RE: PETITION FOR VARIANCE	*	BEFORE THE
Located on the eastern corner of Saint		
Marys Road and Tred Avon Road	*	OFFICE OF ADMINISTRATIVE
15 th Election District		
6 th Councilmanic District	*	HEARINGS FOR
(203 Saint Marys Road)		
	*	BALTIMORE COUNTY
Donna and Mark Simmons		
<i>Petitioners</i>	*	CASE NO. 2012-0056-A

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings for Baltimore County for consideration of a Petition for Variance filed by Donna and Mark Simmons, legal owners of the subject property. Petitioners request Variance relief from Section 100.6 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) to permit six (6) chickens on a lot less than one acre. The subject property and requested relief are more fully depicted on the site plan that was marked and accepted into evidence as Petitioners’ Exhibit 1.

Appearing at the requisite public hearing in support of the variance request were Donna and Mark Simmons. Appearing in opposition to their request were Joseph and Marcia Palmisano, adjacent property owners, and Ronald Duncan, nearby neighbor. The file reveals that the Petition was properly advertised and the site was properly posted as required by the Baltimore County Zoning Regulations (B.C.Z.R.).

Testimony and evidence offered revealed that the property which is the subject of this request, consists of 24,096 square feet and is zoned D.R.3.5. The property is improved with a one story dwelling and an accessory garage, along with a small wooden building which serves as a chicken coop. The property is a waterfront lot located in the Middleborough area of Baltimore County.

This matter is currently the subject of an active violation case (Case No. CO-0098376) before the Office of Administrative Hearings, and a copy of the Code Enforcement file was made a part of the zoning hearing file. It should be noted that the fact that a code violation is issued is generally not considered in a zoning case. Zoning enforcement is conducted by the Department of Permits, Approvals and Inspections, which has the authority to issue Correction Notices and Citations and to impose fines and other penalties for violation of law. On the other hand, the role of the Administrative Law Judge in this matter is to decide the discreet legal issue of whether the Petitioner is entitled to the requested variance.

The testimony and evidence offered by Mr. and Mrs. Simmons indicated that they have been keeping chickens on their property for the past five years. They testified that prior to bringing the chickens onto their property, they contacted Baltimore County Zoning and were advised that it was legal to have chickens on their ½ acre lot. For the past five years, they have kept up to six chickens on their property without any complaints from their surrounding neighbors. In July 2011, a complaint was registered with Code Enforcement and Inspector George Williams issued a Correction Notice to Mr. and Mrs. Simmons to remove the chickens from their property. The Simmons' have availed themselves of the opportunity to seek a variance to allow the chickens to remain on the property, thereby avoiding a violation case. Hence, the case before me.

The Simmons' further testified that the chickens were brought to their property as part of a Boy Scout initiative that their sons were involved in. The chickens are well cared for and the property is kept very clean. The Simmons' enjoy the chickens as pets and also benefit from the eggs that are laid by the hens which are consumed by their family. Various photographs were submitted into evidence corroborating the fact that the property is well-maintained.

Appearing in opposition to the Petitioners' request were the adjacent property owners, Joseph and Marcia Palmisano. At this time, the Palmisano's are opposed to the chickens remaining on their neighbor's property. Both Mr. and Mrs. Palmisano complained about the noise that the chickens make and the feces that they leave behind. Mrs. Palmisano testified that she has seen an increase in rodents in the area which she attributes to the chickens. They are opposed to the granting of any variance which would allow the chickens to remain on the property.

Also appearing at the hearing in opposition to the request was Mr. Ronald Duncan. Mr. Duncan lives several houses down on St. Mary's Road and is also opposed to the variance being granted for the chickens to remain on the property. Mr. Duncan was very complimentary of Mr. and Mrs. Simmons' as neighbors; however, he is concerned over any precedent that might be set for allowing the chickens to officially remain on the property. He is also concerned that the granting of such a variance could adversely impact property values in their neighborhood. He asked that the variance be denied.

The Baltimore County Zoning Regulations (B.C.Z.R.); specifically Section 100.6, imposes a one acre minimum lot size requirement for the keeping of chickens, ducks, turkeys, geese or pigeons on any persons property in Baltimore County. It also indicates that there are no numerical limitations as to the number of chickens that can be kept so long as the owner has one acre of land and a nuisance is not created by such a number of chickens. In this application, the Simmons' own approximately 24,096 square feet of land, well short of the one acre required. In order to keep the chickens, the variance request is necessary.

The Court of Special Appeals in the case of *Cromwell v. Ward*, 102 Md. 691 (1995) redefined the test for variance, requiring that before a Petitioner even gets to the question of hardship and practical difficulty, there must be a finding that the property is unique when

compared to other properties in the neighborhood. By this, the Court requires a finding that the property has some special circumstances or conditions existing that are peculiar to the land or the structure which is the subject of the variance request. This finding must be made before any consideration of hardship or difficulty is made and if the property is not found to be unique, no variance can be granted.

Equally important, the Court wanted to correct the practice of many jurisdictions of finding hardship and difficulty first which would then be used to show the property was unique, reasoning that the unusual situation on the property was different from that found on surrounding properties.

The evidence before me gives no indication that the regulations requiring the one acre of property to raise fowl or poultry impacts the Simmons' property in any way different from the other lots in the neighborhood. The lot is a typical waterfront lot. Further, the size of the property is a little more than half the size required by the regulations. These regulations found in the Livestock Ratio Table (Section 100.6 of the B.C.Z.R.) were derived by the Department of Agriculture at the University of Maryland and adopted by the Baltimore County Council.

I find no special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request. As noted above and much to the Petitioners' dismay, I may not use the finding that strict compliance with the zoning regulations would result in practical difficulty or unreasonable hardship to indicate uniqueness. For all these reasons, the relief requested must be denied. However, I will give Mr. and Mrs. Simmons six months from the date of this Order to find a new home for their chickens.

Pursuant to the advertisement, posting of the property, and public hearing on this Petition held, and for the reasons set forth above, the relief requested shall be denied.

THEREFORE, IT IS ORDERED by the Administrative Law Judge for Baltimore County this 19th day of October 2010 that the Petition for Variance seeking relief from Section 100.6 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit six (6) chickens on a lot less than one acre, be and the same is hereby DENIED; and,

IT IS FURTHER ORDERED that the Petitioners shall have one hundred eighty (180) days from the date of this Order to find a new home for the chickens and remove them from the subject property.

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

Signed
TIMOTHY M. KOTROCO
Administrative Law Judge
for Baltimore County

TMK:dlw