12/10/01

IN THE MATTER OF THE APPLICATION OF RONALD SANDERS - PETITIONER FOR SPECIAL HEARING AND VARIANCE ON PROPERTY LOCATED ON THE NW/S CROMWELL BRIDGE RD, 78' SW OF C/L LOCH RAVEN DR. (2260 CROMWELL BRIDGE ROAD) 9TH ELECTION DISTRICT 6TH COUNCILMANIC DISTRICT (Case No. 96-168-SPHA and Case No. 97-332-SPH)	*	ON REMAND FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY File No. 3-C-98-05437

* * * * * * * * *

OPINION ON REMAND FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY PURSUANT TO ORDER OF THE COURT OF SPECIAL APPEALS

This case comes before the Baltimore County Board of Appeals on remand by Order of the Circuit Court, pursuant to the Order of the Court of Special Appeals of Maryland.

The subject property is 2260 Cromwell Bridge Road, 9th Election District, 6th Councilmanic District. The Petitioner and property owner is Ronald Sanders, represented by G. Scott Barhight, Esquire, and Jennifer R. Busse, Esquire. Lillian Jennifer appeared at the original hearing as a Protestant, and Peter M. Zimmerman, People's Counsel for Baltimore County, appeared on behalf of the Office of People's Counsel.

Three issues were raised on remand:

1. Relative to the nonconforming use of the parking lot to the east of the subject property, the Court of Special Appeals requires the Board to address the question of whether the expansion of the building from a carryout store to a full-service restaurant changed the use of the building and thereby terminated the nonconforming use status of the existing parking lot;

2. Relative to the floodplain waiver (requested by the Petitioner as an alternative to the variance request and denied by the Board), the Court of Special Appeals requires the Board to articulate its reasoning and the legal standards for its decision; and

3. Relative to the Petitioner's request for variance of the parking space requirement (granted by the Board), the Court of Special Appeals found sufficient support for the "uniqueness" standard to grant the variance but requires additional explanation from the Board to support the "practical difficulty" standard.

The panel of the Board considering the remand consisted of two of the original panel members: Lawrence Stahl and Margaret Worrall. Lawrence S. Wescott, Chairman, replaced Kristine Howanski now retired from the Board. The complete record extracts and copies of all exhibits were provided to this panel upon remand. The issues of remand were publicly deliberated on October 31, 2001.

The Board finds that the nonconforming use status of the parking lot to the east of the subject property has not been terminated by the change of the carryout store to a full-service restaurant. This parcel is separately deeded from the restaurant parcel. In 1991 Judge James Smith determined that the eastern parcel was nonconforming as a parking lot; this decision was not appealed. While the use of the building on another parcel of land may have changed, this lot is still used for parking with the same number of spaces as established in 1991. The change in use of the neighboring building has not altered the use of this parcel for parking in any way.

In its original Opinion, the Board denied the Petitioner's request for a floodplain waiver to allow that area to be used for restaurant parking. Instead, the Board granted the variance to reduce the number of parking spaces required, which was requested by the

Petitioner as an alternative relief to the floodplain request. The Board was persuaded that the County's policy of protecting flood plains as expressed in the Master Plan was more important to public safety and welfare than permitting fewer parking spaces. Testimony by the Petitioner indicated that he had been operating the restaurant under those more limited conditions for several years without incident.

Since the issuance of the original Opinion, however, the County Council has taken action and rezoned the floodplain parcel to B.L. (Business Local) from D.R. 1 (Density Residential, maximum 1 unit per acre), adjoining the restaurant parcel which has been zoned B.L. since 1998.

In reviewing § 26-670 of the *Baltimore County Code*, the Board finds that with the change in zoning the Petitioner qualifies for a waiver from the floodplain restrictions in that he has good and sufficient cause for the request. The granting of parking in the floodplain will permit the Petitioner to fulfill the requirement for 72 parking spaces whereas he has only 39 at the present time. It is apparent that the County Council saw the need for the additional spaces as a safety issue to assure that all customers will find appropriate parking set aside for their use; it is apparent that this is not an economic consideration inasmuch as the restaurant has operated without those additional spaces for a considerable period of time.

The Board also finds that the granting of such a waiver will not increase flood heights, will not impact public safety adversely (indeed, the converse is true), will not incur public expense, will conflict with no laws, will constitute no fraud, and will not cause a nuisance.

As to the spirit and intent of the waiver request, the Board notes that there has long existed a stone road across this property in the floodplain for the County to access a water monitoring station for the adjacent Minebank Run. There is no evidence that this situation has caused any problems. The Board is thereby persuaded that the Petitioner may now use the rezoned. parcel for parking by right with a floodplain waiver

Indeed, Mr. Zimmerman, People's Counsel for Baltimore County, noted (Transcript, pp. 160-161) the following in his cross-examination of Norman Gerber, the Petitioner's expert in land planning and zoning:

> …Isn't it logical to assume or to infer that the County Council zoned only a portion of this property, the Sanders property, B.L., because it didn't want development in the floodplain to be made easy and that it would have to get a special exception combined with waivers of various types, whereas if it had zoned the whole property B.L., the use permitted as a right, it makes it that much easier to ask for waivers in the floodplain….
>
> In rezoning the floodplain area to B.L., the County Council has spoken plainly that in this particular case permitting safe and adequate parking outweighs their concerns for the floodplain.

Therefore, the Board will grant the floodplain waiver.

By granting the floodplain waiver, the Petitioner's request for alternate relief in the form of a variance from the parking requirement is eliminated. Nevertheless, the court has asked the Board to make findings on practical difficulty, having found that the subject property is unique.

It was the Board's opinion that the failure to grant a wavier from the floodplain regulations to use a portion of the property for accessory parking for a legally operating restaurant zoned B.L. created practical difficulty. Without the use of this section of his

property, the Petitioner could not meet the requirement of 72 parking spaces. Without parking as required, the Petitioner would have had to close his longstanding business.

In its opinion of September 20, 2000, the Court of Special Appeals described "practical difficulty" as follows:

> ...Practical difficulty, associated with area variances, requires a lesser showing of (1) that compliance with the strict letter of the restrictions would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome; (2) whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners; and (3) whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured. *See Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md.App. 28, 39, 322 A.2d 220 (1974).

In the original granting of the variance (now moot), the Board found that the property was unique, that the floodplain created practical difficulty unless a waiver was granted (which the Board originally denied), that the relaxation of the strict standards for parking would serve the owner of the property as well as protect neighbors whose property might be affected by the floodplain, and that the granting of the variance met the spirit and intent of the regulations and the Master Plan in protecting floodplain areas in resource conservation and residential zones.

In conclusion, the Board finds that the separately deeded parking parcel to the east of the Petitioner's restaurant retains its nonconforming status as determined in 1991; the Board grants the floodplain waiver; and the Board finds, with regard to the variance request, that the practical difficulty resulting from the denial of the floodplain wavier is now moot.

ORDER

THEREFORE, IT IS THIS 10th day of December, 2001 by the County Board of Appeals of Baltimore County

ORDERED, pursuant to the aforegoing Opinion, that the separately deeded parking parcel to the east of the Petitioner's restaurant retains its nonconforming status as determined in 1991; and it is further

ORDERED, that the requested floodplain waiver be and the same is hereby **GRANTED**; and it is further

ORDERED that, with regard to the variance request, the practical difficulty resulting from the denial of the floodplain wavier is now **MOOT**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Chairman

Lawrence M. Stahl

Margaret Worrall

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

December 10, 2001

Peter Max Zimmerman
People's Counsel
for Baltimore County
Room 47, Old Courthouse
400 Washington Avenue
Towson, MD 21204

RE: Civil Action #03-C-98-05437 /In the Matter of *Ronald Sanders* –Petitioner; Case No. 96-168-SPHA and Case No. 97-332-SPH / On Remand from the Circuit Court for Baltimore County

Dear Mr. Zimmerman:

Enclosed please find a copy of the Board's Order issued this date in response to the Remand Order of the Circuit Court for Baltimore County pursuant to the Order of the Court of Special Appeals in accordance with the opinion of that Court.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules of Procedure*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Kathleen C. Bianco/as

Kathleen C. Bianco
Administrator

Enclosure

c: G. Scott Barhight, Esquire
Jennifer R. Busse, Esquire
Ronald Sanders
Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.
Lillian Jennifer
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM

Printed with Soybean Ink
on Recycled Paper

11/29/00

96-168-SPH & 97-332-SPH /R. Sanders
CC: REMANDS to CBA pursuant to CSA
0/00 opinion
(11/29/00 - James T. Smith, Jr., J)

PETITION OF RONALD SANDERS AND CROSS PETITION OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY AND LILLIAN JENIFER FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY IN THE CASE OF :	*	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY
IN THE MATTER OF RONALD SANDERS - PETITIONER FOR A SPECIAL HEARING, WAIVERS AND VARIANCE FOR PROPERTY LOCATED AT 2260 CROMWELL BRIDGE ROAD	*	CASE NO. 3-C-98-5437

ORDER

Consistent with the Opinion of the Court of Specials Appeals in Case No. 1503, September Term, 1999, filed September 20, 2000, the decision of the Baltimore County Board of Appeals is hereby vacated and this case is remanded to the Board of Appeals for Baltimore County for further proceedings consistent with the Opinion of Court of Special Appeals of Maryland.

JAMES T. SMITH, JR., JUDGE

11/29/2000
DATE

00 NOV 30 PM 7:04

JTS/ss
Copy: Scott G. Barhight, Esq.
David K. Gildea, Esq.
Peter M. Zimmerman, Esq.
Board of Appeals for Baltimore County
Court file

9/20/00

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1503

SEPTEMBER TERM, 1998

RONALD SANDERS

v.

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, ET AL.

Sonner,
Kenney,
Krauser,

JJ.

Opinion by Kenney, J.

Filed: September 20, 2000

#3C985437

Appellant, Ronald Sanders ("Sanders"), appeals the decision of the Circuit Court for Baltimore County that reversed in part and affirmed in part a decision of the Baltimore County Board of Appeals. He presents four questions on appeal, which we have rephrased as follows:

> I. Did the Board of Appeals properly grant the parking variance?
>
> II. Did the Board of Appeals err, as a matter of law, in hearing and ruling on issues related to the forest buffer variance?
>
> III. Did the Board of Appeals err in denying the floodplain waiver, forest buffer variance, and request for commercial parking in a residential zone?
>
> IV. Did the circuit court improperly instruct the Board of Appeals to hear all of the remanded issues on the record that was created before the Board of Appeals?

Appellees, Lillian Jennifer and the People's Counsel for Baltimore County, filed a cross-appeal, presenting one issue, which we have re-phrased as follows:

> V. Did the Board of Appeals err in designating the existing parking lot adjacent to the restaurant as a non-conforming use?

FACTUAL AND PROCEDURAL BACKGROUND

Sanders is the owner and operator of Sanders' Corner Restaurant, located on the northwest corner of Cromwell Bridge Road and Loch Raven Drive in Baltimore County, Maryland. He owns a total of 2.11 acres of land, which is divided by Loch Raven Drive. The restaurant structure and existing parking lot in front of the restaurant is located on the west side of Loch Raven Drive on an 0.91 acre portion of the Sanders property. The footprint of the

structure encompasses 0.15 acres. Behind the building is the valley floor and floodplain of a stream, Minebank Run, that feeds Gunpowder Falls. On the eastern side of Loch Raven Drive lies Sanders' remaining 1.3 acres of property. This area is mostly woodlands with the exception of an existing parking area situated close to the road and restaurant.

Sanders took over the family business after his father's death in 1986. Until then, the business was a carry-out and ice-cream stand that had operated since 1956. The structure occupied 1200 square feet with an apartment on the easterly side of the building. The property was zoned Density Residential 1 ("D.R.1") allowing one residential unit per acre. The business constituted a nonconforming use of the land.

In 1987, Sanders sought to have the property re-zoned to accommodate the existing business and to allow reconstruction and continued operation in the event of a fire.[1] The Baltimore County Council granted Sanders' request, but zoned only the land around the periphery of the building as Business Local. Sanders then sought to have the parking lot on the eastern portion of the property, which contained 39 parking spaces, designated as an approved non-conforming use. This status was granted on March 20, 1991.

The building was expanded in 1993-1994 to include an extra dining area that extended the length of the building, a conversion

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[1]Under the Baltimore County regulations at the time, if the nonconforming business was destroyed by a fire, the business would not be able to continue.

of the existing apartment for restaurant use, and the addition of a rear porch. As a result, the business was expanded into a full service restaurant with a full kitchen and 30 dining tables, and the size of the building was increased from 1200 square feet to 4500 square feet. This expansion required additional parking spaces for a total of 72 spaces.[2]

On October 17, 1995, in an effort to increase the number of parking spaces at the restaurant, Sanders filed a Petition for Special Hearing with the Zoning Commissioner of Baltimore County (the "Commissioner"). He sought to construct a new parking lot behind the restaurant and petitioned the Commissioner to permit commercial parking in a residential zone. He also sought to confirm the state of the existing parking lot adjacent to the restaurant as a nonconforming use. In addition, Sanders also requested a variance, seeking to reduce the number of required spaces from 72 to his existing 39. Sanders apparently saw his requests for commercial parking in a residential zone and for a variance as alternatives.

On July 30, 1996, Deputy Commissioner Kotroco denied Sanders' request for a variance from the number of required parking spaces. In his written findings of fact and conclusions of law, the

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[2] In their brief, appellees set forth a time line, relating that between 1993-1994, Sanders obtained a building permit to the restaurant's expansion, but "fail[ed] to apply for zoning use permit for required additional commercial parking in residential zone...." It continues: "1995-1996: After complaints from citizens about new construction, which almost quadruples [the] size of restaurant, the Zoning Office finds that the permits were issued without proper zoning and development approvals and requires Sanders to file petitions to try to legitimize the use."

Commissioner concluded that "the need for off-street parking at this particular location is absolutely necessary" and that Sanders "has sufficient property on which to provide the required parking, provided he can obtain the necessary approval and waiver of floodplain regulations."

Deputy Commissioner Kotroco granted Sanders' request for confirmation of the nonconforming use status of the existing adjacent parking spaces and the modification of the layout of five spaces in front of the restaurant that posed traffic hazards. He also granted Sanders' petition for commercial parking, conditioning the construction of the new parking lot on Sanders obtaining a recomendation for a floodplain waiver from the Department of Public Works ("DPW").[3] Sanders appealed the denial of the parking variance, while Lillian Jennifer and the Long Green Valley Association appealed Deputy Commissioner Kotroco's decision to

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[3] Deputy Commissioner Kotroco found: "The petitioner has also requested approval of commercial parking in the residential zoned portions of his property. As stated previously, the entire property is zoned D.R.1, with the exception of the footprint of the restaurant building itself, which is zoned B.L. Therefore, all of the parking surrounding this restaurant use is located in the D.R.1 zone and a special hearing to approve same is necessary. In dealing with the issue of commercial parking in a residential zone, it is incumbent upon me as Deputy Zoning Commissioner to consider whether any surrounding residents would be affected by commercial parking in a residential zone. Testimony and evidence indicated that this property is located in the area of the Loch Raven Reservoir and there is limited, if any, residential housing surrounding this site. In fact, testimony revealed that the closest residential property to this site is that owned by Ms. Lillian Jennifer, whose house is approximately 1900 feet west of the subject property. Thus, it would appear that parking on the residential portion of the subject property would have no detrimental effect upon surrounding residential property, in that there are none immediately adjacent to this site. Therefore, I believe it is appropriate to allow parking to exist on the residential portions of this property and I shall so Order."

permit the commercial parking.[4]

Before any further action was taken pursuant to Deputy Commissioner Kotroco's order, Sanders sought and obtained the DPW's recommendation for the floodplain waiver. He then petitioned the Commissioner for approval of the floodplain waiver and his amended site plan. In his written findings dated May 13, 1997, Deputy Commissioner Schmidt approved Sanders' floodplain waiver and amended site plan, conditioned upon Sanders now obtaining a forest buffer variance from the Department of Environmental Protection of Resource Management ("DEPRM"). He concluded:

> In this case, the Petitioner cannot obtain a zoning variance relief and avoid the parking requirements for the reasons set forth in Deputy Commissioner Kotroco's opinion. Moreover, as pointed out in the petitioner's letter to Mr. Olsen, dated August 19, 1996, the granting of a waiver will, "...mitigate an ongoing traffic congestion and maneuverability problem ...." Obviously, without an additional parking area, these problems of congestion and maneuverability will continue. Moreover, the commercial operation would have to be reduced in size, an exceptional result.
>
> I find that exceptional hardship would exist if the waiver were denied. The granting of the waiver to provide additional parking is appropriate in order to alleviate congestion and improve traffic conditions, not only this site, but the public roads which lie adjacent thereto. **This is not a matter of economic hardship, but a concern for public safety.** The Council has recognized the commercial use of the existing building by zoning same B.L. To not permit parking adjacent to this use would be inappropriate. Thus, the request for a waiver shall be granted. [Emphasis added.]

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[4]Long Green Valley Association is not a party to this appeal.

Appellee Lillian Jennifer appealed this order. On June 18, 1997, Sanders petitioned to have the appeals consolidated, which was granted. The hearing was scheduled for July 9, 1997, but was continued to await DEPRM's decision on the forest buffer variance. On July 15, 1997, DEPRM granted Sanders' requested variance.

A de novo hearing before the Baltimore County Board of Appeals ("the Board") on the consolidated appeals began on November 19 and continued on December 10, 1997. Sanders testified and also presented expert testimony. An engineer testified that the proposed parking lot met all the requirements for parking in a residential zone. He opined that the impact on the neighborhood would be negligible, considering the land to the east, north, and south were used as public parks, and the southern land slopes at such a steep grade as to be "unbuildable." A second engineer, specializing in hydrology and environmental impact, testified on Sanders' behalf, as did a traffic expert, who concluded that the proposed commercial parking lot would improve the current traffic situation. Sanders also presented testimony from an urban and regional planner that, due to the uniqueness of Sanders' property, Sanders was confronted with practical difficulty and economic hardship in providing parking. He also testified that the proposed use would not negatively impact the area.

Appellee Lillian Jennifer testified on her own behalf. She opined that Sanders' proposed commercial parking lot would cause runoff damage to a nearby trout stream, spoke of concerns about traffic, and argued that any hardship Sanders confronted was self-

imposed, as he expanded the business without regard for parking requirements. The Long Green Valley Association also presented testimony, voicing its opposition to commercialization of the area, and citing the Baltimore County Master Plan, which seeks to preserve the rural character of this area.

The Board issued a written Opinion and Order on May 1, 1998. It effectively denied Sanders' request for commercial parking in a restricted zone by rejecting the floodplain waiver and forest buffer variance, but granted Sanders a variance reducing the required parking spaces to 39. In addition, the Board confirmed the status of the restaurant's adjacent parking area as a non-conforming use. It held, in part:

> With regard, however, to the request for parking in the flood plain area, as the Petitioner's memorandum states, parking facilities in residential zones are in the nature of special exception use. Where special exceptions, as conditional uses, require separate waivers and variances, '[T]he [rebuttable] presumption that a conditional use is permitted may well fall by the wayside.' *Chester Haven L.P. v. County Board of Appeals*, 103 Md. App. 324, at 336 (1995); *Umerly v. People's Counsel*, 108 Md. App. 497, at 510-511 (1996). In the case before us, the Petitioner's proposal fails to satisfy basic environmental standards. The proposed flood plain waiver and forest buffer variances run contrary to the legislative intent to keep the flood plain clear of development and provide a forest buffer.
>
> The Board will therefore deny the Petitioner's request for waivers of the flood plain and forest buffer regulations to permit parking in a riverine area.
>
> The Petitioner's alternative request is for a variance to reduce the required number of parking spaces from 73 to 39 [sic].
>
> ***

Under the Court of Special Appeals decision in *Cromwell v. Ward*, 102 Md. App. 691 (1995), which sets forth the legal standards under which a variance may be granted, the Board of Appeals, hearing the case de novo, is given the task of interpreting regulations and statutes where issues are debatable in the light of the law. The first burden on the Petitioner for variance is to prove that the property is unique. This standard must be met before other parts of the variance requirements can properly be considered.

Upon consideration of the testimony and evidence offered during this hearing, the Board finds that the subject property, aside from the flood plain area, is unique because of its topography. The area surrounding the usable portions of the property is steeply sloping and unusable for parking. In addition, the subject property is surrounded on three sides by park land which will not be developed, nor can it be purchased or used by the Petitioner to satisfy his needs.

Having found that the property meets the first prong of the *Cromwell v. Ward* standard, namely uniqueness, the Board then considered the issue of practical difficulty or unreasonable hardship. The Board finds that the subject property is of a commercial nature and, therefore, there is a presumption, not necessarily found in residential properties, that the owners have the property for the purpose of economic gain. The severe and unique limitations of the topography create a hardship in the expansion of the commercial use for which part of the property is zoned.

As to the spirit and intent of the Baltimore County Zoning Regulations, the Board finds that the granting of the requested variance in the number of parking spaces limits the expansion of the commercial use and will not adversely affect the neighboring properties.

... We grant a variance to reduce the number of parking spaces as required from 73 to 39 [sic]; we deny any waiver of the flood plain regulations; we deny the Petitioner's request for a waiver of the forest buffer requirements; and we deny the petitioner's proposal for a parking lot in the riverine area. [Alterations in original.]

Both Sanders and appellees, Lillian Jennifer and the People's Counsel for Baltimore County, appealed the Board's decision to the Circuit Court for Baltimore County. In a written Opinion and Order, the trial court affirmed the Board's grant of non-conforming use status, but reversed the Board's grant of the parking variance. The trial court also reversed the Board's denial of floodplain and forest buffer waivers and the permit for commercial parking, remanding those issues to the Board for further consideration. It stated:

> With respect to the first issue raised by [Sanders], namely that the Board erred in considering the flood plain waiver and forest buffer easement variance de novo rather than on the record, this issue has not been preserved for appeal....
>
> ***
>
> The next issue to be considered by the Court is [Sanders] second complaint regarding whether the Board erred as a matter of law considering DEPRM's grant of a forest buffer easement variance. As with the first issue addressed above, [Sanders] raises this complaint on appeal without having first complained before the Board.
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> ***
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> [Sanders] third issue is that the Board erred as a matter of law in ignoring the rebuttable presumption associated with a special exception when considering [Sanders] Petition for Special Hearing. ...
>
> The Board nowhere suggests that *Chester Haven Beach Partnership v. Cty. Bd. Of Appeals*, 103 Md. App. 324 (1995) and *Umerly v. People's Counsel*, 108 Md. App. 497 (1996) held that the rebuttable presumption associated with the special exception "falls by the wayside" whenever the development of land also requires a flood plain waiver or a DEPRM variance of the forest buffer easement requirements. What the Board did say respecting [Sanders] request for Special Hearing to permit commercial parking in a

residential zone which required waivers and variances is that "the rebuttable presumption that a conditional use is permitted may well fall by the wayside."

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More troubling than the Board's quote from *Chester Haven* and *Umerly*, about which [Sanders] complains, is the Board's failure to make any factual findings with regard to its denial of the Special Hearing Request for commercial parking in the residential zone. On p. 12 of its Opinion, the Board states: "In the case before us, the Petitioner's proposal fails to satisfy basic environmental standards. The proposed flood plain waiver and forest buffer variance run contrary to the legislative intent to keep the flood plain clear of development and to provide a forest buffer."

The Board never explained what it meant by "basic environmental standards" in relation to [Sanders'] property. Although there was testimony that the flood plain area was in close proximity to Mine Bank Run and the Gunpowder Falls and that detrimental run-off into a protected trout stream would be caused if parking were permitted, the Board made no reference to this evidence as a basis for denying [Sanders'] Special Use Permit for commercial parking, nor did the Board discuss any factual determinations with respect to steep slopes and topography and how, if at all, these site characteristics affected basic environmental standards.

Although the Board did not erroneously strip away the rebuttable presumption of the permissible nature of business parking in a residential zone, the Board did fail to support its denial by articulating the factual basis upon which that denial was based. Consistent with the Court of Appeals holding in *Schultz v. Pritts*, 291 Md. 1 (1981), the Board should consider the facts and circumstances of a proposed particular use at the location proposed to determine whether allowing such use would have an adverse affect above and beyond that inherently associated with such a use regardless of its location. Since the Board failed to articulate its findings with respect to the Special Use Permit for commercial parking beyond its

denial of the flood plain waiver and forest buffer easement variance, the Board's decision in this regard cannot properly be reviewed.

It may well be that the Board denied the commercial parking use based solely on its denials of the flood plain waiver and forest buffer easement variance, which brings us to [Sanders'] remaining two issues. The factual basis for these denial must be identified by the Board. The mere statement on pg 12 of the Board's opinion that "the proposed flood plain waiver and forest buffer easement variance run contrary to the legislative intent to keep the flood plain clear of development and to provide a forest buffer" is a restatement of a general purpose of the regulations and is insufficient explanation of the Board's decision. Although the Board had testimony and evidence regarding the subject property and the surrounding environment, it made no reference to any of this evidence on the waiver and variance issues in its opinion. What consideration the Board gave to the evidence and what factual findings the Board made are not set forth.

[Appellees] also argue in their Response Memorandum that both forest buffer easements variances and the flood plain waiver require a finding of "practical difficulty and exceptional hardship (other than economic)," and that [Sanders] cannot satisfy either of these requirements.

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Although [appellees] argue that [Sanders] cannot satisfy any of the hardship requirements in connection with his request for waiver and variance, this issue was never addressed nor decided by the Board and is not an issue to be decided in the first instance on appeal. It is the Board's function to make the factual determination and to reach the conclusions regarding whether [Sanders] satisfies the hardship standards as to these issues as required....

Standard of Review

In a case such as this, our review is essentially the same as that of the circuit court. We review the Board of Appeal's

decision. We do not give deference to the Board's conclusions of law, but we accept the Board's findings and conclusions of fact "'if they are based on substantial evidence and if reasoning minds could reach the same conclusion based on the record.'" *Cowles v. Montgomery County*, 123 Md. App. 426, 432, 718 A.2d 678 (1998)(quoting *Columbia Road Citizens' Ass'n v. Montgomery County*, 98 Md. App. 695, 698, 635 A.2d 30 (1994)). The Board's decision must be "fairly debatable." That is, it must be "'based upon evidence from which reasonable persons could come to different conclusions.'" *White v. North*, 356 Md. 31, 736 A.2d 1072 (1999)(quoting *Sembly v. County Bd. of Appeals of Baltimore County*, 269 Md. 177, 182, 304 A.2d 814, 818 (1973)).

"If the questions involved are fairly debatable and the facts presented are sufficient to support the Board's decision, it must be upheld." *Sembly*, 269 Md. at 182. We may uphold the Board's decision "only on the basis of reasons and findings upon which the Board relied." *Cowles*, 123 Md. App. at 698.

I. Parking Variance

Appellant argues that the Board properly applied the law regarding the issuance of a parking variance and that the Board's decision to grant the parking variance was supported by the evidence presented. Both parties agree that Sanders, by requesting a reduction in the number of parking spaces, would have to obtain a variance.[5] It is also agreed that in order for Sanders to obtain

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[5]A variance, a deviation from the legislated zoning classification or a departure from the

(continued...)

this variance, the property first must be found to be unique. If the property is found to be unique, then the Board must determine whether strict compliance with the zoning regulations would result in practical difficulty or unreasonable hardship. Baltimore County Zoning Regulation ("BCZR") § 307.1.[6] Although we agree with Sanders that the Board correctly articulated the general law regarding variances, it failed to make appropriate findings on the issue of practical difficulty or unreasonable hardship.[7]

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[5](...continued)
terms of the ordinance, is distinguished from a special exception or conditional use of the land. *Cromwell v. Ward*, 102 Md. App. 691, 702, 651 A.2d 424 (1995).

[6] BZCR 307.1 provides:

> The Zoning Commissioner of Baltimore County and the County Board of Appeals, upon appeal, shall have and they hereby are given the power to grant variances from height and area regulations, from off-street parking regulations ... only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance of the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship. ... Furthermore, any such variance shall be granted only if in strict harmony with the spirit and intent of said height, area, off-street parking or sign regulations, and only in such manner as to grant relief without injury to public health, safety and general welfare.

[7] Unreasonableness or unwarranted hardship, associated with the use variance, requires a finding that (1) applicant would be unable to secure a reasonable return from or to make any reasonable use of his property with compliance; (2) the difficulties or hardships were peculiar to the property in question and contrast with those of other property owners in the same district; and (3) the hardship was not the result of the applicant's own actions. Practical difficulty, associated with area variances, requires a lesser showing of (1) that compliance with the strict letter of the restrictions would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome; (2)

(continued...)

In its opinion, the Board properly set forth the general standard for granting a variance. Citing *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995), the Board emphasized that it must initially find that the "property is unique" and that "this standard must be met before other parts of the variance requirements can properly be considered."

Uniqueness in a variance context, however, has a "rather specialized meaning." *Umerley v. People's Counsel for Baltimore City, et al.*, 108 Md. App. 497, 506, 672 A.2d 173, *cert. denied*, 342 A.2d 584, 678 A.2d 1049 (1996).

> 'Uniqueness' of a property for zoning purposes requires that the subject of the property have an inherent characteristic not shared by other properties in the area, i.e. its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions), or other similar restrictions.

Umerley, 108 Md. App. at 506 (quoting *North v. St. Mary's County*, 99 Md. App. 502, 638 A.2d 1175, *cert. denied*, 336 Md. 224, 647 A.2d

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[7](...continued)
whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners; and (3) whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured. *See Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 39, 322 A.2d 220 (1974). We note that parking variances are ordinarily considered an area variance. *See* EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING & PLANNING, § 58.07[b] (4th ed., 1999 Supp.) ("Ordinarily where a variance application seeks permission to provide less parking than is required under the ordinance, the variance requested will be considered an area or non-use variance and only practical difficulty need be shown.")

444 (1994)). Although the Board did not fully articulate this particular aspect of the "uniqueness" standard, its uniqueness determination clearly was based on the topography of the property as compared to the neighboring land. In its opinion, the Board stated:

> Upon consideration of the testimony and evidence offered during this hearing, the Board finds that the subject property, aside from the flood plain area, is unique because of its topography. The area surrounding the usable portions of the property is steeply sloping and unusable for parking. In addition, the subject property is surrounded on three sides by park land which will not be developed, nor can it be purchased or used by the Petitioner to satisfy his needs. [Emphasis in original.]

We believe that there was substantial evidence to support the finding that the land was unique. Sanders presented numerous experts at the hearing, including an expert in urban/regional planning, who spoke of the topography of the land, the steepness of the slopes, the floodplain constraints, and the surrounding public lands. He stated: "[I]t's the only property along this area or in this area that is surrounded by very steep slopes, surrounded by public property on all four sides, the road on the south side, the city property on the north and the county park on the west." From this testimony, we are satisfied that the issue was "fairly debatable" and that there was sufficient evidence to support the Board's uniqueness decision. Therefore, we find no error in this aspect of the Board's ruling.

After finding that the land was unique, the Board then went on

to analyze the second prong, whether Sanders was confronted with practical difficulty or unreasonable hardship. It concluded that "the subject property is of a commercial nature and, therefore, there is a presumption, not necessarily found in residential properties, that those owners have the property for the purpose of economic gain. The severe and unique limitations of the topography create a hardship in the expansion of the commercial use for which part of the property is zoned."

We find the Board's findings regarding practical difficulty or unreasonable hardship insufficient. The Board, apparently applying an unreasonable hardship standard, presumed that because Sanders could not expand the commercial use of his property it thereby created a hardship sufficient to authorize a variance. Although a factor to be considered, economic hardship alone is insufficient to justify a hardship variance. *Marino v. City of Baltimore*, 215 Md. 206, 218, 137 A.2d 198(1957).

Additionally, the Board failed to discuss or address whether Sanders' practical difficulty or unreasonable hardship was "self-inflicted." As discussed in *Cromwell*, 102 Md. App. at 721, "practical difficulty or unnecessary hardship for zoning variance purposes cannot generally be self-inflicted." Appellee Lillian Jennifer raised this issue during the hearing, arguing that Sanders expanded the restaurant without considering the parking implications.

For these reasons, the case shall be remanded to the Board for findings regarding the practical difficulty and unreasonable hardship aspect of Sanders' variance request.

II. Did the Board of Appeals err, as a matter of law, in hearing and ruling on issues related to the forest buffer variance?

Sanders argues that the forest buffer variance was granted by the Director of DEPRM, not the Zoning Commissioner, and that appellees did not timely appeal the DEPRM decision. He contends that whether a timely appeal was taken is a jurisdictional question, which cannot be waived, and that, despite his failure to assert this during the Board's hearing, he is not precluded from asserting this claim on appeal. He requests that this Court reverse the Board's denial of the forest buffer variance.

In response, appellees argue that Sanders failed to raise this timeliness issue before the Board, and therefore he is precluded from raising it here. Alternatively, appellees contend that the Board had subject matter jurisdiction to review the forest buffer variance as it was incidental to construction of the parking lot and thereby incidental to the lot's conditional use permit. We will begin our discussion with whether the Board of Appeals has jurisdiction to review the DEPRM's issuance of a forest buffer variance.

Assuming, without deciding, that the Board of Appeals had authority to review the *DEPRM* issuance of the forest buffer variance, we find that appellees failed to timely appeal the permit's issuance, and therefore the Board of Appeals was without

jurisdiction to review it. Baltimore County Code ("BCC") §1-8.1 provides:

> Unless otherwise provided by statute, all appeals to the board of appeals, subject to and limited by statutory authority to hear appeals, shall be made within thirty (30) days from the date of the final action appealed.

Thus, pursuant to BCC §1-8.1, an appeal must have been taken within thirty days of the issuance of the forest buffer variance. Appellees, however, did not appeal the issuance of the forest buffer variance, let alone appeal it within thirty days, and therefore the Board of Appeals should not have reviewed the appropriateness of its issuance.

In response, appellees argue that Sanders waived this argument, as he did not raise it before the Board of Appeals. We disagree. Similar to the thirty day appeal requirement of Maryland Rule 8-202(a), BCC §1-8.1 is a "time for appeal" provision. See *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 580, 650 A.2d 226 (1994)(holding that BCC §26-132 is a "time for appeal" provision akin to Rule 8-202(a)) "[I]f the requirement is not met, the appellate court acquires no jurisdiction and the appeal must be dismissed." *Houghton v. County Comm'rs of Kent Co.*, 305 Md. 407, 413, 504 A.2d 1145, *reconsideration denied*, 307 Md. 216, 513 A.2d 291 (1986). As stated in *United Parcel*:

> [T]he time for appeal begins to run from a fixed date. In mandatory language, the Baltimore County statute states that a notice of appeal "shall" be filed within thirty days of the decision from which the appeal is

> taken. Under language like that set forth in BCC § 26-132, this Court has consistently held that, where the notice of appeal was not filed within the prescribed period after the final decision from which the appeal was taken, the appellate tribunal had no authority to decide the case on its merits.

Appellees failure to appeal the DEPRM's issuance of the forest buffer variance divested the Board of Appeals of authority to decide the merits. Sanders' failure to raise the issue before the lower tribunal could not confer authority on the Board.

Appellees contend that the Board of Appeals had authority to review the issuance of the forest buffer variance, as it was incidental to the special use permit and floodplain waiver. We are not persuaded. As appellant states in his reply brief, the forest buffer variance was a separate issue that "either stands or falls on its own." Contrary to appellees assertions, and although approval was conditioned upon a forest buffer variance, Deputy Commissioner Schmidt did not independently analyze the impact of forest disturbance or evaluate the propriety of granting a forest buffer variance under Title 14. He stated:

> Specifically, David Leikens of the Department of Environmental Protection and Resource Management (DEPRM) attended the hearing and participated therein. As he indicated, any relief granted within the instant Petition should be conditioned upon the Petitioner obtaining a variance from DEPRM's requirements relating to the disturbance of the subject property to build the parking lot. Specifically, although a zoning variance is not necessary, a variance from DEPRM's requirements as set forth in Title 14 of the Baltimore County Code is required. Thus, the Petition for Special Hearing shall be granted, subject to the Petitioner obtaining a variance

from DEPRM.

Therefore, we do not find that the DEPRM's grant of a forest buffer variance was "incidental" to the review of the special use permit or floodplain waiver.

Additionally, appellees argue that the Board of Appeals had authority to review the issuance of the forest buffer variance because it resulted from an ex parte process, and that they had no voice or say in the issuance of the variance. We find this argument also unpersuasive. In fact, the ex parte process may lend support to appellant's position that the BCC does not provide an appeal to the Board of Appeals from the grant of a forest buffer variance. In any event, this argument would transform the 30 day limitation for filing appeals into a statute of limitations subject to the discovery rule, a position that was rejected in *United Parcel Service*, 336 Md. 569.

III. Did the Board of Appeals err in denying the floodplain waiver, forest buffer variance, and request for commercial parking in a residential zone?

Sanders next argues that the Board failed to "provide a sufficient explanation of its decision" with regard to its denial of the commercial parking permit, floodplain waiver, and forest buffer variance. He argues that the Board "improperly applied the law with regard to the floodplain waiver and forest buffer easement variances" and that the Board had no jurisdiction to hear the floodplain waiver issue *de novo*, as the Baltimore County Code provides that the appeal should have been on record.

Baltimore County Zoning Regulation 409.8.B.1 sets forth the standards for the Commissioner's approval of business parking in a residential zone. It provides, in part:

> 1. Upon application, the Zoning Commissioner may issue a use permit for the use of land in a residential zone for parking facilities to meet the requirements of Section 409.6,[8] under the following procedure:
>
> ***
>
> d. If a formal request for a public hearing is filed, the Zoning Commissioner shall schedule a date for the public hearing...
>
> e. Following the public hearing, the Zoning Commissioner may either deny or grant a use permit conditioned upon:
>
> (1) His findings following the public hearing;
>
> (2) The character of the surrounding community and the anticipated impact of the proposed use on that community;
>
> (3) The manner in which the requirements of Section 409.8.B.2[9] and other applicable requirements are met; and
>
> (4) Any additional requirements as deemed necessary by the Zoning Commissioner in order to ensure that the parking facility will not be detrimental to the health, safety, or general welfare of the surrounding community and as are deemed necessary to satisfy the objectives of Section 502.1 of these regulations.

BCZR 502.1 provides, in part:

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[8]BCZR 409.6 sets forth the required number of parking spaces necessary for various facilities. Standard and fast food restaurants require 16 parking spaces for every 1,000 feet of gross floor area. A carry out restaurant requires only 5 parking spaces for every 1,000 feet of gross floor area.

[9] BCZR 409.8B2 setS forth additional design standards for parking facilities.

Before any special exception may be granted, it must appear that the use for which the special exception is requested will not:

> A. Be detrimental to the health, safety or general welfare of the locality involved;
>
> B. Tend to create congestion in roads, streets or alleys therein;
>
> ***
>
> G. Be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit and intent of these Zoning Regulations; nor
>
> H. Be inconsistent with the impermeable surface and vegetative retention provisions of these Zoning Regulations.

Under these regulations, the Commissioner was authorized to make findings of fact and grant or deny Sanders use permit for the construction of his commercial parking lot in a residential zone. In fact, both Deputy Commissioner Schmidt and Deputy Commissioner Kotroco granted Sanders commercial parking use permit, but its approval was conditioned upon Sanders obtaining a floodplain waiver and forest buffer variance. The Board, however, denied Sanders' request for the commercial parking permit, concluding:

> With regard, however, to the request for parking in the flood plain area, as the Petitioner's memorandum states, parking facilities in residential zones are in the nature of special exception use. Where special exceptions, as conditional uses, require separate waivers and variances, "...the (rebuttable)presumption that a conditional use is permitted may well fall by the wayside." *Chester Haven L.P. v. County Board of Appeals*, 103 Md. App. 324, at 336 (1995); *Umerley v. People's Council*, 108 Md. App. 497, at 510-11 (1996). In the case before us, the Petitioner's proposal fails to satisfy basic environmental standards. The proposed flood

> plain waiver and forest buffer variances run contrary to the legislative intent to keep the flood plain clear of development and provide a forest buffer.
>
> The Board therefore will deny the Petitioner's request for waivers of the flood plain and forest buffer regulations to permit parking in a riverine area.

Essentially, the Board denied Sanders' commercial parking permit by rejecting the floodplain waiver and forest buffer variance. The Board reasoned that Sanders' proposal failed to satisfy "basic environmental standards." As we stated above, the Board did not have authority to review, much less deny the DEPRM issuance of a forest buffer variance. Consequently, the Board erred in this respect. We therefore will limit our discussion to the Board's denial of the floodplain waiver, and its consequential denial of the commercial use permit on this basis.

Baltimore County Code §603 states that all hearings before the Board "shall be heard de novo, unless otherwise provided by legislative act of the County Council, and shall be open to the public." Thus, we begin from the general proposition that the Board's review of the floodplain waiver was *de novo*. Sanders asserts, however, that the County Council has limited the Board's review of a floodplain waiver. He argues that BCC §26-670 grants the Commission authority to grant floodplain waivers pursuant to §26-172.[10] With this, we agree. Sanders then asserts that because

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[10] BCC 26-670 provides, in part:

(continued...)

§26-172 falls within Article V of the BCC, titled Development Regulations, the appeal process of Article V., §26-206 and 26-209, limits the Board's review of the floodplain waiver to the record. We do not agree.

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[10](...continued)

> Waivers may be granted to the terms of the floodplain regulations as provided in section 26-172. The hearing officer, as defined in section 26-168, shall hear and decide requests for waivers from the requirements of this article...

BCC 26-168 defines hearing officer as "county zoning commissioner or the deputy zoning commissioner."

BCC 26-172 provides:

> (a) At the request of a department director, the hearing officer may grant a waiver of any or all requirements of division 3, 4, and 5 [public and private improvements, general design standards, and reclamation of property] of these regulations if the hearing officer finds that:
>
> (1)(a) The size, scope, and nature of a proposed development does not justify strict compliance with these regulations;
> (b) A waiver would be within the scope, purpose, and intent of these regulations; and
> (c) All other county laws, ordinances and regulations have been complied with; or
> (2) Compliance with these regulations would cause unnecessary hardship.
> (3) A waiver shall be in accordance with the floodplain management regulations.
>
> (b) A waiver from the requirements of section 26-203 of this Code and from the hearing officer's hearing may be granted under the following conditions:
> (1) After consultation with the appropriate county agencies the director finds:
>
> (a) That the size, scope, and nature of a proposed development does not justify strict compliance with these regulations; and
> (b) That a waiver would be within the scope, purpose, and intent of these regulations; and
> (c) That the proposed development complies with all other county laws, ordinances and regulations.
>
> (2) Before proposing to grant a waiver for development within the critical area, the director of planning shall obtain recommended findings from the director of the department of environmental protection and resource management which shall be based on the standards specified in section 26-205(b)(2)d.

First, §26-172 does not discuss review of the Commissioner's ruling, nor does it refer to §§26-206 and 209. It simply sets forth the Commission's authority to grant a waiver and under what circumstances. Sanders seems to leap to §§ 26-206 and 209,[11] isolating language that supports his position. However, just as we strictly interpreted review of the forest buffer variance, we will also strictly construe the review of floodplain waivers. Both section 26-206 and 26-209 deal with the approval of development plans rather than the Commissioner's grant of a floodplain waiver. The sections set forth a specific detailed procedure that one must follow for approval of a final development plan. The scheme requires numerous steps, including conferences, community input meetings, county review, re-submission of a final development plan, referrals to planning boards, and hearings. With such a detailed and distinctive approval process, much of which requires technical

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[11] §26-206(b) provides, in part: "... All final decisions of the hearing officer with respect to such matters shall be subject to appeal to the county board of appeals as provided in section 26-209."

§26-209 provides, in part:

> (a)(1) any person aggrieved or feeling aggrieved by final action on a plan may appeal to the county board of appeals within thirty (30) days after the date of the final decision of the hearing officer. ...
>
> (c) The board shall conduct a proceeding under this section by hearing oral argument of the parties and by receiving written briefs, if requested by any party to the proceeding. At the board's discretion, additional evidence and testimony may be allowed.

compliance with specific regulatory standards, it is understandable that the County Council would limit the Board's review to the record, subject, of course, to the Board's discretion to take additional evidence. The Commissioner's grant or denial of a floodplain waiver is a more limited issue. We therefore do not find that the Board's review was limited to the record pursuant to §§26-206 and 209. Rather, we believe that review of a floodplain waiver would be *de novo* pursuant to the Board's general power of review granted by BCC §603. It is noted that even if a review on the record was provided, the Board, in its discretion, could still take additional testimony and evidence. Thus, with either approach, the result could be the same. With this in mind, we will now discuss the sufficiency of the Board's review and its findings.

We find that although the Board properly conducted a *de novo* review of the Commissioner's grant of a floodplain waiver, its decision, including its findings of fact, was insufficient. In granting the floodplain waiver Deputy Commissioner Schmidt made detailed findings of fact and conclusions of law, stating:

> The Protestants in this did not offer any evidence. However, they oppose the requested waiver and as reasons therefore, argue that the Petitioner failed to comply with the requirements set forth in Section 26-670(a) of the Baltimore County Code. That Section provides that waivers shall be granted only

upon a showing of good and sufficient cause; after a determination that failure to grant a waiver would result in exceptional hardship to the applicant; and, a determination 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. The Protestants conceded in their argument that the Petitioner produced sufficient testimony to support a finding that good and sufficient cause exists for the waiver and that the granting of a waiver would not increase flood heights, impact public safety, incur extraordinary public expense, create nuisances, cause fraud, or victimization of the [sic] agree. The facts summarized above fully support such findings. The Protestants, however, claim that there has been no proof of exceptional hardship. The Protestants contend that the standard to determine exceptional hardship set forth in *Cromwell v. Ward*, 107 Md. App. 1 (1995), applies.

I disagree that the standard to obtain a variance relief as stated in Section 307 of the B.C.Z.R. is the same standard to obtain a waiver, pursuant to Section 26-670(a)(2) of the Baltimore County Code. Although obviously similar, the Council, in enacting these Sections, chose to employ different words. Proof of unreasonable [emphasis in original] hardship i.e. required to obtain a variance, whereas, a showing of exceptional hardship is needed to obtain a waiver. Particularly with the long and well known history of judicial review of the precise language of Section 307, the Council, in enacting Section 26-670, could have utilized identical language if it so desired. Clearly, it did not. Although similar in meaning and application, the words "unreasonable" and "exceptional" are not

synonymous. Moreover, the Protestants cite no authority, and I know of none, where the requirements of *Cromwell*, supra, have been specifically applied to Section 26-670. For these reasons, I decline to do so.

The cardinal rule of statutory construction is to ascertain and carry out the intent of the legislature, which requires a consideration of the language of the enactment and giving that language its natural and ordinary meaning. *Montgomery Co. v. Beckman*, 333 Md. 516 (1994). A review of the words used throughout Section 26-670 is helpful in determining what the legislature had in mind when it required a showing of exceptional hardship.

In this case, [Sanders] cannot obtain a zoning variance relief and avoid the parking requirements for the reasons set forth in Deputy Commissioner Kotroco's opinion. Moreover, as pointed out in [Sanders'] letter to Mr. Olsen, dated August 13, 1996, the granting of a waiver will, "mitigate an ongoing traffic congestion and maneuverability problem..." Obviously, without an additional parking area, these problems of congestion and maneuverability will continue. Moreover, the commercial operation would have to be reduced in size, an exceptional result.

I find that exceptional hardship would exist if the waiver were denied. The granting of a waiver to provide additional parking is appropriate in order to alleviate congestion and improve traffic conditions, not only on this site, but the public roads which lie adjacent thereto. This is not a matter of economic hardship, but a concern for public safety. The Council has recognized the commercial use of the existing building by zoning same B.L. To not permit parking adjacent to this use would be inappropriate. Thus, the request for a waiver shall be granted.

The Board was not bound to accept the Commissioner's factual findings or conclusions of law, but the Board erred in denying the floodplain waiver based on a summary finding that Sanders' proposal "fails to satisfy basic environmental standards" and because it "run[s] contrary to the legislative intent to keep the floodplain clear of development and provide a forest buffer." The Board was obligated to make findings pursuant to BCC §26-670 regarding the floodplain waivers and to articulate the basis for its decision. If the Board disagreed with the Deputy Commissioner's interpretation of the exceptional hardship standard and the inapplicability of the *Cromwell* standard, the Board needed to state its own interpretation.

Appellees discuss, at length in their brief, that Sanders did not meet the exceptional hardship test. Perhaps these considerations were taken into account by the Board, but without an explanation of the standard employed by the Board and findings of fact articulating the evidence adduced at the hearing. Thus, we cannot say that the Board's denial of the floodplain waiver was a correct interpretation of the law and supported by evidence.

Further, the Board made no attempt to evaluate the appropriateness of the use permit for commercial parking. The Board apparently relied on its denial of the floodplain waiver and

forest buffer variance to support its denial of the commercial use permit. The Board did not refer to any BCC or BCZR provision, nor did it discuss any legal standard for granting commercial use permits. One inference to be made is that the Board implicitly approved of the Deputy Commissioner's grant of the use permit, except for the need to obtain both a floodplain waiver and forest buffer variance; otherwise, the Board's reliance on the denial of the floodplain waiver and forest buffer variance would have little meaning. However, we are left only to speculate on the Board's reasoning and analysis. Therefore, on remand, the Board should articulate its reasoning and legal standards for its decision regarding both the floodplain waiver and commercial use permit.

We note that commercial parking in a residential zone is treated as a special exception, and, thus, on remand, the Board should address the applicable standards for granting such a special exception. As noted, BCZR 409.6 sets forth the specific criteria for permitting commercial parking in a residential zone. In evaluating special exceptions generally, "it is not whether a use permitted by way of a special exception will have adverse effects ... it is whether the adverse effects in a particular location would be greater than the adverse effects ordinarily associated with a particular use that is to be considered by the agency."

Mossburg v. Montgomery County, 107 Md. App. 1, 8, 666 A.2d 1253 (1995), *cert. denied sub nom.*, 341 Md. 649, 672 A.2d 623 (1996) (discussing *Schultz v. Pritz*, 291 Md. 1, 432 A.2d 1319 (1981)).

IV. Did the circuit court improperly instruct the Board of Appeals to hear all of the remanded issues on the record that was created before the Board of Appeals?

Appellant argues that, on remand, he should be allowed to present further testimony on specific issues, including the commercial parking use permit. He asserts that because this case is unusual the issues were easily confused, as evidenced by the Board's "unfounded reliance" on environmental issues. Therefore, he reasons that it would be best for the Board to conduct a new *de novo* hearing on the commercial parking permit. It does appear that the consolidation of the variance appeals, which was requested by appellant, may have blurred the process and, thus, revisiting the issues separately *de novo* may have some merit. We believe, however, that it should be left to the Board to determine whether additional evidence should be taken and on what issues. The Board is in the better position to determine whether it has sufficient evidence in the record to make its decision. Therefore, whether additional evidence will be taken on remand will be left to the Board's discretion.

Cross Appeal

V. Did the Board of Appeals err in designating the existing parking lot adjacent to the restaurant as a non-conforming use?

On cross-appeal, appellees argue that the Board erred in finding that the parking lot on the eastern portion of the property constituted a legal nonconforming use. They argue that although the lot may have constituted a valid non conforming use in 1991 when designated as such, because the expansion of the restaurant tripled the usable commercial space, the use of the parking lot "changed significantly in nature, character, and impact" sufficient to terminate its non-conforming use status. As support, appellees cite BCZR 104.1 and 104.3, which provide:

> 104.1 A nonconforming use (as defined in Section 101) may continue except as otherwise specifically provided in these regulations; provided that upon any change from such nonconforming use to any other use whatsoever..., the right to continue or resume such nonconforming use shall terminate.
>
> 104.3 No nonconforming building or structure and no nonconforming use of a building, structure, or parcel of land shall hereafter be extended more than 25% of the ground floor area of the buildings so used....

In essence, appellees argue that after Sanders received non-conforming use status of the eastern parking lot in 1991, his expansion in 1993-1994 constituted a change of use. With the

change of use, the nonconforming use status of both the business and parking lot should have terminated. Sanders contends that the expansion of the business was not the expansion of a nonconforming use because the footprint of the facility was zoned Business Local and that there has been no expansion of the parking areas.

As noted, non-conforming use status was granted to the eastern parking lot in 1991. The Board found that this status was not challenged. In 1996, Sanders petitioned the Commission to grant non-conforming use status to the parking lot adjacent to the restaurant on the western portion of the property, which was granted by both Deputy Commissioner Kotroco and the Board. Although appellees appear to argue that the eastern lot's use changed due to the expansion, the Board's grant of nonconforming use in 1998 related specifically to the parking lot adjacent to the restaurant on the western portion of the property.[12]

We do not reach the merits of this argument because we agree with appellees that the Board failed to address the issue of whether the expansion "changed" the use of the building from a carry-out store to a full service restaurant and by doing so terminated the nonconforming use status of the existing parking

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[12] The Board concluded: "In summary, the Board grants non-conforming use status to the parking adjacent to the west side of the building and in front of the building."

lots. The Board simply concluded: "The Petitioner has received non-conforming use status in the residential zone on the south [sic] side of Cromwell Bridge Road and that is not before us today. Further, evidence is convincing that parking for the commercial use has long been in effect in the front of and adjacent to the building on the west side along Cromwell Bridge Road." Therefore, on remand, the Board should consider this argument in light of the BCC and the applicable law.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART, REVERSED IN PART; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO VACATE THE DECISION OF THE BALTIMORE COUNTY BOARD OF APPEALS AND REMAND THE CASE TO THAT BODY FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION.

COSTS TO BE EQUALLY DIVIDED BETWEEN THE PARTIES.

8/17/99

PETITION OF RONALD SANDERS AND CROSS PETITION OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY AND ILLIAN JENIFER FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY IN THE CASE OF:	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
IN THE MATTER OF RONALD SANDERS Petitioner	*	Case No.: 3-C-98-5437
FOR A SPECIAL HEARING, WAIVERS AND VARIANCE FOR PROPERTY LOCATED AT 2260 CROMWELL BRIDGE ROAD	*	
	*	

****

NOTICE OF APPEAL

Appellant, Ronald Sanders, by and through his attorneys, G. Scott Barhight, David K. Gildea and Whiteford, Taylor & Preston, L.L.P., pursuant to Maryland Rules 8-202, *et seq.*, hereby notes an appeal from the Opinion and Order of the Circuit Court for Baltimore County, entered July 27, 1999.

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COUNTY BOARD OF APPEALS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 1999, a copy of the foregoing Notice of Appeal was mailed first class, postage prepaid to:

County Board of Appeals of Baltimore County
Old Courthouse, Room 49
400 Washington Avenue
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People's Counsel for Baltimore County
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8/2/99

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08/02/99

Case Number: 03-C-98-005437 AE
Date Filed: 06/02/1998
Status: Closed/Active
Judge Assigned: To Be Assigned,

In The Matter of: Ronald Sanders

C A S E H I S T O R Y

OTHER REFERENCE NUMBERS

Description	Number
Administrative Agency	96-168-SPHA
Administrative Agency	97-332-SPH

INVOLVED PARTIES

Type	Num	Name(Last,First,Mid,Title)	Disposition Addr Start/End	Entered
PET	001	Sanders, Ronald	CT DO 07/28/99	06/02/98
		Attorney:		
		0016862 Barhight, G Scott		06/02/98
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ITP	001	Board Of Appeals Of Baltimore County	CT DO 07/28/99	06/02/98
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Type	Num	Name(Last,First,Mid,Title)	Disposition Addr Start/End	Entered
ITP	002	Jenifer, Lillian	CT DO 07/28/99	06/05/98
		2200 Cromwell Bridge Road	06/05/98	
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CALENDAR EVENTS

Date	Time	Dur	Cer	Evnt	Lvl	Jdg	Day	Of	Rslt	By	ResultDt	Jdg	T	Notice	Rec
11/23/98	09:30A	02Q	yes	CIVI		REC	01	/01	VAC	C	12/07/98		P		
02/17/99	09:30A	02Q	yes	CIVI		JTS	01	/01	CON	C	02/17/99	JTS	P		Y

Stenographer(s): Steven D. Perrine

JUDGE HISTORY

JUDGE ASSIGNED	Type	Assign Date	Removal RSN
TBA To Be Assigned,	J	06/02/98	
TBA To Be Assigned,	J	06/02/98	

DOCUMENT TRACKING

Num/Seq	Description	Filed	Entered	Party	Jdg	Ruling	Closed	User ID
0001000	Petition for Judicial Review	05/29/98	06/02/98	PET001	TBA		07/28/99	JM PH
0001001	Answer Filed by ITP001-Board Of Appeals Of Baltimore County, , ITP002-Jenifer, Lillian	06/04/98	06/05/98	ITP001	TBA		07/28/99	SD PH
0002000	Cross-Petition for Judicial Release Filed by ITP001-Board Of Appeals Of Baltimore County, , ITP002-Jenifer, Lillian	06/04/98	06/05/98	ITP001	TBA		07/28/99	SD PH
0002001	Answer	06/09/98	06/10/98	PET001	TBA		07/28/99	SD PH
0003000	Certificate Of Notice **	06/09/98	06/11/98	000	TBA		07/28/99	JH PH
0004000	Transcript of Record from Adm Agency **	07/17/98	07/17/98	000	TBA		07/28/99	JH PH
0005000	Notice of Transcript of Record Sent	07/17/98	07/17/98	ITP001	TBA		07/17/98	JH JH
0006000	Notice of Transcript of Record Sent	07/17/98	07/17/98	ITP002	TBA		07/17/98	JH JH
0007000	Notice of Transcript of Record Sent	07/17/98	07/17/98	PET001	TBA		07/17/98	JH JH
0008000	Motion to Extend Time	08/05/98	08/05/98	ITP001	ALB	Granted	08/05/98	PH PH
0009000	Scheduling Order	08/14/98	08/14/98	000	TBA		08/14/98	JD JD
0010000	Memorandum	09/15/98	09/15/98	ITP002	TBA		09/15/98	PH PH
0010001	Answer **	10/15/98	10/19/98	PET001	TBA		07/28/99	SD PH
0010002	Response Memorandum	10/29/98	10/29/98	PET001	TBA		07/28/99	DFF PH
0011000	Memorandum	09/15/98	09/15/98	PET001	TBA		09/15/98	PH PH
0011001	Answer	10/14/98	10/16/98	ITP002	TBA		07/28/99	RHP PH
0012000	Correspondence	11/24/98	11/25/98	000	TBA		11/25/98	JH JH
0013000	Hearing Notice	12/08/98	12/08/98	PET001	TBA		12/08/98	LLH LLH
0014000	Hearing Notice	12/08/98	12/08/98	ITP002	TBA		12/08/98	LLH LLH
0015000	Open Court Proceeding Feb. 17, 1999. Hon. James T. Smith, Jr. Hearing had. Held sub	02/17/99	02/17/99	000	JTS		07/28/99	KFM PH

curia. Opinion and Order to be filed.

Num/Seq	Description	Filed	Entered	Party	Jdg Ruling	Closed	User ID
0016000	Order remanding case	07/28/99	07/28/99	000	JTS Granted	07/28/99	PH PH
0017000	Docket Entries Sent To The Board Of Appeals For Baltimore County	08/02/99	08/02/99	000	TBA		FG FG

TICKLE

Code	Tickle Name	Status	Expires	#Days	AutoExpire	GoAhead	From	Type	Num	Seq
1YRT	One Year Tickle (Jud	CLOSED	05/29/99	365	no	no	DAAA	D	000	000
1ANS	1st Answer Tickle	CLOSED	06/03/98	0	no	no	DANS	D	001	001
SLTR	Set List For Trial	DONE	06/03/98	0	yes	yes	1ANS	T	001	001
SLMR	Set List For Motions	CANCEL	08/27/98	22	no	no	MEXT	D	000	000
EXPU	Exhibit Pickup Notic	CLOSED	09/26/99	30	no	no			000	000

EXHIBITS

Line #	Marked	Code	Description	SpH	Sloc	NoticeDt	Disp Dt	Dis By
Offered By: ITP 001 Board Of Appeals Of Baltimore								
000		B	BOX 89/CBA TRANSCR		B			

DIFFERENTIATED CASE MANAGEMENT

TRACKS AND MILESTONES

Track : R1 Description: EXPEDITED APPEAL TRACK Custom: Yes
Assign Date: 08/14/98 Order Date : 08/14/98
Start Date : 08/14/98 Remove Date:

Milestone	Scheduled	Target	Actual	Status
Motions to Dismiss under MD. Rule 2-322(		08/29/98	07/28/99	CLOSED
All Motions (excluding Motions in Limine		01/08/99	07/28/99	CLOSED
TRIAL DATE is	02/17/99	11/12/98	02/17/99	REACHED

I hereby certify that the aforegoing docket is a true copy of the Civil records of the Clerk of the Circuit Court for Baltimore County. IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the Seal of the Circuit Court for Baltimore County, MD, this date 08/02/1999.

Suzanne Mensh
Clerk of the Circuit Court

7/29/99

Ronald
96-168-SPHA & 97-332-SPH / Sanders
CCt AFFIRMED in part and REVERSED in part (grant of parking variance) and REMANDS to the CBA.
7/27/99 (James T. Smith, Jr., J)

PETITION OF RONALD SANDERS * IN THE CIRCUIT COURT
AND CROSS PETITION OF PEOPLE'S
COUNSEL FOR BALTIMORE COUNTY * FOR BALTIMORE COUNTY
AND LILLIAN JENIFER FOR JUDICIAL
REVIEW OF THE DECISION OF THE *
COUNTY BOARD OF APPEALS OF
BALTIMORE COUNTY IN THE CASE *
OF :
*
IN THE MATTER OF RONALD SANDERS CASE NO. 3-C-98-5437
- PETITIONER FOR A SPECIAL HEARING,*
WAIVERS AND VARIANCE FOR PROPERTY
LOCATED AT 2260 CROMWELL BRIDGE *
ROAD
*

OPINION and ORDER

A hearing in this appeal from the Board of Appeals for Baltimore County (hereinafter referred to as "Board") was held and argument of counsel for all parties presented on February 17, 1999. The Court has reviewed the transcript of the proceedings before the Board, the various exhibits received, the Memoranda, Response Memoranda and Reply to Response submitted by counsel, and the Opinion of the Board dated May 1, 1998.

Ronald Sanders, Appellant and Cross-Appellee (hereinafter referred to as "Appellant") operates Sanders Corner Restaurant which is located on the northwest corner of Cromwell Bridge Road and Loch Raven Road in Baltimore County, Maryland. Appellant's property consists of 2.113 acres, 1.2 acres on the east side of Loch Raven Road and south of Cromwell Bridge Road zoned D.R.1, and .913 acres on the west side of Loch Raven Road, of which approximately .1 acre is zoned B.L. and the balance is zoned D.R.1. Appellant's restaurant building takes up all of Appellant's B.L. zoning.

Prior to October of 1988, Sanders Corner Restaurant was operated as an ice cream store of approximately 1,250 sq. ft. See Opinion of the Board ("Bd.Op.") at 4. The restaurant/store operated as a non-conforming use until October of 1988. In October of 1988, the Baltimore County Council rezoned the approximate .1 acre building footprint of the restaurant as B.L. property. Appellant was granted nonconforming use status for parking spaces on the east side of Loch Raven Road in 1991.

Subsequent to 1991, Appellant enclosed a wooden deck/rear addition, constructed a front porch, and converted an apartment in the existing structure to commercial use, thereby increasing the total square footage of the commercial operation to approximately 4,550 sq. ft. See Bd.Op. at 4-5. Although Appellant had obtained construction permits for his expansion, he had failed to apply for the necessary use permits for the additional commercial parking needed to support his expansion or for a variance to reduce the number of required parking spaces in connection with the commercial expansion of his building.

After the restaurant expansion, Appellant filed a Petition for Special Hearing to permit commercial parking in a residential zone, a request to confirm non-conforming use of additional parking beside and in front of the building on the west side of Loch Raven Road, and a request for a waiver to allow parking in a flood plain.

From the Zoning Commissioner's grant of the flood plain waiver, the special hearing use permit for commercial parking in a residential zone and non-conforming use status for existing parking near Appellant's building, People's Counsel for Baltimore County and Lillian Jenifer, Appellees and Cross-Appellants (hereinafter referred to as "Cross Appellants") appealed to the Board.

The Board scheduled the first day of its de novo hearing on July 9, 1997. At the beginning of the hearing, counsel for Cross-Appellant Jenifer advised the Board that Appellant's request for a forest buffer easement variance had not yet been resolved and that the Zoning Commissioner's approval had been conditioned on the approval of this variance. With all parties' agreement, the Board suspended the hearing pending the decision by the Department of Environmental Protection and Resource Management (hereinafter referred to as "DEPRM") respecting the forest buffer easement issue after the Board heard testimony from a witness who was already present and who had expected to testify on July 9th. The hearing was to be resumed after DEPRM's decision on the forest buffer easement. The hearing continued on November 19, 1997 and December 10, 1997, following DEPRM's grant of the forest buffer easement variance.

On May 1, 1998, the Board denied the flood plain waiver, denied the variance of the forest buffer easement requirements, and denied the Appellant's Petition for Special Hearing for approval of commercial parking in a residential zone. The Board granted non-conforming use status to additional parking in the front of and adjacent to the existing building structure and granted Appellant's alternative request before the Board to grant a parking variance reducing the number of parking spaces required for the commercial use from 73 to the 39 nonconforming use parking spaces available to Appellant. From these decisions, both Appellant and Cross-Appellants have appealed.

Appellant raises five issues in his appeal, which have been renumbered and restated by the Court as follows:

> 1) That the Board erred as a matter of law in determining that an appeal on a flood plain waiver and forest buffer easement variance should be heard de novo and not on the record of the Zoning Commissioner and Department of Environmental Protection and Resource Management; and

2) That the Board had no jurisdiction to consider DEPRM's grant of the forest buffer easement variance as no timely appeal from DEPRM's decision had been filed; and

3) That the Board's ruling that the rebuttable presumption associated with a special exception "falls by the wayside" whenever development requires a flood plain waiver or a variance from the forest buffer easement requirements was erroneous as a matter of law; and

4) That the Board erred as a matter of law by failing to apply properly the law governing flood plain waivers; and

5) That the Board erred as a matter of law by failing to apply properly the law governing forest buffer easement variances.

Cross-Appellants raise two issues in their cross-appeal, which have been renumbered and restated by this Court, namely:

1) That the Board erred in allowing Appellant to retain the nonconforming use status for parking in light of Appellant's commercial expansion of his building; and

2) That the Board erred in granting Appellant's request for a parking variance.

Cross-Appellants included two additional issues in their Memorandum, namely:

1) That Appellant has no claim to equitable estoppel or vested rights; and

2) That People's Counsel for Baltimore County has standing to file its cross appeal.

This Court will not address either of these last two issues in light of the fact that Appellant has made no equitable estoppel or vested rights claims and has not raised the issue of People's Counsel's right to participate in the proceedings in this appeal.

With respect to the first issue raised by Appellant, namely, that the Board erred in considering the flood plain waiver and forest buffer easement variance de novo matters rather than on the record, this issue has not been preserved for appeal. Appellant makes no contention on appeal that he objected below respecting the Board's consideration of these matters or regarding the hearing proceeding on a de novo basis. No objection was made to the presentation of evidence not presented to the zoning commissioner or DEPRM on these issues when such evidence was presented to the Board, and no argument was made before the Board respecting any presumption of correctness of the Zoning Commissioner's decision or that of DEPRM.

Section 26-209 of the Baltimore County Code allows the Board in its discretion to receive additional evidence and testimony. There was no objection to any of the evidence offered before the Board on the basis Appellant argues on appeal. The Board clearly had jurisdiction to hear both issues and did so "de novo" without objection. As stated in Heft v. Maryland Racing Comm'n, 323 Md. 257, 273-74 (1991), "[o]ne such principle [of administrative law] is that a person may not obtain judicial review of a matter when he or she failed to properly raise the matter before the administrative agency". See also, Mayor and City Council of Rockville v. Woodmont Country Club, 348 Md. 572, 582 fn. 3 (1998) ("Judicial review of administrative decisions is limited to issues raised before the agency.").

The next issue to be considered by the Court is Appellant's second complaint regarding whether the Board erred as a matter of law in considering DEPRM's grant of a forest buffer easement variance. As with the first issue addressed above, Appellant raises this complaint on appeal without having first complained before the Board.

Although the Board heard testimony on July 9, 1997, the first day of its hearing, all parties agreed that the Board should suspend the hearing so that a final decision could be made by DEPRM on the forest buffer easement variance. Appellant had advised the Board that this "requirement was 'in the works' but the variance had not been received to date." See Bd.Op. at 2.

The Board's hearing was recessed for the very purpose of obtaining the DEPRM decision so that it could be included as part of the appeal before the Board. The forest buffer easement variance was not an issue that stood alone, but was an integral part of Cross-Appellants' appeal granting Appellant commercial parking in the residential zone. Both Appellant and Cross-Appellants presented evidence on the issue of the forest buffer easement before the Board without objection. This issue was considered as an appeal issue by all parties and the Board, and Appellant will not now be heard to argue that such was not the case.

Appellant's third issue is that the Board erred as a matter of law in ignoring the rebuttable presumption associated with a special exception when considering Appellant's Petition for Special Hearing. On page 5 of its original Memorandum, Appellant inadequately quotes the "fall by the wayside language" of the Board's decision.

The Board nowhere suggests that Chester Haven Beach Partnership v. County Bd. of Appeals, 103 Md.App. 324 (1995) and Umerley v. People's Counsel, 108 Md. App. 497

(1996) held that the rebuttable presumption associated with the special exception "falls by the wayside" whenever the development of land also requires a flood plain waiver or a DEPRM variance of the forest buffer easement requirements. What the Board did say respecting Appellant's request for Special Hearing to permit commercial parking in a residential zone which required waivers and variances is that "the rebuttable presumption that a conditional use is permitted may well fall by the wayside." See Bd.Op.at 11 (emphasis added).

Section 409.8B of the BCZR does not require that commercial parking be allowed in a residential zone if all of the conditions of subparagraph (2) of Sec. 409.8B are satisfied. Sec. 409.8B(1) provides in pertinent part:

> Upon application, the Zoning Commissioner may issue a use permit for the use of land in a residential zone for parking facilities to meet the requirements of Section 409.6, under the following procedure:
>
> > (c) The use permit may be issued with such conditions or restrictions as determined appropriate by the Zoning Commissioner to satisfy the provisions of Section 409.8B.2 below and to ensure that the parking facility will not be detrimental to the health, safety or general welfare of the surrounding community.

BCZR, § 409.8B (emphasis added).

Section 409.8B of the BCZR provides in subsection 1(e) that a use permit may be either denied or granted conditioned upon:

> (2) The character of the surrounding community and the anticipated impact of the proposed use on that community;
> (3) The manner in which the requirements of Section. 409.8.B.2 and any other applicable requirements are met ; and (4) any additional requirements as deemed necessary by the Zoning Commissioner to ensure that the parking facility will not be detrimental to the health, safety or welfare of the surrounding community and as are deemed necessary to satisfy the

objectives of Section 502.1 of these regulations.

Section 409.8B makes clear throughout the legislation that the objectives of Sec. 502.1 of the BCZR that the commercial parking would not be detrimental to the health, safety or general welfare of the surrounding community had to be met. Nothing in Sec. 409.8B precludes the Zoning Commissioner or the Board of Appeals from denying a commercial parking use because of a particular property's location in the flood plain or the forest buffer area of the particular site. The location and topography and the surrounding environment are all factors which the Board might consider in determining that the flood plain and forest buffer issues relevant to a particular site support a finding that to allow commercial parking would be detrimental to the health, safety or general welfare of the surrounding community.

Although waivers and variances are not conditions specifically set forth in Sec. 409.8B(2) of the BCZR, they would be required to allow Appellant to implement a grant allowing commercial parking on his residentially zoned land and are fair game for consideration by the Board in making its ultimate determination. Thus, the presumption may fall by the wayside, as stated by the Board and indicated in Chester Haven and Umerley, although it does not necessarily do so. There was no legal error committed by the Board in its discussion on p.11 of the Board's Opinion.

More troubling than the Board's quote from Chester Haven and Umerley, about which Appellant complains, is the Board's failure to make any factual findings with regard to its denial of the Special Hearing Request for commercial parking in the residential zone. On p.12 of its Opinion, the Board states "In the case before us, the Petitioner's proposal fails to satisfy basic environmental standards. The proposed flood plain waiver and forest buffer variance run contrary to the legislative intent to keep the flood plain clear of development and to provide a forest buffer."

The Board never explained in its Opinion what it meant by "basic environmental standards" in relation to Appellant's property. Although there was testimony that the flood plain area was in close proximity to Mine Bank Run and the Gunpowder Falls and that detrimental run-off into a protected trout stream would be caused if parking were permitted, the Board made no reference to this evidence as a basis for denying Appellant's Special Use Permit for commercial parking, nor did the Board discuss any factual determinations with respect to steep slopes and topography and how, if at all, these site characteristics affected basic environmental standards.

Although the Board did not erroneously strip away the rebuttable presumption of the permissible nature of business parking in a residential zone, the Board did fail to support its denial by articulating the factual basis upon which that denial was based. Consistent with the Court of Appeals holding in Schultz v. Pritts, 291 Md. 1 (1981), the Board should consider the facts and circumstances of a proposed particular use at the location proposed to determine whether allowing such use would have an adverse effect above and beyond that inherently associated with such a use regardless of its location. Since the Board failed to articulate its factual findings with respect to the Special Use Permit for commercial parking beyond its denial of the flood plain waiver and forest buffer easement variance, the Board's decision in this regard cannot properly be reviewed.

It may well be that the Board denied the commercial parking use based solely on its denials of the flood plain waiver and forest buffer easement variance, which brings us to Appellant's remaining two issues. The factual basis for these denials must be identified by the Board. The mere statement on page 12 of the Board's Opinion that " the proposed flood plain waiver and forest buffer easement variance run contrary to the legislative intent to keep the flood plain clear of development and to provide a forest buffer" is a restatement of a general purpose of the regulations and is insufficient explanation of the Board's decision. Although

the Board had testimony and evidence regarding the subject property and the surrounding environment, it made no reference to any of this evidence on the waiver and variance issues in its Opinion. What consideration the Board gave to the evidence and what factual findings the Board made are not set forth.

Cross-Appellants, in their Response Memorandum, argue that forest buffers not only protect existing forest, but also retard storm water run-off, minimize storm water pollution and stream channel erosion and enhance recharge to the ground water. The problem with Cross-Appellants' position is that the Board referenced no such findings or considerations in connection with its decision nor does the Board relate these factors in any way to the site characteristics of Appellant's property or to its surrounding environment.

Cross-Appellants also argue in their Response Memorandum that both forest buffer easement variances and the flood plain waiver require a finding of "practical difficulty and exceptional hardship (other than economic)," and that Appellant cannot satisfy either of these requirements.

Section 26-670 of the Baltimore County Code, in discussing flood plain waivers, provides in subsection (a)(2) that waivers shall only be issued upon "a determination that failure to grant a waiver would result in exceptional hardship (other than economic) . . . ." Baltimore County Code Sec. 14-334 entitled "Variances" provides in relevant part as follows:

> (a) The director of the department may grant a variance:
>
> (1) For those projects or activities where strict compliance with
>
> the requirements of the regulations herein would result in practical difficulty or unreasonable hardship.

Although Cross-Appellants argue that Appellant cannot satisfy any of the hardship requirements in connection with his request for waiver and variance, this issue was never

addressed nor decided by the Board and is not an issue to be decided in the first instance on appeal. It is the Board's function to make the factual determination and to reach the conclusions regarding whether Appellant satisfies the hardship standards as to these issues as required. As pointed out on page 12 of Cross-Appellants' original Memorandum "in judicial review of agency action, the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency." See Cross-Appellant Brief at 12, citing United Steelworkers v. Beth Steel Corporation, 298 Md. 665, 679 (1984).

With regard to Cross-Appellants' first issue raised in their appeal, namely, that the Board erred in granting nonconforming use status to the existing parking at Appellant's business establishment, Cross-Appellants' argument deals with the expanded nature of the use of the commercial property and not with any change in the nonconforming use which has always been the parking of vehicles.

Cross-Appellants argue on page 27 of their original Memorandum that "the law does not allow a nonconforming use to change in use whatsoever. It limits any legal nonconforming use to a 25% increase in ground floor area. It does not allow expansion into a new area of the property, such as for a new parking lot."

In this case, however, the non-conforming parking use of Appellant's property has changed in no way "whatsoever". The Board found a nonconforming parking use on the south side of Cromwell Bridge Road which had been approved in 1991 and further found that parking for commercial use had long been in effect in front of and adjacent to Appellant's commercial building. There has been no nonconforming use change nor nonconforming use increase. The increase about which Cross-Appellants complain is an increase in the area of the commercial restaurant which was re-zoned in 1988 to business local zoning allowing the

commercial operation. None of the parking area was included in the BL zoning and the parking area merely continued as nonconforming use parking adjacent to Appellant's business operation.

The issue of Appellant's unilateral enlargement of the commercial area without first obtaining the necessary use permits did not change the nonconforming use status of the parking area. Without the grant of a special use for commercial parking in a residential zone or a parking variance, Appellant may well be required to reduce the size of his commercial operation. Appellant's expansion of the commercial use of his building did not increase the parking lot. The parking area was the same and it served the same purpose which supported the granting of its non-conforming use status in 1991 and the non-conforming use status granted in this appeal. No exception has been taken by Cross-Appellants to the Board's factual finding that the parking adjacent to the commercial use had long been in effect and, consequently, qualified for nonconforming use status.

Cross-Appellants' argument is really with the Board's decision to grant Appellant a parking variance by reducing Appellant's parking requirement from 73 spaces to his 39 nonconforming use parking spaces. Whether Appellant's expanded commercial use would be allowed to continue was clearly a decision for the Board in connection with Appellant's parking request. The Board could either deny Appellant's special use for commercial parking or the parking variance and require Appellant to reduce the size of his business in the commercial zone or it could grant either of Appellant's requests. The Board chose to grant the parking variance, which brings us to Cross-Appellants' second issue, that the Board erred in granting Appellant's request for a parking variance.

Although the Board recognized on page 12 of its Opinion the Court of Appeals decision in Cromwell v. Ward, 102 Md. App. 691 (1995), as setting forth the legal standards under

which a variance should be considered, the Board in its decision veered somewhat wide of the Cromwell Court's holding and the analysis provided by its author, the Hon. Glenn Harrell. The Board properly identified the two criteria which must be met before a variance may be granted, namely, (1) that special circumstances or conditions exist peculiar to the land or structure which is the subject of the variance request, and (2) that strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship. These are referred to as the "uniqueness" and "hardship" standards.

On page 13 of its Opinion, the Board addressed the uniqueness standard and found that, after elimination of consideration of the flood plain area of Appellant's land, Appellant's property is unique because of its topography. With the flood plain eliminated, and presumably the forest buffer easement area also, the Board found that the usable portions of Appellant's property, other than the non-conforming parking use residential land, were steeply sloping and unusable for parking. The Board found uniqueness of Appellant's site because, after elimination of Appellant's residentially zoned flood plain and forest buffer easement areas, the balance of Appellant's property is steeply sloping and unusable, and is surrounded on three sides by park land which will not be developed and cannot be purchased or used by Appellant for his commercial business.

The fallacy in the Board's finding is that it is not the topography of Appellant's land which limits the subject site from being fully adapted to commercial use in conformity with applicable zoning requirements. It is the circumstance that Appellant has no commercially zoned property other than the building itself on the subject site. Appellant has no commercial property on which to place parking for his commercial operation regardless of its topography. All of the land surrounding Appellant's commercial building is zoned residential.

Even considering the residential land, it is not the topography of the residential land which prevents Appellant from expanding his commercial use. As recognized by the Board in its Opinion on page 13, it is the subject property "aside from the flood plain area "(emphasis included) which causes the problem. That part of Appellant's residential property topographically usable for parking lies within the flood plain and forest buffer easement areas. The property needed for additional parking outside the flood plain and the forest buffer easement areas are steeply sloping and unusable for parking. Had the flood plain waiver and forest buffer easements variance been granted, and had the special hearing use permit for commercial parking in a residential zone been granted, the steep slopes and topography of Appellant's remaining land would in no way impact Appellant's expansion of his commercial operation. The Board's factual findings that the usable portions of Appellant's property outside the flood plain and forest buffer easement areas was steeply sloping and unusable for parking and surrounded on three sides by park land which could not be developed nor purchased or used, does not make Appellant's property unique and is insufficient to satisfy the first standard of Sec. 307 of the BCZR and the holding in Cromwell v. Ward, supra.

In the Cromwell opinion, Judge Harrell cited A. Eugene McQuillan, Municipal Corporations, Sec. 25.167 (3rd Ed. Rev. 1991) on page 719 of his Opinion.

> It is *fundamental* that the difficulties or hardships must be unique to justify a variance; they must be peculiar to the application of zoning restrictions *to particular property* and not general in character . . . [I]t is not uniqueness of the plight of the owner, but uniqueness of the land causing the plight, which is the criteria. If the hardship is common to the whole neighborhood, it may be ground for an exception or special use permit [if the statute so provides] . [T]he hardship [in order to justify a variance, however,] . . . must relate to the particular property of the applicant . . . .

Appellant's commercial property is surrounded by residential land, some of which is steeply sloping and some of which lies in the flood plain and forest buffer easement area. All

property owners, under such circumstances, would experience the same limitations on the size of their commercial operation and would require a flood plain waiver, forest buffer easement variance, and a special use permit for commercial parking in a residential zone. Appellant's situation is no different and his property is in no way unique. The Board's elimination from its consideration of all of Appellant's property excepting the steep slopes and topographically unfit land does not cause Appellant's property to become unique.

As to the "hardship" standard, the Board included its findings on page 13 of its Opinion.

> The Board finds that the subject property is of a commercial nature and, therefore, there is a presumption, not necessarily found in residential properties, that the owners have the property for the purpose of economic gain. The severe and unique limitations of the topography create a hardship in the expansion of the commercial use for which part of the property is zoned.
>
> As to the spirit and intent of the Baltimore County Zoning Regulations, the Board finds that the granting of the requested variance in the number of parking spaces limits the expansion of the commercial use and will not adversely affect the neighboring property.

What the Board meant in its Opinion by "As to the spirit and intent of the Baltimore County Zoning Regulations" is somewhat of a mystery to this Court in the context in which that phrase was used by the Board. The Court assumes that the Board meant that when the Baltimore County Council granted B.L. zoning in 1988 to the building envelope only, the Council not only intended that the property could be used for commercial purposes, and rebuilt in the event it burned down or was otherwise destroyed, but also intended that the commercial use would be expanded in the owner's discretion. Not only is this inconsistent with the language in Sec. 307.1 of the BCZR, "furthermore, any such variance shall be granted only if in strict harmony with the spirit and intent of . . . off street parking . . ., and only in such manner as to grant relief without injury to public health, safety and general welfare," it is also contradictory to the testimony which the Board quoted in its Opinion on page 8,

Mr. Gerber testified that, in 1988, it was a typical technique at the time to limit expansion and provide buffers to the neighborhood by zoning the building one type and the surrounding undeveloped property another. . . He opined that the technique was used here with the assumption that the parking adjacent to the commercial building be permitted.

Mr. Gerber recited that Mr. Sanders (Appellant) asked for B.L. zoning in 1988 because he was concerned that he would not be able to replace his building should it burn down or otherwise be destroyed. Expansion was not an issue at that time. (Emphasis supplied)

The only testimony before the Board on the spirit and intent of zoning in Appellant's case was provided by Norman Gerber. Rather than supporting the Board's conclusion with respect to the spirit and intent of the regulations, Mr. Gerber's testimony runs contrary to the Board's finding.

Returning to the "hardship" standard, the findings by the Board on page 13 of its Opinion present a number of legal issues. The first involves the Board's statement that there is a presumption that owners of commercial properties have their property for the purpose of economic gain and that this presumption is "not necessarily found in residential properties . . .". Not only would such a presumption as to commercial properties, if not applicable to residential properties, raise substantial equal protection issues, there is no testimony or basis in the record for the Board to have found such a presumption. Certainly owners of vacant residential land looking to development want to maximize the economic return on their investments. Even individual home owners who want to enhance their properties to make them more comfortable for living and more saleable when that event occurs, generally look to ultimate economic gain when buying, improving and selling their residential properties. There is simply no basis for the Board to have found any presumption respecting Appellant's commercial property. In zoning Appellant's building envelope B.L. in 1988,

it could only be presumed that the County Council intended that the building would be used for commercial purposes, as the building had been so used for many years prior to the 1988 comprehensive re-zoning process.

Before leaving the hardship issue, the Court must address whether a limitation on Appellant's ability to expand his commercial business could ever satisfy the unreasonable hardship standard. The Court of Appeals has stated that "to grant a variance, the Board must find from the evidence more than that the building allowed . . . would be convenient for or profitable to its owner." Kennerly v. Mayor and City Council of Baltimore, 247 Md. 601, 606 (1967). In addition, the Court of Special Appeals has stated that "[m]ere financial hardship or an opportunity to get an increased return from the property is not a sufficient reason for granting a variance." Green v. Bair, 77 Md. App. 144, 151 (1988), citing Anderson v. Board of Appeals, 22 Md. App. 28, 38-39 (1974); see also, Cromwell, supra, quoting Xanthos v. Board of Adjustment of Salt Lake City, 685 P.2d 1032, 37 (Utah 1984) ("Hardship is not demonstrated by economic loss alone . . . . Every person requesting a variance can indicate some economic loss. To allow a variance any time any economic loss is alleged would make a mockery of the zoning program.") Xanthos involved the building of a duplex on residential property which violated set back and parking requirements and is certainly an example of an effort to maximize the economic gain on residential property by the building of a duplex rather than a single family dwelling on the land. Just as legal hardship did not exist in Xanthos, it does not exist in Appellant's case.

For the reasons stated herein, the Board is hereby AFFIRMED as to the grant of nonconforming use status to the parking in front of and adjacent to the west side of Appellant's restaurant building, and is hereby REVERSED as to the grant of the parking variance to reduce the number of parking spaces required from 73 to 39, and is hereby REVERSED AND THE CASE IS REMANDED on the Board's decision to deny the flood

plain waiver, the forest buffer easement variance and the Petition for Special Hearing to permit commercial parking in a residential zone, with the Board to consider the flood plain waiver, forest buffer easement variance, and special hearing request for commercial parking in a residential zone based upon the record already before the Board consistent with this Opinion and Order. The costs of this Appeal shall be paid one-half by Appellant and one-half by Cross-Appellants.

JAMES T. SMITH, JR., JUDGE

July 27, 1995
DATE

JTS/ss
Copy: Scott G. Barhight, Esq.
David K. Gildea, Esq.
Peter M. Zimmerman, Esq.
Board of Appeals for Baltimore County
Court file

7/17/98

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY *

PETITION OF RONALD SANDERS *
2260 CROMWELL BRIDGE ROAD *
BALTIMORE, MARYLAND 21234 *

FOR JUDICIAL REVIEW OF THE DECISION OF CIVIL
THE COUNTY BOARD OF APPEALS * ACTION
OF BALTIMORE COUNTY No. 3-C-98-05437
Room 49, Old Courthouse, 400 Washing- *
ton Avenue, Towson, MD 21204 *

IN THE CASE OF: IN THE MATTER *
RONALD SANDERS - PETITIONER *
FOR A SPECIAL HEARING AND VARIANCE
ON PROPERTY LOCATED ON THE NORTHEAST *
SIDE OF CROMWELL BRIDGE ROAD, 78'
SOUTHWEST OF THE C/L OF LOCH RAVEN *
9TH ELECTION DISTRICT
4TH COUNCILMANIC DISTRICT *
CASE NOS. 96-168-SPHA and 97-332-SPH
*

* * * * * * * * * * * * *

PROCEEDINGS BEFORE THE ZONING COMMISSIONER AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now come Kristine K. Howanski, Lawrence M. Stahl, and Margaret Worrall, constituting the County Board of Appeals of Baltimore County, and in answer to the Petition for Judicial Review directed against them in this case, herewith return the record of proceedings had in the above-entitled matter, consisting of the following certified copies or original papers on file in the Department of Permits and Development Management and the Board of Appeals of Baltimore County:

ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT OF BALTIMORE COUNTY

No. 96-168-SPHA

October 17, 1995	Petitions for Special Hearing and Variance filed by Charles E. Brooks, Esquire, on behalf of Ronald Sanders - SPH /to allow commercial parking in a residential zone; to amend a previously approved site plan in Case No. 91-256-SPH to reflect the proposed parking arrangement and existing improvements on the site; to confirm an existing parking area as

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CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

(cont'd 10/17/95)	nonconforming; and in the alternative, to approve a modified parking plan; and VAR /to permit a reduction in the required number of parking spaces from 72 to 39 spaces.
November 9, 1995	Publication in newspaper.
November 17	Certificate of Posting.
November 22	ZAC Comments.
November 29	Hearing held on Petition by the Zoning Commissioner.
July 30, 1996	Order of the Zoning Commissioner in which Petition for Special Hearing was GRANTED with restrictions in part, and DENIED in part; Petition for Variance is DENIED.
August 28	Notice of Appeal filed by Leslie M. Pittler, Esquire, on behalf of Lillian D. Jenifer and the Long Green Valley Association.
August 29	Notice of Appeal filed by Charles E. Brooks, Esquire, on behalf of Ronald H. Sanders.
No. 97-332-SPH	
February 7, 1997	Petition for Special Hearing filed by Charles E. Brooks, Esquire, on behalf of Ronald Sanders, for approval of a waiver to permit construction of a parking lot in a riverine floodplain.
February 20	Publication in newspaper.
March 11	ZAC Comments.
	Certificate of Posting.
March 14	Hearing held on Petition by the Zoning Commissioner.
May 13	Order of the Zoning Commissioner in which Petition for Special Hearing was GRANTED with restrictions.
June 12	Notice of Appeal filed by Leslie M. Pittler, Esquire, on behalf of Lillian D. Jenifer, Protestant.

96-168-SPHA and 97-332-SPH

June 18, 1997	Letter from Charles Brooks requesting consolidation of Case No. 96-168-SPHA and Case No. 97-332-SPH, both to be heard at one hearing on assigned date of July 9, 1997.
July 9	Hearing begun by the Board; continued by agreement of counsel.
November 19	Hearing before the Board of Appeals (Day #1).
December 10	Hearing before the Board of Appeals (Day #2 - concluded).
January 9, 1998	People's Counsel's Memorandum filed.
January 12	Petitioner's Memorandum of Proposed Findings of Fact and Conclusions of Law filed by M. Spicer on behalf of Petitioner, Ronald H. Sanders.
February 3	Open deliberation conducted by the Board.
May 1	Opinion and Order issued by the Board; Petition for Special Hearing is DENIED; nonconforming use status to the parking is GRANTED; Petition for Variance is GRANTED with restrictions.
May 29	Petition for Judicial Review filed in the Circuit Court for Baltimore County by G. Scott Barhight, Counsel for Ronald Sanders.
June 5	Copy of Petition for Judicial Review received by the Board of Appeals from the Circuit Court for Baltimore County.
June 9	Certificate of Notice sent to interested parties.

Sanders Exhibit Nos. 1 -Sign-in sheet of people in favor of Sanders and physically in attendance
2 -Photo - 1937 - Sanders Property

Petitioner's Exhibit Nos. A.1-25-SH variance exhibits 96-168-SPHA
B.1-6-Petition for SH exhibits 97-332-SPH
1 -Sign-in sheet - support of Petitioners
2 -Plat -"Sanders Corner"
3 -Proposed comm. pkg plat approved by ZC
4 -Plat showing modifications to original proposed rear pkg lot supplemental plan

(cont'd Pet. Exhibits)

5 -Letter to Jos. Larson from Chas. Olsen 1/23/97
6 -Photographic Map NE120
7 -Photographic Map NE120 enlarged
8 -Rec. & Pks. map - Find Master Plan - Cromwell Valley Park
9 -Photograph of B. City access dirt road to mussel station
10 -Photograph of mussel station
11 -Photograph taken from deck of restaurant looking north
12 -Photo of slope toward mussel access rd
13 -Photo on edge of property toward Jenifer's house looking west
14 -Sanders petition in support
15 -Jan. 27, 1997 to interested citizens from John Weber III
16 -Letter to DEPRM from DED- Feb. 4, 1997
17 -Letter & study from KCW, Inc. to B. Cty, Public Works Jan. 3, 1996
18 -May 28, 1997 - KCW Inc. to B.Cty DEPRM
19 -July 15, 1997 DEPRM to Howe letter
20 -Richard Moore C.V.
21 -Wells & Assoc. Traffic compilations - Accidents 1993-1996
22 -Restrictive Covenant Agreement Oct. 10, 1988
23 -Feb. 26, 1986 letter to Sanders from Jenifer

People's Counsel Exhibit Nos.

1-1988 Issue File for CZMP 6-087
2-1988 Council Rezoning Log, with Issue 6-087
3-October 13, 1988 Council Minutes
4-February 5, 1990 Master Plan (Pages 64, 106)
5-March 20, 1991 Zoning Commissioner Opinion
6-1991-95 Building permit applications, summaries, printouts
7-1996 1"=200' scale zoning map 12D (Loch Raven Reservoir area /Cromwell Bridge)
8-1996 1"=1000' scale zoning map 3C (Towson)
9-Topographic map 12-D (prep. 1953)
10-Aerial Photo map 12-D (flown 1986)
11-ADC Road map
12-Md Dept of Ass & Taxation property info. printout (July 8, 1987)
13-Md. Dept of Ass & Taxation tax map

July 17, 1998 Transcript of testimony filed.

July 17, 1998 Record of Proceedings filed in the Circuit Court for Baltimore County.

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Respectfully submitted,

Charlotte E. Radcliffe

Charlotte E. Radcliffe, Legal Secretary
County Board of Appeals of Baltimore County, Room 49, Basement - Old Courthouse
400 Washington Avenue
Towson, MD 21204 (410) 887-3180

cc: ✓G. Scott Barhight, Esquire
Ronald Sanders
Leslie Pittler, Esquire
Lillian Jenifer
People's Counsel for Baltimore County
Virginia W. Barnhart, County Attorney

6/9/98

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY

PETITION OF RONALD SANDERS
2260 CROMWELL BRIDGE ROAD
BALTIMORE, MARYLAND 21234

FOR JUDICIAL REVIEW OF THE DECISION OF
THE COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY
Room 49, Old Courthouse, 400 Washington Avenue, Towson, MD 21204

IN THE CASE OF: IN THE MATTER
RONALD SANDERS - PETITIONER
FOR A SPECIAL HEARING AND VARIANCE
ON PROPERTY LOCATED ON THE NORTHEAST
SIDE OF CROMWELL BRIDGE ROAD, 78'
SOUTHWEST OF THE C/L OF LOCH RAVEN
9TH ELECTION DISTRICT
4TH COUNCILMANIC DISTRICT
CASE NO. 97-332-SPH

CIVIL
ACTION
No. 3-C-98-05437

CERTIFICATE OF NOTICE

Madam Clerk:

Pursuant to the provisions of Rule 7-202(e) of the Maryland Rules of Procedure, Kristine K. Howanski, Lawrence M. Stahl, and Margaret Worrall, constituting the County Board of Appeals of Baltimore County, has given notice by mail of the filing of the Petition for Judicial Review to the representative of every party to the proceeding before it; namely, G. Scott Barhight, Esquire, WHITEFORD, TAYLOR & PRESTON L.L.P., 210 West Pennsylvania Avenue, Towson, Maryland 21204-4515, Counsel for Petitioner; Ronald Sanders, 2260 Cromwell Bridge Road, Baltimore, MD 21234, Petitioner; Leslie M. Pittler, Esquire, 29 West Susquehanna Avenue, Suite 610, Towson, Maryland 21204, and Peter Max Zimmerman, PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, 400 Washington Avenue, Room 47, Towson, MD 21204; a copy of which Notice is attached hereto and prayed that it may be made a part hereof.

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CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

Charlotte E. Radcliffe

Charlotte E. Radcliffe, Legal Secretary
County Board of Appeals, Room 49 -Basement
Old Courthouse, 400 Washington Avenue
Towson, MD 21204 (410) 887-3180

I **HEREBY CERTIFY** that a copy of the foregoing Certificate of Notice has been mailed to G. Scott Barhight, Esquire, WHITEFORD, TAYLOR & PRESTON L.L.P., 210 West Pennsylvania Avenue, Towson, Maryland 21204-4515, Counsel for Petitioner; Ronald Sanders, 2260 Cromwell Bridge Road, Baltimore, MD 21234, Petitioner; Leslie M. Pittler, Esquire, 29 West Susquehanna Avenue, Suite 610, Towson, Maryland 21204, and Peter Max Zimmerman, PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, 400 Washington Avenue, Room 47, Towson, Maryland 21204, this 9th day of June, 1998.

Charlotte E. Radcliffe

Charlotte E. Radcliffe, Legal Secretary
County Board of Appeals, Room 49 -Basement
Old Courthouse, 400 Washington Avenue
Towson, MD 21204 (410) 887-3180

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180

June 9, 1998

Leslie M. Pittler, Esquire
29 W. Susquehanna Avenue, Suite 610
Towson, MD 21204

RE: Civil Action No. 3-C-98-05437
RONALD SANDERS

Dear Mr. Pittler:

Notice is hereby given, in accordance with the Maryland Rules of Procedure, that a Petition for Judicial Review was filed on May 29, 1998, in the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter. Any party wishing to oppose the petition must file a response within 30 days after the date of this letter, pursuant to Rule 7-202(d)(2)(B).

Please note that any documents filed in this matter, including, but not limited to, any other Petition for Judicial Review, must be filed under Civil Action No. 3-C-98-05437.

Enclosed is a copy of the Certificate of Notice, which has been filed in the Circuit Court.

Very truly yours,

Charlotte E. Radcliffe

Charlotte E. Radcliffe
Legal Secretary

Enclosure

c: Lillian Jennifer
Charlotte W. Pine
Carol Trela /Long Green Valley
Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.
People's Counsel for Baltimore County
Lawrence E. Schmidt /ZC
Pat Keller /Planning
Arnold Jablon, Director /PDM
Virginia W. Barnhart, Co. Atty

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County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180

June 9, 1998

G. Scott Barhight, Esquire
WHITEFORD, TAYLOR & PRESTON
500 Court Towers
210 W. Pennsylvania Avenue
Towson, MD 21204-4515

RE: Civil Action No. 3-C-98-05437
RONALDS SANDERS - Petitioner

Dear Mr. Barhight:

In accordance with Rule 7-206(c) of the Maryland Rules of Procedure, the County Board of Appeals is required to submit the record of proceedings of the petition for judicial review which you have taken to the Circuit Court for Baltimore County in the above-entitled matter within sixty days.

The cost of the transcript of the record must be paid by you. In addition, all costs incurred for certified copies of other documents necessary for the completion of the record must also be at your expense.

The cost of the transcript, plus any other documents, must be paid in time to transmit the same to the Circuit Court within sixty days, in accordance with Rule 7-206(c).

Enclosed is a copy of the Certificate of Notice which has been filed in the Circuit Court.

Very truly yours,

Charlotte E. Radcliffe

Charlotte E. Radcliffe
Legal Secretary

Enclosure

c: Ronald Sanders

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5/29/98

IN THE MATTER OF THE
APPLICATION OF
RONALD SANDERS - PETITIONER
FOR SPECIAL HEARING AND
VARIANCE ON PROPERTY LOCATED
ON THE NORTHEAST SIDE OF
CROMWELL BRIDGE ROAD, 78'
SOUTHWEST OF THE C/L OF LOCH
RAVEN ROAD (2260 CROMWELL
BRIDGE ROAD)

CASE NOS.: 96-168-SPHA and
97-332-SPH

APPEAL FROM THE BALTIMORE
COUNTY BOARD OF APPEALS

* IN THE

* CIRCUIT COURT

* FOR

* BALTIMORE COUNTY

*

* Case No: C-98-5437

*

*

*

* * * * * * * * * * *

Case: 03-C-98-005437
CF-Civil Fili 80.00
Appearance Fee 10.00
TOTAL $90.00

Current: Barhight and
ronald sanders
Receipt #19980010473
Cashier: KK CCBACOX001
06/01/98 Board of Appeals of

PETITION FOR JUDICIAL REVIEW

Petitioner, Ronald Sanders, by and through his attorneys, G. Scott Barhight and Whiteford, Taylor & Preston, L.L.P., pursuant to Maryland Rules 7-202, et seq., hereby requests judicial review of portions of the decision of the County Board of Appeals of Baltimore County ("the Board") dated May 1, 1998, granting in part and denying in part the zoning relief requested therein by the Petitioner, and states:

1. Petitioner was a party to the proceedings before the Board in this matter.

2. The Board's order issued May 1, 1998, in the above-referenced matter, denied Petitioner's Petition for Special Hearing seeking (1) approval of a waiver to permit construction of a parking lot in a riverine flood plain, (2) approval of a waiver of flood plain regulations, and (3) approval of a waiver of the forest buffer requirements.

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cc: ITP001 06/02/98

3. The Board's order issued May 1, 1998, in the above-referenced matter, granted nonconforming use status to the parking adjacent to the west side of Petitioner's building and in the front of Petitioner's building, and granted the Petitioner's request for variance to reduce the number of parking spaces required from 73 to 39, subject to four restrictions.

4. Petitioner is not challenging in his Petition for Judicial Review the Board's decision to grant nonconforming status to the buildings' adjacent parking spaces, or its decision to grant, subject to 4 restrictions, the Petitioner's request for a variance to reduce the number of required parking spaces from 73 to 39.

5. Petitioner is challenging in his Petition for Judicial Review, the Board's decision in its May 1, 1998 Opinion and Order to deny the Petitioner's Petition for Special Hearing seeking (1) approval of a waiver to permit construction of a parking lot in a riverine flood plain, (2) approval of a waiver of flood plain regulations, and (3) approval of a waiver of the forest buffer requirements.

6. Petitioner asserts that the Board's decision denying the Petitioner's Petition for Special Hearing seeking (1) approval of a waiver to permit construction of a parking lot in a riverine flood plain, (2) approval of a waiver of flood plain regulations, and (3) approval of a waiver of the forest buffer requirements is arbitrary, unreasonable, and capricious, and is unsupported by law or fact.

WHEREFORE, the Petitioner, Ronald Sanders, respectfully requests, as explained

and set forth hereinabove, judicial review of the Board's decision in its Opinion and Order dated May 1, 1998, and issued in the above-referenced case.

G. Scott Barhight
Whiteford, Taylor & Preston L.L.P.
210 West Pennsylvania Avenue
Towson, Maryland 21204-4515
(410) 832-2000

Attorney for Petitioner,
Ronald Sanders

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May, 1998, a copy of the foregoing Petition for Judicial Review was mailed first class, postage prepaid to:

Leslie M. Pittler, Esq.
29 West Susquehanna Avenue
Towson, Maryland 21204

Peter Max Zimmerman, Esq.
People's Counsel for Baltimore County
Room 47, Courthouse
400 Washington Avenue
Towson, Maryland 21204

G. Scott Barhight

5/1/98

IN THE MATTER OF	*	BEFORE THE
THE APPLICATION OF		
RONALD SANDERS -PETITIONER	*	COUNTY BOARD OF APPEALS
FOR SPECIAL HEARING AND		
VARIANCE ON PROPERTY LOCATED	*	OF
ON THE NORTHEAST SIDE CROMWELL		
BRIDGE ROAD, 78' SOUTHWEST OF	*	BALTIMORE COUNTY
THE C/L OF LOCH RAVEN ROAD		
(2260 CROMWELL BRIDGE ROAD)	*	CASE NO. 96-168-SPHA
9TH ELECTION DISTRICT		and
4TH COUNCILMANIC DISTRICT	*	CASE NO. 97-332-SPH

* * * * * * * * *

O P I N I O N

Leslie Pittler, Esquire, filed a timely appeal on behalf of Lillian D. Jenifer from the Zoning Commissioner's decision, dated May 13, 1997. Said Order granted the Petition for Special Hearing to the Petitioner, Ronald Sanders, of a waiver to permit construction of a parking lot in a riverine flood plain, pursuant to Section 500.6 of the Baltimore County Zoning Regulations (BCZR), Section 517.2 (510.2) of the Building Code, and Sections 26-276, 26-670, and 26-172(a)(3) of the Baltimore County Code (BCC), and granted an amendment to the previously approved site plan in Case No. 96-168-SPHA to reflect the proposed parking configuration, subject to the Petitioner obtaining a variance from the internal standards of the Department of Environmental Protection & Resource Management (DEPRM) regarding forest buffers, as set forth in Title 14 of the BCC.

Further, the Zoning Commissioner's Order set forth that the Petitioner shall not, in the future, increase the square footage of the commercial use on this property without first obtaining approval through a Petition for Special Hearing to amend the site plan and the requisite public hearing for same, and the site plan

must reference this case and the restrictions set forth in the Order.

The subject property is known as 2260 Cromwell Bridge Road, at the corner of Loch Raven Road. The owner of the property is the Petitioner, Ronald Sanders.

A de novo hearing before the County Board of Appeals began on July 9, 1997. Charles E. Brooks, Esquire, represented the Petitioner, Ronald Sanders. Leslie M. Pittler, Esquire, appeared on behalf of the Appellant /Protestant, Lillian Jenifer. Peter M. Zimmerman, People's Counsel for Baltimore County, also participated in these proceedings.

Following opening statements by Mr. Brooks and Mr. Zimmerman, Mr. Pittler made a Motion to suspend the hearing because the condition in the Zoning Commissioner's Order requiring the variance from DEPRM relative to a forest buffer had not been fulfilled. Mr. Brooks agreed that this requirement was "in the works," but the variance had not been received to date.

The Board, by agreement of Counsel, suspended the hearing until DEPRM made their decision. The Board acknowledged, however, the persons in attendance in favor of the Petitioners, and agreed to take the testimony of J. Ralph Bridges on the issue of nonconforming use parking because Mr. Bridges is elderly and had made a significant effort to attend on this day.

Mr. Bridges testified that he had visited the ice cream store at Sanders Corner since childhood, a span of time he estimated at more than 60 years. He indicated that visitors to the store parked

on both sides of Cromwell Bridge Road for as long as he could recall. Mr. Bridges confirmed that Sanders' Exhibit #2 (placed in evidence on Day #1, July 9, 1997), a 1937 photo of the subject site, was consistent with what he remembered. Mr. Bridges also remembered that the store portion of the building was located on the west side while the east side was an apartment. He described an increase in tables from eight in the ice cream store to about 30 total today to serve a full-scale restaurant. Mr. Bridges commented that at one time a post office also existed in the building, but he could not remember when that use ceased.

At the close of Mr. Bridges' testimony, the Board granted Mr. Pittler's Motion and suspended the hearing until a decision from DEPRM on the forest buffer was rendered.

On November 19, 1997, the hearing resumed. Mr. Brooks confirmed that a decision had been received from DEPRM granting a variance from the forest buffer requirements.

Elizabeth H. Littleton, a neighbor who lives on Hoover Lane across from Sanders Corner, testified that she had lived in the area for all of her 76 years. She had lived in the Sanders apartment in the 1950s, and she said that the Sanders building had once been a saloon and a dance hall.

Joseph Larson of Spellman, Larson & Associates was accepted by the Board as an expert in engineering. Mr. Larson testified that he had prepared the plats for the subject property showing that 1.2 acres on the east side of Loch Raven Road form a parking lot, and .9 acre forms the existing restaurant. The restaurant fronts on

Cromwell Bridge Road.

The actual building (4,458 square feet) and some of the front parking (the building footprint) are zoned B.L. All of the property surrounding the restaurant building is zoned D.R. 1. Petitioner's Exhibit #3 shows the proposed commercial parking in a residential zone, with modifications (Petitioner's Exhibit #4) to change the entrance to conform to Baltimore County flood plain waiver conditions. A letter (Petitioner's Exhibit #5) from the Department of Public Works indicates non-opposition to the proposed parking lot.

Mr. Larson further testified that the proposed parking lot meets all the requirements of Section 409.8(b) for parking in residential zones. It adjoins the street, will be vehicular only, no buses, no service use, and street lights as required already exist. Furthermore, according to Mr. Larson, the impact on the neighborhood will be negligible in that the land to the east, north and west are in public use as part of the Gunpowder and Cromwell Valley Parks. To the south, the land slopes upward at a severe grade, and although zoned residential, is unbuildable. Petitioner's Exhibits #6 and #7 show on a photographic map that the closest residence is that of Appellant, Lillian Jenifer, approximately 1,900 feet away in a westerly direction.

In response to Mr. Zimmerman, Mr. Larson broke down the square footage of the building in question. He indicated that the old ice cream store had occupied 1,250 square feet. The enclosure of the wooden deck/rear addition added another 2,000 square feet, plus 400

square feet for the front porch, and another 900 square feet in the converted apartment, for a total of approximately 4,550 square feet now in commercial use. The new operation, therefore, is nearly four times the space of the initial ice cream store/carryout.

With regard to the parking, Mr. Larson stated that in 1991 the subject property had been granted 19 additional spaces across Cromwell Bridge Road as a nonconforming use. He also admitted that the Petitioner had not received the appropriate approval necessary to construct the additions or conversion of the apartment to commercial use. Further, if the entire site were zoned B.L., rather than the building alone, the parking question would be moot, except for the flood plain and forest buffer requirements, and the required number of spaces.

The Petitioner, Ronald Sanders, was next to testify. Mr. Sanders indicated that his parents had owned the property since 1956, and that he had inherited it in 1986 upon the death of his father. The property had all been zoned residential in 1986 even though it had been used for commercial purposes for over a century. In the 1988 Comprehensive Zoning Map Process, Mr. Sanders attempted to have the zoning on the entire parcel reclassified to B.L. The County Council decision was to rezone the building footprint B.L. but to leave D.R. 1 on the remaining land.

Mr. Sanders described a subsequent arrangement with Baltimore City wherein they put a gravel roadway in the area where he is requesting parking in the flood plain in order to access their mussel counting equipment. Petitioner's Exhibits #9 through #12

show photos of the flood plain area.

According to Mr. Sanders, the hours of operation of the restaurant are 8:00 a.m. to 10:00 p.m. on weekdays and 8:00 a.m. to 11:00 p.m. on weekends, with 26 tables inside the restaurant and several on the deck. The deck is used only in good weather, about 40 percent of the year. The restaurant has a liquor license and is fully handicapped-accessible.

On questioning from Mr. Zimmerman, Mr. Sanders indicated that the addition/conversion did not exist in 1986 when he took over the business. It was 1991-92 when the addition was constructed. At that time he had sufficient parking to meet the requirements. Upon conversion of the apartment and porch enclosure, he could no longer meet the number of spaces needed.

The next witness was Edwin S. Howe III of KCW Associates. Mr. Howe was accepted by the Board as an expert engineer in hydrology and environmental impact. Mr. Howe performed a hydraulic study of the flood plain on January 3, 1996, and submitted same to DEPRM. On May 28, 1997, he submitted a request for forest buffer and flood plain variances including an impact study which he performed. On July 15, 1997, the Zoning Commissioner approved the variances with conditions of his Order including forest buffer mitigation. Mr. Howe testified that 17,000 square feet of the Sanders property, approximately one-third acre, exist within the 100-year flood plain. He also noted that the parking lot proposed would impact 1,000 feet of the forest buffer area. The afforestation as required by Baltimore County had not been determined to date, but

it would not be on site, and a grading permit for the parking would not be granted until the mitigation location is determined.

Richard Moore of Wells & Associates was accepted by the Board as an expert in traffic. Mr. Moore testified that he made a study of the subject site. On January 16, 1997, he reviewed the site access, and he reviewed traffic data for 1993, 1994, 1995 and 1996. He testified that there were only seven accidents in four years near the intersection of Cromwell Bridge and Loch Raven Roads. This is less than the State average for rural roads, according to Mr. Moore. He also indicated that Baltimore County had approved the access for the proposed parking lot.

Mr. Moore concluded that allowing commercial parking on the residential portion of the subject site, including the riverine area, actually would improve the current situation in that the five spaces in front of the building would be removed, thereby eliminating the need for customers to back into Cromwell Bridge Road when leaving the restaurant. Further, a walkway from the proposed parking lot in the flood plain directly to the restaurant would eliminate the need for customers to walk along the side of Loch Raven Road which has no sidewalks. Mr. Moore opined that,as an ice cream store, there was more coming and going than as an established sit-down restaurant.

Norman Gerber was accepted by the Board and testified on behalf of the Petitioner as an expert in urban/regional planning. Mr. Gerber indicated that he studied the property relative to commercial parking in a residential zone and parking in a flood

plain. He concluded that the subject property is unique in that the stream to the rear, the steep slope to the front and the public land surrounding limit the parking to precisely what is on the plat. He also indicated that, since no other property could ever be available, the Petitioner is confronted with practical difficulty and economic hardship. Furthermore, the use of the subject property would not in any way impact the area negatively, thereby complying with the requirements of Section 502.1 and the spirit and intent of the law.

Mr. Gerber testified that, in 1988, it was a typical technique of the time to limit expansion and provide buffers to the neighborhood by zoning the building one type and the surrounding undeveloped property another. This was before setbacks and landscape requirements were in existence in County law. He opined that the technique was used here with the assumption that the parking adjacent to the commercial building would be permitted.

Mr. Gerber recited that Mr. Sanders asked for B.L. zoning in 1988 because he was concerned that he would not be able to replace his building should it burn down or otherwise be destroyed. Expansion was not an issue at that time. He said that some citizens did oppose the change in zoning in 1988, but the Cromwell Valley Park did not exist and there was general concern about development in the rural area. Furthermore, the laws governing flood plain protection did not go into effect until 1992-93.

The Appellant /Protestant, Lillian D. Jenifer, testified that she lives at Cromwell Bridge and Satyr Hill Roads and has lived

there since 1961. With respect to the subject property, she objects to parking in the rear of the site in the flood plain area, close to Minebank Run and Gunpowder Falls. She cites damage from runoff into a protected trout stream if parking is permitted. She opined that, except for its commercial use in a residential area, the Sanders property is not unique, but exactly like all other parcels bordering the stream and subject to flooding.

Ms. Jenifer also spoke of concerns about traffic, especially the sight distance for someone turning left onto Cromwell Bridge Road from Loch Raven Road. She noted seeing restaurant customers using the flood plain area for parking even though that permission has not been secured. She felt that the hardship described by Mr. Sanders was self-imposed by expanding the commercial use without regard for parking requirements.

Cathy Gabriel presented authorization from the Long Green Valley Association to represent that group before the Board. She testified that the boundaries of the association, which has approximately 1,900 members, include the subject property. The Long Green Valley Association is opposed to any further commercialization of the area. Ms. Gabriel also pointed out that Cromwell Bridge Road is narrow, winding, and hilly with few shoulders. Nevertheless, it is heavily traveled as a commuter route. Therefore, the group is also concerned about safety and traffic along this road.

She further cited the Baltimore County Master Plan 1989-2000, p. 106 (People's Counsel's Exhibit #4), which spoke of the County's

intention to preserve the rural character of this area. In addition, the association is opposed to parking vehicles in the flood plain which would be detrimental to the water quality in the adjacent stream as a result of runoff.

Carol Trela, secretary of the Long Green Valley Association, spoke on her own behalf as a neighbor who lives on Patterson Road, approximately 5-1/2 miles from the subject property. Ms. Trela feels that allowing commercial parking on a residentially-zoned property and in a flood plain is a bad precedent. Further, the property owner was not new to the constraints of the property and should have considered the parking problems before expanding the business.

Counsel for the Petitioner, Mr. Brooks, challenged People's Counsel's standing with regard to environmental issues. The Board asked for legal argument on this issue at the end of the hearing, and agreed to rule at that time. The Board finds as a matter of fact that there is valid standing for the People's Counsel in environmental matters in this case. It is the duty of People's Counsel to defend the zoning maps and the Baltimore County Master Plan. The issues of commercialization in a designated rural area plus incursions into the flood plain and/or forest buffer are integral to the Master Plan and to the case before us.

With regard to the specific issue before us, the Petitioner requests commercial parking in a residential zone, accompanied by a waiver of flood plain and forest buffer requirements. In the alternative, the Petitioner requests a variance to reduce the

parking requirement from 73 spaces to 39. Mr. Sanders testified that 39 spaces will serve the needs of the current restaurant.

Extensive testimony was received as to the long-lived commercial use of the property as a local ice cream store and carry out, plus supporting the request that the subject site be rezoned from residential to commercial to reflect the existing commercial use. Evidence is uncontradicted that the County Council decided in 1988 to split-zone the property so that the footprint of the building would be zoned for commercial use (B.L.), but the surrounding parcel would remain residential (D.R. 1). Inasmuch as there is no other commercially-zoned property in this rural area, the Board finds that the County Council wished to permit the current business to exist but to limit its expansion.

The Petitioner has received nonconforming use status for parking in the residential zone on the south side of Cromwell Bridge Road and that is not before us today. Further, evidence is convincing that parking for the commercial use has long been in effect in the front of and adjacent to the building on the west side along Cromwell Bridge Road.

With regard, however, to the request for parking in the flood plain area, as the Petitioner's memorandum states, parking facilities in residential zones are in the nature of special exception use. Where special exceptions, as conditional uses, require separate waivers and variances, "...the [rebuttable] presumption that a conditional use is permitted may well fall by the wayside." Chester Haven L.P. v. County Board of Appeals, 103

Md.App. 324, at 336 (1995); Umerley v. People's Counsel, 108 Md.App. 497, at 510-11 (1996). In the case before us, the Petitioner's proposal fails to satisfy basic environmental standards. The proposed flood plain waiver and forest buffer variances run contrary to the legislative intent to keep the flood plain clear of development and provide a forest buffer.

The Board therefore will deny the Petitioner's request for waivers of the flood plain and forest buffer regulations to permit parking in a riverine area.

The Petitioner's alternative request is for a variance to reduce the required number of parking spaces from 73 to 39.

Section 307 of the BCZR permits granting of a variance upon certain terms and conditions which, in pertinent part in this case, allow a variance where special circumstances or conditions exist that are peculiar to the land that is the subject of the variance requested, and where strict compliance with the zoning regulations would result in practical difficulty or unreasonable hardship.

Under the Court of Special Appeals decision in Cromwell v. Ward, 102 Md.App. 691 (1995), which sets forth the legal standards under which a variance may be granted, the Board of Appeals, hearing the case de novo, is given the task of interpreting regulations and statutes where issues are debatable in the light of the law. The first burden on the Petitioner for variance is to prove that the property is unique. This standard must be met before other parts of the variance requirements can properly be considered.

Upon consideration of the testimony and evidence offered during this hearing, the Board finds that the subject property, aside from the flood plain area, is unique because of its topography. The area surrounding the usable portions of the property is steeply sloping and unusable for parking. In addition, the subject property is surrounded on three sides by park land which will not be developed, nor can it be purchased or used by the Petitioner to satisfy his needs.

Having found that the property meets the first prong of the Cromwell v. Ward standard, namely uniqueness, the Board then considered the issue of practical difficulty or unreasonable hardship. The Board finds that the subject property is of a commercial nature and, therefore, there is a presumption, not necessarily found in residential properties, that the owners have the property for the purpose of economic gain. The severe and unique limitations of the topography create a hardship in the expansion of the commercial use for which part of the property is zoned.

As to the spirit and intent of the Baltimore County Zoning Regulations, the Board finds that the granting of the requested variance in the number of parking spaces limits the expansion of the commercial use and will not adversely affect the neighboring properties.

In summary, the Board grants nonconforming use status to the parking adjacent to the west side of the building and in the front of the building. We grant a variance to reduce the number of

parking spaces required from 73 to 39; we deny any waiver of the flood plain regulations; we deny the Petitioner's request for a waiver of the forest buffer requirements; and we deny the Petitioner's proposal for a parking lot in the riverine area.

In addition, the Petitioner shall not, in the future, increase the square footage of the commercial use on this property without first obtaining approval through a Petition for Special Hearing to amend the site plan and the requisite public hearing for same, and the site plan must reference this case and the restrictions set forth in the Order.

O R D E R

THEREFORE, IT IS THIS 1st day of May, 1998 by the County Board of Appeals of Baltimore County

ORDERED that the Petition for Special Hearing seeking approval of a waiver to permit construction of a parking lot in a riverine flood plain; approval of waiver of flood plain regulations; and approval of a waiver of the forest buffer requirements be and the same is hereby **DENIED**; and it is further

ORDERED that nonconforming use status to the parking adjacent to the west side of the building and in the front of the building is **GRANTED**; and it is further

ORDERED that Petitioner's request for variance to reduce the number of parking spaces required from 73 to 39 be and is hereby **GRANTED**; subject to the following restrictions:

1. The Petitioners may apply for their building permit and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this

time is at their own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, the relief granted herein shall be rescinded.

2. The Petitioner shall not, in the future, increase the square footage of the commercial use on this property without first obtaining approval through a Petition for Special Hearing to amend the site plan approved herein and the requisite public hearing for same.

3. Within 30 days of the date of this Order, the Petitioner shall file a revised site plan with the Department of Permits & Development Management reflecting the restrictions cited herein.

4. When applying for any permits, the site plan filed must reference this case and set forth and address the restrictions of this Order.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Kristine K. Howanski, Chairman

Lawrence M. Stahl

Margaret Worrall

County Board of Appeals of Baltimore County
OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180

May 1, 1998

Leslie M. Pittler, Esquire
Suite 610, 29 W. Susquehanna Avenue
Towson, MD 21204

Charles E. Brooks, Esquire
BROOKS & SPICER
610 Bosley Avenue
Towson, MD 21204

RE: Case No. 97-332-SPH /Case No. 96-168-SPHA
Ronald Sanders -Petitioner

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the County Board of Appeals of Baltimore County in the subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the Maryland Rules and Procedure, **with a photocopy provided to this office concurrent with filing in Circuit Court.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Charlotte E. Radcliffe

Kathleen C. Bianco
Administrator

encl.

cc: Ronald Sanders
Lillian Jenifer
Charlotte W. Pine
Carol Trela /Long Green Valley
Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.
People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director/PDM
Virginia W. Barnhart, County Attorney

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BALTIMORE COUNTY, MARYLAND

Inter-Office Correspondence

TO: K. Howanski
L. Stahl
M. Worrall

DATE: January 13, 1998

FROM: Kathi

SUBJECT: In the Matter of Ronald Sanders -Petitioner; Case No. 96-168-SPHA and 97-332-SPHA / Closing Briefs and Findings of Fact as filed by Parties

Attached for your review and information are copies of the following documents which were filed in the subject matter, as requested by the Board at the conclusion of its hearing on December 10th:

1) People's Counsel's Memorandum filed January 9, 1998 by Peter Max Zimmerman, People's Counsel for Baltimore County, and Carole S. Demilio, Deputy People's Counsel.

2) Petitioner's Memorandum of Proposed Findings of Fact and Conclusions of Law filed January 12, 1998 by Malcolm F. Spicer, Esquire, on behalf of Ronald H. Sanders.

Deliberation in this matter is scheduled for Tuesday, February 3, 1998 at 9:30 a.m.

Should you have any questions regarding this case, or any attachment, etc., please let me know.

kathi

Attachments

1/12/98

(2)

IN THE MATTER OF	*	BEFFORE THE
RONALD SANDERS,	*	COUNTY BOARD
PETITIONER	*	OF APPEALS OF
2260 CROMWELL BRIDGE ROAD	*	BALTIMORE COUNTY
	*	CASE NO.: 96-168-SPHA CASE NO.: 97-332-SPH

* * * * * * * * * * * * *

PETITIONER'S MEMORANDUM OF

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, Ronald H. Sanders, by his attorneys, files this Memorandum for consideration by the Board of Appeals.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Baltimore County Board of Appeals for consideration of various Petitions filed by the Petitioner for that property known as 2260 Cromwell Bridge Road located in the vicinity of Loch Raven Road near the Loch Raven Reservoir.

Petitioner's primary request is for permission to build a commercial parking facility in residential zone, on property which the Petitioner owns. Petitioner's plan has already been approved by two different Baltimore County Zoning Commissioners, and is here as the result of an appeal by a resident who lives more than a third of a mile from Petitioner's property.

Case number: 96-168-SPHA seeks approval of commercial parking in a residential zone pursuant to Section 409.8.B of the Baltimore County Zoning Regulations (B.C.Z.R); to amend the previously approved site plan in case number: 91-256-SPH to reflect the proposed parking arrangement and existing improvements on the site; to confirm an existing parking area as non-conforming; and, in the

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alternative, to approve a modified parking plan pursuant to Section 409.12 of the B.C.Z.R. In addition to the special hearing relief, the Petitioner seeks a variance to permit a reduction in the required number of parking spaces from 73 to 39. (Petitioner's Exhibit #2)

The Deputy Zoning Commissioner in an Opinion dated July 30, 1996 granted the approval of commercial parking in a residential zone, granted the approval to amend the previously approved site plan and confirmed the existing non-conforming parking area. The Deputy Zoning Commissioner denied the request to approve the modified parking plan which was contained in Petitioner's Exhibit 16 and denied the variance requested in view of the fact that the Petitioner had adequate property on which to place the required number of parking spaces and in view of the fact that the Deputy Zoning Commissioner was approving the request for commercial parking in a residential zone. The order required 5 spaces in the front to be modified to place 3 in the rear and make the remaining 2 parallel to Cromwell Bridge Road. Petitioner's Exhibit 3 reflects this change. The order was also contingent on Petitioner obtaining approvals to allow construction of the new parking lot in a flood plain. The approvals granted by the Deputy Zoning Commissioner were appealed by Lillian Jenifer and the Long Green Valley Association. The Petitioner filed an appeal from the denial of the variance petition.

Case number: 97-332-SPH was filed by the Petitioner seeking approval of a waiver to permit construction of a parking lot in a riverine flood plain pursuant to Section 500.6 of the B.C.Z.R., Section 517.2 (510.2) of the Building Code and Sections 26-276, 26-670, and 26-172(a)(3) of the Baltimore County Code. In addition, Petitioner seeks approval of an amendment to the previously approved site

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plan in case number: 96-168-SPHA to reflect the order of the Deputy Zoning Commissioner. The Zoning Commissioner granted the relief requested in the Petition For Special Hearing and the same was appealed by Lillian Jenifer, a property owner whose home is located approximately 1,900 feet to the west of the subject site.

Testimony and evidence offered revealed that the subject property consists in total of 2.113 acres of land divided into 2 parcels with frontage on Cromwell Bridge Road and divided by Loch Raven Road. The parcel to the east of Loch Raven Road containing 1.2 acres is improved by an existing parking area containing 19 parking spaces. This property was apparently the subject of a prior Petition For Special Hearing in case number: 91-256-SPH which sought approval of the area to the east of Loch Raven Road as a non-conforming use of parking in a residential area. This approval was granted on March 20, 1991. Apparently at that time, the Opinion did not address the parking area then existing immediately adjacent to the improvements on the west side of Loch Raven Drive and hence the request for approval of a non-conforming use in case number: 96-168-SPHA.

The testimony of Ralph Bridges and Betty Littleton before this Board are more than sufficient to establish that the existing parking area fronting on the north side of Cromwell Bridge Road has existed since prior to January 2, 1945 and has been continuously used for parking for customers of the various businesses that have existed at this location since prior to 1945 and up to and including the present use. The evidence indicates that the current use of this parking area is similar to the nature and purpose of the original non-conforming use. The evidence establishes that the current use, while it may involve more cars than it did in 1944 and to prior, does not constitute a use different in character, nature and kind. There is no evidence that the

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current use of this parking area has any substantially different effect upon the neighborhood and the current use does not constitute a drastic enlargement or extension of the original non-conforming use.

But even if the parking area immediately to the north of Cromwell Bridge Road did not satisfy the test required to be a non-conforming use, there is more than sufficient evidence to support a conclusion that this area, along with the proposed parking area to the rear of the subject property, should be approved for commercial parking in a residential zone pursuant to the Petitioner's request for the same. Evidence presented before this Board by Joseph L. Larson, Petitioner's Engineer, Norman Gerber, Petitioner's Land Planing Expert, and C. Richard Moore, the Petitioner's Expert in Traffic are more than sufficient to satisfy the criteria of Section 409.8.B and 502.1 of the B.C.Z.R.

Section 409.8.B of the B.C.Z.R. specifically allows parking facilities in a residential zone. The existing and proposed parking facilities on the .913 acre parcel to the west of Loch Raven Road and as depicted on Petitioner's Exhibits 3 and 4 fully satisfy the criteria contained in Section 502.1 of the B.C.Z.R. for the grant of special exceptions. Considering the Petitioner's request for parking in a residential zone to be in a nature of a special exception, it is clear that the grant of the same would have no adverse effect on any adjoining or surrounding properties. The proposed parking area has already been disturbed and improved by an access road and zebra mussel monitoring station installed by Baltimore City Department of Public Works.

In addition, The Sanders' Corner Restaurant is located in the Cromwell Valley Area which is primarily a passive recreation area. The property is located immediately to the east of the Cromwell Valley Park recently acquired by Baltimore

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County. The final master plan adopted by the Department of Recreation and Parks marked as Exhibit 8 reflects the Department's plans with respect to the park and their intention to construct a parking facility immediately to the west of the Petitioner's property and to have an open field for active play and picnicking between Cromwell Bridge Road and the Mine Bank Run.

The use of this property as a restaurant with accessory parking is totally consistent with the character of the community and is an augmentation and enhancement of it. The restaurant blends with and supports the rural recreational character of the community. It lends itself to making the area a recreational destination and will serve future users of the Cromwell Valley Park. In reviewing the criteria of Section 502.1 of the B.C.Z.R. it is clear that granting the approval for the existing and proposed parking facilities in the residential zoned portion of the subject site will not be detrimental to the health, safety or general welfare of the locality. It will not tend to create congestion in roads, streets or alleys in the community and in fact, according to the testimony of C. Richard Moore, the proposed parking facility will improve traffic flow, relieve congestion and improve traffic safety. The approval will not create any potential hazard from fire or other dangers nor overcrowd the land or cause undue concentration of population as there is obviously no population increase anticipated. It will not interfere with adequate provisions for schools, parks, transportation or other public requirements as contained in Section 502.1(e) and obviously it will not interfere with adequate light and air.

Furthermore, the proposal is consistent with the property zoning classification in view of the fact that only the footprint of the present building has been zoned BL. It is obvious and must have been obvious to the County Council that

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parking would have to be supplied on the remaining portion of the Sanders' property which is zoned DR1. As Mr. Normal Gerber, Petitioner's Land Planning expert who headed the Baltimore County Zoning Office for many years, testified before this Board, it would have made no sense for the County Council to have zoned the footprint of the Sanders' Corner restaurant BL without intending that parking be provided in the surrounding DR1 area. Otherwise, Petitioner would be unable to legally use the BL zoning, and the grant of the BL zoning would have been an empty gesture. The approval of this parking facility would be consistent with the spirit and intent of the zoning regulations and with the impermeable surface and vegetative retention provisions of the regulations as it will be subject to Baltimore County Landscaping Standards.

Parking facilities in residential zones are in the nature of a special exception use and this Board looks to the case of **Schultz v. Pritts,** 291 Md. 1, 432 A.2d 1319 (1981) for guidance. Under that case, decided by the Court of Appeals of Maryland, a special exception use is a part of the comprehensive zoning plan and it shares a presumption that as such, it is in the interest of the general welfare and therefore valid. The evidence before the Board fails to disclose or establish any fact or circumstance which would negate this presumption and in fact the evidence is quite to the contrary. There is no evidence that this use of a parking facility at this site would have any adverse effect upon adjoining and surrounding properties. In fact, the evidence is to the contrary and this parking facility would have less impact at this site and would be of more benefit at this site than at some other locality in the DR1 zone. Testimony of Joseph Larson, Norman Gerber and C. Richard Moore as to meeting the tests of 502.1 and complying with 409.8-B of the BCZR has been uncontradicted.

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The Petitioner has also applied for a variance from the parking requirements. In view of the approval of Petitioner's request for approval of the parking facility as proposed and as existing, there is no need for the Board to decide the variance and it is considered to be moot. The parking which is proposed to be added to the rear of the property is essentially all located in a flood plain. In order to allow for the parking in the flood plain, the Petitioner has requested a waiver be granted under the provisions of the Baltimore County Code previously cited and which waiver petition is the subject of case number: 97-332-SPH. The final outcome of any appeal on that waiver could have an effect upon the decision to be made in connection with the variance case as an additional factor of uniqueness to the property would be presented. It is therefore appropriate that the Board, rather than deny the variance, merely make no decision on the same and consider it as moot in view of the approvals which are being given to the Petitioner.

Case number: 97-332-SPH is the Petitioner's waiver request to allow construction of the parking facility in a riverine flood plain. As previously indicated, this approval was granted by the Zoning Commissioner. Petitioner made application to the Department of Public Works and received approval from the Department of Public Works which has been introduced as Petitioner's Exhibit 5. The Petitioner introduced evidence through Mr. Joseph Larson and Mr. Edwin Howe, a professional engineer with KCW Consultants, Inc. that construction of the parking lot on the rear of the subject property in the flood plain would not increase flood heights or the extent of the flood plain on neighboring properties. Baltimore County Code Section 26-670 allows for the granting of waivers pursuant to Section 26-172 upon a showing of good and sufficient cause, a determination that the failure to grant a waiver would result in

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exceptional hardship and a determination that the granting of a waiver would not increase flood heights, impact safety, incur extraordinary public expense, create nuisances, cause fraud or victimization or conflict with existing local and state laws and ordinances.

The testimony and evidence offered by Edwin S. Howe and Joseph Larson are more than sufficient to establish these criteria. In considering the waiver request, the Board of Appeals is required to make a determination that the failure to grant a waiver would result in exceptional hardship. The Zoning Commissioner below found that just such an exceptional hardship would result without a waiver. The Commissioner found that the problems of traffic congestion and lack of maneuverability would continue without a waiver and, "moreover, the commercial operation would have to be reduced in size, an exceptional result... The Council has recognized the commercial use of the existing building by zoning same BL. To not permit parking adjacent to this use would be inappropriate." Opinion, p.8. This Board concurs with these findings. In essence, exceptional means unusual and clearly the circumstances of this particular property are unusual and unique. Prior to 1988, all of Mr. Sanders' property was zoned residential DR1 and the then existing smaller restaurant was a non-conforming use. In 1988, the comprehensive zoning maps adopted by the County Council granted BL Zoning to the then existing restaurant and enough additional area to allow for expansion of the same to its now present size of 4,548 square feet which includes a proposed enclosure of the front porch. It seems clear and unmistakable that, at the time this zoning was placed on the property, that all of the parking for the existing restaurant and any expansion into the additional BL Zoned area would have to be placed on the residentially zoned remainder of the

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property located to the west of Loch Raven Road. The Petitioner owns additional property to the east of Loch Raven Road which contains some 19 parking spaces, but the remainder of that property is in steep slopes and and clearly unusable as a parking area. The Petitioner has sufficient property on which to construct the required additional 34 parking spaces. To deny the Petitioner the ability and right to construct this parking lot on the only property available to the Petitioner for that purpose would result in an exceptional and unreasonable hardship as it would result in the denial to the Petitioner of his right to use a substantial portion of his property which was zoned BL and which appears to have been zoned BL specifically to allow for an addition to the restaurant which then existed in 1988. The granting of the waiver will further serve to alleviate congestion and improve traffic conditions on this site and on the public roads which lie adjacent thereto. It would also improve pedestrian safety, as restaurant customers would be able to park immediately behind the restaurant and gain access to it without having to traverse any public roads.

In 1987, the Petitioner initiated a request to rezone the entire .913 acre parcel located at the northwest corner of Cromwell Bridge and Loch Raven Roads from DR1 to BL. This request was part of the 1988 comprehensive rezoning process and it was identified as Issue 6-087. Interestingly, the request of Mr. Sanders was not opposed by the Long Green Valley Association as indicated in the letter dated December 18, 1987 from Mr. Edward L. Blanton, Jr. Members of the Summerfield Farms Association did submit letters to the Office of Planning and Zoning indicating opposition to the requested rezoning. As this rezoning request was winding its way through the process, the Summerfield Farms Association, Inc. and Mr. Sanders entered

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into a Restrictive Covenant Agreement (Exhibit #22) dated October 10, 1988 which recites on page 2, paragraph D as follows:

> D. Since Sanders submitted his request for change, an alternative has been proposed to reclassify to BL only the portion of the land on which the existing store and any addition thereto may be located. (the "Rezoned Portion").

In the Restrictive Covenant Agreement, Mr. Sanders agreed to limit the combined square footage of all buildings continued, enlarged or constructed on the rezoned portion to 7,000 square feet. In consideration for this as well as other concessions by Mr. Sanders, the Association agreed not to oppose the reclassification of a portion of the property to BL and agreed not to oppose the continued operation on the parcel and the rezoned portion of the existing uses and the limited expansion of those uses in a manner consistent with the agreements of Mr. Sanders. The County Council voted to adopt the comprehensive zoning maps of 1988 on October 13, at which time Councilman Evans proposed a change from the Planning Board recommendation of BL on the entire parcel to a combination of BL and DR1 as shown on an overlay. (See People's Council Exhibits 2, 3) It is certainly a clear and reasonable inference that Councilman Evans, in moving to change the Planning Board recommendation, was fully cognizant and aware of the Restrictive Covenant Agreement and went along with the alternate proposal referred to in the Agreement to reclassify a portion of the land to include the existing building with area for an addition. All additions to the building that existed in 1988 have been within the BL zone boundary lines. To deny the waiver would result in an unreasonable, unnecessary and exceptional hardship.

People's Counsel suggests and argues that the relief being sought by the Petitioner should be denied because the problems that he now faces are self

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imposed. There is no evidence to support such conclusion nor is there any evidence to indicate that Mr. Sanders either intentionally or surreptitiously expanded his restaurant in an effort to avoid parking requirements. Indeed, all expansions to the restaurant have remained within the BL zoned footprint of the building as provided by the Council and well under the allowable expansion limit as provided in the zoning covenant with the community. In other words, the expansions to the restaurant were contemplated by the Council and the community. Moreover, it is noteworthy that, at the time of the expansions in 1991, the flood plain did not even extend to cover the subject parking area, and the Baltimore County regulations requiring a waiver for construction in a riverine flood plain had not yet been adopted. Thus, recent flood plain elevations and regulatory changes have contributed to the hardship which Petitioner faces.

The Zoning Commissioner's Decision in case number: 97-332-SPH provided that the Petitioner would have to obtain a variance from the internal standards of the Department of Environmental Protection and Resource Management as set forth in Title 14 of the Baltimore County Code. Evidence establishes that the Petitioner has sought and obtained the necessary forest buffer variance. The application is Exhibit 18 and the approval is contained in Exhibit 19.

In summary, for the reasons contained herein, the Petition for Special Hearing seeking approval of a waiver to permit construction of a parking lot in a riverine floodplain, pursuant to Section 500.6 of the Baltimore County Zoning Regulations (B.C.Z.R.), Section 517.2 (510.2) of the Building Code, and Sections 26-276, 26-670 and 260-172(a)(3) of the Baltimore County Code (B.C.C), and an

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amendment to the previously approved site plan in Case No. 96-168-SPHA to reflect the proposed parking configuration, in accordance with Petitioner's Exhibits 3 and 4 should be GRANTED, and the Petition for Special Hearing seeking approval of commercial parking in a residential zone, pursuant to Section 409.8.B of the Baltimore County Zoning Regulations (B.C.A.R.), to amend the previously approved site plan in Case No. 91-256-SPH, and, to confirm an existing nonconforming parking area should be GRANTED.

Respectfully submitted,

Charles E. Brooks

Malcolm F. Spicer, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 12th day of January, 1998, a copy of the aforegoing Petitioner's Memorandum of Proposed Findings of Fact and Conclusions of Law was mailed via first class mail, postage prepaid to: People's Counsel, Old Court House, Towson, Maryland 21204 and Leslie M. Pittler, Esquire,8415 Bellona Lane, #605, Towson, Maryland 21204.

Charles E. Brooks

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IN THE MATTER OF
RONALD SANDERS, PETITIONER *
2260 Cromwell Bridge Road

PETITION FOR SPECIAL HEARING *
PETITION FOR FLOODPLAIN WAIVER
or, in the alternative,
PETITION FOR PARKING FOR VARIANCE *

IN THE

COUNTY BOARD OF APPEALS

FOR BALTIMORE COUNTY

CONSOLIDATED CASES
96-168-SPHA and 97-332-SPHA

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People's Counsel's Memorandum

Statement of the Case

These are consolidated de novo appeals brought by Lillian Jenifer under Charter Sec. 603 and Code Sec. 26-132. They concern: (1) Deputy Zoning Commissioner (DZC) approval of a use permit for commercial parking in a residential (D.R.1) zone, akin to a special exception (BCZR 409.8, 502.1); and (2) DZC approval of a Public Works Department floodplain waiver (Code Secs.26-168, 26-172, 26-670) based on exceptional hardship and other defined standards. There also occurred during the proceedings: (3) a DEPRM forest buffer easement variance (Code Sec.14-334).

People's Counsel for Baltimore County entered its appearance and participated in both cases pursuant to its Charter Sec. 524.1 (attached) responsibility to defend the comprehensive zoning maps and master plan, and to pursue broad public interest objectives to protect land, air, and water resources.

Sanders cross-appealed, in the alternative, from the denial of a parking variance.

All of these cases arose after Sanders the younger completed a dramatic expansion

of "Sanders' Corner", a modest ice cream store/carry-out operated by his father at the intersection of Cromwell Bridge and Loch Raven Roads. In 1993-94, Sanders somehow procured building permits for major additions to increase facility size from 1200 to 4500 square feet for a full-service restaurant. He did this without the required 72 parking spaces, at 16 spaces per 1000 square feet, under BCZR 409.6A2. The new 37-space parking lot would occupy the entire rear of the corner property and its floodplain.

The requests for the use permit or, in the alternative, for parking variance, should have come before construction. As it is, they come after the fact, to attempt to legitimize the dramatically expanded use. For reasons explained below, the permits and construction are neither within the scope of any preexisting nonconforming use nor justified by the theory of "equitable estoppel". Rather, the case must be evaluated anew, on the merits.

Questions Presented

Main Questions

1. Whether the special hearing (special exception) for commercial parking is, as a matter of law, contrary to the intent of the County Council's particular limitation of commercial zoning to .1 acre of a 2.2 acre site (including .9 acres at the northwest corner)?

2. Whether the special hearing, being in the nature of a conditional use, is disqualified for failure to meet specified floodplain and forest buffer conditions?

3. Whether, by itself, the floodplain waiver fails because the property is not unique in any relevant way and because, as a matter of law, there is no exceptional hardship?

4. Whether the alleged "hardship" is both economic and self-created?

Ancillary Questions

5. Whether the original nonconforming use may expand to more than triple its original size and change in character, and yet retain nonconforming status?

6. Whether there is any equitable estoppel to protect or favor petitioner?

7. Whether the scope of People's Counsel's responsibility includes the floodplain waiver insofar as: (1) it is involved with the zoning special hearing/special exception; (2) it affects defense of the master plan; and (3) it pertains to land and water resources referred to in Sec. 524.1.

8. Whether there is any justification for a parking variance?

Statement of Facts

Location and Zoning

The property is towards the east end of the Cromwell Valley, on the north side of Cromwell Bridge Road, the main .9 acre "corner" being to the west of Loch Raven Road and the other 1.3 acres, including existing parking, on the east side.

In common with other properties, it slopes downward to the north towards Mine Branch Run and contains substantial 100-year floodplain. It also shares a border with Cromwell Valley Park, along with other properties.

The D.R. 1 zone, the bulk of the property, signifies the lowest density of any residential zone. Other nearby properties are zoned either D.R. 1 or more restrictive R.C. (Resource Conservation) zones. The property's tiny .1 acre commercial (B.L., Business-Local) zoning derives from the old ice cream stand. There is no other nearby commercial zoning or use.

History

The basic facts are simple. For many years, Petitioner's father operated a modest carryout and ice cream stand, with a few tables, with parking spaces along Cromwell Bridge Road and across Loch Raven Drive. It occupied about 1200 square feet, according to engineer Joseph Larson. There was also an apartment on the east side of the building.

This nonconforming use did not cause any controversy.

After his father's death in about 1986, Petitioner asked the Council to rezone the corner .913 acres to B.L. (File, P.C. Exh.1).With the request, Issue 6-087, Petitioner's attorney Deborah Dopkin wrote October 26, 1987 that the purpose was to preserve the longstanding commercial use and allow reconstruction in the event of fire. At that time, BCZR 104 (prior to Bill 124-91 amendment), provided that destruction of a nonconforming use would terminate the use. Most community associations and individuals opposed any commercial zoning at all, citing the beauty, character, environment, and sensitivity of the Cromwell Valley and expressing concerns about commerce and traffic. One association did not. Dopkin wrote on May 5, 1988:

"As I stated at the [Planning Board] hearing on Thursday, April 28, 1988, the country store has existed continuously at this location for nearly a century and is a well-known local institution. Mr. Sanders is continuing a family business once operated by his father, and he has invested a substantial amount of money and time in refurbishing the store.

"We oppose the Planning Staff recommendation [D.R. 1] and ask that you favorably recommend BL to conform the zoning to the long-established use."

The Planning Board recommended B.L. But the Council limited the B.L. to a small

area in the shape of a trapezoid around the periphery of the store, leaving the rest D.R.1. The log and minutes show the Council drew a specific overlay to divide the zoning on the property. See P.C. Exh. 2, 3.

* * *

On March 20, 1991, Petitioner obtained nonconforming use approval for the parking lot on the east side of Loch Raven Road. The Zoning Commissioner opinion in Case 91-256-SPH, P.C. Exh. 5, makes no mention of any expansion. The building permit records (P.C. Exh. 6) do show a very small rear building addition to the site plan accompanying the 1991 case. As Mr. Larson said, this addition was not large enough to generate any need for parking in the rear, or for a variance.

The permit records then reflect the major expansion in 1993 and 1994, including the rear porch dining area extending virtually the length of the building, and the conversion of the apartment to restaurant use. The renovations accommodated kitchen facilities, more than 30 tables, and standard restaurant service. As a result, the commercial use expanded from 1200 square feet to 4500 square feet, and the area of the building itself more than doubled. Unfortunately, the County issued these permits without proper or required zoning approval.

Subsequently, this situation came to the attention of the zoning office, which required the petitioner to file the petitions presently under consideration.

The Master Plan

The Council's 1989-2000 Master Plan (Excerpts, P.C. Exh. 4) states a purpose to protect streams and associated floodplains. P. 64. Separately, the Plan for the Central Sector states prominently an intent to preserve the character of the Cromwell Valley. It describes the valley's historic, tranquil, and environmentally sensitive character; says it is in "serious jeopardy of development which, even if attempted with utmost sensitivity to the valley's scenic qualities, would be fundamentally incompatible with exactly that scenic character;" and forbids any "higher density zoning in this Valley." P. 106.

The Petitioner emphasized a Department of Recreation and Parks final master plan for the Cromwell Valley, and its placement of a parking lot adjacent to the proposed location here. But the Council has neither approved this plan nor taken any budget and appropriation action towards implementation.

The Mine Branch Run and Its Floodplain

The Mine Branch Run traverses the Cromwell Valley and runs to its confluence with the Gunpowder Falls. It runs behind not only Petitioner's property, but also all the properties on the north side of Cromwell Bridge Road, public or private. The County Council has begun a stream restoration program, starting with the headwaters. (The Board may take notice of the Capital Budget and future project stages for the entire stream).

On August 19, 1996, Joseph Larson wrote, on behalf of Petitioner, to request a floodplain waiver for the rear parking lot encroachment. After describing the minor

impact and lack of homes nearby, he made this plea concerning hardship:

> "Lastly, and as a more personal closing argument for our proposal, aside from the public good that it will serve, is the fact that a severe financial hardship will be incurred by Mr. Sanders should this parking area not be allowed by way of this Waiver request. The restaurant which has existed in its current location for ages desperately needs this parking to be economically viable."

Larson failed to support this sympathy argument, but did call it economic hardship.

There was never any real evidence of hardship. Norman Gerber, Petitioner's expert planner, suggested at the hearing that a restriction on use of any part of the property is a hardship. Gerber also seemed to consider it a kind of philosophical issue.

But the issue of commercial expansion vs. limitation is clearly an economic issue.

As to environmental effects, Edwin Howe testified to their insignificance. He did concede that during a 100-year storm cars would be sitting in water 18 inches high.

The Public Works Director, Charles R. Olsen, did "not oppose" the waiver in his terse two-sentence letter dated January 23, 1997. He made no statutory findings.

The Forest Buffer Variance

The Department of Environment approved a forest buffer variance. This would allow placement of the parking lot in a wooded area. It was conditioned on afforestation elsewhere; but there was, and is, no specific plan to fulfill this condition in any way. Nor was there any explanation as to how this condition would offset damage to the valley.

The Petitioner's Testimony

The Petitioner presented promotional testimony and attempted to create an aura of

customer and community support. He claimed he had cooperated with county officials. But he gave no cogent explanation as to why in 1993 and 1994, he unilaterally proceeded to his major expansion without zoning compliance. This contrasted with his actions in 1987-88 and 1991, when he had at least gone through proper channels and had attorneys.

Norman Gerber, Planner

Gerber gave conclusory testimony that expanded use and parking was beneficial, and that there would otherwise be hardship of unspecified nature. He had not previously reviewed the 1988 CZMP Issue File, but stubbornly refused to draw any inference of intended limits from the commercial zoning of just the .1 acre. He drew support from the Recreation and Parks Plan to put a parking lot on adjacent property, but had to admit that the Council had not acted on or funded this Plan. Gerber failed to mention the County Council's 1989-2000 Plan and its intent to preserve the Cromwell Valley.

The Citizens

The 1988 CZMP file, reviewed above, shows prevailing opposition to further commercialization of this Cromwell Valley location, and the various reasons. To the same effect is the current testimony of Lillian Jenifer, the nearest neighbor; and Katherine Gabriel and Carol Trela of the Long Green Valley Association.

The Long Green group is the one group which had not opposed commercial zoning in 1988. It may have relied on Petitioner's counsel's position that the 1988 zoning was intended merely to protect the longstanding nonconforming use.

The Summerfield Farms Association; Its Restrictive Covenant Agreement

The Summerfield Farms Association is a group which had opposed Sanders in 1988. But Sanders produced an agreement dated October 10, 1988, obligating the group not to oppose commercial rezoning and expansion of the restaurant. It was not in the County's Issue file. Nor has it, apparently, been recorded in the Land Records, to show satisfaction of its conditions precedent and make it binding. Agreement P. 6. Nobody from Summerfield testified at the current hearing.

The agreement is silent on expansion of parking or intrusion into the floodplain. It says nothing of any potential use permit for business parking or of any waivers or variances. Nevertheless, the arguably ambiguous implications of the language about restaurant expansion may have deterred Summerfield residents from appearance here in opposition. In any event, they appeared neither in support nor to verify the covenants.

Petitioner suggested that these covenants were the basis for its business zoning. But there is no evidence for this. Moreover, none of the other parties expressing written interest in the 1988 CZMP process is a party to this agreement.

There is no documentation to show that the agreement was ever transmitted to the Council. There is no evidence that the Council made the agreement a premise of its legislation, or that it was a factor. Mrs. Jenifer stated, to the contrary, her understanding that the decision was made to limit Petitioner to the traditional use.

(The Council, of course, may not engage in contract zoning. See People's Counsel

v. Beachwood 107 Md. App. 627 (1995); Baylis v. City of Baltimore 219 Md. 164 (1959); Rose v. Paape 221 Md. 369 (1960); Carole Highlands Cit. Assoc. v. P.G. County 222 Md. 44 (1960); Mont. County v. Nat'l.Cap. Rlty.Co. 267 Md. 364 (1972).)

Argument

The Special Hearing for Use Permit; Special Exception Standards

BCZR 409.8.B.1e defines the standards for approval of a use permit for business parking in a residential zone. They involve in essence:

"(2) the character of the surrounding community and the anticipated impact of the proposed use on that community;

(3) ...and any additional requirements as deemed necessary by the zoning commissioner in order to ensure that the parking facility will not be detrimental to the health, safety or general welfare of the surrounding community and as are deemed necessary to satisfy the objectives of Section 502.1 of these regulations."

BCZR 502.1, in turn, lists the special exception standards. The CBA had occasion to apply these in the use permit case of Michael's Restaurant in Timonium, Kendrick, 96-340-SPHA. Each case depends, of course, on its own circumstances.

Pursuant to BCZR 502.1, it must appear that the proposed use will not, inter alia:

"a. Be detrimental to the health, safety,or general welfare of the locality involved."

...

"e. Interfere with adequate provisions for ...other public requirements, conveniences, or improvements."

"g. Be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit and intent of these Zoning Regulations;"

A special exception is a conditional use. Montgomery County v. Merlands 202 Md. 279 (1952); Rockville Fuel & Feed Co. v. Board of Appeals 257 Md.183 (1970). Building on these cases, the Court said in Schultz v. Pritts:

"If [the applicant] shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide." 291 Md., 11-12. (Emphasis supplied).

"Generally, when a use district is established, the zoning regulations prescribe that certain uses are permitted as of right (permitted use), while other uses are permitted only under certain conditions (conditional or special exception use) .... In determining which uses should be designated as permitted or conditional in a given use district, a legislative body considers the variety of possible uses available, examines the impact upon the various purposes of the zoning ordinance, determines which uses are compatible with each other and can share reciprocal benefits, and decides which uses will provide for coordinated, adjusted, and harmonious development of the district." (Emphasis supplied)

* * *

"When the legislative body determines that other uses are compatible with the permitted uses in a use district, but that the beneficial purposes such other uses serve do not outweigh their possible adverse effect, such uses are designated as conditional or special exception uses. Such uses cannot be developed if at the particular location proposed they have an adverse effect above and beyond that ordinarily associated with such uses." (Emphasis supplied). 291 Md. 1, 20-22.

I. The Proposed Use Permit Conflicts with the Comprehensive Zoning Plan

This case presents the Council's extraordinary limitation of commercial zoning to .1 acre of the property, leaving the rest as D.R. 1. It should be underlined that commercial uses of residential property ordinarily are prohibited. BCZR 102.1; see Leimbach Construction Co. v. City of Baltimore 257 Md. 635 (1970). The BCZR 409.8 use permit system does allow commercial parking but subject to the defined standards.

This limitation on its face shows intent to limit business use and accessory parking. Had the Council intended full commercial use of the site, it could have zoned the

entire corner B.L. The rear parking would then be permitted by right. By split zoning the property, the Council envisioned the ice cream store/carryout with a use permit for the existing 35 parking spaces on Cromwell Bridge Road and across Loch Raven Drive.

Indeed, the Petitioner had room to expand the restaurant from 1200 to about 2200 square feet and to meet parking requirements with a use permit for the existing 35 spaces, at 16 per 1000 square feet. Instead, Petitioner overreached.

The Council's apparent intent to limit the use is corroborated by the record. The Issue File shows Petitioner's attorney's representation that the request for rezoning was to protect and accommodate the longstanding use. It was never stated that the intent was to triple or quadruple the use in size, double the parking area, or invade the floodplain.

The Petitioner, like the proverbial camel, having gotten its nose under the tent, now seeks to occupy the whole tent. In this attempt, Petitioner both exceeds and subverts the intent of the 1988 County Council and its successor councils. Petitioner's proposal causes unique "...disruption of the harmony of the comprehensive zoning plan." Schultz.

As the Court also said in People's Counsel v. Mangione 85 Md. App. 738 n. 6 (1991): "The size and scope of the project are thus relevant considerations."

Here, moreover, the Council's zoning limitation is consistent with the 1989-2000 Master Plan, prepared at about the same time. It calls for protection of the Cromwell Valley. If there should be more commerce in this valley and its floodplain, then it is up to the Council to make the decision, not this Petitioner and not by unilateral aggression.

II. The Use Permit Also Conflicts with Floodplain and Forest Buffer Conditions

Where special exceptions, as conditional uses, require separate waivers and variances, then "...the [rebuttable] presumption that a conditional use is permitted may well fall by the wayside." Chester Haven L.P. v. County Board of Appeals 103 Md. App. 324, at 336 (1995); Umerley v. People's Counsel 108 Md. App. 497, at 510-11 (1996). Here, Petitioner's proposal fails fatally to satisfy basic environmental standards.

Even if such deviations could be justified along with a use permitted by right, their presence is a disqualfying factor in a special exception case. As explained in Schultz, the inherent adverse effects which the legislature tolerates in a use classified as permitted are unacceptable in a condtional use. So it is with environmental conflicts.

The proposed floodplain waiver and forest buffer variance run contrary to the legislative intent to keep the floodplain clear of development and provide a forest buffer. If a use be permitted by right, an applicant may try to satisfy statutory standards for deviations and argue for development despite inevitable adverse effects. But in a special exception case, the deviation reflects a basic failure to meet a legislative condition.

The Floodplain Waiver

The County's floodplain management program is authorized under Secs. 26-661 to 26-670 of the County Code. The policy recognizes "...the 100-year flood as the event defining the area of peril." 26-661. The County program generally does not allow development in the floodplain.

There is, however, provision for waivers under 26-670(a): "Waivers shall only be issued upon: "(1) A showing of good and sufficient cause; (2) A determination ...[of]... exceptional hardship (other than economic) to the applicant; and (3) A determination that...the waiver will not increase flood heights, impact public safety, incur extraordinary public expense, create nuisances,...." (Emphasis supplied).

The waiver action shall be "the minimum necessary...to afford relief." It also "must" take into account both state water resources administration and county public works department comments. Ibid.

Sec. 26-670(b) states further conditions as to waivers, including a letter memorandum to accompany any waiver with detailed terms and conditions, requirements for recordation in the land records, and impact on National Flood Insurance Coverage.

The "Exceptional Hardship" Standard

The term "exceptional hardship" is one of art. In Baltimore County, the CBA is accustomed to deciding zoning variances under the more "relaxed" standard of "practical difficulty." See McLean v. Soley 270 Md. 208 (1973). The word "relaxed" is in quotation marks because it is still a tough standard. But the "hardship" standard is tougher.

Zoning cases are available from local jurisdictions which employ the hardship standard. Green v. Bair 77 Md. App. 144 (1988), cert. denied (1989), is attached. It involves a request to enlarge an existing (1969 vintage) medical office building, zoned commercial, based on need and hardship, to accommodate expansion of the practice.

Despite the doctors' testimony that expansion was important to continue the practice at this location, and the lack of feasible alternatives, the Westminster City Board of Zoning Appeals approved. But the courts reversed. The CSA decision centered on the"undue hardship" standard. Quoting Anderson v. Board of Appeals 22 Md. App. 28, 38-39 (1974), Judge Robert M. Bell wrote:

> "Where the standard of undue hardship applies, the applicant, in order to justify the grant of the variance, must meet three criteria:
>
> 1) If he complied with the ordinance he would be unable to secure a reasonable return from or to make a reasonable use of his property.... Mere financial hardship or an opportunity to get an increased return is not a sufficient reason for granting a variance....
>
> 2) The difficulties or hardships were peculiar to the property in question and contrast with those of other property owners in the same district....."
>
> 3) The hardship was not the result of the applicant's own actions....
> 77 Md. App., at 151-52. (Citations omitted).

The Court of Appeals has consistently rejected comparable hardship variance/exception claims for additions, expansions, and ancillary parking: Easter v. Mayor & City Council 195 Md. 395 (1950), addition on front of store and dwelling in commercial zone, despite nearby nonconforming uses; Cleland v. Mayor & City Council 198 Md. 440 (1951), parking lot for physicians' offices in residential zone, despite preexisting nonconforming office use; Marino v. City of Baltimore 215 Md. 206 (1957), store building and parking area in residential zone, despite earlier issuance of commercial permit on adjacent property; Pem Constr. Co. v. City of Baltimore 233 Md. 372 (1964), parking lots in

residential zone for nearby shopping center. A review of these cases, attached, illustrates the standard and its application. They control the present claim, and compel its denial.

III. There Is No Hardship Unique to Sanders Corner

It "...must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood." Easter, supra, 195 Md., at 400, quoted in Marino, supra. See Carney v. City of Baltimore 201 Md. 130, 137 (1952). Thus, one must show both that the property is unique and that its attendant hardship is unique.

Sanders' Corner is one of many properties sloping down to Mine Branch Run and its floodplain. There is nothing unusual about it. Petitioner says his property is next to the park. So are many others. But even if it were the only one, it is irrelevant to hardship. The law does not accept encroachment in floodplain areas merely because of nearness to a park. Cf. Chester Haven, denying variances in the Chesapeake Bay Critical Area.

> The Court of Appeals explained the danger of piecemeal hardship approvals:
>
> "It is by these gradual encroachments, individually of relative insignificance, that the integrity of the general scheme is undermined and ultimately shattered. One departure serves as justification for another...." Easter, supra.
>
> * * *
>
> " As a general rule [hardship] exceptions are granted sparingly, and under exceptional circumstances. To do otherwise would decimate zoning restrictions and eventually destroy all zoning regulations...." Marino, supra.

Here, the casual allowance of a waiver, without any finding of unique hardship, is an invitation to destroy the floodplain ordinance. This Petitioner is no more entitled to a waiver than any other in the area. So, as the County begins its stream restoration program,

its public works department and hearing officer are acting at cross purposes.

Petitioner also claims his property is unusual because it had a nonconforming store. But the Courts in Easter and Cleland stated the purpose to curb nonconforming uses and to deny " unique hardship" exceptions which might extend, multiply and perpetuate such uses. In sum, Petitioner does not under law have a peculiar hardship.

IV. There Is No Hardship Anyway, But Rather a Matter of Financial Gain

In order to show hardship under the above cases, the claimant must prove that there is otherwise no reasonable use of the property. It is insufficient to suggest that the restriction deprives the owner of maximum use or level of return, or that a part of the property is restricted. See also Burns v. Mayor & City Council 251 Md. 554 (1968).

Land use controls, by their very nature, place limits on property use and financial gain. If these very limits were to justify a hardship claim, then the law would disappear. Here, Petitioner had a past business use. He had, and may still have, a residential use. His expansion involves merely intensity of use and level of financial return.

The engineer, Larson, wrote that parking would be necessary to make the restaurant "economically viable." He gave no basis for such an assertion. He was actually speaking of an expanded use which Sanders desired for the obvious financial gain.

This connects to the additional point that the alleged hardship is self-created. As such, it also fails under the rule of Marino; Pem Construction; and Gleason v. Keswick Improvement Ass'n 197 Md. 146 (1964).

The Court most recently said in Cromwell v. Ward 102 Md. App. 691, 721-22 (1995):

> "Self-inflicted or self-created hardship... is never considered proper grounds for a variance... Where the applicant creates a nonconformity, the board lacks power to grant a variance...."
>
> * * *
>
> "Were we to hold that self-inflicted hardships in and of themselves justified variances, we would effectively not only generate a plethora of such hardships but we would also emasculate zoning ordinances. Zoning would become meaningless." (Citations omitted).

The hardship claim is thus legally insufficient in all respects. The Department of Public Works could not have been more casual in its approval letter, and the Hearing Officer followed suit. It was enough to deny the waiver that the "exceptional hardship" claim failed under Sec. 26-670(a), that it was economic, and that it was self-created.

DPW also failed to consult with the State Water Resources Administration and to inquire into effects on the Mine Branch Run stream restoration. We have provided the relevant DEPRM memorandum December 17, 1997 and Phase I Contract. These show, as expected, that the program's scope includes the entire stream. It was incumbent on the Petitioner and on DPW to address the relationship of floodplain waivers to the program. There should also have been the mandatory letter of conditions under Sec. 26-670(b).

It is hard to imagine a more flagrant all-around disregard of the law.

The Forest Buffer Variance

The DEPRM forest buffer variance approval under Code Sec. 14-334 (See 14-331 to 14-350) was casual and legally insufficient. The reasons which negate "hardship" approval of the floodplain waiver also apply to "practical difficulty", the standard here.

DEPRM's July 15, 1997 approval letter "...determined that a hardship exists due to the fact that the entire property behind the existing restaurant is located within the FBE." The Director asked for mitigation by 34,000 square feet of planting elsewhere.

The Court rejected a similar justification in Umerley v. People's Counsel 108 Md. App. 497, cert. den. 342 Md. 584 (1996). The argument there was that, without a variance, it would be impossible to have a trucking facility. The property was also situated where it could not comply with statutory setbacks. But, were this to justify a variance, the law would be meaningless. Failure to comply would be its own justification.

Indeed, Umerley was a harsher case because the entire facility was at stake. Here, the issue is merely the expansion of the restaurant and the required rear parking.

There is no point in having forest buffer standards if they are to be avoided merely to allow Petitioner maximum exploitation of the buffer area. Nor is it a justification to include a condition to plant trees elsewhere. If the FBE law is so applied, it is illusory.

The variance here, coming on top of the floodplain waiver, makes it appear that County agencies will mock all rules in order to satisfy Sanders' desires.

Comment on Traffic

There was conflicting testimony about traffic. Richard Moore, for the Petitioner, stated that the parking layout met minimum standards, is safe, and does not cause undue congestion. He also suggested that the added traffic generation is insignificant. At the same time, several of Petitioner's witnesses suggested that the rear parking would

alleviate congestion around the existing parking areas on Cromwell Bridge Road and at the Loch Raven Road intersection. Clearly, there are concerns about parking congestion. The Deputy Zoning Commissioner used relief of parking congestion as the reason to approve the new parking to the rear.

On the other hand, citizen witnesses -- Jenifer, Gabriel, and Trela -- described serious congestion and added danger. This tracks concerns expressed to the Council in 1988. The Court accepted the legitimacy of citizen observations about traffic conditions in Eger v. Stone 253 Md. 533 (1969).

Even if the Board believes that the added traffic meets absolute engineering standards, this does not justify approval of the use permit. It should not distract from the main question reviewed above: the Council's overall intent in limiting commercial zoning to the .1 acre, and the overall land use impact of the expanded restaurant and parking.

Moreover, the suggestion that the use permit might alleviate congestion due to restaurant expansion is impertinent. It amounts to a disguised reward for creating or aggravating a problem. Without the expansion to start with, there would be no problem.

Traffic issues are both quantitative and qualitative. The Council may, for many reasons, decide to disallow a use which technically could meet minimum quantitative traffic engineering standards. After all, the job of engineers is to accommodate development. They don't make basic land use judgments. It is predictable that Mr. Moore would testify favorably. Again, the relevant inquiry is of the Council's broader intent.

V. There Is No Nonconforming Use Protection for the Dramatic Expansion

The specter of the nonconforming use is a "red herring" in light of the change from ice cream store to restaurant, more than tripling of commercial space, and doubling of building size. BCZR 104.1 does not allow a nonconforming use to change in use. It limits the existing use to a 25% increase in ground floor area. It does not allow expansion of the area of the property used, such as for a new parking lot. From any point of view, the original nonconforming use, as confirmed in 1991, is gone.

The fundamental purpose of the law is to eliminate nonconforming uses over time.

Prince George's County v. Gardner 293 Md. 259, 266 (1982):

> "Thus, this Court has recognized that the problem inherent in accommodating existing vested rights in incompatible land uses with the future planned development of a community is ordinarily resolved, under local ordinances, by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment."

In this context, "...local ordinances must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses." Ibid. See Hewitt v. Co. Comm'rs of Baltimore County 220 Md. 48, 59 (1959). The law precludes "....some sort of 'creeping' process..." to grow these uses. Phillips v. Zoning Comm'r of Howard County 225 Md. 102 (1961). The law also prohiits their spread onto adjacent areas. Cleland, supra, 198 Md. 440; Chayt v. Board of Zoning Appeals 177 Md. 426 (1939).

As the Court said in Beyer v. Mayor & City Council 182 Md. 444 (1943):

> "The right of the non-conforming owner, however, is to the use and not to the class of use."

The Court said in Phillips:

"The courts generally disapprove -- as a substantial departure from a vested nonconforming use -- a change from one use to another."

All too often, Petitioners present a nonconforming use as something to be revered. They suggest that its limitation, or perchance its stifling, is a tragedy to be avoided at all costs. This is a pernicious and unacceptable distortion of the law.

Sanders' 1993-94 unilateral expansion destroyed any claims to the nonconforming use approved in 1991. He now has a tiny commercial zone, dependent on a use permit for parking in any of the residentially zoned property. It would desecrate the law to make the past nonconforming use a launching pad for a dramatic spread of commercialization. As argued above, if a use permit is to be granted at all, it should be for the old parking areas, and in conjunction with about 2000 square feet of restaurant space, not 4500. There should be no rear parking lot. The rear additions should be ordered removed.

VI. Petitioner Has No Claim of Equitable Estoppel or Vested Rights

Since Lipsitz v. Parr 164 Md. 222 (1933), it has been law that a mistakenly issued permit, in conflict with zoning, may not be set up as an estoppel or to assert vested rights. Later cases include Berwyn Heights v.Rogers 228 Md. 271 (1962); Kent County Planning Inspector v. Abel 246 Md. 395 (1967); City of Hagerstown v. Longmeadow Shopping Center 264 Md. 481 (1972); and Inlet Associates v. Assateague House 313 Md. 413 (1988). There are strong reasons for this rule, which overrides construction based on an illegal permit. Mistaken official action may not defeat public rights. Moreover, applicants

are charged with knowledge of zoning law. To give "equitable" priority to wrongfully issued permits would open the door to legal evasion -- innocent, negligent, or intentional.

Here, there was no excuse for issuance of building permits directly in conflict with applicable parking requirements, and without the necessary zoning use permit. This Petitioner, moreover, had experience in the legislative and adminstrative zoning process.

In Cromwell v. Ward, supra, 102 Md. App., at 723-25, the County issued a building permit without proper zoning approval, a height variance on a garage/wine cellar addition. Judge Dale Cathell reviewed the cases, from Lipsitz to Inlet Associates. These included Board of County Comm'rs v. Snyder 186 Md. 342 (1946), where Plaintiff sought to force issuance of a permit for an alleged nonconforming use. That Court held:

> "No permit was issued, and if it had been, it would have conferred no vested right, nor would it have created an estoppel." 182 Md., at 347.

Cromwell also quoted Inlet Associates, 313 Md., at 437:

> "The doctrine of equitable estoppel 'cannot be ...invoked to defeat the ...enforcement of...ordinances, because of an error or mistake committed by one of its officers...which has been relied on by a third party to his detriment."

Judge Cathell wrote that such a permit, and ensuing construction, could not themselves be the foundation of a "uniqueness" or "practical difficulty" argument:

> "It is not the purpose of variance procedures to effect a legalization of a property owner's intentional or unintentional violations of zoning requirements. When administrative entities such as zoning authorities take it upon themselves to ignore the provisions of statutes enacted by the legislative branch of government, they substitute their policies for those of the policymakers." 102 Md. App. , at 726.

This goes for use permits, floodplain waivers, and forest buffer variances.

VII. People's Counsel Has Responsibility to Litigate Not Only the Zoning Issues, but also the related Master Plan and/or Environmental Issues

County Charter Sec. 524.1 entrusts People's Counsel with defense of the zoning maps and master plan, and to act as legislatively designated party in interest. Courts have approved the standing of People's Counsel in a variety of cases defending council action: People's Counsel v. A.V. Williams 45 Md. App. 617 (1980), rezoning; People's Counsel v. Webster 65 Md. App.694 (1986), special exception/master plan; People's Counsel v. Mockard 73 Md. App. 340 (1987), rezoning/master plan; People's Counsel v. Md. Marine Mfg. Co. 316 Md. 493 (1989), special hearing/waterfront zoning interpretation/State wetlands law; Board of Child Care v. Harker 316 Md. 683 (1989), special hearing/zoning immunity; People's Counsel v. Mangione 85 Md. App. 738 (1991), special exception; Red Roof Inns v. People's Counsel 96 Md. App. 219 (1993), zoning variance; People's Counsel v. Crown Dev. Corp. 328 Md. 303 (1992), development plan, density transfer; Security Management Corp. v. Baltimore County 104 Md. App. 234 (1995) Civil Rights Act/comprehensive zoning; People's Counsel v. Beachwood I Ltd. Partnership 107 Md. App. 627 (1995) cert. den. 342 Md. 472 (1996), rezoning/Chesapeake Bay Critical Area Act compliance; Umerley v. People's Counsel 108 Md. App. 497 (1996); cert. den. 342 Md. 584 (1996) special exception/variances; Sycamore Realty Co. v. People's Counsel 344 Md. 57 (1996), development plan/zoning estoppel. People's Counsel appears here consistent with charter and usual practice.

In Crown Development, 328 Md., at 317, Judge James McAuliffe wrote:

"People's Counsel has been given a broad charge to protect the public interest in zoning and related matters....Density regulation is an important part of the zoning process.

In the present case, Petitioner does not challenge People's Counsel's standing to participate in the zoning use permit/special exception review. 96-168-SPHA. He has, however, opposed People's Counsel's standing in the consolidated floodplain waiver case. 97-332-SPH. For several reasons, it is clear that People's Counsel does have standing.

First of all, the floodplain waiver is integral to the use permit/special exception. It is a condition of a conditional use. The case thus has to do broadly with defense of the comprehensive zoning map, here the D.R. 1 zone. In addition, it is specifically a case "involving...[a] special exception under the Baltimore County Zoning Regulations."

Secondly, the county master plan's intent to protect the Cromwell Valley involves both the use permit and floodplain waiver. It is an independent source of standing.

Thirdly, the charter provides that People's Counsel "may appear as a party in interest ...before all state ...boards...on matters involving the preservation of the quality of the air, land, and water resources of Baltimore County and/or may initiate such proceedings in the public interest." The floodplain waiver is in this category as well.

There are thus (1) zoning map (2) master plan, and (3) water resources grounds for the appearance in this case. It is necessary to underline that the issue of standing is distinct from the ultimate decision on the merits. See Sugarloaf Citizens v. MDE 344 Md. 271, 293-97 (1996). Thus, People's Counsel's standing does not depend on the CBA's

ultimate acceptance of its arguments on the merits. Even were the Board to find that Petitioner's proposal is consistent with the zoning map, the master plan, and the protection of land and water resources, such a substantive decision does not eliminate the basic standing or interest in the controversy and presentation of the issues. While this may seem like a simple point, the Sugarloaf case demonstrates the danger of blurring standing with the eventual outcome of the case.

> Finally, as reiterated in Sugarloaf, 344 Md., at 297, quoting Crown Development:
>
> "It is a settled principle of Maryland law that, 'where there exists a party having standing to bring an action...we shall not ordinarily inquire as to whether another party on the same side also has standing." 328 Md., at 317.

Here, Lillian Jenifer, the adjacent private property owner bordering the same Mine Branch Run, is a party under informal administrative law standing principles: "...anyone clearly identifying himself to the agency for the record as having an interest in the outcome of the matter..." Sugarloaf, 344 Md., at 286-87. She also qualifies under the "aggrievement" standard applicable to judicial review. See Sugarloaf, supra; Becker v. Litty 318 Md. 76 (1990). The Long Green Valley Association, Katherine Gabriel, and Carol Trela also qualify, at the very least, as parties to the administrative proceedings.

Given the presence of parties with standing to challenge the floodplain waiver, it is unnecessary to inquire into People's Counsel's standing. In any event, the public interest bases for that standing are clear. In addition, the observations applicable to the floodplain waiver are equally applicable to the forest buffer easement variance.

VIII. There Is No Evidence to Support a Parking Variance

Petitioner never really pressed its case for the parking variance. The same reasons which negate the floodplain waiver and FBE variance are applicable here. There is nothing unique about the property, and there is no practical difficulty to justify an expansion of the past use in conjunction with a deviation from parking requirements. Once again, the intent of the 1988 Council is pertinent.

Moreover, the expansion does generate additional congestion. If the entire property were zoned commercial, there would be no question that the additional parking should be provided. The problem here is that the rear property is zoned residential, and the Petitioner is attempting to bootstrap and overreach for additional parking or, in the alternative, a parking variance to legalize his unilateral expansion.

Conclusion

The CBA should deny the related requests for use permit, floodplain waiver, and forest buffer easement variance because, as a matter of law, they fail to satisfy relevant legal standards. It should also deny the alternative request for parking variance.

The CBA should clarify that a past limited nonconforming use does not extend to or justify a major unilateral expansion, and that the various changes have resulted in termination of the nonconforming use under BCZR 104.1.

The CBA should rule that Petitioners may not obtain rewards for such expansions and/or mistakenly issued permits, in conflict with legal requirements, and that they may

not fall back on false theories of equitable estoppel, vested rights, or popularity.

The CBA should rule that People's Counsel has standing to address all issues, and that in any event, the presence of other parties makes this an unnecessary inquiry.

The CBA should rule that Sanders' expansion is unauthorized by law, that the restaurant expansion should be removed so as to bring the use in conformity with applicable requirements, and that a revised site plan should be filed with the Department of Zoning and Development Management for review and approval.

We thank for the Board for its attention and patience to this important case which raises many issues of public interest.

Peter Max Zimmerman
People's Counsel for Baltimore County

Carole S. DeMilio
Deputy People's Counsel

Courthouse, Room 47
400 Washington Avenue
Towson, Maryland 21204
410 887-2188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 1998, a copy of the foregoing People's Counsel's Memorandum was mailed to Charles E. Brooks, Esquire, Brooks & Spicer, 610 Bosley Avenue, Towson, MD 21204, attorney for Petitioner, and to Leslie M. Pittler, Esquire, 29 W. Susquehanna Avenue, Suite 610, Towson, MD 21204, attorney for Protestants.

Peter Max Zimmerman

PETER MAX ZIMMERMAN

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180

December 10, 1997

NOTICE OF DELIBERATION

Having concluded this matter after three days of hearing (July 9, November 19, and December 10, 1997, public deliberation has been scheduled by the Board as follows:

RONALD SANDERS - Petitioner
Case No. 96-168-SPHA and Case No. 97-332-SPH

DATE AND TIME : Tuesday, February 3, 1998 @ 9:30 a.m.

LOCATION : Room 48, Basement, Old Courthouse

(NOTE: CLOSING BRIEFS AND PROPOSED FINDINGS OF FACT ARE DUE FROM COUNSEL ON MONDAY, JANUARY 12, 1998 (Original and three (3) copies.)

Kathleen C. Bianco
Administrator

---

cc: Counsel for Appellant /Petitioner: Charles E. Brooks, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Counsel for Appellants/Protestants: Leslie M. Pittler, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

Copied: K.L.W.

Printed with Soybean Ink on Recycled Paper

KLW
(L)

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

September 25, 1997

NOTICE OF ASSIGNMENT

CASE #: 96-168-SPHA **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(SPH granted in part /denied in part; VAR denied.)

CASE #: 97-332-SPH **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(Special hearing GRANTED by Z.C. /parking lot.)

Both of the above cases to be consolidated for hearing; and

ASSIGNED FOR: WEDNESDAY, NOVEMBER 19, 1997 at 10:00 a.m.

NOTICE: **This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.**

Please refer to the Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

IMPORTANT: Postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

Kathleen C. Bianco
Legal Administrator

---

cc: Counsel for Appellant /Petitioner: Leslie M. Pittler, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Counsel for Appellants/Protestants: Charles E. Brooks, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer, et al
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

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KLW

(L)

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
(410) 887-3180

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

June 24, 1997

AMENDED NOTICE OF ASSIGNMENT

CASE #: 96-168-SPHA **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(SPH granted in part /denied in part; VAR denied.)

Notice for subject hearing is herewith **AMENDED** to include assignment of the following matter:

CASE #: 97-332-SPH **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(Special hearing GRANTED by Z.C. /parking lot.)

Both of the above cases to be consolidated for hearing; and

ASSIGNED FOR: WEDNESDAY, JULY 9, 1997 at 10:00 a.m.

NOTICE: This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.

No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c). For further information, see Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

Kathleen C. Bianco
Legal Administrator

---

cc: Counsel for Appellant /Petitioner: Leslie M. Pittler, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Counsel for Appellants/Protestants: Charles E. Brooks, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer, et al
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

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7-9-97

96-168 SPHA
97-332-SPH IN RE Ronald Sanders

Spicer
Charles Brooks - Petit
Peter Zimm - P. Co.
Les Pittle - Mrs Jennifer

OPENING STATEMENTS

SANDERS - BROOKS
1-Consolidation

A B-L- Zoning was instituted for a restaurant w an agreement
2 parking areas - 1 was approved as a non conforming use - 1 was mistakenly left out (from before maps)

72-73 to ~~82~~ 39 parking variance requested
~~75 to 82~~ already existed

Schmidt approved flood plain restriction now appealed

ZIMMERMAN - Defend zoning maps for county
S.P.H. to greatly ~~the~~ expand D.R.1 parking
to commercial in a residential area

ISSUE Prop is in 100 yr. flood plain
(97-332) Sec. 26-67 BCZR
"Exceptional Hardship"
Economics is not a criteria
ZONING COMM. WAS incorrect - Nothing in record to prove it
Letter approvals here are no good
Condition of waiver from Dept of DNR
Can we change zoning while a further appeal is still necessary
So is case kept now

Corner of Cromwell Br. Rd & Loch Raven Rd - Site

Stall Pkg to east of Loch Raven reservoir - only commercial use in neighborhood (become its been there so long (though smaller)
was a non conforming use - ice cream light
take out
6, 7, 8, 10 spaces on Cromwell Br. Rd, a few in front
much less used smaller
They want new spaces never used before as parking

1988 Sandler req. .9 acres for comm use

B

allow use there already to continue - County
intent

1991 Petit asked for var. use of A.R. Rd
side parking but didn't include rear side
parcel that was N.C use too
than req. to enclose deck to provide
more seating - apartment space (1)
also utilized
Zoning doesn't catch that if granted, they'll
need more parking but they issue it
anyway so now a Sp. H or Var.
— Now he's trying to legalize what
was done.
- Nobody caught floodplain issue because
they didn't look to parking
ramifications (& need for land to put
parking on even if granted later)
- Traffic problems now at Cosmo-Del Rayo
adding to restaurant has caused
congestion in past

No moral judgements
ISSUE What was (Petit's) INTENTION FOR LAW

Pittler - Zoning waiver under Title 14 by ENV. agency

- Zoning Comm made it a Constitutional precedent

DEORM Hoont set aquand

~~B~~ WOT/AN Pittler
NOT Ripe yet

Brooks - Go about people here
~~as~~ still pending

Case P/P (Soap.) Ley
Agreement TILL DEORM
~~BLANK~~ ACTS ON CONTINGENT
WAIVER

+ / graffiti murders

5

Clark X Bridges – Zimmerman

This was what it was in 1930's

9 spaces on Westside of Cromwell Rd.

- Parking spaces in front

- ~~Before 1945~~ 6 tables, carryout

doesn't know when it was paved

across the street

- additional tables up to ~~[redacted]~~ 30 tables including original

12 tables in back

12 " in basement (apt)

now it's a full service Breakfast, lunch, dinner – no more carryout

– a major change in use since orig. used for food

– no apt. in last 3 years

Hearing Suspended


GUNTHER'S
BEER
JAN. 28 1937
447-A.

(L)

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

November 20, 1997

NOTICE OF ASSIGNMENT /additional date

CASE #: 96-168-SPHA — **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(SPH granted in part /denied in part; VAR denied.)

CASE #: 97-332-SPH — **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(Special hearing GRANTED by Z.C. /parking lot.)

ASSIGNED FOR: WEDNESDAY, DECEMBER 10, 1997 at 9:30 a.m.

NOTICE: **This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.**

Please refer to the Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

Kathleen C. Bianco
Administrator

---

cc: Counsel for Appellant /Petitioner: Charles E. Brooks, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Counsel for Appellants/Protestants: Leslie M. Pittler, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

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15

96-168 SPH
97-332-SPH

12-10-97

Charles F Brooks
Les Pittle
Peter Zimmerman

Protestants Case

LILLIAN B JENIFER - Direct - Pittle
2200 Acorn Well Rd. Rd.
Potts

- Cromwell Rd. & Satyr Hill ¼ mile SW of 1961 to site
  - Objects to Parking Lot in Rear because:
    - to near gunpowder - Flood plain
    - Lot across Loch Raven was meant to ease his following your parking requirements
    - thought it was understood that allowing "footprint" simply would give him it to build then

- Flood plain continues to be back at that point
- if Parking lot runoff (water) adds to it - whole area will suffer from increased flow.

- He's created his own problem by not checking on his parking first

---

Jennifer - Zimmerman

He shows his 1996 map of area (zoning) mine bout his tennis courts at the back of her property too

- that entire area falls by grade (Best Commercial) is actually still (quite a distance away)

- what if no parking in back? (Alternative) I can't say if it would still generate a lot of traffic

- What about [illegible]

10

~~[illegible]~~

- to allow commercial parking on a flood plain in a residential area due to problems brought on by Sanders himself

- He should have checked on parking (FIRST) - He didn't push

[was failure to give him parking, Co. way to limit his expansion]

ZIMMERMAN - LOST EXHIBIT #

NOV 17, 1997 Co. Council Agenda Item F-10 proposal to improve bank of river + Stream Restoration $$ for consultant

Is it his burden to prove that Co-Council action to improve headwaters won't be incongruent to Co-actions.

— Pfeiler

96-168 PHA continued 11-19-97
97-332 SPH

Charles B Brooks - Petit
Petit 2nd W - P Co. B. Co -
Leslie Pittle - Jennifer (Chaw
primarily
Peoples Counsel

Brooks 2 opinions of Zoning Commissioners
the failure to include zoning
for patio
Floodplain waiver was granted

Petit
Sp. H for Sp. EX for patio additions
made necessary by enlargement
of restaurant w/ conversion of
apartment
Sp. H & Sp. EX + Flood plain waiver
Front lyfle (reason for P/P) has been
granted
& NP non conforming use petition for

(2)

Elizabeth H. Littleton - Direct - Brooks
Wagner Jane - Cross Examined
Rudy from Sanders (site) over 70yrs
at location & area

- once resided in Apartment on site in 1950's
- There was parking to west in 1945

Cross X — NO Questions - Zimmerman

Joseph Larson - Direct - Brooks
Spellman Larson Exs - Eng & Surveying

Admitted by Court (A) Expert in Engineering

(A) 96-168 SPHA Zoning Comm. Exhibits (A) 1-25

(B) 97-332 SPHA (B) 1-6

Admitted by Court #1 - Today's sign - in sheet

- prepared plat
Superseded by Zoning Plat 1.2 acres - Parking Lot

(3)

Structure is in BL zone

Petit # 2 — Plat of property

Petit # 3 — Plat shows new parking area as approved below & modified by request of Balto Co. to provide parking in DR-1

Petit # 4 — plat shows Parking lot on North side of Cromwell Rd - Rd in conformance with B. Co. comments

Petit # 5 — 1-23-97 Approval from DPW of parking as proposed

Health Safety prob
Concession
Fire Panic
Middle Pop Con.
Parks - water
Aisles Light & dr
OK with Regs
Remedial problem

WO problem

Zoning
Laundry
List

Temple Rep is 1900 ft from Site & is closest structure accessible by road.

Retail #7 ~~plat~~ photo-plat

Retail ex #8 Master Plan of Cromwell Valley Park Shows a parking area for Park adj to parking area requested by Petit.

39 existing spaces currently to get a total of 73 spaces required for size of restaurant requested (enclosed porch)

Spokesman is requested to point parking on a residence

Lasar - Cross - Zimmerman

looking at ex #3 - plat accompanying request for Special Hearing

2008 sq. ft. - New Wall addition (deck) doesn't include sq. footage of apt. to be used for cold-space

(5)

19 E Side of Loch Lann – Non Conf.
expects on footprint 1991 code
49 – 39 – old spaces
Code – to set remainder of all additional space
Sec. 409 math requires 34 new
(based on new sq. footage of spaces
restaurant) Total of 73

Construction talking Was Dge W/out previous Special Hearing – now they want to legitimize what they did

Site as now exists is not in compliance with law, unless SP. Dg for addt parking is granted or variance of parking requirement is granted

– Only the building is B.L. remainder of Petit Bros is DR / (105 spaces must still need buffer flood plain Wavier, but not variance or SP Hearing

– If Council, Board of Comm.

(6)

Lavon Redlett - Brooks

porch is 800 sq. ft to enclose
3748 NOD of Ed. approves

X There is a variance for Parking
appeal of Denial by Zoning
Commissions as an alternate
request

Ronald Sanders - Petit Direct Brooks

1984 Dad died he took over
1956 then (parents) bought it

On 1986 it was all residential
IN 1988 tried to rezone as B-L (Bus Local)

entered into 9 pg covenant agreement
with nearest comm. association - they
agreed to allow expansion to 7000 sq. ft.
- was granted B-L for footprint of
restaurant

8

Shortage of small channels & Atpl. fields
Co will want to buy it for that
purpose as Co school dep. grows

Sanders Cross X Zimmerman

~~Co #1~~ from a canyon of 4-5 tables
rain up to ±33

Co #1 Co documents for vegan
" " #6 Map of Park

Capital Acknowledges the changes of no Co. Council
budgeting for the park

EDWIN HOWE Direct Circuits
KCSW Consultants

~~Hp~~ - Prof. engineering
environmental issues
Hydrology

Petition #17

1-3-97 Did a hydrologic study of site
" open channel hydraulics or flood

10

Richard Moore Pickett Brooks
Wells + Associates

Expert - Traffic + transportation
Planning & Parking

Letter #20

1-16-97 made investigation of site
incl. site plan, access, roads
obtained accid - data & traffic
volume data available from Co.
1993—1996 Satyr Hill to Cub Hill
on Cromwell connection 8 or 9 accidents
per year
- over 1/2 at or near Satyr Hill
road intersection
- some at Cub Hill intersection
- only 2 occurred in 4 yrs. at Loch
Raven intersection
1.50 is factor of occurrence at site
2.0 is State average
4.5 at Satyr Hill
2.58 @ Cub Hill
NOW Cromwell Br Rd is already
affected by cars backing out
of spaces & waiting to get out to work

conclusions:

As to Parking commercial in Res. zoning area - is appropriate

27% slope - unbuildable on both sides

footprint rezoning was a procedure used when in 1960's or so no buffer regulations existed

Then — parking permits were easily granted

In 70's case law discouraged this kind of zoning.

They allowed for additions in what they did in 1988 Footprint zoning.

So They had to do it with future parking to be allowed - although it makes it unusable.

[because - when you zone for commercial you must have parking to support it.]

Variance UNIQUE-ness of property

- Steep slopes city ROW, Co park property + floodplain - no place for him to have parking area.

Would be a hardship unless

502.1

plan for Pub of 6 - calls for a parking lot to be put adjacent to requested parking site

---

Gerber Cost X Zimmerman

remembers huge traffic jams in & out as a kid getting ice cream there

- looked at 1988 zoning file & spoke to area planner at that time
- he was planning Director in 1987-88.

10-26-87 letter from Deb Dopkin & Charles Howard (counsel for Alit) asking for zoning change for present uses - not for any expansion - simply to protect site from destruction resulting in non conforming use lapse.

Yes - needed Special Hearing & variance for more parking

They could have rezoned just the footprint but instead they allowed extra room sufficient for some

Don't ask for more

Baltimore County, Maryland

OFFICE OF PEOPLE'S COUNSEL
Room 47, Old CourtHouse
400 Washington Ave.
Towson, MD 21204

(410) 887-2188

PETER MAX ZIMMERMAN
People's Counsel

CAROLE S. DEMILIO
Deputy People's Counsel

December 23, 1997

Kristine K. Howanski, Chairman
Board of Appeals of Baltimore County
Room 49 Courthouse
400 Washington Avenue
Towson, MD 21204

RECEIVED
COUNTY BOARD OF APPEALS
97 DEC 24 PM 3:00

Hand-delivered

Re: Ronald Sanders
Case Nos. 96-168-SPHA / 97-332-SPH

Dear Chairman Howanski:

Please recall that the Board gave us leave to obtain and submit a copy of the consultant agreement for the design of the Phase I Stream Restoration for the reach of Minebank Run from Goucher Boulevard to I-695. Accordingly, we submit herewith the approved agreement, together with the "Minebank Run Watershed Assessment."

We also submit the accompanying DEPRM memorandum dated December 17, 1997 from Chin Y. Lien, Supervisor, Capital Improvements Section, Bureau of Resource Management and Engineering Services. This memo reflects that the consulting agreement deals with Phase I (from the headwater area at Goucher Boulevard to I-695). It also states that the write-up for the overall watershed includes Phase II, from I-695 to the confluence with the Gunpowder River. Phase II is included in the proposed F.Y. 2000 Capital Budget.

The Sanders property borders a part of the Minebank Run slated for restoration in Phase II.

We will address the relevance of this material in our post-hearing Memorandum to be filed on or before January 12, 1998.

Very truly yours,

Peter Max Zimmerman

Peter Max Zimmerman
People's Counsel for Baltimore County

Carole S. Demilio

Carole S. Demilio
Deputy People's Counsel

PMZ/caf

cc: Charles E. Brooks, Esq.
Attorney for Petitioner

Leslie M. Pittler, Esq.
Attorney for Protestants

Chin Y. Lien, Supervisor, Capital Improvements Section
Bureau of Resource Management and Engineering Services
Baltimore County DEPRM

Rocky Powell, Natural Resources Manager
Bureau of Resource Management and Engineering Services
Baltimore County DEPRM

BALTIMORE COUNTY, MARYLAND

DEPARTMENT OF ENVIRONMENTAL PROTECTION AND RESOURCE MANAGEMENT

INTER-OFFICE CORRESPONDENCE

DEC 19 1997

TO: Mr. Peter M. Zimmermann
People's Council

DATE: December 17, 1997

FROM: Chin Y. Lien, Supervisor
Capital Improvements Section
Bureau of Resource Management and Engineering Services

SUBJECT: Minebank Run Stream Restoration

In response to your request, please find the following information for the above referenced project:

- A copy of the Consultant Agreement with Biohabitats, Inc., for the design of the Phase I Stream Restoration for the reach of Minebank Run from Goucher Blvd. to I-695.
- A copy of the write-up for the overall Minebank Run Watershed. This includes what we are now calling the Phase II restoration of Minebank from I-695 to the confluence with the Gunpowder River. The Minebank Run Phase II Stream Restoration Design is included in the proposed Capital Budget in FY 2000.

If you have any questions regarding this communication, please contact me or Ms. Karen Ogle of my staff at X2904.

CYL:ko

c: Rocky Powell

MINEBANK RUN WATERSHED ASSESSMENT

1. INTRODUCTION

The Minebank Run drains a 3.3 square mile watershed in the Piedmont Region of southcentral Baltimore County. Although its heavily developed headwaters are located in Towson its lower reaches flow through the rural Cromwell Valley before it confluences with the Gunpowder River at the lower end of the valley. As is common with many streams that drain urban watersheds the Minebank Run has been affected by significant alteration of its hydrologic and sediment regimes resulting in concomitant adjustments in channel cross-section, profile and pattern.

The major portion of the upper watershed developed prior to the promulgation of current County regulations regarding stream and floodplain protection and stormwater management. Segments of the upper reaches were lined with concrete revetment in the 1950's and 1970's to convey stormwater runoff through the developed neighborhoods. The revetment is currently failing, leaving the steep, confined reaches in this area in an unstable condition. This situation has created concern among residents for their properties and the safety of children in the neighborhood. The lower reaches also adjusted, both vertically and laterally, as a result of the increased flow volume and reduced time of concentration associated with the development of the upper watershed. These channel adjustments exposed a sanitary sewer line and damaged private and public land.

In the late 1980's Baltimore County's Department of Public Works had proposed improvements to protect the sanitary sewer in the lower Minebank which included channelization and armoring with gabions. This project was abandoned due to the potential for significant environmental impacts and the fact that the channel had adjusted reburying some of the previously exposed sections of sanitary sewer. In 1993 a significant portion of the lower Minebank came into public ownership when Baltimore County Department of Recreation and Parks and the Maryland Department of Natural Resources purchased several farms in the Cromwell Valley to establish a park.

The Minebank Run was initially identified as a capital project when the Department of Recreation and Parks requested that DEPRM assist in restoring the lower Minebank through DEPRM's Capital Improvement Program. DEPRM made the decision to identify opportunities for stormwater retrofits in the upper watershed that would increase the likelihood of success in the lower watershed. In addition, the Department of Public Works had developed a capital budget to address the problems associated with the failing concrete revetment and channel instability in the upper watershed. Their monies have been rolled into an overall capital budget focused on the entire Minebank Run watershed.

The watershed rehabilitation efforts will include: stormwater retrofits to provide peak and volume management for more frequent storms (ie. 1- 1.5 yr RI); water quality

management to reduce pollutant loadings; stream restoration to reestablish a stable channel geometry, profile and pattern; and riparian reforestation.

The watershed rehabilitation effort will be divided into three phases. Phase I involves stabilization/restoration of the upper Minebank Run and its tributaries (ie. upstream of I-695). Phase II involves implementation of stormwater management retrofits in the upper and lower watershed. Phase III involves stabilization/restoration of the lower Minebank Run and its tributaries (ie. downstream of I-695).

2. STUDY OBJECTIVES

The purpose of this assessment is: 1) to characterize the existing morphological conditions of the Minebank Run and its tributaries (upper and lower watershed); 2) to determine, on an individual reach basis, the potential for natural recovery following implementation of stormwater retrofitting; 3) to prioritize unstable reaches, focusing restoration efforts on those areas with the greatest need, highest probability for success and lowest likelihood of recovery without direct intervention; 4) to determine the natural stable form appropriate for the unstable reaches; and 5) to establish permanent cross-sections that will provide data that can be utilized for the Hydrogeomorphologic Study of Piedmont Streams, pre and post rehabilitation/restoration monitoring, and for future staff training in conducting morphological assessments; 6) to characterize the existing aquatic habitat and biological communities (including fish and benthic macroinvertebrates) along the mainstem of Minebank Run and its major tributaries to provide data relevant to the permit process and for pre and post rehabilitation/restoration monitoring.

3. STUDY METHODS

A. Watershed Characterization

The Minebank Run watershed will be characterized relative to: regional climate, watershed morphometry (size, shape, topography, and drainage density), geology, soils, land use and land cover, hydrology, and stream morphology. Mapped resources e.g. aerials, photogrammetrics, geological and soil surveys will be utilized to conduct a portion of this characterization. In addition, a U.S.G.S. gage station was installed on the lower Minebank Run in October, 1996 to provide data on more frequent storm events (1 - 1.5 yr RI).

B. Morphological Assessment

An interagency team including Baltimore County Department of Environmental Protection and Resource Management, Maryland Department of Natural Resources, Maryland Department of the Environment, U.S. Army Corps of Engineers, and U.S. Fish & Wildlife Service will conduct the initial phases of the morphological assessment of the

Minebank Run and its tributaries. The morphological assessment will utilize the applied fluvial geomorphology methods developed by Rosgen (1996).

1) Level I- Geomorphic Characterization

The Minebank Run and all its tributaries will be classified by stream type utilizing broad level descriptions (Rosgen, 1994). County photogrammetrics, aerials and some field verification will be used to conduct this classification.

2) Level II - Morphological Descriptions

The Minebank Run and all its tributaries will be classified by stream type utilizing the detailed morphological descriptions (Rosgen, 1994). The classification protocol will include establishing reference reaches, two for each stream type identified (ie. C3, C4, F3, F4, etc.) along the Minebank Run and its tributaries, to calibrate the field teams classification/assessment methods. Establishing these reference (or calibration) reaches requires detailed measurements (surveyed at established cross-sections with a horizontal, leveled line, measuring tape, rod, and laser or auto levels) of the bankfull channel dimensions, pattern and profile including: width, mean depth, width/depth ratio, floodprone width, entrenchment ratio, slope (channel invert, water surface, bankfull and top of bank), sinuosity, and particle size distribution.

The remaining reaches will be classified utilizing an extrapolation method. This method allows classification of a reach by stream type where rapid field measurements confirm its characteristics are consistent with those of one of the reference stream types already identified. The rapid field method involves measuring (with a stretched measuring tape, rod, and lock-level) the bankfull channel dimensions, pattern and profile including; width, mean depth (fewer data points), width/depth ratio, floodprone width, entrenchment ratio, water surface slope and sinuosity. Mean particle size (D_{50}) will be estimated based on visual observations (comparison to previously completed reference reach).

The field teams will complete standard reference reach and reach classification data forms for each reference reach classified (ie. Reference Reach Stream Classification Field Form and Pebble Count Data/Particle Size Distribution Forms) and each extrapolated reach classified (ie. Stream Classification Field Data Forms).

3) Level III - Assessment of Stream Condition and Departure from its Potential

The Minebank Run and its tributaries will be assessed relative to current morphologic condition, potential and stability utilizing the Level III assessment methods outlined in Rosgen (1996). This assessment will include observations/measurements of: riparian vegetation, streamflow regime, stream size and order, organic debris and/or channel blockages, depositional patterns, meander patterns, channel stability rating, mass wasting, of adjacent slopes, streambank erosion potential, aggradation/degradation potential, and channel alterations.

The field teams will record their observations/measurements on standard Level III field forms (ie. Summary of Condition Categories for Level III Inventory, Altered Stream State, Channel Stability Pfankuch Evaluation and Stream Classification Summary, Bank Erodibility Hazard Index and Stress in the Near Bank Region).

4) Level IV - Field Data Verification

Selected reaches of the Minebank Run and its tributaries will be analyzed to verify the Level III assessments of condition, potential and stability. This analysis will include: streamflow measurements; sediment analyses; and channel stability monitoring.

Stream flow measurements

A U.S.G.S. gage station was installed on the lower Minebank Run in October, 1996. Due to the minimal operational time period, gage data will be used very cautiously in calibrating the bankfull channel and developing bankfull discharge estimates. It is anticipated that more reliable information will be available prior to the initiation of restoration design on the lower Minebank Run. In addition, this gage will eventually provide a data set for a small urban watershed that can be incorporated into the Hydrogeomorphologic Study of the Piedmont Streams.

Sediment Analyses

Significant instream sediment sources in the watershed will be identified using the stream classification and condition, potential, stability data from the Level II and Level III assessments. A particle size distribution of the bed material will be determined for each reference reach utilizing the Modified Wolman Pebble Count Method (Rosgen, 1996).

In addition, a particle size distribution of bedload transported at bankfull stage will be determined for each stable reference reach utilizing the field procedures for sampling point bars and/or central bars developed by Rosgen (1996).

Suspended sediment and bedload monitoring may be included at a latter phase of the assessment depending on manpower and equipment availability.

Channel Stability Monitoring

Vertical or Bed Stability will be monitored utilizing the field procedures outlined by Rosgen (1996). This involves an initial survey of the cross-sectional profile at monumented cross-sections located in riffle and pool segments of specific reaches. These monumented cross-sections will be resurveyed at regular intervals and after significant discharge events (bankfull or greater).

Lateral Stability will be monitored utilizing the field procedures outlined by Rosgen (1996). This analysis involves the installation of bank pins and a bank profile bed pin at the same monumented cross-sections used in the bed stability analysis. At regular intervals and after significant discharge events (bankfull or greater) the length of the exposed pins will be measured. Horizontal distances from the bank profile rod to previously measured points on the bank will be measured also.

C. Data Compilation , Analysis and Reporting

Baltimore County will compile and analyze the data collected during the assessments. A report summarizing the findings of the assessment will be prepared and made available to Baltimore County's consultant and the participating agencies.

4. PERSONNEL, WORK SCHEDULE, AND EQUIPMENT

A. Personnel

Project management and coordination will be provided by Rocky Powell, Baltimore County DEPRM.

The assessment will be conducted by five field teams comprised of a team leader and four field assistants.

Team Leaders

Team 1 - Rich Everett, U.S. F&W S (410) 573-4518
Team 2 - Tamara McCandless, U.S. F&W S (410) 573-4552
Team 3 - Rich Starr, U.S. ACOE (410) 962-4633
Team 4 - Sean Smith, MDNR (410) 974-3016
Team 5 - Rocky Powell, Balto. Co. DEPRM (410) 887-3733

Teams will be assigned to specific subwatersheds. Each team will be responsible for conducting the Level II, Level III and Level IV assessments in their assigned subwatersheds, including establishing and surveying the permanent monumented cross-sections for the Level IV channel stability analyses and collecting the bar samples to determine the particle size distribution of bedload transported at bankfull stage.

Team assignments are indicated on the attached spread sheet.

B. Schedule

A pre-assessment briefing will be held at the Sherwood House in Cromwell Valley Park at 1:00 PM, May 2, 1997. All team members should attend this briefing. Team leaders should plan on staying later.

Preassessment training will be conducted from 8:00 AM - 4:00 PM, May 1, 1997 and May 7, 1997 on Minebank Run at the Sherwood House. Team members should plan on attending at least one of the two training days.

The assessment will be conducted during the week of May 12 - 16, 1997, 8:30 AM - 4:30 PM each day. Teams will meet at the Sherwood House each morning at 8:00 AM to plan and prepare for that day's activities.

Team leaders will collect all completed and partially completed field forms at the end of each day for safe keeping. At the end of the week all field forms should be turned into the project manager.

C. Equipment

Each team will be provided with the following equipment:

laser level and tripod
surveying rod with laser eye
hand level
surveying rod without laser eye
cross-section pins
camline
line level
100' measuring tape
300' measuring tape
centimeter ruler
clinometer and slope rod
Level II and III field forms
bank pins
bar sample containers

Each team member must bring:

hip boots or chest waders
rain gear
calculator
field guides
pencils

2755

BALTIMORE COUNTY, MARYLAND
DEPARTMENT OF PUBLIC WORKS
AGREEMENT FOR ENGINEERING SERVICES

THIS AGREEMENT made this _____ day of _____ in the year _____ by and between Biohabitats, Inc. _____

hereinafter referred to as Engineer, and Baltimore County, Maryland, hereinafter referred to as County.

WHEREAS, County has appointed Biohabitats, Inc. _____

as Engineer to furnish professional services for the design of stream restoration and storm water retrofit measures for Minebank Run from the headwater area at Goucher Blvd. to I-695

J.O. # 21-106-9601 - $248,511.33

hereinafter referred to as Project.

WITNESSETH

County and Engineer, in consideration of the performance on their respective parts of the several provisions herein contained, and intending to be legally bound, agree as follows:

ARTICLE 1 - GENERAL

The completed DPW Form 101 prequalification questionnaire approved March 14,1997 and filed by the Engineer with the Department of Public Works is part of the consideration of this agreement and its existence is considered a condition precedent to the employment of said Engineer. Dependence has been placed thereon by the County in judging the Engineer's fitness to execute satisfactorily the work covered by this agreement, and any material misstatement therein bearing upon his ability shall render this agreement voidable at the option of the County's Director of Public Works, hereinafter called the Director, without the County being liable for any part of the fee for any damage whatever to anyone in connection with the Project, and the Engineer agrees to save County harmless from any such damages.

ARTICLE 2 - RESPONSIBILITY OF THE ENGINEER

2.1 The Engineer shall be responsible for the professional quality, technical accuracy, timely completion, and the coordination of all designs, drawings, specifications, reports, and other services furnished by the Engineer under this agreement. The Engineer shall, without additional compensation, correct or revise any errors or deficiencies in his designs, drawings, specifications, reports, and other services furnished by the Engineer under this agreement. The Engineer shall, without additional compensation, correct or revise any errors or deficiencies in his designs, drawings, specifications, reports and other services.

2.2 The Engineer shall perform such professional services as may be necessary to accomplish the work required under this agreement, in accordance with this agreement and applicable law and code requirements.

2.3 Approval by the County or other Regulatory Agencies of drawings, designs, specifications, reports, and incidental work or materials furnished hereunder shall not in any way relieve the Engineer of responsibility for the technical adequacy of the work. Neither the County's nor other Regulatory Agencies' review, approval or acceptance of, nor payment for, any of the services shall be construed to operate as a waiver of any rights under this agreement or of any cause of action arising out of the performance of this agreement, and the Engineer shall be and remain liable in accordance with applicable law for all damages to the County or other Regulatory Agencies caused by the Engineer's negligent performance of any of the services furnished under this agreement.

2.4 The rights and remedies of the County provided for under this agreement are in addition to any other rights and remedies provided by law.

ARTICLE 3 - SCOPE OF WORK

3.1 Except as may be otherwise specifically limited in this agreement, the Scope of Work to be rendered by the Engineer shall include all services required to complete the task in accordance with applicable laws, regulations and codes.

3.2 The Engineer's proposal dated September 24, 1997 is attached as Appendix A and is hereby made part of this agreement.

The generalized tasks for the project are:

A) Watershed & Fluvial Geomorphologic Characterization
B) Survey
C) Structural Evaluation

D) Hydrologic/Hydraulic Modeling and Analyses
E) Restoration Concept Plan
F) Stream Restoation and Storm Water Retrofit Design
G) Permit Aquisition
H) Community Meetings
I) Construction Inspection
J) Post-Construction Monitoring

3.3 Performance Time - The Engineer shall complete the Project within the number of working days specified in the Engineer's Proposal.

3.4 The Engineer will be required to submit monthly progress reports covering the work accomplished.

ARTICLE 4 - CHANGES

4.1 The County may, at any time, by written order, make changes within the general scope of this agreement in the services or work to be performed. If such changes cause an increase or decrease in the Engineer's cost of, or time required for, performance of any services under this agreement, whether or not changed by any order, an equitable adjustment shall be made and this agreement shall be modified in writing accordingly. Any claim of the Engineer for adjustment under this clause must be asserted in writing within Thirty (30) days from the date of receipt by the Engineer of the notification of changes unless the County grants a further period of time before the date of final payment under this agreement.

4.2 No services for which an additional compensation will be charged by the Engineer shall be furnished without the written authorization of the County

ARTICLE 5 - TERMINATION

Should the project be abandoned or terminated prior to completion, the County will pay the Engineer the proportionate share of the fee earned at the time of termination. No amount of fee shall be allowed for anticipated profit for work not performed.

ARTICLE 6 - DISPUTES

All questions involving the interpretation of this agreement, which cannot be resolved between the Engineer and the Director, shall be referred to the County Administrative Officer, whose decision in the matter shall be final.

ARTICLE 7 - PAYMENT (COST PLUS PROFIT)

7.1 The County covenants and agrees in consideration of the Engineer's professional services called for by Article 3 to pay the Engineer for such services on a Cost Plus Profit Basis with an Upset Limit.

7.2 Direct Labor Costs, as used herein, shall be actual salaries paid to productive employees before tax and other deductions and does not include overhead expenses, administrative support time, payroll taxes, workmen's compensation and/or other insurances paid on behalf of the employee, allowances for vacation, holidays or sick leave, bonuses or other incentives. The Engineer shall submit for approval, by the County, prior to assignment of personnel to any phase of the work, a schedule of personnel, by identification number, classification, rate of pay and effective date of pay, proposed for the Project. Any and all changes to this schedule, as approved, must have prior written approval of the County before billing shall be authorized.

7.3 During the term of this agreement, the Engineer will bill for reimbursement of Indirect Costs, comprised of combined overhead and payroll burden, at a rate that shall not exceed 130.0 percent of the Direct Labor Costs for productive personnel engaged directly in the performances of services.

7.4 Profit shall be affixed at a value equivalent to ten (10) percent, maximum, of the combined total of Direct Labor Costs plus Indirect Costs. Under this agreement, the maximum profit payable to the Engineer shall be Eleven Thousand Forty Two Dollars and 15/100 Cents ($11,042.15)

No Profit shall be allowed as a percentage of Other Direct Costs.

7.5 The total Professional Fee payable to the Engineer under this agreement shall not exceed One Hundred Twenty Nine Thousand Fifty Two Dollars and 56/100 Cents ($129,052.56)

7.6 Payment for Other Direct Costs incurred incidental to and directly attributable to the Project are specified herein under Article 20 - Special Clauses. Any payments made to subconsultants (Direct Labor Costs, Indirect Costs, Profit and Other Direct Costs) shall be included as an Other Direct Cost Item. The maximum amount payable for Other Direct Costs shall not exceed One Hundred Nineteen Thousand Four Hundred Fifty Eight Dollars and 77/100 Cents ($119,458.77)

7.7 The maximum amount payable to the Engineer under this Agreement shall be the sum of the total Professional Fee and Other Direct Costs. This amount shall not exceed a total value of Two Hundred Forty Eight Thousand Five Hundred Eleven Dollars and 33/100 Cents ($248,511.33) unless authorized in writing by the Director.

There shall be non interchangeability between the Upset Limit for Professional Fee and the Upset Limit for Other Direct Costs unless there is an approved amendment to the agreement.

7.8 No overtime work, or payment therefore, shall be performed without prior written authorization from the Director.

7.9 Payment to the Engineer shall be made monthly on the basis of certified invoices accompanied by the required supporting documentation and affidavits.

7.10 The preparation of Invoices shall be in accordance with the format specified by the County.

7.11 Final payment to the Engineer shall be made upon completion and acceptance of the professional services specified under the terms of this agreement.

ARTICLE 8 - PROJECT DESIGN

8.1 All work for the Project shall be designed in conformance with the following:

A. Baltimore County Design Manual - Adopted by County Council 1983 and latest revisions thereto.

B. Standard Specifications and Details for Construction - Adopted by County Council 1983 and latest revisions thereto.

C. Laws, codes and regulations that pertain or apply to the Project.

8.2 In the performance of this agreement, the Engineer shall, to the extent practicable, provide for maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through competitive procurement, or through standard or proven production techniques, methods and processes.

8.3 The Engineer shall not, in the performance of the work called for by this agreement, produce a design or specification such as to require the use of structures, machines, products, materials, construction methods, equipment, or processes which are known by the Engineer to be available only from a sole source, unless such use has been

adequately justified in writing by the Engineer as necessary for the minimum needs of the project.

ARTICLE 9 - AUDIT AND ACCESS TO RECORDS

9.1 The Engineer shall maintain books, records, documents and other evidence directly pertinent to performance under this agreement in accordance with accepted professional practice, appropriate accounting procedures and practices and shall make such materials available at all reasonable times during the period of this agreement and for three years from the date of final payment.

In the case of any agreement involving a Project funded in whole or in part by Federal/State Grants, records shall be maintained for a period of three years after final payment is received by the County from the Federal/State Government.

9.2 The County shall reserve the right to audit any project.

9.3 For any project wherein the professional fee is based upon Direct Labor and Indirect Costs, there will be no final audit performed to determine the increase or decrease of Overhead and Burden that was experienced during the performance of this agreement. The percentage of Direct Labor cost which represents Overhead and Payroll, and is enumerated in Article 7 - Payment, shall not be adjusted.

ARTICLE 10 - PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

10.1 If the County determines that any price, including profit, negotiated in connection with this agreement or any cost reimbursable under this agreement was increased by any significant sums because the Engineer, or any subcontractor, furnished incomplete or inaccurate cost or pricing data or data not current as specified in the proposal, then such price or cost or profit shall be reduced accordingly and this agreement shall be modified in writing to reflect such reduction.

10.2 Failure to agree on a reduction shall be subject to Article 6 - Disputes, of this agreement.

ARTICLE 11 - SUBCONTRACTS

11.1 Any subcontractors and outside associates or consultants required by the Engineer in connection with the services covered by this agreement will be limited to such individuals or firms as were specifically identified and agreed to during negotiations, or as are specifically approved by the County during the performance of this agreement. Any

substitution in such subcontractors, associates, or consultants will be subject to the prior approval of the County.

11.2 Except as otherwise provided in this agreement, the Engineer may not subcontract services in excess of thirty percent (30%) of the contract price to subcontractors or consultants without prior written approval of the County.

ARTICLE 12 - EQUAL EMPLOYMENT OPPORTUNITY

12.1 In the performance of the work covered by this agreement, the Engineer shall not discriminate against any worker because of race, creed, color, sex, political affiliation or national origin.

12.2 Should the Engineer need to retain the services of a subconsultant, to perform certain specialized work, it shall be the Engineer's responsibility to assure that the subconsultant adheres to all applicable Affirmative Action Plans for Equal Employment Opportunity.

ARTICLE 13 - COVENANT AGAINST CONTINGENT FEES

13.1 The Engineer warrants that he has not employed or retained any company or person other than a bona fide employee working solely for the Engineer to solicit or secure this agreement and that he has not paid or agreed to pay any person, company or corporation, individual or firm, other than a bona fide employee working solely for the Engineer any favor, commission, percentage, gift, fee or any other consideration contingent upon or resulting from the award or making of this agreement.

13.2 For the breach or violation of this provision, the County shall have the right to terminate this agreement without liability and, at its discretion, deduct from the contract price, or otherwise recover, three times the full amount of such favor, commission, percentage, gift, fee or other consideration. In addition, the firm will be removed from the list of eligible consultants until such time as the County determines as appropriate that requalification be made. In no event shall the requalification take place within three years.

ARTICLE 14 - RIGHTS IN DATA

14.1 The Engineer agrees that any plans, drawings, specifications, computer programs, technical reports, operating manuals or other "Subject Data" shall be the sole and absolute property of the County.

14.2 All such "Subject Data" furnished by the Engineer pursuant to this agreement are instruments of his services in respect to the project. It is understood that they are not

intended or represented to oe suitable for reuse on any other project. Any reuse by the County without specific written verification or adaptation by the Engineer will be at the risk of the County and without liability or legal exposure to the Engineer. Any such verification or adaptation will entitle the Engineer to further compensation at rates to be agreed upon by the County and the Engineer.

ARTICLE 15 - NOTICES

It is agreed that all notices that are required to be given by either party to the other may be either personally delivered or sent by registered or certified mail, return receipt requested, properly addressed and postage prepaid to the addressee for the parties herein given unless another address shall have been substituted for such by notice in writing. Such notice shall be addressed or delivered to:

Firm's Name and Address	Biohabitats, Inc. 15 W. Aylsbury Road Timonium, Maryland 21093
Baltimore County:	Baltimore County Department of Public Works Towson, Maryland 21204 Attention: W. William Korpman, III, Chief Bureau of Engineering and Construction

Such notice shall be deemed to have been duly given on the second business day after the same has been mailed by registered or certified mail, return receipt requested, or on the day when hand delivered against receipt.

ARTICLE 16 - JURISDICTION

This Agreement and the rights and obligations of the parties hereunder shall be construed in accordance with the laws of the State of Maryland.

ARTICLE 17 - WAIVER

It is particularly understood and agreed that in the event of a waiver at any time by the parties of any particular covenant or condition of this Agreement, said waiver shall extend to the particular incident or case only and in the manner specified and such waiver shall not be construed or understood as applying to or waiving in any manner any further or other rights hereunder or any character whatever.

ARTICLE 18 - VOIDABLE PROVISIONS

It is agreed that if any provision of this Agreement shall be determined to be void by any court or competent jurisdiction, then such determination shall not affect any other

provision of this Agreement, all of which other provisions shall remain in full force and effect; and it is the intention of the parties hereto that if any provision of this Agreement is capable of two (2) constructions, one (1) of which would render the provision valid, then the provision shall have the meaning which renders it valid.

ARTICLE 19 - INTEGRATION

This Agreement, including any Exhibits that may be attached hereto, shall constitute the entire agreement between the parties and any prior understanding or representation of any kind preceding the date of this Agreement shall not be binding upon either party except to the extent incorporated in this Agreement. Any modification of this Agreement or additional obligation assumed by either party in connection with this Agreement shall be binding only if evidenced in writing signed by each party.

ARTICLE 20 - SPECIAL CLAUSES

20.1 Council Approval: The Engineer covenants that this agreement is subject to and in compliance with provisions of Section 715 of the Baltimore County Charter, Article VII, title, "Budgetary and Fiscal Procedures."

20.2 Asbestos: It is understood and agreed that the handling or removal of asbestos products involves certain health risks which require specific safety measures. The Engineer shall not be responsible for asbestos safety and safety measures on the job including safeguards for the protection of employees of contractors or subcontractors, nor for the protection of the general public. Such responsibility for asbestos safety and safety measures is and shall remain, that of others. Therefore, except for claims arising from the Engineer's own professional negligent acts, errors or omissions, County agrees to hold harmless, defend and indemnify the Engineer from all claims, suits, expenses or damages arising from or alleged to arise from exposure to or inhalation of asbestos or asbestos fibers, resulting from the County or Engineer's actions or failure to act while performing work (services) under this agreement and to the extent as provided for in the Courts and Judicial Proceedings Article, Sections 5-401 through 5-404, entitled "Local Government Tort Claims Act."

20.3 Employment of Federal, State, City or County Personnel

A. The Engineer shall not engage, on a full or part time or other basis, during the period of this agreement, any professional or technical personnel who are in the employ of the Federal Government or in the

organization of any State, City or County, except regularly retired employees, without the written consent of the public employer of such person.

B. The intent of Article 20.3A is to preclude a governmental employee involved with the Project from also being simultaneously employed by the Engineer to work on the Project. It is not the intent of the Article to prevent or preclude such a governmental employee from being recruited, interviewed or hired by the Engineer. Should the Engineer hire a County employee, this will not be cause for termination of this agreement nor have any effect upon the Engineer's ability to secure new County consulting assignments.

20.4 As referred to in Article 3, Section 3.3, "working days" refer to a five (5) day week, excluding Saturdays, Sundays and State of Maryland Legal Holidays.

20.5 Reimbursement of Other Direct Costs directly attributable to the Project shall be in accordance with the following:

Other Direct Cost Items	Estimated Costs
Travel	$ 471.20
Reproduction	$ 4,480.00
Photography	$ 708.00
Telephone/Fax	$ 764.00
Mail/Delivery	$ 900.00
Field Supplies	$ 350.00
Subconsultants:	
Greenman, Pedersen, Inc.	$ 92,456.79
George W. Stephens, Inc.	$ 11,348.25
EBA Engineering, Inc.	$ 7,980.53
TOTAL	$ 119,458.77 (Upset Limit)

Total Agreement

Professional Fee	$ 129,052.56
Other Direct Costs	$ 119,458.77
Total	$ 248,511.33

IN WITNESS e parties have executed this Agreemen.. oy causing the same to be signed on the day and year above written.

FOR THE CONSULTANT

ATTEST:

Elizabeth D. Clarkson

Name of Corporation

Address 5 W ALLEGHENY RD

TOWSON, MD 21093

ATTEST:

Elizabeth D. Clarkson

By 10-7-97

Date

Title PRESIDENT

FOR BALTIMORE COUNTY

By Thomas H Hamer 10/9/97

Director of Public Works Date

By 10/16/97

Director of Environmental Protection and Resource Management Date

ATTEST:

Donna Morrison 11/20/97

Date

By Robin L Churchill 11/19/97

for O. A. Dutch Ruppersberger Date

Baltimore County Executive

BALTIMORE COUNTY COUNCIL

By Joseph Bartenfelder 11/17/97

Date

APPROVED FOR LEGAL FORM AND SUFFICIENCY *

(Subject to the execution by the duly authorized administrative official and chairman of the county council. As indicated)

10/17/97

Office of the County Attorney

*Approved of Legal Form and Sufficiency Does Not Convey Approval or Disapproval of the Substantive Nature of this Transaction. Approval is Based Upon Typeset Document - All Modifications Require Re-Approval.

OFFICE OF BUDGET & FINANCE
FUNDS AVAILABLE AND ENCUMBERED

10/20/97
DATE

DEPUTY DIRECTOR FOR FINANCE

ML

SO.# 21-106-9601 $249,311.33

WORK PLAN

PHASE 1 - RESTORATION CONCEPTS

Task 1.1 Watershed Characterization — BIO w/GPI GWS and EBA

Biohabitats, GWS, GPI and EBA will participate in a one (1) day walk-through of the study area with Baltimore County to review site conditions, discuss results of the data collected by the County, and assess restoration opportunities and constraints.

Biohabitats will gather existing data pertaining to the study area including aerial photographs, topographic maps, utility maps, wetland inventory maps, H&H studies, etc.

Using the information collected from the work efforts above, Biohabitats will conduct a cursory review of the entire watershed to identify potential stormwater quantity and quality retrofit projects. Locations of potential retrofit projects will be marked on an overlay to an aerial photograph of the watershed and include the following information:

- type(s) of facility
- drainage area boundaries and acreage
- land ownership
- ranking
- preliminary cost estimate

A copy of the Watershed Characterization map and a write-up of the methodology, findings, and recommendations will be prepared as a section of the Concept Report (Task 1.6).

Task 1.2 Fluvial Geomorphologic Characterization — BIO w/GPI

Biohabitats will review the geomorphologic data collected by Baltimore County earlier this year and use the information to collaborate our field work findings.

Biohabitats, with the assistance of GPI, will perform a morphological characterization on the study reach and a reference reach for both a C and B stream type. Information collected on the study reach will provide the framework for the restoration design. The data from the reference reaches is extremely important as it will provide the appropriate ratios for the dimension, pattern and profile for the stable stream type to be used for the natural channel design.

Standard Penetration Tests (SPT) will be performed at 2.5 foot intervals in each boring and a soil sample will be collected from each SPT location. The samples will be delivered to EBA's laboratory where sieve analyses will be performed on selected samples to classify the soils.

A report will be prepared which describes the subsurface conditions and provides recommendations regarding the design of structure foundations. Attachments to the report will include a sketch indicating the soil boring locations, the boring logs and laboratory test results.

Task 1.4 Existing Conditions Hydrologic and Hydraulic Studies (floodplain study) GPI

GPI will prepare an existing conditions floodplain study. Baltimore County will provide GPI with the TR-20 model that was prepared by Purdum and Jeschke. Hydrology will be prepared based on the Purdum and Jeschke SCS TR-20 computer modeling. Hydraulics will be prepared using the HEC-RAS computer modeling.

Biohabitats will review hydrologic and hydraulic modeling data prepared by GPI. Values of peak discharges determined by the models for bankfull, 2 year, 10 year, 50 year and 100 year floods will be corroborated with field observations of morphological features in and along the stream that can be used to estimate the magnitude of relevant flood events.

Additionally, GPI will calculate the bankfull critical shear stress in both the study and reference reaches and Biohabitats will then compare the size of sediment potentially entrained to the largest size measured in a bar sample. This information will provide guidance in targeting a bankfull critical shear stress for the restored channel that can transport the largest particle size made available to the system without scouring stream banks.

Task 1.5 Existing Conditions and Restoration Concept Plan BIO w/GPI & GWS

Biohabitats, with the assistance of GPI and GWS, will prepare an Existing Conditions & Restoration Concept Plan (EC&RCP) with a menu of alternatives for both channel restoration and watershed stormwater retrofits. The EC&RCP will illustrate existing conditions on one (1) set of plans and both channel geometry alternatives and stormwater retrofit alternatives on a separate set of plans. The existing conditions plans will include existing land uses, vegetation, channel classification, channel geometry, channel improvements, stormwater management facilities, and major utility systems.

Channel restoration alternatives will focus on developing a stable stream channel geometry (dimension, plan, and profile) for the study reach based on the data collected in Tasks 1.1 through 1.4. Alternative stream channel geometry concepts and in-stream stormwater management concepts will then be evaluated and ranked in accordance with project objectives. Concurrently, Biohabitats will integrate the findings of Task 1.1 to illustrate watershed stormwater management retrofit opportunities and their relationship with channel restoration alternatives. A menu of selected alternatives will

Task 1.6 Concept Report and Presentation BIO

Biohabitats will assimilate the data and analyses performed in Tasks 1.1 through 1.5 and prepare a concept report. The report will summarize existing conditions of the watershed and study reach, data collection methodologies, and hydrologic and hydraulic studies (including bankfull discharges). Specific recommendations for stream restoration and stormwater management retrofits and preliminary cost estimates for recommended alternatives will be highlighted . The report will include a copy of the EC&RCP and channel field data sheets.

Biohabitats will submit two (2) copies of a DRAFT report to DEPRM for review and critique. Within fifteen (15) days of receiving comments from DEPRM, Biohabitats will prepare a FINAL report and submit one (1) digital and five (5) hard copies to DEPRM. Biohabitats will attend one (1) meeting with DEPRM to present the report, discuss restoration alternatives, provide recommendations for final design, and select preferred alternatives. Selection of preferred alternatives will be used as the basis for preparing the Design and Construction Drawings.

PHASE 2 - DESIGN AND CONSTRUCTION DRAWINGS

(NOTE: Scope, man-hours, and fee only include stream restoration design and one (1) in-stream stormwater management facility. If additional in-stream stormwater management facilities or stormwater management facilities located outside the stream corridor are selected for final design, an extra work order proposal will be prepared for DEPRM review and approval.)

Task 2.1.1 Final Design and Construction Package - 50% Submittal BIO w/GPI

Biohabitats, with support from GPI, will prepare (in AutoCAD Release 12 or 13) design drawings, details, notes, special provision specifications, and an engineers cost estimate for a 50% final design and construction package. Specifically, the package will include the following components:

- Geometry Layout
- Grading Plan, Details, and Notes
- Erosion and Sediment Control Plan
- E&S Sequence of Construction, Details, Notes
- Grading Cross Sections
- Stream Profile
- Soil Bioengineering Details
- Planting Plan, Details, Notes
- Maintenance Schedule
- Preliminary Cost Estimate
- Special Provision Specifications

Biohabitats will submit five (5) sets of the 50% final design and construction package for DEPRM to review. Biohabitats will attend one (1) meeting with DEPRM to review the plans, specifications, and cost estimate, answer questions, and provide clarifications on specific design features, construction processes, and maintenance activities. Revisions will be incorporated into the final design - 95% submittal.

Task 2.1.2 Preliminary Design Justification Report BIO

Biohabitats will prepare a preliminary Design Justification Report to accompany the 50% final design and construction package submittal. The Design Justification Report will include a description of the stream geometry and hydraulic computations (including bankfull identification and calculations) used to develop the stream restoration design. The report will also include an analysis of the pre- and post-conditions hydrologic and hydraulic studies.

Task 2.1.3 Design of utility relocation/upgrades GWS

GWS will prepare 50% design plans for up to 500' of utility relocation and upgrade (encasement/ resetting) of lateral sewer line crossings. GPI will prepare a plan and profile. GWS will meet with Baltimore County DPW to review the plans and solicit comments for incorporation into the 90% submittal

Task 2.1.4 Design of in-stream structural stabiiization GPI

GPI will design and prepare details for in-stream structural stabilization measures including rip-rap protection, imbricated rip-rap walls, or other measures selected from the concept plan. This will include performing hydraulic calculations as required utilizing H&H studies prepared by GPI.

Task 2.1.5 Design of in-stream SWM - (IF REQUIRED) GWS

GWS will prepare a design for one (1) in-stream stormwater management structure with 50% complete plans. This task does not include geo-technical borings or tests.

Task 2.2.1 Final Design and Construction Package - 90% Submittal BIO

Biohabitats will prepare final design sketches, notes, and specifications for a 95% final drawing package, including the following:

- Geometry Layout
- Grading Plan, Details, and Notes
- Erosion and Sediment Control Plan

- E&S Sequence of Construction, Details, Notes
- Grading Cross Sections
- Stream Profile
- Soil Bioengineering Details
- Planting Plan, Details, Notes
- Maintenance Schedule
- Special Provision Specification Package
- DPW Engineers Cost Estimate

Biohabitats will submit five (5) sets of the plans, specifications, and estimate to DEPRM for final review. Biohabitats will incorporate final revisions based on DEPRM's review of the 95% final design submittal. The final submittal package will include three (3) sets of the plans, specifications, DPW cost estimate, and one (1) digital copy of the plans and specifications.

Task 2.2.2 Erosion and Sediment Control approval BIO

Biohabitats will prepare and submit erosion and sediment control plans (see Task 2.1.1 & 2.2.1), an erosion and sediment control plan review checklist, and a transmittal letter to the Baltimore County Soil Conservation District for review and approval. Biohabitats will address and respond to all comments, revise the plans, and resubmit, as necessary, in order to obtain SCD approval.

Revisions to the erosion and sediment control plans due to errors and omissions will be completed in accordance with this proposal. Revisions due to changes from the EC&RCP will be considered an addition to the Scope of Work and Cost Estimate.

Task 2.2.3 Design Justification Report (includes computations) BIO

Biohabitats will incorporate comments received during the 50% DEPRM review and prepare a final Design Justification Report to accompany the 95% final design and con package submittal.

Task 2.3 Post Conditions Hydrologic and Hydraulic Studies GPI

GPI will prepare a post-conditions hydrologic and hydraulic study using the HEC-RAS computer model. Shear stresses of the proposed channel will be documented and floodplain limits will be delineated.

Task 2.4 Record Plat Preparation and Filing GWS

GWS will prepare a maximum of twelve (12) right-of-way plats to extend and/or adjust easements, right-of-ways and reservations.

PHASE 3 - 401/404 PERMITTING

(NOTE: It is our understanding that DEPRM will perform a jurisdictional wetland delineation of the study area and obtain jurisdictional validation from the regulatory agencies. It is also our understanding that DEPRM will take responsibility for all work efforts associated with complying with the Forest Conservation Act.)

Task 3.1 Permit Application and Submittal — BIO

Biohabitats will prepare a Maryland Joint State/Federal Permit Application in accordance with current regulatory requirements for submittal to MDE. The application will be prepared upon completion and approval of the 50% design and construction package submittal. Biohabitats will submit a draft copy of the application to DEPRM for review, approval, and signature prior to submitting the final copy to MDE.

Task 3.2 Permit Tracking — BIO

Biohabitats will participate in up to two (2) meetings with the regulatory agencies to review the site and discuss proposed design measures and potential wetland impacts. Additionally, Biohabitats will track the status of the permit application and be available by telephone to answer questions and provide clarifications regarding the project.

Biohabitats will incorporate regulatory requested revisions to the design in the 95% submittal package. Revisions to the permit application due to errors and omissions will be completed in accordance with this proposal. Revisions due to changes from the EC&RCP will be considered an addition to the Scope of Work and Cost Estimate.

PHASE 4 - COMMUNITY MEETINGS

Task 4.1 Community Meetings — BIO

Biohabitats will attend up to three (3) community meetings to present the Mine Bank Run Stream Restoration project and proposed design measures. We will prepare presentation graphics including color plots and video presentations, and hand-outs illustrating and describing the existing conditions of the stream and proposed restoration measures.

Task 4.2 Homeowner Meetings — BIO

Biohabitats will attend up to twelve (12) meetings with individual homeowners and businesses to discuss restoration measures and ensure that community needs are being addressed and reflected in the final design.

PHASE 5 - CONSTRUCTION PROCUREMENT

Task 5.1 Pre-Bid Meeting — BIO

Biohabitats will attend one (1) pre-bid meeting to answer questions, provide clarifications, and lead a field review of the project. Biohabitats will assist DEPRM in issuing one (1) set of addenda as appropriate to interpret, clarify, or expand the bidding documents. Biohabitats will prepare meeting minutes for distribution within five days of the meeting.

At the request of DEPRM, Biohabitats will review (via facsimile or mail) contractors' qualifications and bid documents and provide assistance (via telephone) to DEPRM in the selection of the most responsive bidder.

Task 5.2 Post Award Meeting — BIO

Biohabitats will attend one (1) post-award meeting with the perspective Contractor to review project expectations, answer questions, provide clarifications, and lead a field review of a reference stream and the project site. Biohabitats will prepare meeting minutes for distribution within five days of the meeting.

PHASE 6 - CONSTRUCTION INSPECTION

Task 6.1 Construction Stakeout Review — BIO

Biohabitats will perform one (1) construction stakeout review of the project site with the Contractor. Biohabitats will flag all areas and items specified to be performed by Baltimore County in the Contract Documents, and coordinate efforts with the Contractor.

Biohabitats will review the Contractor's construction stakeout including limits of construction, erosion and sediment control measures, construction staging and access areas, stream centerline, in-stream structures, stream profile and cross-section grades, soil bioengineering measures, monitoring cross section locations, planting locations, and seeding areas.

Task 6.2 Reviewing Shop Drawings and Material Samples — BIO w/GPI & GWS

Biohabitats (and, if required, GPI and GWS) will review shop drawings and material samples for conformance with the Contract Documents. Biohabitats will provide DEPRM with recommendations concerning proposed alterations to the Contract Documents.

Task 6.3 Site Inspection — BIO w/GPI & GWS

Biohabitats will perform site inspections at appropriate intervals as construction proceeds to observe and report on the progress and the quality of the executed work, document construction activities with photographs (color slides), conduct punch-out inspection services, prepare punch-out lists, and conduct final inspections. Site inspection services will encompass all phases of work including erosion and sediment control installation, clearing and grubbing, excavation and grading, installation on in-stream stabilization measures, installation of bioengineering measures, planting, seeding, and clean-up. Biohabitats anticipates a total of eighty (80) working days (4 months total) to complete the project, staggered over a six (6) month period. Accordingly, Biohabitats anticipates up to thirty (30) days (240 man hours) of construction inspection time.

Biohabitats will prepare weekly construction inspection logs noting construction activity for the week, weather conditions, problems encountered, resolutions of problems, site visits by regulatory agencies, citizen concerns, and recommendations for future work efforts.

Task 6.4 Field Problem Resolution and Clarification — BIO

Biohabitats will provide professional advice and prepare sketches required to resolve problems due to actual encountered field conditions.

Task 6.5 Final and Warranty Inspections — BIO

Biohabitats will perform one (1) 90% final inspection (punch-out), one (1) 100% final inspection , and one (1) warranty inspection with the Contractor.

Task 6.6 As-Built Construction Drawings — BIO & GPI

GPI and Biohabitats will prepare As-Built construction drawings based on post-construction field conditions. The As-Built construction drawings will be based on a controlled, post-construction survey of selected cross-sections identified by Biohabitats, red-line sketches of proposed conditions, and red-line revisions to the specifications . One (1) complete set of the surveyed cross-sections, red-lined drawings and specifications will be prepared and submitted to the County within thirty (30) days of the final inspection and approval of Construction.

Task 6.7 Establish Monitoring Cross Sections — BIO

Biohabitats will establish ten (10) monitoring cross-sections along the constructed stream channel. Biohabitats will furnish and install two (2) bank erosion pins and one (1) scour chain at the location of each cross-section and survey their initial locations and elevations. Monitoring cross-sections will be illustrated on the As-Built drawings.

PHASE 7- MONITORING

(Monitoring services specified below are for a two (2) year period beginning immeadiatly after the final inspection)

Task 7.1 Channel Geometry Monitoring — BIO

Biohabitats will measure channel erosion/deposition on the channel bed scour chains and bank pins once (1X) per year and after each rain event greater than a 2-year storm (up to 3X per year). Biohabitats will reset chain and pins removed due to erosion or vandalism up to three (3) times.

Biohabitats will survey a cross-section at each chain and pin monitoring location once (1X) per year and after each rain event greater than a 2-year frequency storm event (up to 3X per year). Biohabitats will measure cross-sectional area, bankfull width, bankfull depth, and floodprone width.

Biohabitats will field survey six (6) representative profiles approximately 300' in length and representing up to three (3) step pool reaches and up to three (3) pool-riffle reaches once (1X) per year. Biohabitats will measure the thalweg, water surface, bankfull, and floodplain profile and photo document each cross-section.

Task 7.2 Monitoring Report — BIO

Biohabitats will prepare an annual monitoring report including monitoring methodology, data collection, and data interpretation. Channel cross-section, profiles, flow and temperature data will be graphed and overlaid for analysis and interpretation. Information will be assessed based on the design bankfull discharges and minimum acceptable criteria for Class I streams as outlined in the Code of Maryland Water Quality Regulations (COMAR 26.08.02). Five (5) copies of the annual report will be submitted to the County for review and distribution to the regulatory agencies.

PHASE 8 - MEETINGS AND PROGRESS REPORTS

Task 8.1 Additional Meetings — BIO, GPI, GWS

Biohabitats will prepare for and attend up to four (4) additional meetings other then those specified above. GPI and GWS will be available to attend up to two (2) additional meetings other then those specified above. Minutes of each meeting will be prepared and distributed to DEPRM and all attendees with five (5) days of the meeting.

Task 8.2 Progress Reports BIO

Biohabitats will prepare a monthly progress report highlighted work efforts completed for the reporting period, areas of potential concern, work performed outside the scope of work, and anticipated progress for the next reporting period. Progress reports will accompany monthly invoices.

SCHEDULE

Biohabitats is available to begin work on these tasks within five days of a Notice-To-Proceed. For your planning purposes, Biohabitats anticipates the following schedule presuming that a Notice-To-Proceed is issued prior to November 17, 1997:

TASK		COMPLETION BY:
PHASE 1 - RESTORATION CONCEPTS		
Task 1.1	Watershed Characterization	December 15, 1997
Task 1.2	Fluvial Geomorphologic Characterization	December 15
Task 1.3.1	Survey	December 15
Task 1.3.2	Structural Evaluation	December 15
Task 1.4	Existing Conditions Hydrologic and Hydraulic Studies	December 31
Task 1.5	Existing Conditions and Restoration Concept Plan	January 30, 1998
Task 1.6	Concept Report and Presentation (30%)	February 9
→	Community Meeting(s)	March 1998
PHASE 2 - DESIGN AND CONSTRUCTION DRAWINGS		
Task 2.1.1	Final Design and Construction Package - 50% Submittal	April 17 1998
Task 2.1.2	Preliminary Design Justification Report	April 17
Task 2.1.3	Design of utility relocation/upgrades	April 17
Task 2.1.4	Design of in-stream structural stabilization	April 17
Task 2.1.5	Design of in-stream SWM -(IF REQUIRED)	April 17
Task 2.2.1	Final Design and Construction Package - 90% Submittal	June 19
Task 2.2.2	Erosion and Sediment Control approval	July 3
Task 2.2.3	Design Justification Report	June 19
Task 2.3	Post Conditions Hydrologic and Hydraulic Studies	June 19
Task 2.4	Record Plat Preparation and Filing	July 3
PHASE 3 - 401/404 PERMITTING		
Task 3.1	Permit Application and Submittal	May 17
Task 3.2	Permit Tracking	May 17 - Nov. 17

TASK		COMPLETION BY:
PHASE 4 - COMMUNITY MEETINGS		
Task 4.1	Community Meetings	Throughout
Task 4.2	Homeowner Meetings	Throughout
PHASE 5 - CONSTRUCTION PROCUREMENT		
Task 5.1	Pre-Bid Meeting	Feb. ~~1998~~ 1999 - May 1999
Task 5.2	Post Award Meeting	Feb. ~~1998~~ 1999 - May 1999
PHASE 6 - CONSTRUCTION INSPECTION		
Task 6.1	Construction Stakeout Review	June 1999 - Nov 1999
Task 6.2	Reviewing Shop Drawings and Material Samples	June 1999 - Nov 1999
Task 6.3	Site Inspection	June 1999 - Nov 1999
Task 6.4	Field Problem Resolution and Clarification	June 1999 - Nov 1999
Task 6.5	Maintenance and Warranty Inspections	June 1999 - Nov 1999
Task 6.6	As-Built Construction Drawings	June 1999 - Nov 1999
Task 6.7	Establish Monitoring Cross-Sections	June 1999 - Nov 1999
PHASE 7- MONITORING (2 years)		
Task 7.1	Channel Geometry Monitoring	1st & 2nd YR after final inspection
Task 7.2	Monitoring Report	1st & 2nd YR after final inspection
PHASE 8 - MEETINGS AND PROGRESS REPORTS		
Task 8.1	Additional Meetings	Throughout
Task 8.2	Progress Reports	Throughout

FEE

A man-hour and fee spreadsheet along with associated DPW 105 forms are attached for your review and approval. Biohabitats proposes a cost plus profit fee of $ 248,511.33. We propose submitting monthly invoices in standard Baltimore County format based on the actual number of man-hours and direct costs expended for the invoice period.

Fees by Consultant:

Consultant	Labor Fee	Direct Costs	Total Fee
Biohabitats, Inc.	$129,052.56	$ 7,673.20	$ 136,725.76
GWS	$ 11,129.09	$ 219.16	$ 11,348.25
GPI	$ 91,646.24	$ 810.55	$ 92,456.79
EBA	$ 5,423.53	$ 2,557.00	$ 7,980.53
Total Fees	$237,251.42	$11,259.75	$ 248,511.33

Man-Hours for BIOHABITATS, INC.

Task/Classification	Principal	Project Manager	Env. Scientist	Env. Technician	CADD Operator	Clerical	To
PHASE 1 - RESTORATION CONCEPTS							
1.1 Watershed Characterization	12	16	60	40	24	4	
1.2 Fluvial Geomorphologic & Hydraulic Chara	12	24	120	96	0	0	
1.3.1 Survey	0	2	16	0	0	0	
1.3.2 Structural Evaluation	0	2	6	0	0	0	
1.4 Existing Conditions H&H Study	1	2	8	0	0	0	
1.5 Restoration Concept Plan	8	16	80	40	60	0	
1.6 Concept Report and Presentation	8	16	48	24	8	12	
Total Phase 1 Hours	**41**	**78**	**338**	**200**	**92**	**16**	
PHASE 2 - DESIGN & CONST DRAW							
2.1.1 Design of Utility feloc/upgrades	8	20	96	60	60	4	
2.1.2 Preliminary Design Justification Report	2	4	20	4	2	2	
2.1.3 Design Utility Relocation Upgrades	2	4	16	0	8	0	
2.1.4 Design in-stream structural stabilization	2	4	24	0	12	0	
2.1.5 Design in-stream SWM	2	4	24	0	12	0	
2.2.1 Final Deisgn & Construction Package 9	8	20	96	40	60	12	
2.2.2 Erosion and Sediment Control	2	4	12	8	20	0	
2.2.3 Design Justification Report	2	4	16	4	2	2	
2.3 Post Conditions H&H Study	1	2	8	0	0	0	
2.4 Record Plat Prep and Filing	1	2	8	0	0	0	
Total Phase 2	**30**	**68**	**320**	**116**	**176**	**20**	
PHASE 3 - PERMIT							
3.1 Permit Application	2	8	20	12	20	2	
3.2 Permit Tracking	2	8	36	16	0	0	
Total Phase 3	**4**	**16**	**56**	**28**	**20**	**2**	
PHASE 4 - COMMUNITY MEETINGS							
4.1 Community Meetings	3	8	38	38	12	0	
4.2 Homeowner Meetings	2	4	36	12	6	0	
Total Phase 4	**5**	**12**	**74**	**50**	**18**	**0**	
PHASE 5 PRE BID/POST AWARD MEETINGS							
5.1 Pre-Bid Meeting	1	2	10	0	0	2	
5.2 Post-Award Meeting	1	1	12	0	0	2	
Total Phase 4	**2**	**3**	**22**	**0**	**0**	**4**	
PHASE 6 - CONSTRUCTION INSPECTION							
6.1 Construction Stakeout Review	1	2	16	4	0	0	
6.2 Review Shop Drawings	1	2	12	4	0	0	
6.3 Site Inspection	8	24	100	140	0	0	
6.4 Field Problem Resolution	8	8	24	12	8	0	
6.5 Final & Warranty Inspections	4	6	36	9	0	0	
6.6 As-Built Construction Drawings	4	8	40	24	24	0	
6.7 Establish Monitoring Cross-Sections	2	2	8	16	0	0	
Total Phase 6	**28**	**52**	**236**	**209**	**32**	**0**	
PHASE 7 - MONITORING							
7.1 Channel Geometry Monitoring	2	20	196	0	0	0	
7.2 Monitoring Report	6	8	56	12	0	0	
Total Phase 7	**8**	**28**	**252**	**12**	**0**	**0**	
PHASE 8 - MEETINGS AND PROGRESS REPORTS							
8.1 Additional Meetings	4	32	8	8	0	0	
8.2 Progress Reports	1	6	24	0	0	0	
Total Phase 8	**5**	**38**	**32**	**8**	**0**	**0**	
TOTAL HOURS	104	236	926	533	300	36	2

Cost Summary Format				
Request for Additional Fees				
1. Project Title - Minebank Run Stream Restoration			2. Project No. P- 97005.01	
3. Name of Consultant - Biohabitats, Inc.			4. Date - September 23, 1997	
5. Address of Consultant - 15 West Aylesbury Rd., Towson, MD 21204				
PART II - Cost Summary				
6. Direct Labor (Specify labor categories)	HOURS	HR. RATES	EST. COST	TOTALS
Project Manager	236	$28.84	$6,806.24	
Environmental Scientist	926	$25.60	$23,705.60	
Environmental Technician	533	$24.04	$12,813.32	
CADD Operator	300	$13.76	$4,128.00	
Clerical	36	$15.45	$556.20	
DIRECT LABOR SUBTOTAL			$48,009.36	
7. Indirect Costs (Specify)	RATE	X DIRECT LABOR TOT	ESTIMATE	
Overhead and Payroll Burden	130.00%	$48,009.36	$62,412.17	
			$0.00	
			$0.00	
			$0.00	
INDIRECT COSTS SUBTOTAL:			$62,412.17	
8. Total of Direct Labor & Indirect Costs (Combined Sum of Items 6 & 7)				$110,421.53
9. Profit 10% of Item 8)				$11,042.15
10. Principals Cost where applicable 104 Hrs @ 72.97				$7,588.88
11. Total Professional Fee (Combined Sum of Items 8, 9, & 10)				$129,052.56
12. Other Direct Costs	QTY.	COST	EST. COST	
a. Travel			$0.00	
(1) Transportation - MILEAGE	1520	$0.31	$471.20	
(2) Per Diem			$0.00	
TRAVEL SUBTOTAL:			$471.20	
b. Equipment, Materials and Supplies (Specify)	QTY.	COST	EST. COST	
Reproduction	896	$5.00	$4,480.00	
Photography	944	$0.75	$708.00	
Phone, Fax, Mail & Film	764	$1.00	$764.00	
Mail/Overnight Delivery	36	$25.00	$900.00	
Field Supplies	1	$350.00	$350.00	
EQUIPMENT SUBTOTAL:			$7,202.00	
c. Subconsultant(s)	QTY.	COST	EST. COST	
Greenman - Pedersen, Inc.	1	$92,456.79	$92,456.79	
G. W. Stephans & Associates	1	$11,348.25	$11,348.25	
EBA Engineering	1	$7,980.53	$7,980.53	
SUBCONCULTANT(S) SUBTOTAL:			$111,785.57	
d. Other (Specify)	QTY.	COST	EST. COST	
			$0.00	
			$0.00	
OTHER SUBTOTAL:			$0.00	
e. Other Direct Costs Total: (Combined Sum of Items b, c, & d)				$119,458.77
13. Total Price (Combined Sum of Items 11 and 12e				$248,511.33

Man-Hours For GREEMAN - PEDERSEN, INC.eorge W. Stephens, Inc - Minebank Run Stream Restoration

Task/Classification	Principal	Project Manager	Designer	Cadd Technician	Water Resource Engineer	Technical Typist	Director Of Survey	Project Surveyor	Party chief	Instru-mentman	Rodman	Total
PHASE 1 - RESTORATION CONCEPTS												
1.1 Watershed Characterization		8	8									16
1.2 Fluvial Geomorphologic & Hydraulic Characterization		2	32									0 34
1.3.1 Survey				20			9	40	166	166	166	567
1.4 Existing Conditions Hydrologic & Hydraulic Studies		20	20	20	52	30						0 142
1.5 Restoration Concepts		8	40	8								56
Total Phase 1 Hours	0	38	100	48	52	30	9	40	166	166	166	
PHASE 2 - DESIGN & CONST DRAW												
2.1.1 Final Design (50%)		2	24									26
2.1.4 Design of In-stream Structural Stabilization	1	4	40	40								0 85
2.1.5 Design of In-Stream SWM		2	80	40	8							130
2.2.1 Final Design (90%)	2	10	80	40	24							156
2.3 Post Conditions Hydrologic & Hydraulic Studies	1	16		80	60	30						0 187
2.4 Record plat preparation and filing				80			32	60				172
Total Phase 2	4	34	224	280	92	30	32	60	0	0	0	756
PHASE 6 - CONSTRUCTION INSPECTION												
6.2 Reviewing Shop Drwgs & Mat'l Supplies		2	8									10
6.3 Site Inspection		4	40									44
6.6 As-Built Const Drwgs		2	24	80			2	40	80	80	80	388
Total Phase 6	0	8	72	80	0	0	2	40	80	80	80	442
PHASE 8 - MTGS/PROGRESS REPORTS												
8.1 Additional Meetings		8										8
8.2 Progress Reports		18				9						27
Total Phase 8	0	26	0	0	0	9	0	0	0	0	0	35
TOTAL HOURS	4	106	396	408	144	69	43	140	246	246	246	2048

Request for Additional Fees	Cost Summary Format Summary			
1. Project Title - Minebank Run			2. Project No. 97005.01	
3. Name of Consultant - Greenman - Pedersen, Inc.			4. Date 9/22/97	
5. Address of Consultant - 14502 Greenview Drive Suite 100 Laurel, MD 20708				
	PART II - Cost Summary			
6. Direct Labor (Specify labor categories)	HOURS	HR. RATES	EST. COST	TOTALS
Project Manager	106	$29.00	$3,074.00	
Designer	396	$19.00	$7,524.00	
Cadd/Technician	488	$15.00	$7,320.00	
Water Resource Engineer	144	$25.00	$3,600.00	
Technical Typist	69	$12.75	$879.75	
Director of Survey	43	$32.25	$1,386.75	
Project Survey	140	$23.00	$3,220.00	
Party Chief	246	$17.90	$4,403.40	
Instrumentman	246	$12.25	$3,013.50	
Rodman	246	$10.50	$2,583.00	
DIRECT LABOR SUBTOTAL			$37,004.40	
7. Indirect Costs (Specify)	RATE	X DIRECT LABOR TO	ESTIMATE	
Overhead and Payroll Burden	124.34%	$37,004.40	$46,011.27	
			$0.00	
			$0.00	
			$0.00	
INDIRECT COSTS SUBTOTAL:			$46,011.27	
8. Total of Direct Labor & Indirect Costs (Combined Sum of Items 6 & 7)				$83,015.67
9. Profit 10% of Item 8)				$8,301.57
10. Principals Cost where applicab 4 Hrs @ 82.25				$329.00
11. Total Professional Fee (Combined Sum of Items 8, 9, & 10)				$91,646.24
12. Other Direct Costs	QTY.	COST	EST. COST	
a. Travel			$0.00	
(1) Transportation - MILEAGE	1440	$0.31	$446.40	
(2) Per Diem			$0.00	
TRAVEL SUBTOTAL:			$446.40	
b. Equipment, Materials and Supplies (Spec	QTY.	COST	EST. COST	
Reproduction	100	$2.50	$250.00	
Photography	152	$0.75	$114.15	
Phone, Fax, Mail & Film		$1.00	$0.00	
Mail/Overnight Delivery		$25.00	$0.00	
Field Supplies			$0.00	
EQUIPMENT SUBTOTAL:			$364.15	
c. Subconsultant(s)	QTY.	COST	EST. COST	
			$0.00	
			$0.00	
SUBCONCULTANT(S) SUBTOTAL:			$0.00	
d. Other (Specify)	QTY.	COST	EST. COST	
			$0.00	
			$0.00	
OTHER SUBTOTAL:			$0.00	
e. Other Direct Costs Total: (Combined Sum of Items b, c, & d)				$810.55
13. Total Price (Combined Sum of Items 11 and 12e				$92,456.79

Man-Hours For G. W. STEPHENS JR. & ASSOC., INC. - Minebank Run Stream Restoration

Task/Classification	Principal	Project Manager	Engineer	Draftsmen	Chief Surveyor	Asst Chief Surveyor	Cadd Technician	Survey Crew	Total
PHASE 1 - RESTORATION CONCEPTS									
1.1 Watershed Characterization	2	2	12						16
1.5 Restoration Concepts	2	4	24						30
Total Phase 1 Hours	4	6	36	0	0	0	0	0	46
PHASE 2 - DESIGN & CONST DRAW									
2.1.3 Design Utility Relocation Upgrades	2	8	60	40	0	0	0	0	110
Total Phase 2	2	8	60	40	0	0	0	0	110
PHASE 6 - CONSTRUCTION INSPECTION									
6.2 Reviewing Shop Drwgs & Mat'l Supplies	1	1	4						6
6.3 Site Inspection	1	4	20						25
Total Phase 6	2	5	24	0	0	0	0	0	31
PHASE 8 - MTGS/PROGRESS REPORTS									
8.1 Additional Meetings		8							8
8.2 Progress Reports		18							18
Total Phase 8	0	26	0	0	0	0	0	0	26
TOTAL HOURS	8	45	120	40	0	0	0	0	213

Request for Additional Fees	Cost Summary Format Summary			
1. Project Title - Minebank Run			2. Project No. 97005.01	
3. Name of Consultant - George W. Stephens, Jr. & Associates			4. Date 9/22/97	
5. Address of Consultant - 658 Kenilworth Drive, Suite 100 Towson, MD 21204				
	PART II - Cost Summary			
6. Direct Labor (Specify labor categories)	HOURS	HR. RATES	EST. COST	TOTALS
Project Manager	45	$30.00	$1,350.00	
Engineer	120	$19.20	$2,304.00	
Draftsmen	40	$15.20	$608.00	
Chief of Surveys	0	$28.00	$0.00	
Assistant Chief of Surveys	0	$24.00	$0.00	
Cadd Technician	0	$22.00	$0.00	
DIRECT LABOR SUBTOTAL			$4,262.00	
7. Indirect Costs (Specify)	RATE	X DIRECT LABOR TO	ESTIMATE	
Overhead and Payroll Burden	123.35%	$4,262.00	$5,257.18	
			$0.00	
			$0.00	
			$0.00	
INDIRECT COSTS SUBTOTAL:			$5,257.18	
8. Total of Direct Labor & Indirect Costs (Combined Sum of Items 6 & 7)				$9,519.18
9. Profit 10% of Item 8)				$951.92
10. Principals Cost where applicab 8 Hrs @ 82.25				$658.00
11. Total Professional Fee (Combined Sum of Items 8, 9, & 10)				$11,129.09
12. Other Direct Costs	QTY.	COST	EST. COST	
a. Travel			$0.00	
(1) Transportation - MILEAGE	100	$0.31	$31.00	
(2) Per Diem			$0.00	
TRAVEL SUBTOTAL:			$31.00	
b. Equipment, Materials and Supplies (Spec	QTY.	COST	EST. COST	
Reproduction	1418	$0.12	$170.16	
Photography		$0.75	$0.00	
Phone, Fax, Mail & Film	18	$1.00	$18.00	
Mail/Overnight Delivery		$25.00	$0.00	
Field Supplies			$0.00	
EQUIPMENT SUBTOTAL:			$188.16	
c. Subconsultant(s)	QTY.	COST	EST. COST	
			$0.00	
			$0.00	
SUBCONCULTANT(S) SUBTOTAL:			$0.00	
d. Other (Specify)	QTY.	COST	EST. COST	
			$0.00	
			$0.00	
OTHER SUBTOTAL:			$0.00	
e. Other Direct Costs Total: (Combined Sum of Items b, c, & d)				$219.16
13. Total Price (Combined Sum of Items 11 and 12e				$11,348.25

EBA ENGINEERING, INC. MAN-HOURS

Task/Classification	Principal	Project Manager	Structural Engineer	Cadd Technician	Geotechnical Engineer	Total
PHASE 1 - RESTORATION CONCEPTS						
1.1.3 Structural Evaluation	5	9	40	14	40	108
Total Phase 1 Hours	5	9	40	14	40	108
TOTAL HOURS	5	9	40	14	40	108

COST SUMMARY FORMAT

REQUEST FOR ADDITIONAL FEES

PART I - GENERAL

1. PROJECT TITLE: MINEBANK RUN STREAM RESTORATION	2. PROJECT NO.
3. NAME OF CONSULTANT: EBA ENGINEERING, INC.	4. PROPSAL DATE: SEPT. 19, 1997
5. ADDRESS OF CONSULTANT: SETON BUSINESS PARK 5800 METRO DRIVE BALTIMORE, MD 21215	

PART II - COST SUMMARY

6. DIRECT LABOR (Specify Labor Categories)	HOURS	HOURLY RATE	ESTIMATED COST	TOTALS
PROJECT MANAGER	9	$28.28	$ 254.52	
STRUCTURAL ENGINEER	40	$25.00	$ 1,000.00	
CADD OPERATOR	14	$13.95	$ 195.30	
GEOTECHNICAL ENGINEER	40	$18.00	$ 720.00	
DIRECT LABOR SUBTOTAL			$ 2,169.82	
7. INDIRECT COSTS (Specify)	RATE	1.1 X DIRECT LABOR TOTAL =	ESTIMATED	
OVERHEAD AND PAYROLL BURDEN	110%	$ 2,169.82	$ 2,386.80	
INDIRECT COSTS SUBTOTAL			$ 2,386.80	
8. TOTAL OF DIRECT LABOR & DIRECT COSTS (Combined Sum of Items 6 & 7)				$ 4,556.62
9. PROFIT (10% of Item 8)				$ 455.66
10. PRINCIPALS COST, WHERE APPLICABLE (5 Hrs. x $ 82.25/Hr.)				$ 411.25
11. TOTAL PROFESSIONAL FEE (Combined Sum of Items 8, 9 & 10)				$ 5,423.53
12. OTHER DIRECT COSTS				
a. TRAVEL			ESTIMATED COST	
(1) TRANSPORTATION 200 MILES @ 0.31			$ 62.00	
(2) PER DIEM				
TRAVEL SUBTOTAL			$ 62.00	
b. EQUIPMENT, MATERIALS, SUPPLIES (Specify)	QTY	COST	ESTIMATED COST	
SOIL BORINGS	L.S.	$2,130.00	$ 2,130.00	
LABORATORY TESTS	L.S.	$330.00	$ 330.00	
PHOTOGRAPHY	25	$1.00	$ 25.00	
PHONE, FAX, MAIL & FILM	1	$10.00	$ 10.00	
EQUIPMENT SUBTOTAL			$ 2,495.00	
c. SUBCONSULTANT(S)			ESTIMATED COST	
SUBCONSULTANT(S) SUBTOTAL				
d. OTHER (SPECIFY)			ESTIMATED COST	
OTHER SUBTOTAL				
e. OTHER DIRECT COSTS TOTAL: (Combined Sum of Items a, b, c & d)				$ 2,557.00
13. TOTAL PRICE (Combined Sum of Items 11 & 12.e)				$ 7,980.53

(K)

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

November 20, 1997

NOTICE OF ASSIGNMENT /additional date

CASE #: 96-168-SPHA — **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(SPH granted in part /denied in part; VAR denied.)

CASE #: 97-332-SPH — **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(Special hearing GRANTED by Z.C. /parking lot.)

ASSIGNED FOR: WEDNESDAY, DECEMBER 10, 1997 at 9:30 a.m.

NOTICE: **This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.**

Please refer to the Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

Kathleen C. Bianco
Administrator

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cc: Counsel for Appellant /Petitioner: Charles E. Brooks, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Counsel for Appellants/Protestants: Leslie M. Pittler, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

Printed with Soybean Ink on Recycled Paper

DAY 3 - CASE # 96-168-SPHA
97-332-SPH

1st W - LILLIAN D. JENIFER, 21234 Cromwell Bridge Rd

1/4 mi. from restaurant — been there since 1961

objects to parking lot in rear of restaurant b/c that is a flood plain area

In 1988, when Council granted ML, was Ltd to footprint of bldg to protect his ability to rebuild

aware of zoning viol — cases re subj. prop. — rest. had incr'd w/o concomitant incr. in parking

has been using back of residential area for parking

will create runoff into Mine Bank Run, agencies are saying it is sharp even tho it is so close to stream.

have concerns about traffic - drive both Raven + sight distance is very ltd; diff. to turn left from both Raven Drive onto Cromwell to go to Glen Arm

1988 - campaign to save valley & flood plain is terrible there, raising lot 4 ft. will cause a worse prob. w/ floods; has seen floods occur in the area

Mr. Sanders created his own prob. by expanding restaurant w/o arranging for addit'l parking - created his own hardship.

CROSS

referencing P.C. 7 ⇒ her house is off of the map SW of subj. prop

Mine Bank Run parallels Cromwell Bridge Rd + runs behind her house as well

w/ 40 mph speed limit + no shldrs, low visibility
tremendous amt. of congestion

slows down to 30 mph when nears Sanders b/c invariably someone will be backing out of that lot

to NE of Sanders → down long Deer Park Rd to Cromwell Bridge Rd, most of Harford County also goes this way

Day must be, traffic backed up already to Loch Raven Drive -

CROSS -

mtg held 3rd Thursday of November; was not present votes in re to this issue was when it came up - was in attendance @ mtg where Sanders was consid'd to best of her recollection

½ mi. away as crow flies from Sanders Corner

attended Cromwell Valley Pk mtg 1yr ago @ Loch Raven H.S. at which time they offered tentative plan w/ 1 acre parks requested & indicated they wd support forestation plan

mentioned traffic on Ash Hill which is never quiet, but backs up all the way to Loch Raven, constr. has not negatively impacted traffic particularly.

3rd W Carol Trella 5433 Patterson Rd, Baldwin MD

5½ mls. NE of site; here as concerned citizen + secty of Long Green Valley Assoc for 7 or 8 yrs

familiar w/ trnsp of opposition - received ltr 10/21 by Mr. Brooks, co had Oct. mtg in which she was present

against heavy comml dvlpmnt - in 1988, Sanders

CROSS

Not in attendance at last hrg

P.C. 15 – City Council Agenda 11-15-97

Item F 10

P.C. 16 –

Brooks objects to relevance

P.C. ⇒ Ret. as reqd for waiver to permit parking in Mine Bank Run flood plain. Shd be addressed

Pitler ⇒ Can't build parking lot w/o waiver

RECALL OF MS. JENIFER

headwaters start @ Providence Rd + Cromwell Rd

for Mine Bank Run, at least 5 mi. for Sanders prop.

runs down under Beltway to Sanders prop to Gunpowder

Rocky Powell came out to see her

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180

(K)

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

September 25, 1997

NOTICE OF ASSIGNMENT

CASE #: 96-168-SPHA **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(SPH granted in part /denied in part; VAR denied.)

CASE #: 97-332-SPH **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(Special hearing GRANTED by Z.C. /parking lot.)

Both of the above cases to be consolidated for hearing; and

ASSIGNED FOR: WEDNESDAY, NOVEMBER 19, 1997 at 10:00 a.m.

NOTICE: **This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.**

Please refer to the Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

IMPORTANT: Postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

Kathleen C. Bianco
Legal Administrator

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cc: Counsel for Appellant /Petitioner: Leslie M. Pittler, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
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Counsel for Appellants/Protestants: Charles E. Brooks, Esquire
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Charlotte W. Pine
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People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

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DAY #2 4/18/97

CASE # 96-168-SPHA, 97-332-SPH RONALD SANDERS

Charles Brooks — Counsel for Developer

Peter Zimmerman, P.C. — Les Pittler — Lillian Jennifer

Main issue is sp. hrg + parking necessitated by large addition + conversion of apt. on east side of bldg. Also have issue of flood plain variance

Pendency of forest buffer variance which has since been approved

No nonconforming use for parking lot, addition to restaurant + conversion of apt, but for lot across st. It does not allow a rear parking lot + addition.

2nd W Elizabeth H. Littleton, Glen Arm (Hoovertown)

born @ this location + has lived there basically since 1921

resided in apt. @ Sanders in early 1950's just before Sanders acquired it; parking lot in existence prior to 1945 b/c prior tenant, John Nast, lived there. Saloon + dance hall on east side.

No cross

3rd W - Joseph Larsen, Pres. Spellman, Larsen

accepted as expert in Engrg

(Pet. Ex. 1 - site - isolent)

tract on rt side of rd + on left side

east side parking lot subject of 1991 hrg, Pet. Ex. 2

entire area zoned DR-1 in surrounding area

BL for restaurant - 4548 sq. ft

prepared plat for com'l parking in residential zone

Pet. Ex. 3 - depicts proposed parking to rear + west of restaurant → plan proposed + approved @ SPH

congestion, undue concentration of pop., etc.
not inconsistent w/ spirit + intent nor w/ —
impermeable

&

land adjoins bus., parking wd only be for vehicular traffic
+ wd excl. buses, loading + unloading
no direction as to lights, lt. on st. presently
illuminates that lot
surrounding props. → prop. to east is all pub. land
prop. to north is all pub. land (Cromwell Valley Pk.)
prop. to west is all pub.
prop. to south - several grades, DR 1
Pet. Ex. 6 - photographic map
closest residential structure is Jennifer residence which
Pet. Ex. 7 - → is 1900 ft. west of subj. prop. which fronts on Cromwell
Bridge Rd
Pet. Ex. 8 - Final Master Plan Cromwell Valley Park → Sanders prop. is
located in far eastern corner of map which shows proposed
parking immed'ly adjacent to subj. prop. to service park's
open field, active play + picnic area.
39 existing parking spaces → proposal was for 73 spaces ~~is~~ requires
variance

CROSS

familiar w/ hist. of prop. since became involved in 1995-96;
# of parking spaces remains same from Pet. Ex. 3 to Pet. Ex. 4
Pet. Ex. #3 shows rear addition + covered wood deck area
39 × 60 — about 2,000 sq. ft. for north addition
Pet. Ex. 6 shows breakdown or dimensions of old apt. → about 900 sq. ft.
2900 addit'l sq. ft. + 400 sq. ft. of front porch to enclose

addition built w/o approval - certain expansion would have been allowed but not entire addition;

either have to get parking variance / leave it grass or build parking lot in conformance

1.2 acres +/- 100 acres of land

no need to be here if comm'ly zoned → one solution - expand comm'l zone on that land via County Council

Satyen Hild further

County purchase you ego,

REDIRECT

3748 sq. footage already enclosed, 800 porch subj enclosure

4th W, RONALD SANDERS, 503 Stonehedge Rd 21212

D of Sanders Corner, dad passed away in 1986 after he purchased it in 1956;

1986 - everything zoned residential, 1988 1st opp'ty to rezone BL b/c used as comm'l establishment for over 100 yrs., entered into 9 page covenant agreement w/ nearest nbrhood ass'n - agreed to allow him to expand to 7,000 sq. ft granted BL zoning for footprint of bldg

Balto. City wanted to put rd behind restaurant to gain access to their mussel equipment + ultimately agreed to build rd where he wants to park cars

Pet. Ex. 9 - photo. depicts Balto. City rt-of-way

Pet. Ex. 10 - mussel station + attendant structure

Pet. Ex. 11 - view for subj. prop. going westward

prop. slopes considerably downward when head north of prop

Pet. Ex. 12 ↑

Pet. Ex. 13 → speck - Ms. Jennifer's house - looking westerly to

breakfast minimal – most srs. also do not work + do not arrive for breakfast til 8:30 ans, 9 am,) has legal license when got date for last hrg, handed out petition + asked ppl to sign it – stopped when got to 1,000 signatures

Pet. Ex 14

9 page covenant agreement – ~~submitted~~

Cooke, Howard, Downes + Tracy –

on Advising Counsel for Cromwell Valley – spoke w/ Balto. Cty Rec. Council + Master Plan has been approved

Pet Ex 15 – 1/97 Ltr to int'd citizens re Cromwell Valley Park

Pet. Ex 16 – 7/24/97 ltr for DEC. Dev'ment → restaurant + location in proximity of park would favorably

Whenever money is available, want to reserve that space for ballfields.

Cross

P. Cr. Exs. 1 – 1988 zoning request by John Howard + Deborah Dobkin of Cooke, Howard, Downes + Tracy

father had about 6 tables in apt + he has 5

33 tables in restaurant, as opposed to carryout w/ 5 tables

rear construction permits 1993 – has 1991 permits for deck area

met w/ agencies + talked about parking requirements

had enough parking spaces @ that time to cover expansion

no documentation showing Bd approval of Master Plan

no awareness of budgets for park

~~Esther~~ – EDWIN S. HOWE III,

offered as professional engr + hydrologist + environmental impact

97-332

1/3/97 – visited site w/ real – of flood plain +

will not incr. flood levels
no detriment under ESOZ

Gross

floodplain waiver required – Larsen worked w/him to some extent → were contacted by Larsen to perform floodplain waiver applic'n Pet. & BI → letter for Larsen to close out applic'n or request for floodplain waiver to DPW

100 yr floodplain – most intense storm or 100 yr event which generates flow rates – 17,000 sq. ft of floodplain affected by parking (which is little more than 1/3 acre, water wd be from 0 – 1½ ft high on parking lot w/100 yr event

26-670 of Code – waivers – if construct w/in 100 yr floodplain

aforestation suggested – has to be done off-site – wd not receive grading permit until.

GKW, Richard Moore, U.P. Wells + Assoc.

offered as expert in traffic

undertook study of site. 1/16/97 made official visit(s) of site, access, site plan; collected accid. data for Balto. Cty records + traffic data from St.

Accidents for Satyr Hill to Cub Hill Rd 1993-1996

.88 miles long w/ 9 accids. in 93 12 accids 1994 8 accids 1995 7 accids 1996 – generally @ ~~Cub~~ Satyr Hill Rd or, to lesser extent Cub Hill unsafe conditions → .3 miles – lower than avg. for rural rd. Satyr Hill is high, Cub Hill is high, access to York Haven Dr. – 25 mph speed limit. w/in acceptable parameters. sight distance > 300 ft in ea. direction.

Cromwell Bridge Rd presently acts as partial park/dist +

CROSS

appl badly out of Cromwell Ridge Rd has been a prob. for yrs., agrees Cromwell is rural rd, but similar roads have double the traffic

Ltr W NORMAN GERBER, 35 Pickburn Ct, Gaithersville, MD

expert in urban reg'l planning, city planning, + rural planning

undertook study of subj. prop. re parking

reviewed official plats, regs., floodplain studies, wetland site + surrounding area 3 x's + disc'd case w/ County Planning Office

concls. ⇒ shd be granted as appropriate.

prop energize - prop. to south steep, unbuildable for anything, floodplain area also unbuildable, footprint zoned c 1988, w/ eye towards bty growth. Parking permits used to be granted routinely. Not so anymore. County Office later dropped this technique. Everyone knows need parking. → BL footprint permitted expansion to dimensions that exist + prop. today, but no place for parking

only portion that can be used for parking is floodplain

all available prop. for parking on other side is exhausted

V negative surrounded by very steep slopes + pub. prop.;

no mktg land for Mr. Sanders to buy, surrounded by floodplain;

§502.1 considerations — no detriment

will help w/ congestion,

409.B.B - adjoining facility, excl. Assoc + Loading, bty to be determ'd by Balto City, bro. in conjunction w/ operation of restaurant, fits in well w/ recreat'l area + activities

existg roadway will be used; Master Plan calls for parking lot to be

no refutation of conservation nature of claim simply to be able to cont. its use.

BL zone or footprint prevented loss of old bus.

1993 floodplain issue arose

Council could have been aware of floodplain + 2 streams not aware of requests in 1992 or 1996 to extend com'l zone

when zone permits expansion, if cannot get waiver for construction in flood plain, constts. unreasonable hardship

hardship → use hardship, among other things such as use of the prop.

Pet. Ex. 2 Covenant Agreement 10/10/86

respect portion can only be used.

REBUTTAL

only nonconforming use party.

PETITIONER'S CASE-IN-CHIEF CLOSED

KLW

(K)

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
(410) 887-3180

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

June 24, 1997

AMENDED NOTICE OF ASSIGNMENT

CASE #: 96-168-SPHA **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(SPH granted in part /denied in part; VAR denied.)

Notice for subject hearing is herewith **AMENDED** to include assignment of the following matter:

CASE #: 97-332-SPH **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(Special hearing GRANTED by Z.C. /parking lot.)

Both of the above cases to be consolidated for hearing; and

ASSIGNED FOR: WEDNESDAY, JULY 9, 1997 at 10:00 a.m.

NOTICE: This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.

No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c). For further information, see Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

Kathleen C. Bianco
Legal Administrator

---

cc: Counsel for Appellant /Petitioner: Leslie M. Pittler, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Counsel for Appellants/Protestants: Charles E. Brooks, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer, et al
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

Printed with Soybean Ink on Recycled Paper

CASE # 96-168-SPHA
97-332-SPH

IN MATTER OF RONALD SANDERS

Chas. E. Brooks + Malcolm F Spicer
Peter Max Zimmerman
Lelia M. Pittler

OPENING - Chas. Brooks

com'ty joined w/ Sanders & FOD's for BL zoning after bus. burg & existed was parking across fm Sanders & in front of Sanders, approved across st parking as nonconforming parking area but not area at & front of Sanders

appealed denial of xtra parking, had to be com'l parking in residential zone since footprint zoned BL only comprised of bldg

floodplain issue - requested waiver - Balto. Cty had no objection + ZC granted, which has been appealed by Ms. Pittler

all shd be granted w/

OPENING - Peter Max Zimmerman

init'g + imp. legal issues w/which this Bd will be confronted

§409.8 of Regs. Bd will have to resolve merits of SPH request for a substantially expanded parking area in a residential area w/lowest density DR1 - also shd be that of no SP. Ex. case

Ult'ly, nonconforming use will be found a distraction ~~past tray~~

flood plain - specific stds & code for waiver or variance §26-670 - except hardship + certain other requirements

Comty's OK does not satisfy waiver std

Can Bd get zoning approval (SPH) when still a waiver or variance to be gotten fm Balto. Cty or shd it be granted or resolved as part of the case; i.e., is this case ripe?

Case essentially documentary in nature for preparation of Ppl's counsel - Cromwell Park to West, St prop to east + Sanders Restaurant & only com'l use in the area, ...

which incls. restaurant, 1.2 acres is Parcel 2 which is east side parking lot. Rather than zone .91 acres com'l, County Council zoned footprint around bldg, ± 5000 sq. ft., BL + left remainder zoned DR 1.

grant was thus to allow what already existed, not to permit expansion.

1991 - Petitioner asked for nonconforming use permission for east side parking, which was granted, but not for west.

1993 - request to enclose deck on rear of prop.

apt. becomes restaurant but characterized as addition to restaurant; not caught by Balto. Cty; ~~but~~ permit is issued + construction is done which shd not have been granted + are now trying to legalize this after the fact. Prob. there is self-created to some extent.

Flood plain - no one caught this prob. either have to put aside fact that construction is there + decide it as a new SPH case,

suggestion parking is going to relieve some of traffic prob. but prob. is that some of traffic came about w/ improper expansion of restaurant

What did the County Council intend when zoned only amt. of land for comm use?

OPENING Les Pittler

Comm'r Schmidt's Order - Pet 2 sd relief granted herein is contingent on getting variance - has not been complied w/ to his knowledge, which creates prob. for Hrg today

Move for Hrg to be suspended until such time as condition complied w/.

Brooks -

Ppl Counsel - will go ahead

only W for today -

CASE Nos. 96-168-SPHA + 97-332-SPH SANDERS

Q's → parkg req'ments + difficulties @ Saunders Corner
or reduce parkg req'ments from 78-39 spots
esp'ly cognizant of hist. of prop. + how it had been used as an ice cream
carryout local bus. which
County split-zoned prop. w/ footprint of bldg BL, believe County Council
intended to permit use but limit its growth
Petitioner has expanded prop. considerably which has engendered needs
for parkg to incr. → 39 spaces approp.!

Petitioner has received nonconforming use permission for adjacent
parkg + adjacent to bldg has long std use
inclined
wd be her inclination to deny in floodplain
variance - some encid. of strip slope - wd be inclined to grant

Nonconforming uses wd be approved →
Variances -

BALTIMORE COUNTY, MARYLAND

Inter-Office Correspondence

TO: K. Howanski
L. Stahl
M. Worrall

DATE: January 13, 1998

FROM: Kathi

SUBJECT: In the Matter of Ronald Sanders -Petitioner; Case No. 96-168-SPHA and 97-332-SPHA / Closing Briefs and Findings of Fact as filed by Parties

Attached for your review and information are copies of the following documents which were filed in the subject matter, as requested by the Board at the conclusion of its hearing on December 10th:

1) People's Counsel's Memorandum filed January 9, 1998 by Peter Max Zimmerman, People's Counsel for Baltimore County, and Carole S. Demilio, Deputy People's Counsel.

2) Petitioner's Memorandum of Proposed Findings of Fact and Conclusions of Law filed January 12, 1998 by Malcolm F. Spicer, Esquire, on behalf of Ronald H. Sanders.

Deliberation in this matter is scheduled for Tuesday, February 3, 1998 at 9:30 a.m.

Should you have any questions regarding this case, or any attachment, etc., please let me know.

kathi

Attachments

County Board of Appeals of Baltimore County
OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

November 20, 1997

Deliberation - Saunders

P.C. has standing
- to defend Master Plan & zoning
- questions relative to forest buffer and flood plain are integral to special exception issue.

Question of Council's intent when property split zoned BL | DR1
No other part of Cromwell Valley is commercial
- indeed, most recently Council has as a park purchased several hundred acres to preclude any development along this area of the Mine Branch Run
∴ I believe that Council intended to permit the use of the subject property as it had been for many years, but to limit its growth as a commercial site

The Pet. has expanded the property considerably in both use and physical size
- This has created parking needs beyond the needs of an ice cream parlor and carry out
- Pet. has received BCA status for parking in a residential zone for

- When the Pet. increased the size of his operation, he needed to consider the parking question
The same applies to the forest buffer encroachment -
- Plus, there are unaddressed questions regarding the required mitigation

I do not find convincing and indeed question the possibility of parking for C. Valley Pk. in a similar floodplain area.

Therefore, I would deny the request for commercial pkg. in the floodplain.

As for a pkg. variance to reduce the req. # from 73 to 39, we must apply standards of C. v. Ward.
- I see the property as unique in its character in that part of the area, though residential in ~~character~~ zoning, which might be permitted for com. pkg. in a residential zone is steeply sloped & difficult to use.
- I can see where the inability to use certain parts of this area would create a hardship for the Pet.
- And, where other parts of the site, ~~outside~~ usable w/ one waivers ~~& variances~~ of environ. mental standards, have been utilized for pkg. Thereon the site's use as an ice cream parlor w/ one to the comm

Deliberation

Questions requirements &
- Relate to parking difficulties @ the site

Request for comm. pkg. in a residential zone
accomp. by waivers for floodplain
& forest buffer incursion

Or: - a variance for pkg. to reduce the required
# of pkg. spaces from 43 to 39.

Harry
P.C. has app. standing - no question
Cty. C. zoned Bh - part
- no one should be surprised that expanded use will occur
Problem w/ determining intent
Don't like waivers of floodplains
- set up for a reason
- But Cty. approved
- sends mixed signal
NCU issues & simple
- ice cream parlor w/ pkg
- in front - adj. to bldg.
- across street
- no problem w/ these areas remaining
Is there another way? Pkg. variance?
- less pkg. creates problems
- may create overflow
CBA reluctant to grant variances
- only rarely given
Question - may should be allowed to use property

(W)

IN THE MATTER OF	*	BEFFORE THE
RONALD SANDERS,	*	COUNTY BOARD
PETITIONER	*	OF APPEALS OF
2260 CROMWELL BRIDGE ROAD	*	BALTIMORE COUNTY
	*	CASE NO.: 96-168-SPHA CASE NO.: 97-332-SPH

* * * * * * * * * * * * *

PETITIONER'S MEMORANDUM OF

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, Ronald H. Sanders, by his attorneys, files this Memorandum for consideration by the Board of Appeals.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Baltimore County Board of Appeals for consideration of various Petitions filed by the Petitioner for that property known as 2260 Cromwell Bridge Road located in the vicinity of Loch Raven Road near the Loch Raven Reservoir.

Petitioner's primary request is for permission to build a commercial parking facility in residential zone, on property which the Petitioner owns. Petitioner's plan has already been approved by two different Baltimore County Zoning Commissioners, and is here as the result of an appeal by a resident who lives more than a third of a mile from Petitioner's property.

Case number: 96-168-SPHA seeks approval of commercial parking in a residential zone pursuant to Section 409.8.B of the Baltimore County Zoning Regulations (B.C.Z.R); to amend the previously approved site plan in case number 91-256-SPH to reflect the proposed parking arrangement and existing improvements on the site; to confirm an existing parking area as non-conforming; and, in the

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alternative, to approve a modified parking plan pursuant to Section 409.12 of the B.C.Z.R. In addition to the special hearing relief, the Petitioner seeks a variance to permit a reduction in the required number of parking spaces from 73 to 39. (Petitioner's Exhibit #2)

The Deputy Zoning Commissioner in an Opinion dated July 30, 1996 granted the approval of commercial parking in a residential zone, granted the approval to amend the previously approved site plan and confirmed the existing non-conforming parking area. The Deputy Zoning Commissioner denied the request to approve the modified parking plan which was contained in Petitioner's Exhibit 16 and denied the variance requested in view of the fact that the Petitioner had adequate property on which to place the required number of parking spaces and in view of the fact that the Deputy Zoning Commissioner was approving the request for commercial parking in a residential zone. The order required 5 spaces in the front to be modified to place 3 in the rear and make the remaining 2 parallel to Cromwell Bridge Road. Petitioner's Exhibit 3 reflects this change. The order was also contingent on Petitioner obtaining approvals to allow construction of the new parking lot in a flood plain. The approvals granted by the Deputy Zoning Commissioner were appealed by Lillian Jenifer and the Long Green Valley Association. The Petitioner filed an appeal from the denial of the variance petition.

Case number: 97-332-SPH was filed by the Petitioner seeking approval of a waiver to permit construction of a parking lot in a riverine flood plain pursuant to Section 500.6 of the B.C.Z.R., Section 517.2 (510.2) of the Building Code and Sections 26-276, 26-670, and 26-172(a)(3) of the Baltimore County Code. In addition, Petitioner seeks approval of an amendment to the previously approved site

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plan in case number: 96-168-SPHA to reflect the order of the Commissioner. The Zoning Commissioner granted the relief reques For Special Hearing and the same was appealed by Lillian Jenifer, whose home is located approximately 1,900 feet to the west of the subject site.

Testimony and evidence offered revealed that the subject property consists in total of 2.113 acres of land divided into 2 parcels with frontage on Cromwell Bridge Road and divided by Loch Raven Road. The parcel to the east of Loch Raven Road containing 1.2 acres is improved by an existing parking area containing 19 parking spaces. This property was apparently the subject of a prior Petition For Special Hearing in case number: 91-256-SPH which sought approval of the area to the east of Loch Raven Road as a non-conforming use of parking in a residential area. This approval was granted on March 20, 1991. Apparently at that time, the Opinion did not address the parking area then existing immediately adjacent to the improvements on the west side of Loch Raven Drive and hence the request for approval of a non-conforming use in case number: 96-168-SPHA.

The testimony of Ralph Bridges and Betty Littleton before this Board are more than sufficient to establish that the existing parking area fronting on the north side of Cromwell Bridge Road has existed since prior to January 2, 1945 and has been continuously used for parking for customers of the various businesses that have existed at this location since prior to 1945 and up to and including the present use. The evidence indicates that the current use of this parking area is similar to the nature and purpose of the original non-conforming use. The evidence establishes that the current use, while it may involve more cars than it did in 1944 and to prior, does not constitute a use different in character, nature and kind. There is no evidence that the

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current use of this parking area has any substantially different effect upon the neighborhood and the current use does not constitute a drastic enlargement or extension of the original non-conforming use.

But even if the parking area immediately to the north of Cromwell Bridge Road did not satisfy the test required to be a non-conforming use, there is more than sufficient evidence to support a conclusion that this area, along with the proposed parking area to the rear of the subject property, should be approved for commercial parking in a residential zone pursuant to the Petitioner's request for the same. Evidence presented before this Board by Joseph L. Larson, Petitioner's Engineer, Norman Gerber, Petitioner's Land Planing Expert, and C. Richard Moore, the Petitioner's Expert in Traffic are more than sufficient to satisfy the criteria of Section 409.8.B and 502.1 of the B.C.Z.R.

Section 409.8.B of the B.C.Z.R. specifically allows parking facilities in a residential zone. The existing and proposed parking facilities on the .913 acre parcel to the west of Loch Raven Road and as depicted on Petitioner's Exhibits 3 and 4 fully satisfy the criteria contained in Section 502.1 of the B.C.Z.R. for the grant of special exceptions. Considering the Petitioner's request for parking in a residential zone to be in a nature of a special exception, it is clear that the grant of the same would have no adverse effect on any adjoining or surrounding properties. The proposed parking area has already been disturbed and improved by an access road and zebra mussel monitoring station installed by Baltimore City Department of Public Works.

In addition, The Sanders' Corner Restaurant is located in the Cromwell Valley Area which is primarily a passive recreation area. The property is located immediately to the east of the Cromwell Valley Park recently acquired by Baltimore

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County. The final master plan adopted by the Department of Recreation and Parks marked as Exhibit 8 reflects the Department's plans with respect to the park and their intention to construct a parking facility immediately to the west of the Petitioner's property and to have an open field for active play and picnicking between Cromwell Bridge Road and the Mine Bank Run.

The use of this property as a restaurant with accessory parking is totally consistent with the character of the community and is an augmentation and enhancement of it. The restaurant blends with and supports the rural recreational character of the community. It lends itself to making the area a recreational destination and will serve future users of the Cromwell Valley Park. In reviewing the criteria of Section 502.1 of the B.C.Z.R. it is clear that granting the approval for the existing and proposed parking facilities in the residential zoned portion of the subject site will not be detrimental to the health, safety or general welfare of the locality. It will not tend to create congestion in roads, streets or alleys in the community and in fact, according to the testimony of C. Richard Moore, the proposed parking facility will improve traffic flow, relieve congestion and improve traffic safety. The approval will not create any potential hazard from fire or other dangers nor overcrowd the land or cause undue concentration of population as there is obviously no population increase anticipated. It will not interfere with adequate provisions for schools, parks, transportation or other public requirements as contained in Section 502.1(e) and obviously it will not interfere with adequate light and air.

Furthermore, the proposal is consistent with the property zoning classification in view of the fact that only the footprint of the present building has been zoned BL. It is obvious and must have been obvious to the County Council that

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parking would have to be supplied on the remaining portion of the Sanders' prop- which is zoned DR1. As Mr. Normal Gerber, Petitioner's Land Planning expert who headed the Baltimore County Zoning Office for many years, testified before this Board, it would have made no sense for the County Council to have zoned the footprint of the Sanders' Corner restaurant BL without intending that parking be provided in the surrounding DR1 area. Otherwise, Petitioner would be unable to legally use the BL zoning, and the grant of the BL zoning would have been an empty gesture. The approval of this parking facility would be consistent with the spirit and intent of the zoning regulations and with the impermeable surface and vegetative retention provisions of the regulations as it will be subject to Baltimore County Landscaping Standards.

Parking facilities in residential zones are in the nature of a special exception use and this Board looks to the case of **Schultz v. Pritts,** 291 Md. 1, 432 A.2d 1319 (1981) for guidance. Under that case, decided by the Court of Appeals of Maryland, a special exception use is a part of the comprehensive zoning plan and it shares a presumption that as such, it is in the interest of the general welfare and therefore valid. The evidence before the Board fails to disclose or establish any fact or circumstance which would negate this presumption and in fact the evidence is quite to the contrary. There is no evidence that this use of a parking facility at this site would have any adverse effect upon adjoining and surrounding properties. In fact, the evidence is to the contrary and this parking facility would have less impact at this site and would be of more benefit at this site than at some other locality in the DR1 zone. Testimony of Joseph Larson, Norman Gerber and C. Richard Moore as to meeting the tests of 502.1 and complying with 409.8-B of the BCZR has been uncontradicted.

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The Petitioner has also applied for a variance from th requirements. In view of the approval of Petitioner's request for approval of the parking facility as proposed and as existing, there is no need for the Board to decide the variance and it is considered to be moot. The parking which is proposed to be added to the rear of the property is essentially all located in a flood plain. In order to allow for the parking in the flood plain, the Petitioner has requested a waiver be granted under the provisions of the Baltimore County Code previously cited and which waiver petition is the subject of case number: 97-332-SPH. The final outcome of any appeal on that waiver could have an effect upon the decision to be made in connection with the variance case as an additional factor of uniqueness to the property would be presented. It is therefore appropriate that the Board, rather than deny the variance, merely make no decision on the same and consider it as moot in view of the approvals which are being given to the Petitioner.

Case number: 97-332-SPH is the Petitioner's waiver request to allow construction of the parking facility in a riverine flood plain. As previously indicated, this approval was granted by the Zoning Commissioner. Petitioner made application to the Department of Public Works and received approval from the Department of Public Works which has been introduced as Petitioner's Exhibit 5. The Petitioner introduced evidence through Mr. Joseph Larson and Mr. Edwin Howe, a professional engineer with KCW Consultants, Inc. that construction of the parking lot on the rear of the subject property in the flood plain would not increase flood heights or the extent of the flood plain on neighboring properties. Baltimore County Code Section 26-670 allows for the granting of waivers pursuant to Section 26-172 upon a showing of good and sufficient cause, a determination that the failure to grant a waiver would result in

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exceptional hardship and a determination that the granting of a waiver would not increase flood heights, impact safety, incur extraordinary public expense, create nuisances, cause fraud or victimization or conflict with existing local and state laws and ordinances.

The testimony and evidence offered by Edwin S. Howe and Joseph Larson are more than sufficient to establish these criteria. In considering the waiver request, the Board of Appeals is required to make a determination that the failure to grant a waiver would result in exceptional hardship. The Zoning Commissioner below found that just such an exceptional hardship would result without a waiver. The Commissioner found that the problems of traffic congestion and lack of maneuverability would continue without a waiver and, "moreover, the commercial operation would have to be reduced in size, an exceptional result... The Council has recognized the commercial use of the existing building by zoning same BL. To not permit parking adjacent to this use would be inappropriate." Opinion, p.8. This Board concurs with these findings. In essence, exceptional means unusual and clearly the circumstances of this particular property are unusual and unique. Prior to 1988, all of Mr. Sanders' property was zoned residential DR1 and the then existing smaller restaurant was a non-conforming use. In 1988, the comprehensive zoning maps adopted by the County Council granted BL Zoning to the then existing restaurant and enough additional area to allow for expansion of the same to its now present size of 4,548 square feet which includes a proposed enclosure of the front porch. It seems clear and unmistakable that, at the time this zoning was placed on the property, that all of the parking for the existing restaurant and any expansion into the additional BL Zoned area would have to be placed on the residentially zoned remainder of the

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property located to the west of Loch Raven Road. The Petitioner owns additional property to the east of Loch Raven Road which contains some 19 parking spaces, but the remainder of that property is in steep slopes and and clearly unusable as a parking area. The Petitioner has sufficient property on which to construct the required additional 34 parking spaces. To deny the Petitioner the ability and right to construct this parking lot on the only property available to the Petitioner for that purpose would result in an exceptional and unreasonable hardship as it would result in the denial to the Petitioner of his right to use a substantial portion of his property which was zoned BL and which appears to have been zoned BL specifically to allow for an addition to the restaurant which then existed in 1988. The granting of the waiver will further serve to alleviate congestion and improve traffic conditions on this site and on the public roads which lie adjacent thereto. It would also improve pedestrian safety, as restaurant customers would be able to park immediately behind the restaurant and gain access to it without having to traverse any public roads.

In 1987, the Petitioner initiated a request to rezone the entire .913 acre parcel located at the northwest corner of Cromwell Bridge and Loch Raven Roads from DR1 to BL. This request was part of the 1988 comprehensive rezoning process and it was identified as Issue 6-087. Interestingly, the request of Mr. Sanders was not opposed by the Long Green Valley Association as indicated in the letter dated December 18, 1987 from Mr. Edward L. Blanton, Jr. Members of the Summerfield Farms Association did submit letters to the Office of Planning and Zoning indicating opposition to the requested rezoning. As this rezoning request was winding its way through the process, the Summerfield Farms Association, Inc. and Mr. Sanders entered

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into a Restrictive Covenant Agreement (Exhibit #22) dated October 10, 1988 which recites on page 2, paragraph D as follows:

> D. Since Sanders submitted his request for change, an alternative has been proposed to reclassify to BL only the portion of the land on which the existing store and any addition thereto may be located. (the "Rezoned Portion").

In the Restrictive Covenant Agreement, Mr. Sanders agreed to limit the combined square footage of all buildings continued, enlarged or constructed on the rezoned portion to 7,000 square feet. In consideration for this as well as other concessions by Mr. Sanders, the Association agreed not to oppose the reclassification of a portion of the property to BL and agreed not to oppose the continued operation on the parcel and the rezoned portion of the existing uses and the limited expansion of those uses in a manner consistent with the agreements of Mr. Sanders. The County Council voted to adopt the comprehensive zoning maps of 1988 on October 13, at which time Councilman Evans proposed a change from the Planning Board recommendation of BL on the entire parcel to a combination of BL and DR1 as shown on an overlay. (See People's Council Exhibits 2, 3) It is certainly a clear and reasonable inference that Councilman Evans, in moving to change the Planning Board recommendation, was fully cognizant and aware of the Restrictive Covenant Agreement and went along with the alternate proposal referred to in the Agreement to reclassify a portion of the land to include the existing building with area for an addition. All additions to the building that existed in 1988 have been within the BL zone boundary lines. To deny the waiver would result in an unreasonable, unnecessary and exceptional hardship.

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People's Counsel suggests and argues that the relief being sought by the Petitioner should be denied because the problems that he now faces are self

imposed. There is no evidence to support such conclusion nor is there any evidence to indicate that Mr. Sanders either intentionally or surreptitiously expanded his restaurant in an effort to avoid parking requirements. Indeed, all expansions to the restaurant have remained within the BL zoned footprint of the building as provided by the Council and well under the allowable expansion limit as provided in the zoning covenant with the community. In other words, the expansions to the restaurant were contemplated by the Council and the community. Moreover, it is noteworthy that, at the time of the expansions in 1991, the flood plain did not even extend to cover the subject parking area, and the Baltimore County regulations requiring a waiver for construction in a riverine flood plain had not yet been adopted. Thus, recent flood plain elevations and regulatory changes have contributed to the hardship which Petitioner faces.

The Zoning Commissioner's Decision in case number: 97-332-SPH provided that the Petitioner would have to obtain a variance from the internal standards of the Department of Environmental Protection and Resource Management as set forth in Title 14 of the Baltimore County Code. Evidence establishes that the Petitioner has sought and obtained the necessary forest buffer variance. The application is Exhibit 18 and the approval is contained in Exhibit 19.

In summary, for the reasons contained herein, the Petition for Special Hearing seeking approval of a waiver to permit construction of a parking lot in a riverine floodplain, pursuant to Section 500.6 of the Baltimore County Zoning Regulations (B.C.Z.R.), Section 517.2 (510.2) of the Building Code, and Sections 26-276, 26-670 and 260-172(a)(3) of the Baltimore County Code (B.C.C), and an

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amendment to the previously approved site plan in Case No. 96-168-SPHA to reflect the proposed parking configuration, in accordance with Petitioner's Exhibits 3 and 4 should be GRANTED, and the Petition for Special Hearing seeking approval of commercial parking in a residential zone, pursuant to Section 409.8.B of the Baltimore County Zoning Regulations (B.C.A.R.), to amend the previously approved site plan in Case No. 91-256-SPH, and, to confirm an existing nonconforming parking area should be GRANTED.

Respectfully submitted,

Charles E. Brooks

Malcolm F. Spicer, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 12th day of January, 1998, a copy of the aforegoing Petitioner's Memorandum of Proposed Findings of Fact and Conclusions of Law was mailed via first class mail, postage prepaid to: People's Counsel, Old Court House, Towson, Maryland 21204 and Leslie M. Pittler, Esquire,8415 Bellona Lane, #605, Towson, Maryland 21204.

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Charles E. Brooks

(W)

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IN THE MATTER OF RONALD SANDERS, PETITIONER 2260 Cromwell Bridge Road	*	IN THE COUNTY BOARD OF APPEALS
PETITION FOR SPECIAL HEARING PETITION FOR FLOODPLAIN WAIVER or, in the alternative, PETITION FOR PARKING FOR VARIANCE	*	FOR BALTIMORE COUNTY CONSOLIDATED CASES 96-168-SPHA and 97-332-SPHA

* * * * * * * * * * * * * *

People's Counsel's Memorandum

Statement of the Case

These are consolidated de novo appeals brought by Lillian Jenifer under Charter Sec. 603 and Code Sec. 26-132. They concern: (1) Deputy Zoning Commissioner (DZC) approval of a use permit for commercial parking in a residential (D.R.1) zone, akin to a special exception (BCZR 409.8, 502.1); and (2) DZC approval of a Public Works Department floodplain waiver (Code Secs.26-168, 26-172, 26-670) based on exceptional hardship and other defined standards. There also occurred during the proceedings: (3) a DEPRM forest buffer easement variance (Code Sec.14-334).

People's Counsel for Baltimore County entered its appearance and participated in both cases pursuant to its Charter Sec. 524.1 (attached) responsibility to defend the comprehensive zoning maps and master plan, and to pursue broad public interest objectives to protect land, air, and water resources.

Sanders cross-appealed, in the alternative, from the denial of a parking variance.

All of these cases arose after Sanders the younger completed a dramatic expansion

of "Sanders' Corner", a modest ice cream store/carry-out operated by his father at the intersection of Cromwell Bridge and Loch Raven Roads. In 1993-94, Sanders somehow procured building permits for major additions to increase facility size from 1200 to 4500 square feet for a full-service restaurant. He did this without the required 72 parking spaces, at 16 spaces per 1000 square feet, under BCZR 409.6A2. The new 37-space parking lot would occupy the entire rear of the corner property and its floodplain.

The requests for the use permit or, in the alternative, for parking variance, should have come before construction. As it is, they come after the fact, to attempt to legitimize the dramatically expanded use. For reasons explained below, the permits and construction are neither within the scope of any preexisting nonconforming use nor justified by the theory of "equitable estoppel". Rather, the case must be evaluated anew, on the merits.

Questions Presented

Main Questions

1. Whether the special hearing (special exception) for commercial parking is, as a matter of law, contrary to the intent of the County Council's particular limitation of commercial zoning to .1 acre of a 2.2 acre site (including .9 acres at the northwest corner)?

2. Whether the special hearing, being in the nature of a conditional use, is disqualified for failure to meet specified floodplain and forest buffer conditions?

3. Whether, by itself, the floodplain waiver fails because the property is not unique in any relevant way and because, as a matter of law, there is no exceptional hardship?

4. Whether the alleged "hardship" is both economic and self-created?

Ancillary Questions

5. Whether the original nonconforming use may expand to more than triple its original size and change in character, and yet retain nonconforming status?

6. Whether there is any equitable estoppel to protect or favor petitioner?

7. Whether the scope of People's Counsel's responsibility includes the floodplain waiver insofar as: (1) it is involved with the zoning special hearing/special exception; (2) it affects defense of the master plan; and (3) it pertains to land and water resources referred to in Sec. 524.1.

8. Whether there is any justification for a parking variance?

Statement of Facts

Location and Zoning

The property is towards the east end of the Cromwell Valley, on the north side of Cromwell Bridge Road, the main .9 acre "corner" being to the west of Loch Raven Road and the other 1.3 acres, including existing parking, on the east side.

In common with other properties, it slopes downward to the north towards Mine Branch Run and contains substantial 100-year floodplain. It also shares a border with Cromwell Valley Park, along with other properties.

The D.R. 1 zone, the bulk of the property, signifies the lowest density of any residential zone. Other nearby properties are zoned either D.R. 1 or more restrictive R.C. (Resource Conservation) zones. The property's tiny .1 acre commercial (B.L., Business-Local) zoning derives from the old ice cream stand. There is no other nearby commercial zoning or use.

History

The basic facts are simple. For many years, Petitioner's father operated a modest carryout and ice cream stand, with a few tables, with parking spaces along Cromwell Bridge Road and across Loch Raven Drive. It occupied about 1200 square feet, according to engineer Joseph Larson. There was also an apartment on the east side of the building.

This nonconforming use did not cause any controversy.

After his father's death in about 1986, Petitioner asked the Council to rezone the corner .913 acres to B.L. (File, P.C. Exh.1). With the request, Issue 6-087, Petitioner's attorney Deborah Dopkin wrote October 26, 1987 that the purpose was to preserve the longstanding commercial use and allow reconstruction in the event of fire. At that time, BCZR 104 (prior to Bill 124-91 amendment), provided that destruction of a nonconforming use would terminate the use. Most community associations and individuals opposed any commercial zoning at all, citing the beauty, character, environment, and sensitivity of the Cromwell Valley and expressing concerns about commerce and traffic. One association did not. Dopkin wrote on May 5, 1988:

> "As I stated at the [Planning Board] hearing on Thursday, April 28, 1988, the country store has existed continuously at this location for nearly a century and is a well-known local institution. Mr. Sanders is continuing a family business once operated by his father, and he has invested a substantial amount of money and time in refurbishing the store.
>
> "We oppose the Planning Staff recommendation [D.R. 1] and ask that you favorably recommend BL to conform the zoning to the long-established use."

The Planning Board recommended B.L. But the Council limited the B.L. to a small

area in the shape of a trapezoid around the periphery of the store, leaving the rest D.R.1. The log and minutes show the Council drew a specific overlay to divide the zoning on the property. See P.C. Exh. 2, 3.

* * *

On March 20, 1991, Petitioner obtained nonconforming use approval for the parking lot on the east side of Loch Raven Road. The Zoning Commissioner opinion in Case 91-256-SPH, P.C. Exh. 5, makes no mention of any expansion. The building permit records (P.C. Exh. 6) do show a very small rear building addition to the site plan accompanying the 1991 case. As Mr. Larson said, this addition was not large enough to generate any need for parking in the rear, or for a variance.

The permit records then reflect the major expansion in 1993 and 1994, including the rear porch dining area extending virtually the length of the building, and the conversion of the apartment to restaurant use. The renovations accommodated kitchen facilities, more than 30 tables, and standard restaurant service. As a result, the commercial use expanded from 1200 square feet to 4500 square feet, and the area of the building itself more than doubled. Unfortunately, the County issued these permits without proper or required zoning approval.

Subsequently, this situation came to the attention of the zoning office, which required the petitioner to file the petitions presently under consideration.

The Master Plan

The Council's 1989-2000 Master Plan (Excerpts, P.C. Exh. 4) states a purpose to protect streams and associated floodplains. P. 64. Separately, the Plan for the Central Sector states prominently an intent to preserve the character of the Cromwell Valley. It describes the valley's historic, tranquil, and environmentally sensitive character; says it is in "serious jeopardy of development which, even if attempted with utmost sensitivity to the valley's scenic qualities, would be fundamentally incompatible with exactly that scenic character;" and forbids any "higher density zoning in this Valley." P. 106.

The Petitioner emphasized a Department of Recreation and Parks final master plan for the Cromwell Valley, and its placement of a parking lot adjacent to the proposed location here. But the Council has neither approved this plan nor taken any budget and appropriation action towards implementation.

The Mine Branch Run and Its Floodplain

The Mine Branch Run traverses the Cromwell Valley and runs to its confluence with the Gunpowder Falls. It runs behind not only Petitioner's property, but also all the properties on the north side of Cromwell Bridge Road, public or private. The County Council has begun a stream restoration program, starting with the headwaters. (The Board may take notice of the Capital Budget and future project stages for the entire stream).

On August 19, 1996, Joseph Larson wrote, on behalf of Petitioner, to request a floodplain waiver for the rear parking lot encroachment. After describing the minor

impact and lack of homes nearby, he made this plea concerning hardship:

> "Lastly, and as a more personal closing argument for our proposal, aside from the public good that it will serve, is the fact that a severe financial hardship will be incurred by Mr. Sanders should this parking area not be allowed by way of this Waiver request. The restaurant which has existed in its current location for ages desperately needs this parking to be economically viable."

Larson failed to support this sympathy argument, but did call it economic hardship.

There was never any real evidence of hardship. Norman Gerber, Petitioner's expert planner, suggested at the hearing that a restriction on use of any part of the property is a hardship. Gerber also seemed to consider it a kind of philosophical issue.

But the issue of commercial expansion vs. limitation is clearly an economic issue.

As to environmental effects, Edwin Howe testified to their insignificance. He did concede that during a 100-year storm cars would be sitting in water 18 inches high.

The Public Works Director, Charles R. Olsen, did "not oppose" the waiver in his terse two-sentence letter dated January 23, 1997. He made no statutory findings.

The Forest Buffer Variance

The Department of Environment approved a forest buffer variance. This would allow placement of the parking lot in a wooded area. It was conditioned on afforestation elsewhere; but there was, and is, no specific plan to fulfill this condition in any way. Nor was there any explanation as to how this condition would offset damage to the valley.

The Petitioner's Testimony

The Petitioner presented promotional testimony and attempted to create an aura of

entire corner B.L. The rear parking would then be permitted by right. By split zoning the property, the Council envisioned the ice cream store/carryout with a use permit for the existing 35 parking spaces on Cromwell Bridge Road and across Loch Raven Drive.

Indeed, the Petitioner had room to expand the restaurant from 1200 to about 2200 square feet and to meet parking requirements with a use permit for the existing 35 spaces, at 16 per 1000 square feet. Instead, Petitioner overreached.

The Council's apparent intent to limit the use is corroborated by the record. The Issue File shows Petitioner's attorney's representation that the request for rezoning was to protect and accommodate the longstanding use. It was never stated that the intent was to triple or quadruple the use in size, double the parking area, or invade the floodplain.

The Petitioner, like the proverbial camel, having gotten its nose under the tent, now seeks to occupy the whole tent. In this attempt, Petitioner both exceeds and subverts the intent of the 1988 County Council and its successor councils. Petitioner's proposal causes unique "...disruption of the harmony of the comprehensive zoning plan." Schultz.

As the Court also said in People's Counsel v. Mangione 85 Md. App. 738 n. 6 (1991): "The size and scope of the project are thus relevant considerations."

Here, moreover, the Council's zoning limitation is consistent with the 1989-2000 Master Plan, prepared at about the same time. It calls for protection of the Cromwell Valley. If there should be more commerce in this valley and its floodplain, then it is up to the Council to make the decision, not this Petitioner and not by unilateral aggression.

II. The Use Permit Also Conflicts with Floodplain and Forest Buffer Conditions

Where special exceptions, as conditional uses, require separate waivers and variances, then "...the [rebuttable] presumption that a conditional use is permitted may well fall by the wayside." Chester Haven L.P. v. County Board of Appeals 103 Md. App. 324, at 336 (1995); Umerley v. People's Counsel 108 Md. App. 497, at 510-11 (1996). Here, Petitioner's proposal fails fatally to satisfy basic environmental standards.

Even if such deviations could be justified along with a use permitted by right, their presence is a disqualfying factor in a special exception case. As explained in Schultz, the inherent adverse effects which the legislature tolerates in a use classified as permitted are

The Master Plan

The Council's 1989-2000 Master Plan (Excerpts, P.C. Exh. 4) states a purpose to protect streams and associated floodplains. P. 64. Separately, the Plan for the Central Sector states prominently an intent to preserve the character of the Cromwell Valley. It describes the valley's historic, tranquil, and environmentally sensitive character; says it is in "serious jeopardy of development which, even if attempted with utmost sensitivity to the valley's scenic qualities, would be fundamentally incompatible with exactly that scenic character;" and forbids any "higher density zoning in this Valley." P. 106.

The Petitioner emphasized a Department of Recreation and Parks final master plan for the Cromwell Valley, and its placement of a parking lot adjacent to the proposed location here. But the Council has neither approved this plan nor taken any budget and

There is, however, provision for waivers under 26-670(a): "Waivers shall only be issued upon: "(1) A showing of good and sufficient cause; (2) A determination ...[of]... exceptional hardship (other than economic) to the applicant; and (3) A determination that...the waiver will not increase flood heights, impact public safety, incur extraordinary public expense, create nuisances,...." (Emphasis supplied).

The waiver action shall be "the minimum necessary...to afford relief." It also "must" take into account both state water resources administration and county public works department comments. Ibid.

Sec. 26-670(b) states further conditions as to waivers, including a letter memorandum to accompany any waiver with detailed terms and conditions, requirements for recordation in the land records, and impact on National Flood Insurance Coverage.

The "Exceptional Hardship" Standard

The term "exceptional hardship" is one of art. In Baltimore County, the CBA is accustomed to deciding zoning variances under the more "relaxed" standard of "practical difficulty." See McLean v. Soley 270 Md. 208 (1973). The word "relaxed" is in quotation marks because it is still a tough standard. But the "hardship" standard is tougher.

Zoning cases are available from local jurisdictions which employ the hardship standard. Green v. Bair 77 Md. App. 144 (1988), cert. denied (1989), is attached. It involves a request to enlarge an existing (1969 vintage) medical office building, zoned commercial, based on need and hardship, to accommodate expansion of the practice.

Despite the doctors' testimony that expansion was important to continue the practice at this location, and the lack of feasible alternatives, the Westminster City Board of Zoning Appeals approved. But the courts reversed. The CSA decision centered on the"undue hardship" standard. Quoting Anderson v. Board of Appeals 22 Md. App. 28, 38-39 (1974), Judge Robert M. Bell wrote:

> "Where the standard of undue hardship applies, the applicant, in order to justify the grant of the variance, must meet three criteria:
>
> 1) If he complied with the ordinance he would be unable to secure a reasonable return from or to make a reasonable use of his property.... Mere financial hardship or an opportunity to get an increased return is not a sufficient reason for granting a variance....
>
> 2) The difficulties or hardships were peculiar to the property in question and contrast with those of other property owners in the same district....."
>
> 3) The hardship was not the result of the applicant's own actions....
> 77 Md. App., at 151-52. (Citations omitted).

The Court of Appeals has consistently rejected comparable hardship variance/exception claims for additions, expansions, and ancillary parking: Easter v. Mayor & City Council 195 Md. 395 (1950), addition on front of store and dwelling in commercial zone, despite nearby nonconforming uses; Cleland v. Mayor & City Council 198 Md. 440 (1951), parking lot for physicians' offices in residential zone, despite preexisting nonconforming office use; Marino v. City of Baltimore 215 Md. 206 (1957), store building and parking area in residential zone, despite earlier issuance of commercial permit on adjacent property; Pem Constr. Co. v. City of Baltimore 233 Md. 372 (1964), parking lots in

residential zone for nearby shopping center. A review of these cases, attached, illustrates the standard and its application. They control the present claim, and compel its denial.

III. There Is No Hardship Unique to Sanders Corner

It "...must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood." Easter, supra, 195 Md., at 400, quoted in Marino, supra. See Carney v. City of Baltimore 201 Md. 130, 137 (1952). Thus, one must show both that the property is unique and that its attendant hardship is unique.

Sanders' Corner is one of many properties sloping down to Mine Branch Run and its floodplain. There is nothing unusual about it. Petitioner says his property is next to the park. So are many others. But even if it were the only one, it is irrelevant to hardship. The law does not accept encroachment in floodplain areas merely because of nearness to a park. Cf. Chester Haven, denying variances in the Chesapeake Bay Critical Area.

> The Court of Appeals explained the danger of piecemeal hardship approvals:
>
> "It is by these gradual encroachments, individually of relative insignificance, that the integrity of the general scheme is undermined and ultimately shattered. One departure serves as justification for another...." Easter, supra.
>
> * * *
>
> " As a general rule [hardship] exceptions are granted sparingly, and under exceptional circumstances. To do otherwise would decimate zoning restrictions and eventually destroy all zoning regulations...." Marino, supra.

Here, the casual allowance of a waiver, without any finding of unique hardship, is an invitation to destroy the floodplain ordinance. This Petitioner is no more entitled to a waiver than any other in the area. So, as the County begins its stream restoration program,

its public works department and hearing officer are acting at cross purposes.

Petitioner also claims his property is unusual because it had a nonconforming store. But the Courts in Easter and Cleland stated the purpose to curb nonconforming uses and to deny " unique hardship" exceptions which might extend, multiply and perpetuate such uses. In sum, Petitioner does not under law have a peculiar hardship.

IV. There Is No Hardship Anyway, But Rather a Matter of Financial Gain

In order to show hardship under the above cases, the claimant must prove that there is otherwise no reasonable use of the property. It is insufficient to suggest that the restriction deprives the owner of maximum use or level of return, or that a part of the property is restricted. See also Burns v. Mayor & City Council 251 Md. 554 (1968).

Land use controls, by their very nature, place limits on property use and financial gain. If these very limits were to justify a hardship claim, then the law would disappear.

entire corner B.L. The rear parking would then be permitted by right. By split zoning the property, the Council envisioned the ice cream store/carryout with a use permit for the existing 35 parking spaces on Cromwell Bridge Road and across Loch Raven Drive.

Indeed, the Petitioner had room to expand the restaurant from 1200 to about 2200 square feet and to meet parking requirements with a use permit for the existing 35 spaces, at 16 per 1000 square feet. Instead, Petitioner overreached.

The Council's apparent intent to limit the use is corroborated by the record. The Issue File shows Petitioner's attorney's representation that the request for rezoning was to

The Court most recently said in Cromwell v. Ward 102 Md. App. 691, 721-22 (1995):

> "Self-inflicted or self-created hardship... is never considered proper grounds for a variance... Where the applicant creates a nonconformity, the board lacks power to grant a variance...."
>
> * * *
>
> "Were we to hold that self-inflicted hardships in and of themselves justified variances, we would effectively not only generate a plethora of such hardships but we would also emasculate zoning ordinances. Zoning would become meaningless." (Citations omitted).

The hardship claim is thus legally insufficient in all respects. The Department of Public Works could not have been more casual in its approval letter, and the Hearing Officer followed suit. It was enough to deny the waiver that the "exceptional hardship" claim failed under Sec. 26-670(a), that it was economic, and that it was self-created.

DPW also failed to consult with the State Water Resources Administration and to inquire into effects on the Mine Branch Run stream restoration. We have provided the relevant DEPRM memorandum December 17, 1997 and Phase I Contract. These show, as expected, that the program's scope includes the entire stream. It was incumbent on the Petitioner and on DPW to address the relationship of floodplain waivers to the program. There should also have been the mandatory letter of conditions under Sec. 26-670(b).

It is hard to imagine a more flagrant all-around disregard of the law.

The Forest Buffer Variance

The DEPRM forest buffer variance approval under Code Sec. 14-334 (See 14-331 to 14-350) was casual and legally insufficient. The reasons which negate "hardship" approval of the floodplain waiver also apply to "practical difficulty", the standard here.

DEPRM's July 15, 1997 approval letter "...determined that a hardship exists due to the fact that the entire property behind the existing restaurant is located within the FBE." The Director asked for mitigation by 34,000 square feet of planting elsewhere.

The Court rejected a similar justification in Umerley v. People's Counsel 108 Md. App. 497, cert. den. 342 Md. 584 (1996). The argument there was that, without a variance, it would be impossible to have a trucking facility. The property was also situated where it could not comply with statutory setbacks. But, were this to justify a variance, the law would be meaningless. Failure to comply would be its own justification.

Indeed, Umerley was a harsher case because the entire facility was at stake. Here, the issue is merely the expansion of the restaurant and the required rear parking.

There is no point in having forest buffer standards if they are to be avoided merely to allow Petitioner maximum exploitation of the buffer area. Nor is it a justification to include a condition to plant trees elsewhere. If the FBE law is so applied, it is illusory.

The variance here, coming on top of the floodplain waiver, makes it appear that County agencies will mock all rules in order to satisfy Sanders' desires.

Comment on Traffic

There was conflicting testimony about traffic. Richard Moore, for the Petitioner, stated that the parking layout met minimum standards, is safe, and does not cause undue congestion. He also suggested that the added traffic generation is insignificant. At the same time, several of Petitioner's witnesses suggested that the rear parking would

alleviate congestion around the existing parking areas on Cromwell Bridge Road and at the Loch Raven Road intersection. Clearly, there are concerns about parking congestion. The Deputy Zoning Commissioner used relief of parking congestion as the reason to approve the new parking to the rear.

On the other hand, citizen witnesses -- Jenifer, Gabriel, and Trela -- described serious congestion and added danger. This tracks concerns expressed to the Council in 1988. The Court accepted the legitimacy of citizen observations about traffic conditions in Eger v. Stone 253 Md. 533 (1969).

Even if the Board believes that the added traffic meets absolute engineering standards, this does not justify approval of the use permit. It should not distract from the main question reviewed above: the Council's overall intent in limiting commercial zoning to the .1 acre, and the overall land use impact of the expanded restaurant and parking.

Moreover, the suggestion that the use permit might alleviate congestion due to restaurant expansion is impertinent. It amounts to a disguised reward for creating or aggravating a problem. Without the expansion to start with, there would be no problem.

Traffic issues are both quantitative and qualitative. The Council may, for many reasons, decide to disallow a use which technically could meet minimum quantitative traffic engineering standards. After all, the job of engineers is to accommodate development. They don't make basic land use judgments. It is predictable that Mr. Moore would testify favorably. Again, the relevant inquiry is of the Council's broader intent.

V. There Is No Nonconforming Use Protection for the Dramatic Expansion

The specter of the nonconforming use is a "red herring" in light of the change from ice cream store to restaurant, more than tripling of commercial space, and doubling of building size. BCZR 104.1 does not allow a nonconforming use to change in use. It limits the existing use to a 25% increase in ground floor area. It does not allow expansion of the area of the property used, such as for a new parking lot. From any point of view, the original nonconforming use, as confirmed in 1991, is gone.

The fundamental purpose of the law is to eliminate nonconforming uses over time. Prince George's County v. Gardner 293 Md. 259, 266 (1982):

> "Thus, this Court has recognized that the problem inherent in accommodating existing vested rights in incompatible land uses with the future planned development of a community is ordinarily resolved, under local ordinances, by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment."

In this context, "...local ordinances must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses." Ibid. See Hewitt v. Co. Comm'rs of Baltimore County 220 Md. 48, 59 (1959). The law precludes "....some sort of 'creeping' process..." to grow these uses. Phillips v. Zoning Comm'r of Howard County 225 Md. 102 (1961). The law also prohiits their spread onto adjacent areas. Cleland, supra, 198 Md. 440; Chayt v. Board of Zoning Appeals 177 Md. 426 (1939).

As the Court said in Beyer v. Mayor & City Council 182 Md. 444 (1943):

> "The right of the non-conforming owner, however, is to the use and not to the class of use."

The Court said in Phillips:

> "The courts generally disapprove -- as a substantial departure from a vested nonconforming use -- a change from one use to another."

All too often, Petitioners present a nonconforming use as something to be revered. They suggest that its limitation, or perchance its stifling, is a tragedy to be avoided at all costs. This is a pernicious and unacceptable distortion of the law.

Sanders' 1993-94 unilateral expansion destroyed any claims to the nonconforming use approved in 1991. He now has a tiny commercial zone, dependent on a use permit for parking in any of the residentially zoned property. It would desecrate the law to make the past nonconforming use a launching pad for a dramatic spread of commercialization. As argued above, if a use permit is to be granted at all, it should be for the old parking areas, and in conjunction with about 2000 square feet of restaurant space, not 4500. There should be no rear parking lot. The rear additions should be ordered removed.

VI. Petitioner Has No Claim of Equitable Estoppel or Vested Rights

Since Lipsitz v. Parr 164 Md. 222 (1933), it has been law that a mistakenly issued permit, in conflict with zoning, may not be set up as an estoppel or to assert vested rights. Later cases include Berwyn Heights v.Rogers 228 Md. 271 (1962); Kent County Planning Inspector v. Abel 246 Md. 395 (1967); City of Hagerstown v. Longmeadow Shopping Center 264 Md. 481 (1972); and Inlet Associates v. Assateague House 313 Md. 413 (1988). There are strong reasons for this rule, which overrides construction based on an illegal permit. Mistaken official action may not defeat public rights. Moreover, applicants

are charged with knowledge of zoning law. To give "equitable" priority to wrongful issued permits would open the door to legal evasion -- innocent, negligent, or intentional.

Here, there was no excuse for issuance of building permits directly in conflict with applicable parking requirements, and without the necessary zoning use permit. This Petitioner, moreover, had experience in the legislative and adminstrative zoning process.

In Cromwell v. Ward, supra, 102 Md. App., at 723-25, the County issued a building permit without proper zoning approval, a height variance on a garage/wine cellar addition. Judge Dale Cathell reviewed the cases, from Lipsitz to Inlet Associates. These included Board of County Comm'rs v. Snyder 186 Md. 342 (1946), where Plaintiff sought to force issuance of a permit for an alleged nonconforming use. That Court held:

> "No permit was issued, and if it had been, it would have conferred no vested right, nor would it have created an estoppel." 182 Md., at 347.

Cromwell also quoted Inlet Associates, 313 Md., at 437:

> "The doctrine of equitable estoppel 'cannot be ...invoked to defeat the ...enforcement of...ordinances, because of an error or mistake committed by one of its officers...which has been relied on by a third party to his detriment."

Judge Cathell wrote that such a permit, and ensuing construction, could not themselves be the foundation of a "uniqueness" or "practical difficulty" argument:

> "It is not the purpose of variance procedures to effect a legalization of a property owner's intentional or unintentional violations of zoning requirements. When administrative entities such as zoning authorities take it upon themselves to ignore the provisions of statutes enacted by the legislative branch of government, they substitute their policies for those of the policymakers." 102 Md. App. , at 726.

This goes for use permits, floodplain waivers, and forest buffer variances.

VII. People's Counsel Has Responsibility to Litigate Not Only the Zoning Issues, but also the related Master Plan and/or Environmental Issues

County Charter Sec. 524.1 entrusts People's Counsel with defense of the zoning maps and master plan, and to act as legislatively designated party in interest. Courts have approved the standing of People's Counsel in a variety of cases defending council action: People's Counsel v. A.V. Williams 45 Md. App. 617 (1980), rezoning; People's Counsel v. Webster 65 Md. App.694 (1986), special exception/master plan; People's Counsel v. Mockard 73 Md. App. 340 (1987), rezoning/master plan; People's Counsel v. Md. Marine Mfg. Co. 316 Md. 493 (1989), special hearing/waterfront zoning interpretation/State wetlands law; Board of Child Care v. Harker 316 Md. 683 (1989), special hearing/zoning immunity; People's Counsel v. Mangione 85 Md. App. 738 (1991), special exception; Red Roof Inns v. People's Counsel 96 Md. App. 219 (1993), zoning variance; People's Counsel v. Crown Dev. Corp. 328 Md. 303 (1992), development plan, density transfer; Security Management Corp. v. Baltimore County 104 Md. App. 234 (1995) Civil Rights Act/comprehensive zoning; People's Counsel v. Beachwood I Ltd. Partnership 107 Md. App. 627 (1995) cert. den. 342 Md. 472 (1996), rezoning/Chesapeake Bay Critical Area Act compliance; Umerley v. People's Counsel 108 Md. App. 497 (1996); cert. den. 342 Md. 584 (1996) special exception/variances; Sycamore Realty Co. v. People's Counsel 344 Md. 57 (1996), development plan/zoning estoppel. People's Counsel appears here consistent with charter and usual practice.

In Crown Development, 328 Md., at 317, Judge James McAuliffe wrote:

"People's Counsel has been given a broad charge to protect the public interest in zoning and related matters....Density regulation is an important part of the zoning process.

In the present case, Petitioner does not challenge People's Counsel's standing to participate in the zoning use permit/special exception review. 96-168-SPHA. He has, however, opposed People's Counsel's standing in the consolidated floodplain waiver case. 97-332-SPH. For several reasons, it is clear that People's Counsel does have standing.

First of all, the floodplain waiver is integral to the use permit/special exception. It is a condition of a conditional use. The case thus has to do broadly with defense of the comprehensive zoning map, here the D.R. 1 zone. In addition, it is specifically a case "involving...[a] special exception under the Baltimore County Zoning Regulations."

Secondly, the county master plan's intent to protect the Cromwell Valley involves both the use permit and floodplain waiver. It is an independent source of standing.

Thirdly, the charter provides that People's Counsel "may appear as a party in interest ...before all state ...boards...on matters involving the preservation of the quality of the air, land, and water resources of Baltimore County and/or may initiate such proceedings in the public interest." The floodplain waiver is in this category as well.

There are thus (1) zoning map (2) master plan, and (3) water resources grounds for the appearance in this case. It is necessary to underline that the issue of standing is distinct from the ultimate decision on the merits. See Sugarloaf Citizens v. MDE 344 Md. 271, 293-97 (1996). Thus, People's Counsel's standing does not depend on the CBA's

ultimate acceptance of its arguments on the merits. Even were the Board to find that Petitioner's proposal is consistent with the zoning map, the master plan, and the protection of land and water resources, such a substantive decision does not eliminate the basic standing or interest in the controversy and presentation of the issues. While this may seem like a simple point, the Sugarloaf case demonstrates the danger of blurring standing with the eventual outcome of the case.

> Finally, as reiterated in Sugarloaf, 344 Md., at 297, quoting Crown Development:
>
> "It is a settled principle of Maryland law that, 'where there exists a party having standing to bring an action...we shall not ordinarily inquire as to whether another party on the same side also has standing." 328 Md., at 317.

Here, Lillian Jenifer, the adjacent private property owner bordering the same Mine Branch Run, is a party under informal administrative law standing principles: "...anyone clearly identifying himself to the agency for the record as having an interest in the outcome of the matter..." Sugarloaf, 344 Md., at 286-87. She also qualifies under the "aggrievement" standard applicable to judicial review. See Sugarloaf, supra; Becker v. Litty 318 Md. 76 (1990). The Long Green Valley Association, Katherine Gabriel, and Carol Trela also qualify, at the very least, as parties to the administrative proceedings.

Given the presence of parties with standing to challenge the floodplain waiver, it is unnecessary to inquire into People's Counsel's standing. In any event, the public interest bases for that standing are clear. In addition, the observations applicable to the floodplain waiver are equally applicable to the forest buffer easement variance.

VIII. There Is No Evidence to Support a Parking Variance

Petitioner never really pressed its case for the parking variance. The same reasons which negate the floodplain waiver and FBE variance are applicable here. There is nothing unique about the property, and there is no practical difficulty to justify an expansion of the past use in conjunction with a deviation from parking requirements. Once again, the intent of the 1988 Council is pertinent.

Moreover, the expansion does generate additional congestion. If the entire property were zoned commercial, there would be no question that the additional parking should be provided. The problem here is that the rear property is zoned residential, and the Petitioner is attempting to bootstrap and overreach for additional parking or, in the alternative, a parking variance to legalize his unilateral expansion.

Conclusion

The CBA should deny the related requests for use permit, floodplain waiver, and forest buffer easement variance because, as a matter of law, they fail to satisfy relevant legal standards. It should also deny the alternative request for parking variance.

The CBA should clarify that a past limited nonconforming use does not extend to or justify a major unilateral expansion, and that the various changes have resulted in termination of the nonconforming use under BCZR 104.1.

The CBA should rule that Petitioners may not obtain rewards for such expansions and/or mistakenly issued permits, in conflict with legal requirements, and that they may

not fall back on false theories of equitable estoppel, vested rights, or popularity.

The CBA should rule that People's Counsel has standing to address all issues, and that in any event, the presence of other parties makes this an unnecessary inquiry.

The CBA should rule that Sanders' expansion is unauthorized by law, that the restaurant expansion should be removed so as to bring the use in conformity with applicable requirements, and that a revised site plan should be filed with the Department of Zoning and Development Management for review and approval.

We thank for the Board for its attention and patience to this important case which raises many issues of public interest.

Peter Max Zimmerman
People's Counsel for Baltimore County

Carole S. DeMilio
Deputy People's Counsel

Courthouse, Room 47
400 Washington Avenue
Towson, Maryland 21204
410 887-2188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 1998, a copy of the foregoing People's Counsel's Memorandum was mailed to Charles E. Brooks, Esquire, Brooks & Spicer, 610 Bosley Avenue, Towson, MD 21204, attorney for Petitioner, and to Leslie M. Pittler, Esquire, 29 W. Susquehanna Avenue, Suite 610, Towson, MD 21204, attorney for Protestants.

Peter Max Zimmerman

PETER MAX ZIMMERMAN

the progress achieved toward implementation of the master plan.

(2) Preparing, at least every six years, recommending to the county council, and administering, a zoning map.

(3) Preparing and recommending to the county council rules and regulations governing the subdivision of land, and administering the subdivision rules and regulations as adopted.

(4) Preparing and recommending to the county council zoning rules and regulations which, together with the zoning map, shall constitute a zoning code.

(5) Administering the zoning code.

(b) The master plan shall be adopted as provided by section 523 of this Charter. All other plans, zoning maps, and rules and regulations recommended for adoption, amendment or repeal by the offices of planning and zoning, the planning board or the zoning commissioner shall, prior to taking effect as law, be approved by legislative act of the county council.
(Bill No. 83, 1978, § 2; approved by voters Nov. 7, 1978; effective Dec. 8, 1978; Bill No. 128, 1990, § 1; approved by voters Nov. 6, 1990; effective Dec. 7, 1990)

Sec. 523. The master plan and the zoning maps.

(a) *Definition and implementation of the master plan.* The master plan shall be a composite of mapped and written proposals setting forth comprehensive objectives, policies and standards to serve as a guide for the development of the county. Upon receipt of the master plan from the office of planning and zoning, the county council shall accept or modify and then adopt it by resolution.

(b) *Definition and implementation of the zoning maps.* The zoning maps shall show the boundaries of the proposed districts, divisions and zones into which the county is to be divided consistent with the master plan. Upon receipt of the zoning map from the office of planning and zoning, the county council shall accept or modify and then adopt it by legislative act.
(Bill No. 83, 1978, § 3) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

Sec. 524. Reorganization of office of planning and zoning.

Notwithstanding any other provisions of this Charter, the county council shall have the power by legislative act to reorganize the office of planning and zoning, to define the duties of the director of said office, to establish the powers, duties and compensation of the planning board, and to establish the duties and responsibilities of the zoning commissioner and deputy zoning commissioners, so that planning and zoning functions shall be conducted in the best interests of the county and its future development and growth.
(Bill No. 83, 1978, § 1; approved by voters Nov. 7, 1978; effective Dec. 8, 1978; Bill No. 128, 1990, § 1; approved by voters Nov. 6, 1990; effective Dec. 7, 1990)

Sec. 524.1. People's counsel.

(a) The county executive shall appoint a people's counsel who shall represent the interests of the public in general in zoning matter as hereinafter set forth, subject, however, to confirmation by the county council, and such person so appointed shall continue to serve as people's counsel until such time as he or she resigns or has been removed pursuant to the provisions herein contained:

(1) *Qualifications:* The people's counsel shall be a resident of Baltimore County, a member in good standing of the Maryland Bar, and actively engaged in the general practice of law for at least five (5) years prior to his appointment.

(2) *Removal:* The people's counsel may be removed at any time on the recommendation of the county executive and with the affirmative vote of not less than a majority plus one of the total number of county council members established by this Charter. (Bill No. 90, 1978, § 1) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

(3) *Powers and duties:* The people's counsel shall have the following powers and duties:

A. He shall appear as a party before the zoning commissioner of Baltimore County, his deputy, the county board

of appeals, the planning board, and the courts on behalf of the interests of the public in general, to defend any duly enacted master plan and/or comprehensive zoning maps as adopted by the county council, and in any matter or proceeding now pending or hereafter brought involving zoning reclassification and/or variance from or special exception under the Baltimore County Zoning Regulations, as now or hereafter in force and effect, in which he may deem the public interest to be involved. In defense of the zoning maps or master plan, he may appear as a party in interest before all state and federal agencies, boards, and courts on matters involving the preservation of the quality of the air, land, and water resources of Baltimore County, and/or may initiate such proceedings in the public interest. He shall have in such appearance, all the rights of counsel for a party in interest, including but not limited to the right to present his case, to cross examine, to object, to be heard, and to file and prosecute an appeal in his capacity as people's counsel from any order or act of the zoning commissioner of Baltimore County or his deputy, or of the county board of appeals to the courts as an aggrieved party pursuant to the provisions of Section 604 of this Charter to promote and protect the health, safety and general welfare of the community. The people's counsel may also prosecute an application before any state or federal court for injunctive and other relief incidental thereto, to enjoin violation of any Baltimore County zoning maps or master plan or as authorized by resolution by the county council. (Bill No. 90, 1978, § 1) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

B. He shall make such investigations as he may deem necessary to the intelligent performance of his duties imposed by subparagraph A. of this Section.

C. He shall have full access to the records of all county agencies, shall be entitled to call upon the assistance of county employees, and shall have the benefit of all other facilities or information of the county in carrying out his duties.

(4) *Employment of experts:* The people's counsel may hire from time to time, as needed, in connection with specific proceedings before the above named bodies, experts in the fields of planning, zoning, traffic, engineering, ecology and architecture, to the extent that county personnel cannot be utilized, and to expend such sums for compensation and/or expenses of these experts as shall be provided in the annual budget.

(5) *Salary and expenses:* He shall receive an annual salary and such sums as may be needed to carry out the powers and duties set forth herein as provided in the annual budget.

(Bill No. 104, 1960; Bill No. 61, 1974, § 1; Bill No. 90, 1978, § 1; approved by voters Nov. 7, 1978; effective Dec. 8, 1978; Bill No. 131, 1990, § 1; approved by voters Nov. 6, 1990, effective Dec. 7, 1990)

Annotation—The people's counsel has the right to appeal zoning decisions. People's Counsel for Baltimore County v. Williams, 45 Md. App. 617, 415 A.2d 585 (1974).

Subdivision 7. [Reserved.] *

DIVISION 3. DEPARTMENTS IN THE ADMINISTRATIVE SERVICES

Subdivision 1. Department of Public Works

Sec. 525. Director of public works.

The department of public works shall be administered by the director of public works who shall be a professional engineer registered under the laws of this state, and shall have had responsible charge of engineering works over a period of at least ten years prior to his appointment. He shall have such other qualifications as may be provided

*Editor's note—Subdivision 7, consisting of sections 524.2 and 524.3, was repealed by Bill No. 131, 1990, § 2, which was approved by the voters on Nov. 6, 1990, effective Nov. 6, 1990.

legal services and the value of the legal services are exclusively for the judge to determine.

A legally trained judge is far better able than a jury to assess the quality of legal services. The issue of what pretrial motions and pleadings were valuable or necessary in a case is one essentially beyond the competence of a jury. For a jury to determine the necessity for and value of legal services in a nonjury case would virtually require a retrial of the case before the jury. The assessment of legal fees in divorce actions and custody cases, for instance, would be drawn into chaos if the law were otherwise. Were Dr. L. to prevail, we can imagine a court-appointed criminal defense attorney refusing to accept a fee awarded by the judge and arguing to a jury that the fee should have been far greater.

In a case such as this, the initial decision by the judge to appoint an attorney to act in the interests of the children, the determination by the judge as to the appropriate remuneration for those legal services and the assessment by the judge of the costs for those legal services simply do not represent a "civil action" within the remote contemplation of § 4–402(e).

JUDGMENT IN CASE NO. 171 REVERSED; JUDGMENT IN CASE NO. 710 AFFIRMED; COSTS TO BE PAID BY DR. L., THE APPELLEE IN CASE NO. 171.

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549 A.2d 762

Sue H. GREEN, et al.

v.

Scott S. BAIR, Sr.

No. 187, Sept. Term, 1988.

Court of Special Appeals of Maryland.

Nov. 4, 1988.

Certiorari Denied March 8, 1989.

Owners of medical building and physicians practicing within it sought zoning variance from setback requirements

in municipal zoning code. The Westminster Board of Zoning Appeals granted the variance. The Circuit Court, Carroll County, Donald J. Gilmore, J., reversed. On appeal, the Court of Special Appeals, Robert M. Bell, J., held that physicians and building owner wives failed to demonstrate undue hardship which would justify grant of zoning variance from the setback requirement.

Affirmed.

Zoning and Planning ⇐504

Under Westminster Zoning Code, financial hardship suffered by physicians and their property owner wives due to space difficulties they suffered in medical building were insufficient to demonstrate either an inability to secure a reasonable return on or use of their property, or that hardship suffered was peculiar to property to demonstrate undue hardship and justify variance from zoning setback requirements.

William B. Dulany (David K. Bowersox and Dulany, Parker & Scott on the brief), Westiminster, for appellants.

Clark R. Shaffer (C. Rogers Hall, Jr. on the brief), Westminster, for appellee.

Argued before MOYLAN, ROBERT M. BELL, and WENNER, JJ.

ROBERT M. BELL, Judge.

This case reaches us on an appeal and cross-appeal from the judgment of the Circuit Court for Carroll County. The City of Westminster Board of Zoning Appeals, after a public hearing, granted, in part, the application, of Sue H. Green and Beulah C. Chang, appellants/cross-appellees, (hereinafter "appellants"), for variances from the City's set back requirements, thus permitting enlargement of an existing medical office building. Upon the appeal of Scott S. Bair, Sr., appellee/cross-appellant, (hereinafter "appellee"),

the circuit court reversed that decision. The appeal presents two questions, *i.e.*,

1. Was the December 29, 1986 decision of the Westminster Board of Zoning Appeals, granting variances for the petitioners/cross-respondents Green and Chang's property, supported by substantial, probative evidence of record and therefore, fairly debatable, making the circuit court's reversal of the Board's decision an impermissible substitution of the circuit court's judgment?

2. Does the language of the City of Westminster's Zoning Ordinance § 21–3, defining the term "variance" create an operative standard which the City of Westminster's Board of Zoning Appeals must apply in ruling on applications for variances, in addition to certain enumerated findings which the Board is directed to make pursuant to § 21–71 of that ordinance?

The cross-appeal presents only one:

Was the advertised notice of hearing adequate under Maryland law?

Inasmuch as we find no merit in appellants' argument, we will affirm the judgment of the circuit court. It is therefore unnecessary that we address the cross-appeal.

Appellants are the owners of land, zoned B–Business, located in Westminster, on which is constructed a medical office building, out of which their husbands conduct their pediatric practice. The medical office building was constructed in 1969 and the doctors have practiced in that building since that date. Although at the time that the building was constructed the City set back requirements were much more liberal, the current set back requirements prohibit the construction of a building closer than 30 feet from the right-of-way adjacent to the building's front or from the residential property bordering on the building's side. *See* Westminster City Zoning Code § 21–16(e).

After their husbands had practiced in the building as originally constructed for some 17 years, appellants filed an application for variances to reduce the set back requirements on those sides of the building adjacent to Washington Road and bordering on appellees' residential property.[1] At the hearing before the Board, testimony in support of the application was presented by one of the appellants, Mrs. Green, and her husband. Each of them testified as to the need for the variances and the hardship which would result if they were not granted. Both testified to the need to have the records generated by the practice close at hand and that there was no feasible alternatives to the expansion of the building that the grant of the variances would allow. Both also testified to the difficulty of continuing the existing practice without the variances. Mrs. Green additionally noted the need to accomodate the support staff. She observed, during her testimony that "it's serving well, but ... it can be a stressful situation in not having the room to function, and not having access to records. If you have to store your record[s] and your files elsewhere, it's greatly difficult to function." Dr. Green, on the other hand, focused on the morale problem that lack of space was causing. In addition to the diminution of property values, he also testified that changes in the medical practice and the existence of a malpractice crisis generated the need to keep more records, as well as required, that they be kept for longer periods of time. Dr. Green acknowledged that he could continue his present practice "with great difficulty" if the variances were not granted and that approval of the variances would increase the value of the property as well as make it more convenient for him to practice medicine.

The Board found this testimony persuasive and incorporated it into its decision. The Board was also "impressed that Dr. Green has expressly represented that there is no

1. The application actually sought variances from the sideline and rear line set back requirements; however, based upon the evidence presented at the hearing and interpreting the City's zoning ordinance, the Board determined that what was actually sought were variances from the front yard set back requirements and a side yard set back variance.

intention nor expectation that the patient load of he [sic] and Dr. Chang will be changed." It concluded:

> The Doctors have considered and explored alternatives to seeking the requested variances, including the rental of space off-site for record keeping, but have been unsuccessful in those efforts. Essentially, in this case, the Board is of the collective opinion that unless a variance can be granted, the continued operations and patient services of Drs. Green and Chang will be substantially compromised if not jeopardized. The medical practice is a permitted use in the B–Business zone, and the ability of doctors to store and retrieve their patient records on-site is customarily incidental to this use. The inability of Drs. Green and Chang to store and retrieve their patient records on-site deprives them of conducting their medical practice as it normally is undertaken by other medical practitioners. Indeed, the availability of those records on-site will enhance the ability of Drs. Greene and Chang to provide patient care.
>
> In sum, the Board is convinced and persuaded by the evidence of record, including but not limited to, the testimony of Dr. Green, that limited variances would not be contrary to the public interest and that there are conditions peculiar to the subject property which are not the result of the actions of the Applicants, and that a literal enforcement of the provisions of the Westminster Zoning and Subdivision Ordinance would result in an unnecessary and undue hardship. Indeed, the Board is of the opinion that for the foregoing reasons, the Applicants have satisfied their burden of proof and the requirements of the ordinance to justify in this case, limited variances.

Implicit in the Board's decision is the recognition that, to justify the variances, it had to find that failure to do so would result in "an unnecessary and undue hardship."

The court agreed with the Board that a showing of undue hardship was a necessary prerequisite to the grant of the variances. Nevertheless and notwithstanding its recognition that it must uphold the Board's decision "if it is not premised upon an error of law and if the agency's conclusions reasonably may be based upon the facts proven." *Ad + Soil, Inc. v. County Comm'rs*, 307 Md. 307, 338, 513 A.2d 893 (1986). *See also Heaps v. Cobb*, 185 Md. 372, 379, 45 A.2d 73 (1945); *Ginn v. Farley*, 43 Md.App. 229, 235, 403 A.2d 858 (1979); *Annapolis v. Annap. Waterfront Co.*, 284 Md. 383, 395, 396 A.2d 1080 (1979), it found that the Board's finding of "undue hardship" was "unreasonable". Relying upon the definition of "undue hardship" set out in *Anderson v. Board of Appeals*, 22 Md.App. 28, 38–9, 322 A.2d 220 (1974), and finding that the evidence failed to meet that test, it concluded:

> "If viewed in a most favorable light, Applicants' testimony revealed only that the variances would do no harm, and would allow them to conduct their business much more easily."

The Westminster City Code defines "variance" as

> A relaxation of the terms of this chapters where such "variance" will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the results of the actions of the applicant, a literal enforcement of this chapter would result in unnecessary and undue hardship.

Moreover,

> (1) such variances shall be authorized by the Board only upon finding by the Board that:
>
> a. There are exceptional or extraordinary circumstances or conditions applying to the property in question or to the intended use of the property that do not apply generally to other properties or classes of uses of the same zone;
>
> b. Such variance is necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same zone and in the same vicinity; and
>
> c. The authorizing of such variance will not be of substantial detriment to adjacent properties and will

not materially impair the purpose of this chapter or the public interest.

Section 21–71(c)(1). Only "area",[2] as opposed to "use", variances are permitted by the Code. *See* § 21–71(c)(2).

Viewing the statutory scheme as a whole makes patent that whether an undue hardship would result if the variances were not granted is an essential element to be considered by the Board when determining whether to grant or deny a variance. The definition of variance in § 21–3 applies whenever the term variance is used throughout the ordinance. Thus § 21–71(c)(1) cannot be read without reference to that definition. To do otherwise would be to fail to adhere to a venerable precept of statutory construction: "if there is no clear indication to the contrary, a statute must be read so that no part of it is rendered surplusage, superfluous, meaningless or nugatory". *Ford Motor Land Development v. Comptroller*, 68 Md.App. 342, 346, 511 A.2d 578 (1986). *See also Scott v. State*, 297 Md. 235, 246, 465 A.2d 1126 (1983); *Board of Education, Garrett County v. Lendo*, 295 Md. 55, 63, 453 A.2d 1185 (1982); *Baltimore Building & Construction Trades Council v. Barnes*, 290 Md. 9, 15, 427 A.2d 979 (1981). But this is precisely what appellants would have us do. Their argument is that since the requirement of "undue hardship" appears only in the definitional section, and not in the substantive provisions of the Code, the only evidence they were required to produce was that which would permit the Board to make the findings set out in § 21–71(c)(1). In short, they urge us to read out of the statute the words "undue hardship". That we decline to do.

2. Ordinarily, applicants seeking an area variance need only meet a standard of "practical difficulty". That standard was explained in *Anderson*, 22 Md.App. at 39, 322 A.2d 220:

> In order to justify a grant of an area variance the applicant need show only that:
>
> "1) Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
>
> "2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
>
> "3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured. *McLean v. Soley*, 270 Md. 208, 214–15, 310 A.2d 783, 787 (1973), quoting 2 Rathkopf, The Law of Zoning Planning, 45–28–29 (3d ed. 1972).

There is, moreover, no logical impediment to our giving effect to both the definitional provision and the substantive one. We considered the showing required to meet the "undue hardship" standard in *Anderson* and concluded:

> Where the standard of undue hardship applies, the applicant, in order to justify the grant of the variance, must meet three criteria:
>
> 1) If he complied with the ordinance he would be unable to secure a reasonable return from or to make reasonable use of his property. *Pem Co. v. Baltimore City*, 233 Md. 372, 378, 196 A.2d 879, 882 (1964); *Marino v. City of Baltimore*, 215 Md. 206, 218, 137 A.2d 198, 202 (1957); *See Salisbury Bd. v. Bounds*, 240 Md. 547, 555, 214 A.2d 810, 815 (1965). Mere financial hardship or an opportunity to get an increased return from the property is not a sufficient reason for granting a variance. *Daihl v. County Board of Appeals*, 258 Md. 157, 167, 265 A.2d 227, 232 (1970); *Salisbury Bd. v. Bounds, supra*, 240 Md. at 555, 214 A.2d at 814; *Marino v. City of Baltimore, supra; Easter v. City of Baltimore*, 195 Md. 395, 400, 73 A.2d 491, 492 (1950).
>
> 2) The difficulties or hardships were peculiar to the property in question and contrast with those of other property owners in the same district. *Burns v. Baltimore City*, 251 Md. 554, 559, 248 A.2d 103, 106 (1968); *Marino v. City of Baltimore, supra; Easter v. City of Baltimore, supra.*

3) The hardship was not the result of the applicant's own actions. *Salisbury Bd. v. Bounds, supra; Marino v. City of Baltimore, supra; Gleason v. Keswick Impvt. Ass'n,* 197 Md. 46, 50–51, 78 A.2d 164, 165–66 (1951).

22 Md.App. at 38–9, 322 A.2d 220. Comparing this standard with the required showings under § 21–71(c)(1) reveals that there is an overlap between the two; but to the extent that the required showings differ from the undue hardship requirement, they are not inconsistent. In other words, the required findings can be made in addition to those required under the undue hardship standard. Thus, the Code creates a variance standard for the City of Westminster that is not wholly that applicable to use variances nor wholly that applicable to area variances, but one that contains elements of both. That it does so does not render the Code in anywise deficient or unenforceable. As the trial court recognized, "It is not for the court to decide the wisdom, *vel non*, of the zoning code, as adopted by the Mayor and common council, but rather to enforce it as it is written."

We agree with the trial court that appellants' evidence failed to demonstrate that they met the first two criteria required for showing undue hardship. It follows, therefore, that we also agree with the trial court that the evidence before the Board did not render that issue fairly debatable. Consequently, the trial court's judgment must be affirmed.[3]

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANTS.

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3. The trial court also found that even under the less onerous standard set out in § 21–71(c)(1), appellants would not prevail because "there is no evidence that the difficulties they are encountering are peculiar to the property in question, or contrast with those of any other successful business in the B–Business zone." We agree with that finding as well. Indeed, were appellants showing sufficient to grant a variance under § 21–71(c)(1)'s required findings, we, like appellees, find "it . . . difficult to imagine a modern business that could not create the same record and obtain the same variance."

549 A.2d 766

MONTGOMERY COUNTY, Maryland, et al.

v.

James W. McDONALD, Jr.

No. 190, Sept. Term, 1988.

Court of Special Appeals of Maryland.

Nov. 7, 1988.

Police officer filed claims for workers' compensation benefits, under an occupational disease theory, for two heart attacks suffered by officer. The Workers' Compensation Commission held that officer's claims were barred by the two-year statute of limitations, and officer appealed. The Circuit Court, Montgomery County, Irma Raker, J., reversed the Commission, and County appealed. The Court of Special Appeals, Gilbert, C.J., held that the statute of limitations was tolled by County's failure "to at once report" the disability incurred by officer as result of his occupational disease.

Affirmed.

1. Workers' Compensation ⇐1280

When employer violates notice provision of statute which requires employer "to at once report" to Commission any disability incurred by employee from occupational disease, statute of limitations as to employee's claim for occupational disease benefits is tolled. Code 1957, Art. 101, §§ 1 et seq., 26 (b).

2. Workers' Compensation ⇐2080

Police officer's claims for occupational disease benefits in regard to heart attacks were not barred by running of two-year statute of limitations for such claims, as employer failed to comply with statute which required employer "to

Savings Fund Society, 127 Pa.Super. 28, 192 A. 139; Linden Methodist Episcopal Church v. City of Linden, 113 N.J.L. 188, 173 A. 593; Snow v. Johnston, 197 Ga. 146, 28 S.E.2d 270; Mueller v. C. Hoffmeister Undertaking & Livery Co., 343 Mo. 430, 121 S.W.2d 775.

[15] We have found no facts in this record so extraordinary as to persuade us to withdraw the case from application of the accepted rule. The ordinance under review is a clear case of "spot zoning." The property in dispute is situated in an area that has been zoned as residential ever since the enactment of the City Zoning Ordinance in 1931. The amending ordinance contains a proviso that the premises shall be used only as a funeral home and that no embalming shall be done on the premises. However, Paragraph 8 of the City Zoning Ordinance explicitly provides that no land or building in a residential use district shall be used for "undertaking business or establishment or funeral home."

The amending ordinance reclassifies a single lot in a district where undertaking establishments are not permitted, thus establishing a permissive district within the restricted district. Armacost, who has been engaged in the undertaking business in Howard Park for some years, contracted to purchase the property in dispute upon the condition that if he could not secure a permit to use it as a funeral home, the contract would be rescinded. In January, 1949, after getting the approval of a number of residents of the neighborhood for the establishment of the funeral home, he had the proposed ordinance introduced in the City Council. A number of residents appeared before the Committee on Buildings and Building Regulations, and no objections were heard to the ordinance. Cassel declares that he was one of the opponents who appeared at the hearing, but that the proponents outnumbered the opponents, and he did not voice any objection because it seemed "rather futile." However that may be, the ordinance was passed by the City Council in March, and eleven days after it was approved by the Mayor, the Buildings Engineer issued the permit.

At the trial of this case Cassel asserted positively that there is no need for a funeral home at 5118 Gwynn Oak Avenue. He showed that the property in dispute is only three blocks from Woodbine Avenue, which is in a first commercial use district. Charles E. Delosier, secretary of the State Board of Funeral Directors, who was called to the stand by appellees, acknowledged that there are three other funeral homes within a radius of about ten blocks. Armacost testified that he spent a large sum of money to paint, paper and wire the house, but neither this fact nor the allegation that the funeral home will be a convenience for the tenants in nearby apartment houses is sufficient to save the ordinance. It was urged that there are about 20,000 inhabitants of the Howard Park section, but Armacost admitted that he has conducted only about two funerals a month from the funeral home since he opened it. It is impossible to avoid the conclusion that the ordinance is an arbitrary and unreasonable discrimination for the reason that it does not operate alike on all persons residing within the residential area. As we are convinced that the ordinance is beyond the statutory power of the City Council, we must declare it void. If a funeral home were permitted here, it might be an opening wedge for other enterprises in this and other residential districts of the city.

For these reasons we must reverse the decree dismissing the bill of complaint and remand the case for the passage of a decree granting the relief prayed for by appellants.

Decree reversed and case remanded, with costs.

EASTER v. MAYOR & CITY COUNCIL OF BALTIMORE et al.

No. 176.

Court of Appeals of Maryland.

May 12, 1950.

Action by Andrew J. Easter against Mayor and City Council of Baltimore and others challenging validity of city's approval of construction of addition on front of store and dwelling. The Baltimore City Court, Emory H. Niles, J., rendered judgment for defendants and plaintiff appealed. The Court of Appeals, Henderson, J., held that granting of variance of setback requirements and occupancy rule was not warranted.

Reversed.

1. Municipal corporations ⇐621.39

Board of Zoning Appeals of City of Baltimore in granting special exceptions must consider the factors set out as standard in zoning ordinance, and its action must be reasonable in light of these and all other pertinent facts.

2. Municipal corporations ⇐621.39

The power of Board of Zoning Appeals of City of Baltimore under zoning ordinance to grant exceptions must be strictly construed.

3. Municipal corporations ⇐621.45

Burden of showing facts to justify an exception of variance under zoning ordinance rests upon applicants, and it must be shown that hardship affects particular premises and is not common to other property in neighborhood.

4. Municipal corporations ⇐621.21

Mere fact that variance would make property more profitable is not a sufficient ground to justify granting of variance from setback requirements of Baltimore Zoning Ordinance.

5. Municipal corporations ⇐621.25

That other buildings extended to front line of lot and lot was irregular did not authorize Board of Municipal and Zoning Appeals of City of Baltimore to grant a permit for construction of addition on front of store and dwelling in variance of setback rules and occupancy requirement on ground of hardship.

John F. Heath, Baltimore, for appellant.

Benjamin Kann and Malcolm J. Coan, Baltimore, for appellees J. P. Easter and wife.

Thomas N. Biddison, City Sol., Edwin, Harlan, Deputy City Sol., and Hamilton O'Dunne, Asst.City Sol., Baltimore, for appellee Mayor and City Council of Baltimore.

Before MARBURY, C. J., and DELAPLAINE, COLLINS, GRASON, HENDERSON and MARKELL, JJ.

HENDERSON, Judge.

This appeal is from a judgment of the Baltimore City Court affirming the action of the Board of Municipal and Zoning Appeals in granting a permit for the construction of a one-story and basement addition on the front of a store and dwelling at 6418 Belair Road, owned by John P. Easter. The only protestant, Andrew J. Easter, is a brother of the permittee, residing at 6420 Belair Road, where he conducts a tavern.

As stated by the trial Court, "The property is in a First Commercial Use, C. Area District, and the permit would allow the store front to be brought out to the building line, in contravention of paragraph 24 of the Zoning Ordinance, which requires a 10-foot minimum depth of front yard in the area in question, and of the percentage of occupancy requirements under paragraph 21, bringing the percentage of occupancy to 85% as opposed to 60%, as provided in the Ordinance. The Board of Municipal and Zoning Appeals granted the permit under the provision of Paragraph 33(c) on the ground that '* * * due to its peculiar location and surroundings it is a case of practical difficulty and unnecessary hardship, since the Tavern already obstructs the view of the store where the addition is now proposed'". The court thought there was "evidence sufficient to support the legal definition of a hardship and * * * in fact, it would be a hardship to allow one brother

to have a tavern all the way out to the street, and to deny the other brother the right to build his store out to the same line as the tavern."

The Board found that the store was "on the west side of Belair Road, 105 feet south of Easter Terrace. * * * Adjacent to the premises under appeal is a building containing a tavern which is built out to the front line of the lot. To the north between Easter Avenue and Kenwood Avenue there are several buildings constructed to the front lines of the lot and the proposed addition would not affect access of light and air to any neighboring properties, nor would it even cut off the view up and down the street. The lot in question is of very shallow depth and irregular in shape * * *." The store and tavern were built as semi-detached buildings. In 1935 Andrew J. Easter obtained a permit to build a sort of covered entrance-way out to the build-line. John P. Easter did not object, and there were no protests. In his present application John P. Easter states that since his brother "has built out in front of us it has hid our store making it difficult to rent." There is a small triangular vacant lot to the south of 6418, and a church property adjoining to the south, across an alley laid out but apparently not opened. The church is set back the required distance. Andrew J. Easter has applied for a permit, and obtained the approval of the Board, to develop the land to the north, comprising about six acres, as a shopping center with off-street parking facilities and the required set-back. If this project is carried out, he states that he proposes to remove the entrance in front of his tavern.

[1, 2] We may assume here, as we have assumed in previous cases, that the delegation to the Board of Zoning Appeals of the power to make special exceptions or variances is valid, and that the standards set up in Section 32(j) are adequate. Colati v. Jirout, 186 Md. 652, 656, 47 A.2d 613; Heath v. Mayor and City Council of Baltimore, 187 Md. 296, 49 A.2d 799; Heath v. Mayor and City Council of Baltimore, Md., 58 A.2d 896, 898. The Board must consider the factors set out in that section and "its action must be reasonable in the light of these and all other pertinent facts." Heath v. Mayor and City Council of Baltimore, supra, 187 Md. 305, 49 A.2d 804. The power to grant exceptions must be strictly construed. Colati v. Jirout, supra, 186 Md. page 659, 47 A.2d 613.

[3, 4] The burden of showing facts to justify an exception or variance rests upon the applicant, and it must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood. Rathkopf, Zoning, 2d Ed., p. 215; Levy v. Board of Standards and Appeals, 267 N.Y. 347, 196 N.E. 284. The mere fact that the variance would make the property more profitable is not a sufficient ground to justify a relaxation of setback requirements. Garden View Homes v. Board of Adjustment, 137 N.J.L. 44, 57 A.2d 677.

In the instant case there is no suggestion that the Board failed to "act as a fact-finding body" or to "give consideration to the rules, regulations, restrictions, guides and standards set forth" in the Ordinance (paragraph 33(c)). The question is whether the undisputed facts support the Board's action. The fact that the lot is irregular has no bearing on the question, nor is it material that three buildings, some distance to the north, extend to the building line. These may have been built before the passage of the Ordinance, or they may have been built under permit or without permit. As was said in Potts v. Board of Adjustment, 133 N.J.L. 230, 43 A.2d 850, 854: "Prior exceptions granted by the adjustment board are not in themselves controlling. Ill-advised or illegal variances do not furnish grounds for a repetition of the wrong. If that were not so, one variation would sustain if it did not compel others, and thus the general regulation eventually would be nullified. The annulment of zoning is a legislative function that is beyond the domain of the zoning board." See also the cases collected in a note 168 A.L.R. 13, 41–44. The same principle was announced and applied in Heath v. Mayor and City Council of Baltimore, supra, Md., 58 A.2d 896, 898, Mayor and City Council of Baltimore v. Byrd, Md., 62 A.2d 588, 591, and Cassel v. Mayor and City Council of Baltimore, Md., 73 A.2d 486.

The principal fact relied upon to justify an exception to the area and set-back rules, adopted in the general interest under the police power, is the existence of an exception on the adjoining lot. Undoubtedly this is detrimental to the applicant, although his case is somewhat weakened by his tacit acceptance of the situation over a period of years. But we think the detriment to the applicant must be weighed against the benefit to the community in maintaining the general plan. "It is by these gradual encroachments, individually of relative insignificance, that the integrity of the general scheme is undermined and ultimately shattered. One departure serves as justification for another * * *." Dubin v. Wich, 120 N.J.L. 469, 200 A. 751, 754. In the case of non-conforming uses, the ordinance tolerates their continuance, but looks towards their ultimate elimination. Colati v. Jirout, supra. The same principle applies to special exceptions. Heath v. Mayor and City Council of Baltimore, supra, Md., 58 A.2d 896. Use variances are doubtless more serious than dimensional changes, but that is only a matter of degree.

In People ex rel. Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 286, 155 N.E. 575, 577, it was contended that the existence of a garage immediately adjoining the proposed garage was sufficient justification for the grant of an exception on the ground of unnecessary hardship. But the Court, speaking through Chief Judge Cardozo, said: "We think the reasons assigned are insufficient to supply a basis for a departure from the map. They amount to nothing more than this, that a garage may be built because there is another one next door." See also Ventresca v. Exley, 358 Pa. 98, 56 A.2d 210, 212. No estoppel can be raised against the Board by reason of its approval of similar extensions in other cases. Appeal of Valicenti, 298 Pa. 276, 148 A. 308; Note 119 A.L.R. 1509, 1517.

[5] Under the circumstances we think the action of the Board cannot be sustained.

Judgment reversed, with costs.

WEST KEY NUMBER SYSTEM

REINDOLLAR et al. v. KAISER et ux.
No. 161.

Court of Appeals of Maryland.
May 10, 1950.

Robert M. Reindollar and others, as Commissioners of the State Roads Commission of Maryland, instituted a condemnation suit for land necessary for road purposes against Frederick A. Kaiser and wife in the Circuit Court, Howard County, James Clark, J. The Roads Commission appealed from a judgment assessing damages in the amount of $12,500. The Court of Appeals, Collins, J., held that the trial judge did not err in charging the jury either by minimizing the weight of appellant's evidence or by assuming facts not in evidence.

Judgment affirmed.

1. Eminent domain ⇐124, 138

In condemnation proceedings, measure of loss is value of land taken at time taken; and when land is part of larger tract, diminution in value of larger tract caused by taking particular segment thereof must also be considered.

2. Eminent domain ⇐222(5)

In condemnation proceedings it was not error, in charging jury, for trial judge to use word "only" to show minimum appraisement when he went on to inform jury that they had exclusive prerogative and duty to determine amount of damages.

3. Trial ⇐185

Review of evidence by trial judge in charge to jury should be impartial.

CLELAND et al. v. MAYOR & CITY COUNCIL OF BALTIMORE et al.

No. 30.

Court of Appeals of Maryland.

Nov. 2, 1951.

Three practicing physicians and their wives, co-owners of certain property applied for a permit to establish a parking lot on their property to be used for parking automobiles belonging to physicians and members of their staff who were using the physicians' offices. The application was opposed by Joseph P. Cleland, trustee, and others. The building inspection engineer declined to grant the permit and an appeal was taken to the Board of Municipal and Zoning Appeals where the application was approved and the objectors appealed. The Mayor and City Council of Baltimore and others were named appellees. The Baltimore City Court, W. Conwell Smith, C. J., affirmed the action of the Board and the objectors appealed. The Court of Appeals, Marbury, C. J., held that exceptions to the Zoning Act are not a matter of right and as it appeared that nothing would be served by granting permit but convenience of physicians and their employees, Board was not justified in granting an exception.

Order reversed and case remanded.

1. Municipal Corporations ⇐601(15)

Baltimore ordinance giving mayor and city council authority to provide by ordinance, on conditions, for establishment of open areas in a residential use district for parking of automobiles, did not impliedly repeal provisions of zoning ordinance permitting board of municipal and zoning appeals to grant use of same classification, necessary or incidental to a nonconforming use existing in a residential use district, within 50 feet from such nonconforming use, and permitting board to grant within 100 feet of a boundary line between use districts any use permitted in that one of such use districts which has lower classification.

2. Municipal Corporations ⇐621.43

Where counsel for applicant for permit to establish parking lot for physicians and their employees on property where physicians' offices were located made unsworn statement of situation to board of municipal and zoning appeals, and two physicians were then called, who adopted counsel's statement, physicians were subject to cross-examination on any statements made by counsel, and method of procedure was not to be commended as a general proposition.

3. Municipal Corporations ⇐621.17

Special exceptions to a zoning ordinance will never be granted to gratify mere convenience, there must be a necessity, and that necessity must be so urgent and the facts so extraordinary as to require withdrawal of that particular case from application of accepted rule.

4. Municipal Corporations ⇐601(23)

The spirit of the Baltimore zoning ordinance is against extension of nonconforming uses.

5. Municipal Corporations ⇐621.17

Rule that special exception to city zoning ordinance will never be granted to gratify convenience, and not only must necessity be urgent but facts in given case so extraordinary as to require withdrawal of case from application of accepted rule, applies to provision of Baltimore zoning ordinance authorizing board of municipal and zoning appeals to grant within 100 feet of a boundary line between two use districts any use permitted in that one of such use districts which has lower classification.

6. Municipal Corporations ⇐621.30

Convenience of physicians and their employees did not warrant granting of exception to zoning ordinance by Baltimore board of municipal and zoning appeals of property owner's application for permit to establish on property where physicians' offices were located in residential use area of parking lot for automobiles of physicians and their employees, although there was a pre-existing nonconforming use of that portion of property permitting its use for physicians' offices.

Norman C. Melvin, Jr., and Douglas H. Gordon, both of Baltimore, for appellants.

J. Cookman Boyd, Jr., Baltimore (F. Murray Benson, Baltimore, on the brief), for appellees Bennett, Johnson & Eaton and others.

Francis J. Valle, Asst. City Sol., Baltimore (Thomas N. Biddison, City Sol., Baltimore, on the brief), for appellees Mayor & City Council of Baltimore.

Before MARBURY, C. J., and DELAPLAINE, COLLINS, and HENDERSON, JJ.

MARBURY, Chief Judge.

Three practising physicians and their wives, co-owners of 4–6 East Madison Street, applied for a permit to establish a parking lot on their property to be used for parking cars belonging to the doctors and members of their staff who were using the doctors' offices at 4 East Madison Street. 4–6 East Madison Street is practically one lot, although it has two numbers. It is located in a residence zone, although there is a pre-existing non-conforming use of 4 East Madison Street, which has been used as doctors' offices since 1919. There is no building on that part of the lot known as 6 East Madison Street, except a garage which holds three automobiles. The building inspection engineer necessarily declined to grant the permit, and an appeal was taken to the Board of Municipal and Zoning Appeals, where the application was approved. An appeal was taken to the Baltimore City Court by the appellants, residents and taxpayers of the city, and owners of real estate near the property. The Baltimore City Court affirmed the action of the Board, and from its order the appeal comes here.

The order appealed from not only authorizes the use of the rear of 6 East Madison Street as a parking lot for the doctors and their employees, but also authorizes an entrance and exit to and from the rear of said property by a roadway on or over the sidewalk and front portion of the lot which is on East Madison Street. The property to the south adjoining the lot of the applicants is zoned first commercial, with the exception of the University Club property which is at the corner of Madison and Charles Streets, and is zoned residential.

[1] The Board of Municipal and Zoning Appeals attempted to act under the provisions of Paragraphs 12(b) and (c) of the zoning ordinance. (b) permits the Board to grant a use of the same classification, necessary or incidental to a non-conforming use now existing in a residential use district, within 50 feet from such non-conforming use. (c) permits the Board to grant within 100 feet of a boundary line between two use districts, any use permitted in that one of such use districts which has a lower classification. Appellants contend that the right to act under these provisions is taken away by the passage of Ordinance 1312, approved July 5, 1950. This ordinance adds Paragraph 14(a) to the zoning ordinance, and gives the Mayor and City Council authority to provide by ordinance, upon conditions for the establishment, maintenance and regulation of open areas in a residential use district, for the parking thereon of automobiles. We are unable to agree with appellant's contention in this respect, as we do not think this ordinance impliedly repeals Paragraphs 12(b) and 12(c).

[2] In their attack upon the action of the Board, the appellants contend that there was no admissible evidence before the Board. The basis for this is that counsel for the applicants made an unsworn statement of the situation, and then two of the doctors were called, who adopted counsel's statement. The doctors were, however, subject to cross-examination under these circumstances on any statements made by counsel, and, while this method of procedure is not to be commended as a general proposition, it was probably allowed in this case as a means of saving time, and we cannot say that there was not evidence of the facts before the Board when it acted. Assuming, therefore, that the statement of counsel became evidence after its adoption by the doctors, we find that the basis for the application is that these physicians are active orthopedic surgeons, and the pressure of parking space has become intolerable because they have to get to their place of business and get away when needed, are frequently called on emergencies, and, if they do not have access to their own cars, delay ensues. The entrance to the garage is through adjacent property and through an alley which, however, has of late years become blocked by trucks of commercial enterprises which border on it. The space in the garage is such that if three cars are there, and the first one in wants to get out, a difficult and awkward situation ensues. The proposal was to breach the wall along Madison Street, put in an ornamental iron gate and a ten-foot driveway which would lead to the back of the lot and the rear of the building on lot No. 4. Sometimes the applicants would want an ambulance to run in, but they primarily want the use of the parking space for the cars of nurses and other employees who work in the building on No. 4.

[3–5] Under Paragraph 12(b), the use to be granted must be necessary or incidental to a non-conforming use already existing. The non-conforming use was that of maintaining doctors' offices. There is nothing to show that it is necessary or incidental to such offices to have parking areas adjacent to them. It would no doubt be a great convenience to the applicants to have their cars, and the cars of their employees, parked in the rear of their offices, but this is neither usual nor necessary. Many physicians have offices in office buildings in the downtown sections of the city, and it is not necessary for them to have parking facilities on the same lot on which they practice their profession. This court has consistently held that special exceptions will never be granted to gratify mere convenience, that there must be a necessity, and that necessity must be so urgent, and the facts so extraordinary as to require the withdrawal of that particular case from the application of the accepted rule. That accepted rule is the division made in the zoning ordinance for various classes of use districts. It is part of a general plan which is not intended to be changed except in cases of urgent necessity. "It is evident that the spirit of the Baltimore City Zoning Ordinance is against the extension of non-conforming uses. It is generally accepted that a few non-conforming buildings and uses, allowed to continue as exceptions to the regulations in order to avoid injustice, will not be a substantial injury to the community if they are not allowed to multiply where they are harmful or improper; but non-conforming uses should not be perpetuated any longer than necessary, and the Zoning Board should make constant efforts to move them into the use districts where they properly belong." Colati v. Jirout, 186 Md. 652, 657, 47 A.2d 613, 615. See also Mayor and City Council of Baltimore v. Byrd, 191 Md. 632, 638, 62 A.2d 588; Heath v. Mayor and City Council of Baltimore, 190 Md. 478, 483–484, 58 A.2d 896. The same general rule applies to the exception to be permitted under Paragraph 12(c) within 100 feet of a boundary line between two use districts. We had such a situation in the recent case of Gleason v. Keswick Improvement Association, Md., 78 A.2d 164, where we ruled against the exception. Cf. Hoffman v. Mayor & City Council, Md., 79 A.2d 367.

The trial court relied upon the case of Akers v. Mayor and City Council of Baltimore, 179 Md. 448, 20 A.2d 181, for the statement that occupants of certain houses are not prohibited from parking cars in their yards. That, however, is quite different from the present application. What is desired here is not to permit the doctors to park their cars in the rear of their residences where they also maintain offices. It is to provide a general parking space for not only their cars in the rear of their offices, but also the cars of all their employees who work in the building. We are unable to find any case in which this court has held that that is a permissible use.

[6] In the instant case, we find no such compelling necessity as to justify the Board of Municipal and Zoning Appeals in granting an extension of the non-conforming use, or in utilizing the provisions of Section 12(c). It was not intended by the zoning act that whenever it was convenient or desirable for an individual owner to have a special exception, he should be allowed it by the Board. Exceptions are not a matter of right, and where it appears, as it does in this case, that nothing will be served but the convenience of the doctors and their employees, we do not think such a case, based upon convenience alone, would justify the Board in granting an exception.

Such action, if based upon insufficient reasons, is arbitrary and is in violation of the zoning law, and it cannot stand.

For these reasons, the action of the trial court will be reversed and the case remanded in order that that court may pass an order reversing the action of the Board of Municipal and Zoning Appeals and directing the dismissal of the petition.

Order reversed with costs and case remanded.



WILLIAMS v. McCARDELL et al.

No. 4.

Court of Appeals of Maryland.

Oct. 31, 1951.

Proceeding by Charles A. Williams, against J. Neil McCardell, and others, wherein it was sought to compel the Board of Trustees of the Employees' Retirement System of Baltimore City, to approve petitioner's application for accidental disability benefits. The Court of Common Pleas of Baltimore City, John T. Tucker, J., dismissed the petition, and the petitioner appealed. The Court of Appeals, Markell, J., held that the evidence sustained the finding that the petitioner's disability was not due to any accident or a series of accidents occurring in course of petitioner's employment as a fireman by the Baltimore City Fire Department.

Order affirmed.

1. Municipal Corporations ⇐200(9)

In proceeding by city fireman for accidental disability benefits for coronary thrombosis, evidence sustained finding that fireman's disability was not due to any single accident or series of accidents occurring in course of fireman's employment by city.

2. Administrative Law and Procedure ⇐763

Action of administrative board may be arbitrary or unlawful because facts found are unsupported by evidence or conclusions drawn are contrary to law or facts.

3. Administrative Law and Procedure ⇐741, 760, 791

Generally, courts are concerned with results rather than methods of administrative boards and review the action not the opinion of the board, and courts cannot set aside findings of facts supported by substantial evidence merely by calling findings arbitrary.

4. Mandamus ⇐187(9)

Where evidence in proceeding for mandamus commanding board of trustees of employee's retirement system to approve petitioner's application for accidental disability benefits presented no issue of fact to be submitted to jury, alleged error if any, in denying petitioner jury trial, on ground that he failed to pray therefor within time prescribed by rule of court, was not prejudicial.

O. Bowie Duckett, Baltimore (Samuel M. Campanaro Baltimore, on the brief), for appellant.

Thomas N. Biddison, City Solicitor and Daniel B. Leonard, Asst. City Solicitor, both of Baltimore, on the brief, for appellees.

Before MARBURY, C. J., and DELAPLAINE, COLLINS, GRASON, HENDERSON and MARKELL, JJ.

MARKELL, Judge.

This is an appeal from an order dismissing a petition for mandamus commanding respondents, the Board of Trustees of the Employees' Retirement System, to approve petitioner's application for accidental disability benefits from December 11, 1948.

In 1927 petitioner, then twenty-five years old, entered the Baltimore City Fire Department. In 1938 he was promoted to the rank of Lieutenant. On December 11, 1948 he was retired by the Department as totally and permanently unfit for duty. He is a member of the Employees' Retirement System.

Section 6 of the Employees' Retirement System ordinance (Ordinance No. 553, approved February 21, 1926; Baltimore

City Code, 1927 Edition, Article 30, section 6) provides: "* * * Accidental Disability Benefit (5) Upon application of a member, * * * any member who has been totally and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty *at some definite time and place,* without wilful negligence on his part, shall be retired by the Board of Trustees, provided that the medical board shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that such member shall be retired. Allowance on Accidental Disability Retirement (6) Upon retirement for accidental disability a member * * * shall receive an accidental disability retirement allowance which shall consist of [a specified annuity and pension]" [Italics supplied.]

Petitioner made application for accidental disability benefits. On June 21, 1949 and September 22, 1949 his application was heard by respondents, on testimony and other evidence and arguments of counsel. On October 19, 1949 the application was denied, with a written opinion, on the ground that "the Board does not find that the incapacity of the applicant is the natural and proximate result of an accident occurring in the actual performance of duty at some definite time and place. This conclusion is based on the testimony and evidence presented to the Board and upon a consideration of the applicable authorities." Petitioner alleges that respondents' action in denying his application "is unwarranted and contrary to the applicable facts and law", and that in denying the application respondents "acted capriciously, arbitrarily, illegally and unreasonably * * *". The application for mandamus was heard on the testimony and other evidence before the Board. The petition was dismissed on two grounds, stated in Judge Tucker's opinion, [1] "There was very substantial evidence before the Board of Trustees of the Retirement System to support their decision that the incapacity of the petitioner was not the natural and proximate result of an accident; and for that reason alone their decision may not be disturbed by the court." [2] "There is another reason, however, that the petitioner may not obtain the relief for which he has prayed. The contention of the petitioner, which, he claims is supported by the testimony of his witnesses, Doctors Skolnick and Serra, is that during his 21 years of services in the Fire Department he sustained various injuries, some of which were accidental, and was subjected to considerable responsibility in protecting property and the lives of people, and it was the combination of these events and conditions that caused his eventual incapacitation. But, even if this contention were supported by uncontradicted evidence it would not entitle the petitioner to the special benefits under the above provisions of the ordinance, because the incapacity would not be the result of "an accident occurring * * * at some definite time and place'. * * * There is no substantial evidence to show that the petitioner's incapacity resulted from 'an accident at some definite time and place'." Judge Tucker held that by the ordinance "the cause of incapacity is limited to one accident at a definite time and place".

Petitioner's disability is due to coronary thrombosis. Petitioner contends this was caused—or aggravated—by accident; respondents contend it was not, and could not be, caused by accident. The Board "does not find" that it "is the natural and proximate result of an accident occurring in the actual performance of duty at some definite time and place". Judge Tucker holds that [1] "There was very substantial evidence before the Board * * * to support their decision" that it was not the natural and proximate result of an accident and [2] "there is no substantial evidence" that it resulted from one "accident at some definite time and place".

Petitioner testified to four "accidents" in the performance of duty, on October 20, 1928, January 18, 1940, August 28, 1942, and December 6, 1948, and six occasions, on April 22, 1942, January 9, 1943, February 12, 1943, November 17, 1948, November 29, 1948, and December 11, 1948, when he was examined (and in five of these instances went off duty) on account of

evidence concerning the physical condition of the road, claiming that those conditions would have shown an additional hazard to safety by any increased use of the road. Confining our ruling to the facts of this case, we hold the chancellor was correct. The only question to be determined was whether the Moores had a legal right to use the road for the benefit of parcel X, and, as we have already decided that they did, this argument of the appellants cannot prevail.

Decree affirmed in part, and reversed in part, and cause remanded for further proceedings not inconsistent with this opinion, appellants to pay the costs.



215 Md. 206

Frank C. MARINO et al.
v.
CITY OF BALTIMORE et al.

No. 79.

Court of Appeals of Maryland.

Dec. 30, 1957.

Proceeding to review action of board of municipal and zoning appeals, denying permit to construct a store building and adjacent parking area on unimproved lot of land in area zoned for residential use only. The Baltimore City Court, E. Paul Mason, J., entered order affirming action of board and property owners appealed. The Court of Appeals, Horney, J., held that question of whether to grant or deny exception under evidence was fairly debatable so that order of trial court must be affirmed.

Affirmed.

1. Municipal Corporations ⇐601(15), 621.8

All zoning regulation, including rezoning, as well as an exception and a variance, which are intended to relieve harshness of zonal restriction in a particular instance, is a lawful exercise of police power by sovereign state.

2. Municipal Corporations ⇐600

Individual right to use privately owned property is subordinate to paramount right of public whenever such use tends to affect injuriously the health, comfort, safety and general welfare of all persons in a community, providing, that such zoning restriction is itself lawful and not such as to permanently deprive property owner of all reasonable use of property.

3. Municipal Corporations ⇐621.8, 621.17

Exceptions to zoning regulations are granted sparingly, under exceptional circumstances, but existence of an unnecessary hardship usually justifies granting of an exception.

4. Municipal Corporations ⇐621.17

Criterion for determining unnecessary hardship is whether applicable zoning restriction when applied to property in setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with basic right of private ownership.

5. Municipal Corporations ⇐621.46

Where property owners sought an exception to zoning ordinance to permit them to construct commercial building in area zoned for residential use, property owners had burden of proving that they were entitled to an exception under ordinance.

6. Municipal Corporations ⇐621.46

Where property owners sought exception to zoning ordinance under Baltimore City ordinance allowing granting of exception when land proposed to be used does present, because of topography, grade or accessibility, practical difficulties or unnecessary hardships, it was incumbent upon owners to prove that their property zoned for residence was peculiar, preventing a reasonable return from or any reasonable use of their property for residential purposes, and that the difficulties or hardships were not the result of owners' own actions. Code Supp.1957, art. 66B, § 7(g)(2, 3).

7. Municipal Corporations ⇐621.21

Mere financial hardship or an opportunity to get an increased return from property is not sufficient reason for granting exception to zoning ordinance but financial advantage, although not controlling, is not entirely irrelevant.

8. Municipal Corporations ⇐621.17

Plight of owner of real property seeking exception to zoning ordinance must be due to unique circumstances and not to general conditions in the neighborhood.

9. Municipal Corporations ⇐621.39

A prior exception to zoning ordinance granted by municipality does not control the granting of a subsequent exception.

10. Eminent Domain ⇐2(1)

A zoning ordinance which permanently so restricts use of property that it cannot be used for any reasonable purpose goes beyond permissible regulation, and must be regarded as taking of property without compensation.

11. Municipal Corporations ⇐621.55

In proceeding by property owners for review of action by municipality in denying exception to zoning ordinance so as to permit owners to construct commercial buildings and adjacent parking area on lots zoned for residential use only, evidence sustained finding that board did not abuse its discretion in denying application for exception. Code Supp.1957, art. 66B, § 7(g)(2, 3).

12. Municipal Corporations ⇐621.14

Traffic congestion is an element which the board should consider in deciding whether or not to grant variance to zoning ordinance. Code 1957, art. 66B, § 3.

13. Municipal Corporations ⇐621.58

Where question of whether to grant or deny exception to zoning ordinance is, under evidence, fairly debatable, order of trial court approving action of board must be affirmed.

14. Administrative Law and Procedure ⇐763

Court may not substitute its judgment as to the wisdom or soundness of action taken by the administrative body unless it is clear that such action was illegal, arbitrary or discriminatory.

Donald N. Rothman and Robert Hammerman, Baltimore (Gordon, Feinblatt & Rothman and David P. Gordon, Baltimore, on the brief), for appellants.

Henry Vogt, Baltimore, for Wm. J. Huber, and others, Intervenors.

Shirley B. Jones, Asst. City Sol., Baltimore (Thomas N. Biddison, City Sol. and Hugo A. Ricciuti, Deputy City Sol., Baltimore, on the brief), for City of Baltimore.

Before BRUNE, C. J., and HENDERSON, HAMMOND, PRESCOTT, and HORNEY, JJ.

HORNEY, Judge.

This is an appeal from an order of the Baltimore City Court affirming the action of the Board of Municipal Zoning Appeals, (the Board), denying a permit to construct a one-story store building and adjacent parking area on the unimproved lot of land owned by Frank C. Marino and Bernardine Marino, his wife, and the Marimar Company, Inc., (the Marinos), on the north side of Belvedere Avenue near the intersection of said Avenue with York Road, generally known as 522 East Belvedere Avenue.

The property is situated in a residential use district and has been so classified since the passage of the initial zoning act in 1931. Only semi-detached or single dwellings are

permitted but none has been constructed by the Marinos or previous owners. The plat filed with the record shows a first commercial use district on both sides of York Road to the north and south of Belvedere Avenue, an area which has been zoned commercial since the original zoning ordinance in 1931. The area between the easternmost boundary of the commercial district and the property for which an exception is sought, also owned by the Marinos, is zoned for residential use, but is now used for commercial purposes under a prior permit approved by the Board. The area immediately to the north of the property in question, above a slope, variously estimated to be ten to thirty feet high, is zoned and used for residential purposes. The sylvan area to the east, owned by the City, is also zoned residential, although a part of it may be used in the future as a portion of the proposed Northern Parkway Extension. Directly across the avenue from the Marino property there is a large parking lot, formerly zoned residential, but now used commercially. A department store is situated on the southeast corner of York Road and Belvedere Avenue, but it is within the first commercial use district referred to. Other nonresidential uses have, by way of exceptions, invaded the residential use district. However, the major part of the originally zoned residential district still remains zoned and is used for residences.

On October 5, 1953, an ordinance was introduced in the City Council of Baltimore City to rezone the property in question from residential to first commercial. On October 30, 1953, the Board approved and recommended passage of the proposed ordinance stating that "it is not suitable for residential development". The Planning Commission of Baltimore City suggested an amendment of the proposed ordinance to the effect that the eastern portion of the property should be restricted to a parking area for the building proposed to be erected on the western portion. The suggestion was acceptable to the Marinos, but on June 1, 1954, the ordinance as amended was rejected by the City Council.

At the hearing before the Board evidence was produced to the effect that the property was unsuitable for residential use; that to use it for that purpose would be wasteful, imprudent, economically unsound, and impossible to finance; and that the property was best suited for commercial use. There was also testimony that the value of the property for commercial use was ten times that for residential use, and that such use would not affect the value of neighboring properties. On the contrary there was evidence, some of it on cross examination, to the effect that the property was suitable for residential purposes; that houses costing from $12,000 to $15,000, if built, could be readily sold; and a banker testified that his savings and loan association would "entertain" an application for a loan for residential development of the property. The protestants, who testified, objected to any further encroachment by commercial interests because it would tend to depreciate the value of their properties. One witness, a real estate appraiser and broker, attempted to testify that the present use of the property as a "dump" and a "parking lot" created a health as well as a safety problem, but his testimony had little probative value. Because vacant lots scared him, another real estate developer, who had seen the property used as a dump inhabited by mice and rats and perhaps a few snakes, and used as a playground for children, thought the residential restriction had created a health, safety and morals hazard, but he was not an expert in either field.

There was some testimony, pro and con, before the Board as to the effect of traffic congestion in the area. In court, the director of traffic, who had made several traffic surveys of the cross-streets area of York Road and Belvedere Avenue, testified that it was a difficult intersection; that it was "strategic", and was considered among the "heaviest traveled corners" in the City—a count on September 1, 1956, showed that 47,988 vehicles passed through the area in a twenty-four hour period, 18,782 of which were going "to the east of York Road". Over a period of four years there were fifty-seven accidents at the intersection. He further testified that the parking lot across the avenue had created traffic congestion and that another on the Marino property would make it "doubly worse", and that the congestion is already great and the street arrangements are not such as permit a present solution of the problem. The traffic director was also of the opinion that the development of a large department store and parking lot in the area was a serious error traffic-wise which ought not to be repeated.

The authority of the Board to make an exception under the Enabling Act, [Code, Cum.Sup. (1957), Art. 66B, sec. 7(g) (2), (3)], and Section 36(b) and (c), [formerly 33(b) and 33(c)], of the Baltimore City Zoning Ordinance, (the ordinance), is not disputed. Furthermore, the City and the intervenors admit that in this case the proper tribunal to hear and determine the appeal from the Board was the Baltimore City Court.

Section 7(g) (3), supra, provides that the Board shall have the power, among others:

> "To authorize upon appeal in specific cases such variance from the terms of the ordinance as is necessary to avoid arbitrariness and so that the spirit of the ordinance shall be observed and substantial justice done."

The ordinance provides that the Board shall have power: (i), by Section 35(g) 2, to "hear and decide special exceptions * * *"; and (ii), by Section 35(g) 3, the same identical power as that granted by Section 7(g) (3), supra, of the enabling act. Section 36(b) and (c), supra, of the ordinance, with which we are primarily concerned, provide, in part, authority to:

> "(b). Grant a permit where the use or change of use of land, * * proposed to be used is limited as to its location because of the * * * topography, grade or accessibility."

[and]

> "(c). Grant a permit where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of any of the provisions of the * * * [zoning ordinance]."

Section 36(b) and (c), supra, also provide that the Board shall act as a fact-finding body and, in arriving at a decision, shall give consideration to the rules, regulations, restrictions, guides and standards set forth elsewhere in the ordinance.

Ordinarily, there is a marked distinction in the law of zoning between a *variance* and an *exception*,[1] but there is none in Baltimore City since an *exception*, apparently, overlaps a *variance* inasmuch as both may be granted where there are "practical difficulties or unnecessary hardships". This is the reason why many cases which arise in Baltimore City, such as this one, discuss exceptions and variances without differentiation.

[1, 2] Basically, of course, all zoning regulation, including rezoning, as well as an exception and a variance, which are intended to relieve the harshness of a zonal restriction in a particular instance, is a lawful exercise of its police power by the sovereign state. It is axiomatic that the individual right to use privately owned property is subordinate to the paramount right of the public whenever such use tends to affect injuriously the health, comfort, safety and general welfare of all persons in a community, provided, however, that such zonal restriction is itself lawful and not such as to permanently deprive the property owner of all reasonable use of his property.

1. See Montgomery County v. Merlands Club, 1953, 202 Md. 279, 288, 96 A.2d 261; Reed v. Board, 1931, 255 N.Y. 126, 174 N.E. 301, 303; Application of Devereux Foundation, Inc., 1945, 351 Pa. 478, 41 A.2d 744.

See Grant v. Mayor and City Council of Baltimore, 1957, 212 Md. 301, 315, 129 A.2d 363; and Walker v. Board of County Com'rs of Talbot County, 1955, 208 Md. 72, 87, 116 A.2d 393, and the cases therein cited; and City of Baltimore v. Cohn, 1954, 204 Md. 523, 105 A.2d 482.

[3, 4] As a general rule exceptions are granted sparingly, and under exceptional circumstances. To do otherwise would decimate zonal restrictions and eventually destroy all zoning regulations, and thus detrimentally affect the marketability of property within zoned areas. On the other hand, the existence of an unnecessary hardship usually justifies the granting of an exception. The criterion for determining unnecessary hardship is whether the applicable zoning restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership. As was stated in Carney v. City of Baltimore, 1952, 201 Md. 130, 137, 93 A.2d 74, 76–77:

> "The need sufficient to justify an exception must be substantial and urgent and not merely for the convenience of the applicant, inasmuch as the aim of the ordinance is to prevent exceptions as far as possible, and a liberal construction allowing exceptions for reasons that are not substantial and urgent would have the tendency to cause discrimination and eventually destroy the usefulness of the ordinance. * * *
>
> "The expression 'practical difficulties or unnecessary hardships' means difficulties or hardships which are peculiar to the situation of the applicant for the permit and are not necessary to carry out the spirit of the ordinance and which are of such a degree of severity that their existence amounts to a substantial and unnecessary injustice to the applicant."

[5, 6] We think that the primary question we must decide on this appeal is whether the Marinos met the burden of proving that they were entitled to an *exception* under Section 36(b) and (c), *supra*, of the ordinance. See Easter v. Mayor and City Council of Baltimore, 1950, 195 Md. 395, 73 A.2d 491; Gleason v. Keswick Imp. Ass'n, 1951, 197 Md. 46, 78 A.2d 164; Serio v. Mayor and City Council of Baltimore, 1956, 208 Md. 545, 119 A.2d 387. Although the Marinos based their application for an exception in part under Section 36(b), supra, on the claim that their property was *peculiar* in that its topography as well as the grade between it and the adjacent land to the north rendered it impossible to construct dwellings thereon, the testimony as to such peculiarities was so meager that it was not unreasonable for the Board and the trial court to have concluded that the property was not unique and therefore was not such as to justify an exception for those reasons. With respect to meeting the required burden under Section 36(c), supra, it was incumbent upon the Marinos to have shown (i) that if they complied with the ordinance they would not be able to secure a reasonable return from, or to make any reasonable use of, their property, (ii) that the difficulties or hardships were peculiar to the property in question in contrast with those of other property owners in the same district, and (iii) that the hardship was not the result of the applicants' own actions.

[7] Mere financial hardship or an opportunity to get an increased return from the property is not sufficient reason for granting an exception. Easter v. Mayor and City Council, supra. However, financial advantage, although not controlling, is not entirely irrelevant. Serio v. Mayor and City Council of Baltimore, supra. Obviously, if unnecessary hardships referred only to economic disadvantage, an exception might always have to be granted as a matter of course. Ellicott v. Mayor and City Council of Baltimore, 1942, 180 Md. 176, 23 A.2d 649; Gleason v. Keswick Imp. Ass'n, supra; Kracke v. Weinberg, 1951, 197 Md. 339, 79 A.2d 387; Serio v. Mayor and City Council of Baltimore, supra. Thus, an analysis of zoning cases demonstrates that the differences between a situation in which the applicant complains that he could secure a greater return from his property if granted an exception and a situation in which the applicant contends that it is impossible to secure a reasonable return from or to make a reasonable use of such property is one of degree rather than kind. In the first instance, his application would invariably be refused. But, in the second instance, if other conditions were met, an exception would likely be allowed. On the whole, this Court, as well as those in other jurisdictions, applies the same rules, but the decisions inevitably depend on the facts of each case.[2]

[8] The plight of the owner must be due to unique circumstances and not to general conditions in the neighborhood. The rule was accurately and succinctly stated by Judge Henderson in Easter v. Mayor & City Council, supra, when he said in 195 Md. at page 400, 73 A.2d at page 492. "* * * it must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood." Thus, it is clear that the Board, in refusing to grant the Marinos an exception, applied the correct principle of law when it said:

> "It is the Board's understanding * * * that in order to make an exception to the use regulations, so as to permit a commercial use in the residential zone, evidence must be produced to show that the practical difficulties and unnecessary hardships involved in the use of the land in question or in the making of improvements on such land must be peculiar to the property in question and the difficulties or hardships must not be such as prevail generally with respect to the use of other similarly situated areas * * *."

[9] While it is true that the Marinos did not purchase the property in question with the thought in mind of applying for an exception—actually they purchased it some years before they petitioned for an exception—they knew, of course, that it was restricted to residential use when they purchased it. More to the point, however, it is a fact that a prior application by them, which was granted, for a commercial use of a part of the property, is without doubt one of the reasons why the remainder is less adaptable now for residential use purposes. Certainly a prior exception granted by the Board does not control the granting of a subsequent exception. Easter v. Mayor & City Council, supra, 195 Md. at page 400, 73 A.2d 491.

[10, 11] The Marinos contend that there is no legal principle which requires that

2. Some of the leading cases in other jurisdictions on this issue in which *variance* was granted include: Nagaven Realties v. Banzhaf, 1933, 149 Misc. 361, 267 N.Y.S. 729; People ex rel. St. Albans-Springfield Corp. v. Connell, 1931, 257 N.Y. 73, 177 N.E. 313; Schuible v. Board of Adjustment, 1946, 134 N.J.L. 473, 49 A.2d 50. Cases in which *variance* was refused include: Fleming v. Prospect Park Board of Adjustment, 1935, 318 Pa. 582, 178 A. 813; Stevens v. Clark, 1926, 216 App.Div. 351, 215 N.Y.S. 190; 4672 Broadway Corp. v. Board of Standards and Appeals, 1928, 225 App.Div. 97, 232 N.Y.S. 266, affirmed 1929, 250 N.Y. 571, 166 N.E. 328; Joyce v. Dobson, 1933, 255 App.Div. 348, 8 N.Y.S.2d 768; Hickox v. Griffin, 1940, 298 N.Y. 365, 83 N.E.2d 836; Otto v. Steinhilber, 1939, 282 N.Y. 71, 24 N.E. 2d 851; Colorado Springs v. Miller, 1934, 95 Colo. 337, 36 P.2d 161; Levy v. Board of Standards and Appeals, 1935, 267 N.Y. 347, 196 N.E. 284; Young Women's Hebrew Ass'n v. Board of Standards and Appeals, 1935, 266 N.Y. 270, 194 N.E. 751; Jenney Mfg. Co. v. Zoning Board of Review, 1939, 63 R.I. 477, 9 A.2d 705; Ricci v. Zoning Board of Review, 1946, 72 R.I. 58, 47 A.2d 923.

the difficulties and hardships referred to in Section 36(c), supra, must be peculiar to their property and not applicable to other property in the same zoning district, citing N. W. Merchants Terminal v. O'Rourke, 1948, 191 Md. 171, 60 A.2d 743; Hoffman v. Mayor and City Council of Baltimore, 1951, 197 Md. 294, 79 A.2d 367; and City of Baltimore v. Cohn, supra. They also insist that the Board abused its discretion in denying an exception on the assumption that the evidence showed that their property was wholly unsuitable for residential use, relying principally, on the Terminal, Hoffman and Cohn cases, supra, to support this contention. Obviously, their interpretation of the Board's finding was erroneous, and the Marinos' contention that it is impossible to use their property for the purposes to which it is restricted by the ordinance is a debatable question. In the Terminal case, in which we applied the presumption of reasonableness to the facts in that particular case, we declared that the rezoning ordinance was invalid because it was unreasonable, arbitrary and contrary to Section 3 of Article 66B of the Code (1951). Likewise in the Hoffman case we held that it was unnecessary to consider the "exceptions" as such because we could and did determine the ordinance to be *pro tanto* invalid on the facts of that case. And in the Cohn case, again on the particular facts there present, we held that a particular application of a zoning ordinance may be held invalid when it restricts property to uses for which the property was not adapted. We did not consider the question of the existence of practical difficulties or unnecessary hardships in any of those cases. Instead we reaffirmed the established constitutional doctrine "that a zoning ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes beyond permissible regulation, and must be regarded as taking of property without compensation." City of Baltimore v. Cohn, supra, 204 Md. at page 530, 105 A.2d at page 486. As previously indicated the facts in the Terminal, Hoffman and Cohn cases were vastly different from the facts here. In the case at bar, there are insufficient facts to show indisputably that the residential use ordinance so restricts the use of their property that it cannot be used for any reasonable purpose. Nor are we persuaded that the Board abused its discretion in denying the Marinos' application for an exception for the reason that their property was unsuitable for residential use. In fact, we believe it is fairly debatable under the testimony in this case whether the owners are able to secure a reasonable return from, or to make any reasonable use of their property, of which more presently. Furthermore we do not believe that it was necessary for the Board to make a specific finding that the Marino property was suitable for residential use. Instead we think that such a finding was implicit in their sole finding that there were no practical difficulties or unnecessary hardships peculiar to the property in question.

[12] There is yet another aspect of this case which is an important factor, although not necessarily controlling. We have recognized repeatedly that traffic congestion is an element which the Board should consider when deciding whether to grant a variance. Hardesty v. Board of Zoning Appeals, 1956, 211 Md. 172, 126 A.2d 621; Temmink v. Board of Zoning Appeals, 1957, 212 Md. 6, 128 A.2d 256; Price v. Cohen, 1957, 213 Md. 457, 132 A.2d 125. In fact, the enabling act [Code (1951), Art. 66B, sec. 3], specifically provides, *inter alia*, that zoning regulations shall be made in accordance with a comprehensive plan and "designed to lessen congestion in the streets". The testimony before the Board on the question of traffic congestion was not extensive, but the weight of what there was is to the effect that at certain hours it is next to impossible to get through the Belvedere Avenue-York Road intersection except at a very slow pace. The testimony of the traffic director in court was to the same effect in that he testified that this intersection was considered to be among the heaviest traveled corners in the city. His opinion was based on the result of several traffic surveys of the area. It was also his opinion that the proposed commercialization of the whole of the Marino property would not help the situation. The Board did not assign the traffic problem as a reason for declining the exception but the trial court did. Such consideration was proper. It is apparent from the testimony of the traffic director, the only traffic expert who testified, that the layout of the streets in the area is not such as would permit a solution of the problem. And there was no evidence that a relocation of the streets was contemplated in the near future. We think it is clear that to grant the exception sought would tend to increase congestion in the streets, not to lessen it, as the clear mandate of the enabling act contemplates. Hardesty v. Zoning Board, supra; Temmink v. Board of Zoning Appeals, supra.

[13, 14] We believe that the question whether to grant or deny an exception under the evidence in this case was fairly debatable. This being so, the order of the trial court must be affirmed. A court may not substitute its judgment as to the wisdom or soundness of the action taken by an administrative body unless it is clear that such action was illegal, arbitrary or discriminatory. Serio v. Mayor and City Council of Baltimore, supra.

Since the Board has broad discretionary powers which a court cannot set aside without sound legal reasons, we are not persuaded that either the Board or the trial court erred in refusing to grant the Marinos an exception to the residential use restriction to which their property is presently subject. If it is a fact that the character of the neighborhood is gradually changing as a result of additional commercial uses from time to time, then the City Council might well extend the adjacent first commercial district to include the whole of the Marino property, but that is a legislative, not a judicial function. See Miller v. Silver, 1951, 278 App. Div. 962, 105 N.Y.S.2d 474, 475, in which it was said:

> "* * * where a claimed hardship is *common* to other properties in the area and not one special and peculiar to the specific property, the remedy is by change in the *zoning ordinance* itself." (Italics supplied.)

There is one remaining objection which requires a brief comment. We think that the admission in evidence of the agreement between the Marinos and certain neighborhood interests concerning the use of the property in question was at the most no more than a harmless error. All that it shows is that the Marinos had a different concept in 1946 as to the use of the property than they had in 1956 when they applied for another exception. Clearly the agreement had no evidentiary value bearing on the finding made by the Board and the question the trial court decided, which we are about to affirm. There is nothing in the record to indicate that the agreement was prejudicial or in any way influenced either the action of the Board or the decision of the trial court.

Order affirmed, the appellants to pay the costs.

WEST KEY NUMBER SYSTEM

Clarence E. TYLER

v.

WARDEN, BALTIMORE CITY JAIL.

Application No. 51.

Court of Appeals of Maryland.

Dec. 24, 1957.

Habeas corpus proceeding to secure release of prisoner in city jail. The Court of Appeals, Prescott, J., held that where defendant, confined in city jail, made ap-

[1] Section 239 provides, *inter alia*, that if an administrator shall not render the first administration account as required by law or shall not within three months after the date of his letters exhibit to the court an inventory, a summons, returnable in not less than eight nor more than thirty days may, ex officio, be issued against such administrator to show cause "wherefore such inventory has not been exhibited," or such account has not been rendered. And upon the return of the summons "summoned," or upon two citations being returned "non est" by the sheriff of the county wherein the party resided at the time of obtaining his letters, if the administrator does not appear at the return of the summons, or appearing, fails to show satisfactory cause, the court may revoke his letters.[2] This Court has frequently stated that the right to administer is a valuable one, and an administrator will not be removed except for "legal and specific causes, and after citation and opportunity to be heard in opposition to the motion." Johnson v. Macaboy, 226 Md. 23, 30, 171 A.2d 474, 478.

The order revoking Lombard's letters was dated July 17, 1963, and, among other things, contains this recital, "Whereas—by authority of Article 93, Section 239 * * *, two summons have been issued to the said Earl J. Lombard *and two citations have [been] returned "non est" by the sheriff* * * *." (Italics supplied.) The Orphans' Court, apparently, was acting upon the assumption that the recital was correct, but, unfortunately, we have been unable to verify the italicized portion above, after a careful examination of appellant's brief and of the transcript.

These examinations reveal the following sequence of events. Lombard seems to have been extremely lax in attending to his duties as administrator, and, at least as early as the latter part of 1962, the court, by telephone calls and letters attempted to get him to settle the estate. He repeatedly requested additional time, and, apparently, took the position that he was entitled to the same as a matter of right, if he had other matters that allegedly needed his attention. Finally, the court, on June 18, 1963, notified him, by registered letter, to be in court on June 21, 1963, to show cause why he should not be removed. This letter was unclaimed. It was followed by another registered letter, dated June 21, 1963, directing him to be in court no later than June 26, 1963, for the same purpose. It, too, was unclaimed. On June 28, 1963, the court passed an order commanding the sheriff to "cite and summon" Lombard to appear before the court on July 12, 1963. The return to this order was "non est." On July 12, 1963, the court passed another order, similar to that described above, which directed the sheriff to "cite and summon" Lombard to be in court on July 23, 1963. The return to this order was "summoned," without the date of its service being noted thereon. This, conceivably, could be a very important part of the return. (The record does reveal, however, that this return was "received" by the court on July 19, 1963.)

At this point, certain inexplicable procedure followed, which is determinative of our decision. Although the sheriff had the court's order commanding him to summon Lombard to be in court on July 23, 1963, to show cause, etc., on July 17, 1963, it passed the order, referred to above, reciting that two citations [had] been returned "non est," and revoking his letters. Thereafter, on July 19, 1963, still another order was passed by the court commanding the sheriff to cite and summon Lombard "forthwith" to be and appear before the court. This order was served upon Lombard on July 21, 1963, some four days after his letters had been revoked.

[2] From the above, it is obvious that no return of "summoned" to a citation and summons for an appearance by Lombard on, or before, July 17, 1963, was existent at the time of the order, and two returns of "non est" had not been made on, or before, that date. Hence, the provisions of the statute were not complied with. We must, therefore, reverse the order, but we shall do so without prejudice to further proceedings relative to removal after proper notice, should the Orphans' Court deem such procedure desirable.

Order reversed, without prejudice to further proceedings relative to the removal of the administrator: Costs to be paid by appellant.

2. For some of the cases in this Court considering the sufficiency of causes for removal, see Johnson v. Macaboy, 226 Md. 23, 30, 171 A.2d 474; Smith v. Waller, 225 Md. 94, 169 A.2d 454; Wheatley v. Fleischmann, 216 Md. 157, 140 A.2d 152; Fulford v. Fulford, 153 Md. 81, 137 A. 487.

233 Md. 640

Jesse Phillip HAWKINS

v.

WARDEN OF the MARYLAND PENITENTIARY.

Post Conviction No. 100.

Court of Appeals of Maryland.

Jan. 29, 1964.

Application for leave to appeal.

Before HENDERSON, HAMMOND, PRESCOTT, HORNEY and MARBURY, JJ.

PER CURIAM:

For reasons stated in the opinion of Judge Prendergast below, the application for leave to appeal is hereby denied.

Application denied.

233 Md. 372

PEM CONSTRUCTION CO.

v.

CITY OF BALTIMORE.

No. 108.

Court of Appeals of Maryland.

Jan. 28, 1964.

Proceeding on appeals from a decision of the Baltimore City Court, Joseph L. Carter, J., affirming the denial of a variation or special exception for two adjoining parcels of land in residential zone. The Court of Appeals, Sybert, J., held that evidence that residential use of the property would not be feasible according to developer's original plans because they would be difficult to sell did not establish an urgent necessity rather than a mere convenience and would not support the grant of a variance.

Affirmed.

1. Zoning ⇐497

Variance or special exception will not be granted on the basis of practical difficulties or unnecessary hardships if such are the result of the applicant's own action.

2. Zoning ⇐497

Contention that zoning restrictions cause peculiar hardships entitling landowner to a variance is not available to one who purchases realty with the intention of applying for a variance.

3. Zoning ⇐495

When an applicant seeks a zoning variance on the basis of practical difficulties or unnecessary hardships, he has the burden of establishing a substantial and urgent need which would justify the exception.

4. Zoning ⇐502

Evidence that residential use of property in residential zone would not be fea-

sible according to developer's original plan because houses constructed thereon would be difficult to sell did not establish an urgent necessity rather than a mere convenience and would not support the grant of a variance.

Sol C. Berenholtz, Baltimore, for appellant.

John A. Dewicki, Asst. City Sol. (Joseph Allen, City Sol. and George W. Baker, Jr., Deputy City Sol., on the brief) all of Baltimore, for appellee.

Before BRUNE, C. J., and HAMMOND, PRESCOTT, HORNEY and SYBERT, JJ.

SYBERT, Judge.

A developer appeals from a decision of the Baltimore City Court which affirmed a resolution of the Board of Municipal and Zoning appeals denying a variation or special exception so that two adjoining parcels of land located in a D–40 residential area could be used as parking lots for a nearby shopping center.

The appellant, Pem Construction Company, is the owner of both parcels, one known as 5451 Tippett Avenue (referred to on a plot plan as Parcel No. 2), and the other as 5401–43 Tippett Avenue (referred to on the plot plan as Parcel No. 3). Tippett Avenue, 50 feet wide, runs in an east-west direction.[1] Parcel No. 2 has a frontage on the north side of Tippett Avenue of about 233 feet, and is about 100 feet in depth. Parcel No. 3, to the east of Parcel No. 2 (the two tracts being separated by a 15 foot right of way), fronts approximately 192 feet on the north side of Tippett Avenue and has a depth of 85 feet. Reisterstown Road, an arterial highway, is one block south of Tippett Avenue and runs parallel thereto. One block north, and parallel to Tippett Avenue, is Price Avenue. Rogers Avenue is west of the area in dispute, and Lewiston Avenue is to the east; both of these streets run in a north-south direction. Fronting on the north side of Reisterstown Road (in the 5400 block) and on the east side of Rogers Avenue, there is a shopping center known as the Hilltop Shopping Center. The back of the shopping center is on the south side of Tippett Avenue, across from Parcel No. 2. Parcel No. 3 faces an existing commercial parking lot and various buildings across Tippett Avenue. The subject parcels are abutted by two-story masonry dwellings on Rogers Avenue to the west and on Price Avenue to the north. On the east, a 90 foot lot with an existing dwelling separates the tracts from Lewiston Avenue, on the east side of which there are two-story dwellings.

In 1946 the appellant owned a tract embracing what are now Parcel No. 2, the Hilltop Shopping Center area, and the land to the west and north of Parcel No. 2 (on which two-story masonry dwellings have been erected). At that time, as well as now, the shopping center area was zoned commercial and Parcel No. 2 and the land west and north thereof were zoned residential. The appellant proceeded to develop the residential areas first; the dwellings were built in 1946 and the shopping center in 1947. Houses were constructed west of Parcel No. 2, facing west on Rogers Avenue, and north thereof facing north on Price Avenue. Nothing was built on Parcel No. 2. Parcel No. 3 was not acquired by the appellant until 1960; the appellant has never owned the land opposite Parcel No. 3 across Tippett Avenue, nor the houses on Price Avenue which are north of Parcel No. 3.

The appellant seeks a variation or exception from the residential area restrictions so that Parcels Nos. 2 and 3 may be used for the parking of motor vehicles in conjunction with the Hilltop Shopping Center. The applications for the two lots were heard together by the Board of Municipal and Zoning Appeals (Board) and by the lower court on appeal, and thus both cases are in one record and are treated as one here.

1. Actually the streets run in a northeast-southwest or northwest-southeast direction, but for purposes of simplicity, the streets involved will be treated as running east-west or north-south.

Originally the applications were rejected by the Building Inspection Engineer of Baltimore City (the Zoning Commissioner), and an appeal to the Board ensued. The requests for special exception or variance were made pursuant to Sec. 36 of the Baltimore City Zoning Ordinance which provides in part that the Board may:

> "(b) Grant a permit where the use or change of use of land, buildings or structures proposed to be used is limited as to its location because of the size of buildings, size of yards, irregularity of shape of land or buildings, topography, grade or accessibility * * *.
>
> "(c) Grant a permit where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of any of the provisions of this Article * * *."

The Board denied the applications on the basis that, *inter alia*, "any hardship that has been created for the appellant is self-induced and therefore does not warrant the Board in making any exception". The appellant then appealed to the Baltimore City Court, which affirmed the decision of the Board on the basis that, "the record clearly shows that whatever hardship the appellant has incurred has been the result of his own mistakes and wrongdoings," and that "the appellant knew at all times that Parcels 2 and 3 were zoned D–40 Residential, and the law is clear that one cannot purchase land in expectation of being granted a variance or special exception."

At the hearing before the Board several qualified experts appeared for the appellant. One testified that although it would be possible to build homes on the parcels in question, they could not be sold profitably, and that the best use of the land would be for parking. Another testified that it would not be feasible to build homes on the parcels and that it would be difficult to sell such homes if they were built because they would have to face the back of the shopping center, or the back of the houses on Price Avenue. Both experts felt that a parking lot would not impair the value of the adjoining properties. An officer of the appellant corporation, a qualified architect, testified that it would not be feasible to build homes on the two parcels. On cross-examination, he stated that originally tract No. 2 was to be used for residential purposes, but that through the years such use was determined to be impracticable. When asked who had made the mistake in the original decision to use the parcels for residential purposes, he stated that the mistake had been "in our own judgment".

Several protestants also testified at the hearing before the Board. Owners of houses on Price Avenue testified that when they bought their homes, a representative of the appellant corporation had expressly stated that homes would be built on Parcel No. 2, and one said she had received a letter to that effect. Other protestants opposed the granting of permits on the basis that it would depreciate the value of their homes and would create a traffic hazard.

[1–4] Even though this Court has held that a variance or special exception will not be granted on the basis of practical difficulties or unnecessary hardships if such were the result of the applicant's own action, Marino v. City of Baltimore, 215 Md. 206, 137 A.2d 198 (1957), and that where a person purchases realty with the intention of applying for a variance, he cannot contend that the zoning restrictions cause him such peculiar hardships as to entitle him to the variance, Gleason v. Keswick Improvement Ass'n., 197 Md. 46, 78 A.2d

164 (1951), there is another, more compelling reason why the applications were properly denied in this case. When an applicant seeks a variance on the basis of "practical difficulties or unnecessary hardships" (Sec. 36(c), supra), he has the burden of showing a substantial and urgent need which would justify the exception. As was stated in Cleland v. City of Baltimore, 198 Md. 440, 444, 84 A.2d 49, 51 (1951):

"* * * This court has consistently held that special exceptions will never be granted to gratify mere convenience, that there must be a necessity, and that necessity must be so urgent, and the facts so extraordinary as to require the withdrawal of that particular case from the application of the accepted rule. That accepted rule is the division made in the zoning ordinance for various classes of use districts. It is part of a general plan which is not intended to be changed except in cases of urgent necessity. * * *"

In the present case the testimony produced by the appellant did not rule out the possibility of residential use of the parcels by utilizing a different plot plan, or of other uses permitted in residential districts. The evidence only showed that it would not be "feasible" to build houses according to the plan originally intended by the appellants because they would be difficult to sell. We believe that this testimony was insufficient to establish an urgent necessity, rather than mere convenience, and thus could not support the granting of a variance. Our most recent consideration of this problem was in City of Baltimore v. Polakoff, 233 Md. 1, 194 A.2d 819 (1963), in which we adhered to the rule stated in Cleland, supra. Cf. Carney v. City of Baltimore, 201 Md. 130, 93 A.2d 74 (1952); Heath v. Mayor and City Council of Baltimore, 190 Md. 478, 58 A.2d 896 (1948). The appellant here is in the same situation as were the appellants in Marino, where it was said (at p. 221 of 215 Md., at p. 204 of 137 A.2d): "* * * there are insufficient facts to show indisputably that the residential use ordinance so restricts the use of their property that it cannot be used for any reasonable purpose. * * *" Cf. City of Baltimore v. Cohn, 204 Md. 523, 105 A.2d 482 (1954). The facts before us fall substantially short of establishing a taking in a constitutional sense. Cf. Frankel v. City of Baltimore, 223 Md. 97, 101, 162 A.2d 447 (1960).

Although the appellant also asked for a variance under Sec. 36(b), supra, our examination of the record reveals no evidence of any limitation on the use of the land by "size of buildings, size of yards, irregularity of shape of land or buildings, topography, grade or accessibility" as would justify an exception. The premises in question do not appear to come within the purview of this section. Cf. Marino (at p. 217 of 215 Md., at p. 202 of 137 A.2d).

Judgment affirmed; appellant to pay the costs.

233 Md. 637

Monroe BANKS

v.

WARDEN OF the MARYLAND PENITENTIARY.

Post Conviction No. 89.

Court of Appeals of Maryland.

Jan. 28, 1964.

Application for leave to appeal.

Before HENDERSON, HAMMOND, PRESCOTT, HORNEY and MARBURY, JJ.

PER CURIAM:

For the reasons assigned by Judge Harlan in the court below, the application for leave to appeal will be denied.

Application denied.

233 Md. 344

Kathryn W. LEATHERBURY

v.

William E. LEATHERBURY.

No. 166.

Court of Appeals of Maryland.

Jan. 24, 1964.

Proceeding by second wife for divorce on ground that Alabama divorce obtained by husband in order to marry her was void. The Circuit Court, Montgomery County, Walter H. Moorman, J., dismissed the bill, and the wife appealed. The Court of Appeals, Hammond, J., held that second wife could not collaterally attack validity of Alabama decree obtained by husband in proceeding wherein both husband and first wife appeared and participated.

Order affirmed.

1. Divorce ⇐172

If one spouse did not participate in divorce proceeding, he or she or state may show that court granting divorce had no jurisdiction over that spouse.

2. Divorce ⇐168

If original defendant spouse in divorce proceeding seemingly then participated but in actuality did not, inattentive deluded or defrauded one may later collaterally attack divorce.

3. Evidence ⇐35

Where second wife who had burden of persuading Maryland court that Alabama would permit collateral attack by subsequent spouse on divorce decree granted by one of its courts did not give notice of her intention to rely on Alabama law under Uniform Judicial Notice of Foreign Law Act and there was no waiver of such requirement, neither Maryland circuit court nor Court of Appeals was required to notice judicially Alabama law other than to presume it was like that of Maryland. Code 1957, art. 35, §§ 47–53; Maryland Rules, Rule 885.

4. Divorce ⇐168

Under Alabama law, where both parties participate, divorce decree regular on its face but actually fraudulent is not void but voidable and neither party alone can collaterally attack it if he or she participated in its procurement.

5. Divorce ⇐354

Second wife who sought divorce in Maryland circuit court on ground that Alabama divorce obtained by husband in order to marry her was void could not collaterally attack validity of Alabama decree obtained by husband in proceeding wherein both husband and first wife appeared and participated.

George L. Quinn, Jr., Silver Spring, and John D. Connelly, Rockville, for appellant.

Edward L. Foster, Silver Spring, for appellee.

Before HENDERSON, HAMMOND, HORNEY, MARBURY and SYBERT, JJ.

HAMMOND, Judge.

A second wife appeals from the dismissal of her bill seeking a divorce on the claim that the Alabama divorce her husband obtained in order to marry her was void. The appellant and her present husband had dis-

ham, filed a bill of complaint for the sale in lieu of partition of real property. The said two infants, together with Mary Anna Graham and the defendant below, Michael J. Rybikowsky (why his name is Rybikowsky and not Ciuffreda is undisclosed by the record) are the four surviving children, heirs at law and next of kin of Alfred Michael Ciuffreda, who died intestate on September 8, 1960, while seized of the real estate here involved. The defendants below were Michael J. Rybikowsky, Theresa A. Nolan, the Emigrant Industrial Savings Bank, and the appellants Joseph B. Pino and his wife, Mary T. Pino. Theresa A. Nolan was the assignee of Rybikowsky's one-fourth interest in his father's estate under an assignment dated August 16, 1962. She in turn had assigned the one-fourth interest to appellants Pino under an assignment dated September 21, 1964. The validity of these assignments was established by the lower court, and is not questioned on this appeal. The Emigrant Industrial Savings Bank was the holder of a note secured by a deed of trust on the subject property.

On October 27, 1960, the administrator of Alfred Ciuffreda's estate erroneously contracted with the appellants to sell the property to them for a total purchase price of $15,000.00, including the balance owing on the trust note. In connection with this purported agreement the Pinos paid to a real estate broker the amount of $500.00 as a deposit and an additional $4,315.43 to the administrator. Pursuant to the agreement the appellants have occupied the subject property, making improvements, paying taxes and insurance, and making payments on the note secured by the deed of trust on the premises. As earlier pointed out, they subsequently acquired a one-fourth interest of one of the decedent's heirs.

The real property was sold on May 31, 1967, at public sale to Joseph B. Pino, one of the appellants, for the sum of $11,600.-00, subject to a balance of $3,554.21 due the Emigrant Industrial Savings Bank on its trust note. By order of the Circuit Court for Prince George's County dated November 18, 1966, the appellants and any other party were allowed to file claims for any allowances they felt they had "with respect to any part of the net proceeds resulting from said sale * * *." After such claims had been made by the appellants and the appellees had filed their opposition, the court referred the matter to the court auditor. The auditor filed reports granting certain of the claimed allowances and denying others. In addition to other claims allowed the Pinos, he allowed the aggregate amount of the monthly payments made by the Pinos on the trust note toward principal and interest. However, he disallowed their claim in the amount of $3,823.98, representing the curtailments they had made against the principal balance of said trust note. In their brief, appellants stated that these curtailments were made by them on January 5, 1962, in the amount of $911.99, and on February 2, 1962, in the amount of $2,911.-99, totaling $3,823.98. Thus the auditor allowed the aggregate of the individual monthly payments, but disallowed both large lump sum payments.

On October 3, 1967, the lower court issued an order ratifying the auditor's report. The appellants filed a motion for reconsideration of the court's order, and the auditor filed a supplementary memorandum in opposition. On October 27, 1967, the lower court denied the motion for reconsideration relying upon the authorities stated in the auditor's memorandum, and the Pinos have appealed to this Court.

[1] The issue presented is whether the lower court erred in ratifying the auditor's report which disallowed appellants' claim for contribution from the other co-tenants for lump sum curtailment payments made on the trust note which was secured by the subject property. We do not find the authorities relied upon by the lower court as determinative of this issue. The general rule in Maryland is that when one tenant pays a mortgage or other encumbrance upon the common property, he is entitled

to contribution from his co-tenants to the extent to which he has paid their share, and is entitled to an equitable lien for the amount due him. Meyers v. East End Loan & Sav. Assn., 139 Md. 607, 116 A. 453; Hogan v. McMahon, 115 Md. 195, 80 A. 695. See Withers v. Douglas, 206 Md. 141, 110 A.2d 513.

[2] The auditor allowed the Pinos a credit for the aggregate amount of the individual monthly payments, but disallowed their claim for the curtailment payments on the ground that these payments were for the exclusive benefit of their estate. We cannot agree that the other co-tenants received no benefit. The equity of the non-contributing co-tenants was increased by these payments just as it was increased by the monthly sums paid by the Pinos. The final result of both the curtailment payments and the monthly payments was to increase the co-tenants' *aliquot* share in the property. Equity will not allow the unjust enrichment of the appellees at the appellants' expense. The Restatement of Restitution, Section 105 (1937) provides:

"Protection of Things Owned by Payor and Another.

(1) Where two persons are tenants in common or joint tenants and one of them has taken reasonably necessary action for the preservation of the subject matter or of their common interests, he is entitled to indemnity or contribution, enforced by means of a lien upon the interest of the other

(a) if he made a request to the other to join in such preservation, or

(b) without such request, if action was immediately necessary and the other was not available.

(2) A person who through legal proceedings procures or preserves property in which he and another have on [sic] interest may be entitled to reasonable compensation for his services and restitution of his expenses in obtaining or preserving the property."

Comment b to this section states that "the rule applies to the payment of encumbrances against the common property * *."

For the above mentioned reasons the lower court's order of October 3, 1967, ratifying the auditor's report and account, is reversed in part to allow the appellants' contribution from the proportionate shares of the co-tenants for their curtailment payments.

Order affirmed in part and reversed in part and case remanded for modification of the Auditor's report in accordance with this opinion. Costs of this appeal to be charged against the interests of the appellees.



251 Md. 554

Andrew J. BURNS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE et al.

No. 405.

Court of Appeals of Maryland.

Dec. 4, 1968.

Appeal from ruling of the Baltimore City Court, J. Harold Grady, J., affirming resolution of zoning board approving application for variance. The Court of Appeals, Finan, J., held that factors upon which applicant's financial crisis depended, namely, current occupancy demands, general economic conditions and management, were factors which presented problems to other rental properties in the neighborhood and were not sufficiently peculiar to applicant's premises as to justify relaxation of zoning ordinance on basis of financial hardship, assuming, arguendo, that hardship may be the subject of valid consideration.

Judgment reversed.

1. Zoning ⇐536

Burden of showing facts to justify an exception or variance rests on applicant, and it must be shown that hardship affects particular premises and is not common to other property in neighborhood.

2. Zoning ⇐496

Factors upon which variance applicant's financial crisis depended, namely, current occupancy demands, general economic conditions and management, were factors which presented problems to other rental properties in neighborhood and were not sufficiently peculiar to applicant's premises as to justify relaxation of zoning ordinance on basis of financial hardship, assuming, arguendo, that hardship may be the subject of valid consideration.

J. Francis Ford, Baltimore (J. Joseph Curran, Jr., Baltimore, on the brief) for appellant.

Paul L. Betz, Baltimore (Charles Mindel and Buckmaster, White, Mindel & Clarke, Baltimore, on the brief) for Leroy Kappelman, and another part of appellees.

Simon Schonfield, Asst. City Solicitor (George L. Russell, Jr., City Solicitor, Baltimore on the brief) for Mayor and City Council of Baltimore, other appellee.

Before HAMMOND, C. J., and BARNES, McWILLIAMS, FINAN and SMITH, JJ.

FINAN, Judge.

This is an appeal from a ruling of the Baltimore City Court which affirmed the resolution of the Board of Municipal and Zoning Appeals (Board) approving the application of Leroy F. Kappelman, Ralph Lubrow and Marian Kappelman, a partnership (appellee), to add two single bedroom units in space already existing, in each of two apartment buildings owned by the appellee designated as Nos. 6103–05 and 6107–09 Bellona Avenue. Appellant is the owner of residential property in which he resides in Baltimore and his home is in close proximity to 6103–05 and 6107–09 Bellona Avenue.

The property designated as 6103–05 is located in an E–40 height and area district and the lot contains 25,918.64 square feet. Under sections 28 and 29 of the Zoning Ordinance (Baltimore City Code (1950 ed., as amended) Art. 40) this lot is sufficient to accomodate ten families. The property designated as 6107–09 contains a total of 31,830.49 square feet, of which 23,609.72 square feet is located in an E–40 height and area district which is sufficient to accommodate nine families and 8,220.77 square feet is located in an F–40 height and area district which is sufficient to accommodate one family. In 1965 each of the lots now designated as Nos. 6103–05 and 6107–09, were improved by a two-story, brick apartment building, 30 feet by 156 feet, housing ten families; the terrace level, two families and the first and second floors, four families each, all in double bedroom units. There was space provided for two additional single bedroom apartments in each of the buildings but they were not completed because under the restrictions of the Zoning Ordinance only ten family occupancy was permitted; consequently, the extra space was used for storage. Construction was completed on these buildings in January, 1965, and the first tenants took possession in April of that same year. In May, 1965, after the apartment units had been in operation for only one month, the appellee made a request for four additional single units, which request was denied because the Board felt that the apartments had not been operated for a sufficient length of time to show hardship. Two years later, in 1967, the appellee filed two applications, one for each property, requesting two additional single bedroom units in each building. The effect of its requests would be to increase the density so that twelve families would be allowed in each of the apartment houses instead of ten, as set out in sections 28 and 29 of the Zoning Ordinance. Again the appellee based its requests primarily on the basis of hardship. Both of appellee's requests were originally turned down by the Zoning Commissioner and appeals were taken to the Board. The Board, after combining the appeals and holding a hearing on them, found that the appellee had shown sufficient hardship under section 40(c) of the Zoning Ordinance (hardship provision) to justify the granting of a special exception and approved the applications.

The resolution of the Board was appealed to the Circuit Court for Baltimore City and there it was affirmed. It is from that ruling that this appeal is taken.

The main thrust of the appellee's hardship argument is that it has sustained a financial loss. In 1966 the loss was $21,363.66, including $21,200.00 depreciation and the projected loss for 1967 was $4,200.00, without taking into consideration depreciation.

This hardship argument was underpinned with evidence that in the general area of the apartments the demand for single bedroom units was seven (7) times that for double bedroom apartments; that if the apartments did not generate additional revenue, service for the tenants and the quality of maintenance would deteriorate with an accompanying detrimental effect on the appearance of the buildings; that appellee intended to provide the additional parking space which the increased occupancy would require; that since the construction of the apartments, Bellona Avenue had been widened by eight feet, thus minimizing any potential traffic congestion; and that the increase in density would not adversely affect the health, safety or welfare of the neighborhood.

Against these contentions the appellant points out that at the time the partnership purchased the property and erected the buildings, it knew full well that only ten (10) families could lawfully be housed on each of the areas in question.

The appellant also argues that the fact, that at the time the buildings were constructed, provision was made for additional space, readily convertible into four (4) extra apartments, raises the suspicion that this may have been by deliberate design in the hope that at some future time the zoning authorities could be persuaded to relax the regulations and allow the construction of the additional units, such as was approved by the Board and affirmed by the lower court.

The lower court in its oral opinion emphasized that the exception granted by the Board was of a "minimal nature." However, this in itself would not justify arbitrary and capricious action on the part of the Board in granting the exception to the Code, as contended by the appellant.

We think the Board did act arbitrarily in granting the exception and that the lower court erred in not reversing the Board's action as constituting an abuse of its discretion.

In City of Baltimore v. Polakoff, 233 Md. 1, 194 A.2d 819 (1963), a case wherein the owner-developer requested a special exception to allow him to construct a four story, 32 family, luxury apartment house, allegedly in demand, on a lot restricted by zoning to a density of 18 families, Judge Hammond (now Chief Judge) speaking for the Court said: "Mr. Polakoff did not meet the burden he bore as an applicant, showing no more than that the granting of the exception would do no harm and be a profitable convenience to him. Under the cases this is not enough. * * *." Id. 9, 194 A.2d 824. In Easter v. Mayor and City Council of Baltimore, 195 Md. 395, 73 A.2d 491 (1950), in reversing the lower court and the zoning board, both of which on the basis of hardship had granted a special exception to front yard requirements to permit an owner to extend a store front on a combination store and dwelling, we said: "* * * The mere fact that the variance would make the property more profitable is not a sufficient ground to justify a relaxation of setback requirements. * * *." Id. 400, 73 A.2d 492.

Assuming, *arguendo*, that straitened financial circumstances could be considered a hardship which would justify a relaxation of the ordinance, the appellee has actually presented a very thin case. In Board of County Commissioners v. Luria, 249 Md. 1, 238 A.2d 108 (1968), in reversing the circuit court which had in turn reversed the action of the Board of County Commissioners for Prince George's County, sitting as the District Council, which had denied a special exception for a gasoline filling station, we stated:

"* * * It is our view that such findings must be based on testimony, and that the applicant assumes the burden of adducing such testimony, even in a prima facie case. * * *." Id. at 3, 238 A.2d at 109.

See also Board of County Commissioners for Prince George's County v. Lightman, 251 Md. 86, 246 A.2d 261.

In the instant case the record reveals that during the year 1966, after allowing $22,100.00 for depreciation, the operation broke about even. The figures for 1967 were projected and presented an estimated $4,200.00 loss after taking depreciation. The testimony on occupancy was vague to the point that it did not close the door on the possibility of obtaining better income from the existing facilities.

[1,2] Also, as we stated in *Easter*, supra:

"The burden of showing facts to justify an exception or variance rests upon the applicant, and it must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood. * * *." Id. at 400, 73 A.2d at 492.

Certainly, in the instant case, factors which contribute to the financial crisis complained of by the appellee depend on current occupancy demands, general economic conditions and management; all factors which may quickly vary. These are also factors which present problems common to other rental properties in the neighborhood and are not sufficiently peculiar to the appellee's premises as to justify the relaxation of the ordinance on the basis of financial hardship, assuming, for the sake of argument, that hardship may be the subject of valid consideration.

We are of the opinion that the lower court erred in affirming the action of the Board.

Judgment reversed, appellees to pay costs.



251 Md. 428

George M. FINLEY et ux.

v.

TEETER STONE, INC.

No. 355.

Court of Appeals of Maryland.

Nov. 19, 1968.

Owners of farm brought action against quarrying company for damage to farm as result of the pumping of percolating water from quarry by quarrying company. The Circuit Court for Carroll County, James Macgill, C. J., rendered a judgment for the quarrying company, and the owners of the farm appealed. The Court of Appeals, Barnes, J., held that where quarrying company, in operation of quarry, was required to pump water from quarry, drawing percolating water from adjoining farm and withdrawal of percolating water caused sink holes on farm and damaged farm, but there was no negligence by quarry company in its excavation of its quarry or any waste, malice, or sale of percolating waters, or other unreasonable use, quarrying company was not liable to owners of farm for damages resulting

pumping percolating waters from arry.

Judgment affirmed.

Waters and Water Courses ⇐99

"Subterranean waters" are generally nsidered to be underground streams or colating waters.

See publication Words and Phrases for other judicial constructions and definitions.

Waters and Water Courses ⇐99

To be classified as "underground eam" water must flow in a definite and d channel whose existence and location ither known or may be ascertained indications on surface of land or by means without subsurface excava- to determine such existence and loca-

See publication Words and Phrases for other judicial constructions and definitions.

Waters and Water Courses ⇐99

"Percolating waters" are those which seep or filter through soil beneath face, without a defined channel, or in a rse that is unknown and not discover- from surface indications without excavation for that purpose, and fact that they in their underground course, at places together so as to form veins or rivu- does not destroy their character as colating waters".

See publication Words and Phrases for other judicial constructions and definitions.

Waters and Water Courses ⇐107(3)

Unless it can be shown that underground water flows in a defined and channel, it will be presumed to be colating water.

Waters and Water Courses ⇐100, 101

While normally the use of underd streams is governed by same law as applies to those waters flowing in defined and fixed channels above the surface, a separate and distinct body of law has developed governing the use of percolating waters.

6. Waters and Water Courses ⇐106

The pumping of large quantities of water, incident to mining or quarrying operations is both reasonable and necessary.

7. Mines and Minerals ⇐121

Generally, landowner engaged in ordinary and usual mining operations is not responsible for damages resulting from diversion or destruction of flow of percolating waters.

8. Mines and Minerals ⇐122

Where quarrying company, in operation of quarry, was required to pump water from quarry, drawing percolating water from adjoining farm, and withdrawal of percolating water caused sink holes on farm and damaged farm, but there was no negligence by quarry company or any waste, malice, or sale of percolating waters, or other unreasonable use, quarrying company was not liable to owners of farm for damages resulting from pumping percolating waters from quarry.

9. Waters and Water Courses ⇐100, 101

Interference with support provided by water is not subject to same rules of absolute liability that are imposed on a landowner who deprives his neighbor of natural support provided by soils and other more solid materials.

Carl H. Lehmann, Jr., Baltimore, for appellants.

Richard A. Reid, Towson (Royston, Mueller, Thomas & McLean, Towson, and Charles O. Fisher and Walsh & Fisher, Westminster, on the brief), for appellee.

Before HAMMOND, C. J., and BARNES, McWILLIAMS, SINGLEY and SMITH, JJ.

CBA 96-168-SPHA Cont'd 12/10/97

P.C's case cont'd.

Lillian Jennifer

Res Pittler

Lives @ Crom. Bridge & Satyr Hill - ¼ mi from Sanders
- since 1961

Position
- obj. to rear pkg.
  - floodplain area
  - close to Minebank Run & Gunpowder Falls
- Bldg. used only to footprint of bldg.
  - pkg. across over pkg. requirements
  - zoning violations against property
    - needs more pkg. for increased seating in restaurant
    - has been using back of property for pkg. which is in floodplain zoned residential
- will cause runoff into Mine Bank Run
  - Cty. in process of restoring this stream

Concerns abt. traffic
- sight distance from Loch Raven Drive is not adequate
- very difficult to see to turn left onto Cromwell Bridge Rd

Ungierers of this property
- 1988 campaign to save valley
- floodplain area

Hurricane Agnes - flooded up onto Cromwell Bridge Rd. over Sanders property

Rear of bldg., prop. is steep
- all properties along area slope down from Crom. Valley Rd

~~Terri~~ Pitter Cathy Gabriel
12601 Long Green Pike - 20 yrs.
- 4½ mi NE Sanders Corner

P.C. #14 V.P. Long Green Valley Ass'n.
- authorized to speak
- rep. approx 1900 people
- boundaries
  - Major Rd - west
  - Hayford Cir - north
  - Hayford Rd - east
  - little Gunpowder Falls - south

Position - opposed
- further comm. of the Crom. Valley (urbanization) (narrow, windy, hilly / rural road)
- traffic issues - no shoulders
- 1985-2000 p. 106 MP
  - county's intention to preserve rural character
  - This project contradicts that intention
  - Concerned abt. environmental

- letter written notifying abt. case
- Oct. mtg - Trela attended
  - 1988 Sanders wanted all prop. comm'cial
    - Council only granted footprint of bldg.
  - not in favor of liquor license
  - problem w/ occupancy permit
  - pkg. needed 37 spaces
    - denied 1996
    - then permitted
  - Wahlgren felt allowing comm. pkg. on resid.-zoned prop. & floodplain was bad precedent
    - owner caused own problems
    - should have considered pkg. before expanding
  - vote was unanimous in opposition

Brooks X — More than footprint of bldg is BL?
obj. sustained

P.C. # 15-16 Minebank Run restoration funded
Brooks obj - no relevance
Zimmer - says relevance bears directly on waiver for pkg. in flood plain -
Pettle - agree of Zimm.
- critical issue
- must have waiver of flood plain standards

KLW

(W)

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
(410) 887-3180

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

June 24, 1997

AMENDED NOTICE OF ASSIGNMENT

CASE #: 96-168-SPHA **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(SPH granted in part /denied in part; VAR denied.)

Notice for subject hearing is herewith **AMENDED** to include assignment of the following matter:

CASE #: 97-332-SPH **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(Special hearing GRANTED by Z.C. /parking lot.)

Both of the above cases to be consolidated for hearing; and

ASSIGNED FOR: WEDNESDAY, JULY 9, 1997 at 10:00 a.m.

NOTICE: **This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.**

No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c). For further information, see Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

Kathleen C. Bianco
Legal Administrator

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cc: Counsel for Appellant /Petitioner: Leslie M. Pittler, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Counsel for Appellants/Protestants: Charles E. Brooks, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer, et al
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

Printed with Soybean Ink on Recycled Paper

7-9-97

Case No. 96-168-SPHA
97-332-SPH

Chas. Brooks, ~~Protestants~~ Pet (Sandus)
Peter Zimmerman - PC
Wes Pitts Appellant | ~~Pet~~ Protestants

Brooks Opening

Rest. covenants agreements w/ neighbors
1) Question of approval of non-conforming pkg. area prior to 1945
2) Usage of pkg. across rd. variance denied
3) Comm. pkg. in residential zone

Only footprint of bldg. zoned BL
Monitoring of mussels - station on property
4) Flood plain issue - req. waiver Schmidt granted

Zimmerman Opening

Function to defend zoning law
legal issues -
1) Merits of pp-hearing req. for substantially expanded comm. pkg. in resid. zone (DR1)
2) non-conforming use - a distraction
- 409.8 BCZR standards
- incorporates SE standards
2) 100-yr. flood plain - issue arose after 96-168-SPHA created separate ~~Pet~~ req. for waiver 97-332

— biggest zoning issue in case for PC

1991 - Pet. asked ZC for approval NCU for pkg. on east side, not on pkg on west side
— granted, no appeal
— we assume it's been there for years as well as west side next to rest.

1993 - then req. to enclose deck, not previously pt. of rest.
— then apt. became restaurant
— no indication of change of use for apt.
— zoning office don't get pt. that large rest. will require more pkg.
— const. issued & permit issued
— did not apply for SPH or SE
— Pet. now trying to legalize something after the fact

Problems are self-created by Pet.
Also no one caught flood plain prob. when const. permit requested & granted
Must put aside fact that const. is there
Implications of Master Plan is also imp't
Also traffic congestion a Cromwell Bridge & North Rose Rd.
— Pet. says pkg. will alleviate
— But problem aggravated by expansion of rest. w/o more adequate pkg.
— Cty. Council had only smaller biz in mind

familiar w/ restaurant
— has visited since childhood – 60+ yrs.
As far as I can recall - was pkd on both sides of street
— don't recall when ~~pkg.~~ lot to west filled in for pkg.
— Sanders was store at that time
— pkd in front
Ma & Pa R.R. station was there
Have breakfast there every Sunday
Sanders #2 1937 Photo shows Sanders
Jim Nieman X Photo consistent - yes
Pkg. to west not paved, don't know when paved
Pkg in front? yes, had to be
Before 1945? Can't recall when post office ceased
Where in bldg? I'm not sure
Blacksmith shop? before my time
No enclosed deck in 1930s? none
Rest. on west side, apt on east? yes
Tables? 6 & 2 tall w/ stools
no counter | carryout
Pkg. lot on east side used by Sanders -
— used ~~w/ bar~~ east side
— bar was'nt there in 1939
Apt. descont'd in last 3-4 yrs.
Tables there today? 30-35 in rest.
— on enclosed deck & where apt. used to be
— increased from 8. to 30 total
— ? was "questionable"

CBA-168-SPHA
CBA 97-332-SPH Continued 11/19/97

Brook + Spreers - atlys for Pet.
Ree Zimmerman - P.C.
Mrs Pitler - atty. for Hillcrest Jennifer
a ZC level

Brooks

ZC case ~~other~~ facts
Earlier failed to estab. need of pkg.
Req. comm. pkg. in resid. zone
" waiver of flood-plain
Forest Buffer issue has been solved

Zimmerman

Mgr. additions in rear (north) + conversion of apt on east
SE also in conj. w/ flood plain variance
- approved by ZC
Question of forest buffer variance which cleared suspension of earlier CBA has been granted
No need for proposed pkg. rear addition or conversion of apts.
1991 ZC approved existing small

Pet. #4 - Plat
- shows pkg. lot
- modified to change entrance to conform to B. Cty. flood-plain waiver
- shows mussel counting device
- existing roadway to get there

Pet. #5 - letter of approval from Public Works
- non-opposition to proposal "of placement of fill & pkg. lot construction as proposed for this site"

Mason Tsirpes's proposal meets all SE standards

409.8.B - pkg. in resid. zone
- adjoins street
- only vehicular, no buses
- no service use to be permitted
- no B. Cty. standards for lighting
- street (public) light exists
- B. Cty. approved access to pkg. lot

Surrounding properties
- East - all public land, along Susquehanna
- North - part of Cromwell Valley Pk " " " " "
- West -
- South - service grade - across from

Old pkg. there plus 39 ~~34~~ spaces
1991 NCU added 19 pkg. spaces across ST.
- only w/ regard to pkg.
- no ncu relative to bldg.
- need approval for additions
- 409. pkg. requirements
  - ratio to sq. footage
  - now 73 (34 additional) required
  - already constructed w/out approval
  - now trying to legitimize what's there
  - no longer in compliance w/out SH for pkg. or grs variance for pkg.
    - variance leaves area in grass
    - SH paves over & adds additional 34 spaces

~~Ha~~ Only footprint of bldg. zoned BL-
- occupies entire BL piece = bldg.
- rest is DR 1
- if all were zoned BL- no zoning issue
  - still need flood plain variance + forest buffer
- option to ask C. Council to expand BL zoning

Pet. 9-12 mussel access rd. photo
Pet. 13 - Photo looking west
Hours - 8-10 weekdays } Brunch - lunch + Sundays
8-11 weekends
Inside rest. = 26 tables
Deck area = "best estimate" - 35%
- only good weather 40% of year
liquor license EXISTS
fully handicapped accessible
Pet. # 14 Sanders generated petition in support from customers
- stopped @ 1000 signatures
Petz objects - not evidence
Cook, Howard, Dames + Tracey submitted covenant agreement to C.C. for rezoning issue
- only footprint rezoned BL
- rest resid.
Kris - covenant agreement not probative
on Petz's objection - sustained
- contract zoning not legal
MP - accepted by Advisory Board of R + Pks.
- according to Sanders doesn't need to go before CC for approval
- except when $ needs to be spent
Pet. # 15 - letter on MP for pk.
Pet # 16 - DED indicates support of pk. +

- further Chairs includes MP + environ. issues

Sect. S. 241 - Brooks says enumerates PC's role
Kris says we won't rule now -
- make legal arguments a end

Per. #17 Jan. 3, 1997 - Hydraulic study performed + submitted
— open channel hydraulics to determine flood plains
— B. Cty. had two in Sunpoodee + Nine Bank Run
— we took + interpolated effect of Sandee proposal
Per. #5 - was response - no opposition

Per. 18 Forest Buffer May 28, 1997
— submitted variance application
— includes impact
Per. #19 — July 15, 1997 approved w/ conditions
— security posted + mitigation required

Granting of waiver will not cause any of the code problems
Also meets SE standards

Rimm. X Flood plain ~~variance~~ waiver
— SE depends on obtaining waiver

— only 7 accidents in 4 yrs. near Loch Raven Rd, 3/10s mi.
~ 1.50/million vehicle mi. compared to 2/million for State average
— less than other rural roads

Access to subject property - Ref. # 4
— acceptable to B. Cty. for proposed pkg lot
— sight distance > 150 ft. = 270' 25 mph
— Loch Raven onto C. Bridge = 325' @ 40 mph
Acts 337' towards ~~SA~~ Cub Hill
more toward I-695

Possibly 5 spaces in front of restaurant
— will be changed
— eliminate congestion in front
— lessen stopping on C. Bridge

Allowing comm. pkg. in resid. area will actually improve current situation
— meets SE standards

Only vehicles would use pkg.
— no buses
— no loading or unloading

B. Cty. to determine type of lighting
" has approved pkg.
— in conjunction w/ restaurant

Does have adverse impacts on neighboring properties

1988 CZMP
- typical technique of times
- limit expansion & provide buffers to neighborhood
- before setbacks & landscape requirs -
- now community-involvement demands SH
- technique used w/ assumption of pkg. to be permitted
- Zimm. objects as speculative
- no foundation for this being case in 1988

Q#1b - If rezoned BL for bldg., then not zone for pkg - must have assumed pkg. in rezd, zone would be granted
- Otherwise, comm. use would not be valid
- All additions for w/in BL zone granted in 1988

Only portion left for pkg. is area w/in flood plain - subject of this hearing

Unique - only property in area that is surrounded by public property
- Sanders can't buy more property nearby
- surrounded by steep slopes + flood plain

Hardship and/or practical difficulty

Verified (Final) 2-05-98

Exhibits

CBA 96-168 SPHA and CBA 97-332-SPH

Petitioner

now attached hereto

A ~~EXH~~ I-25 SH variance exhibits 96-168-SPHA

STILL IN ORIG FILE

B 1-6 Petition for SH exhibits 97-332-SPH

1. Sign-in sheet in support of Petitioners
2. Plat - "Sanders Corner"
3. Proposed comm. pkg. plat approved by ZC
4. Plat showing modifications to original proposal - rear pkg. lot supplemental plan
5. letter to Js. Larson from Chas. Olsen 1/23/97
6. Photographic Map NE 120
7. " " enlarged
8. Rec & PKs map - final Master Plan - Cromwell Valley Park
9. Photograph of B. City access dirt road to mussel station
10. Photograph of mussel station
11. " taken from deck of restaurant looking north
12. Photo of slope toward mussel access rd.
13. Photo on edge of property toward Jennifer's house looking WEST
14. Sanders petition in support
15. Jan. 27, 1997 to interested citizens from John Weber III
16. letter to DEPRM from DED - Feb. 4, 1997
17. letter & study from KCW, Inc to B. City Public Works Jan. 3, 1996
18. May 28, 1997 KCW Inc to B. City DEPRM

1. Sign - in cheer of people in favor of Sanders - and physically in attendance
2. Photo - 1937 - Sanders property

legal services and the value of the legal services are exclusively for the judge to determine.

A legally trained judge is far better able than a jury to assess the quality of legal services. The issue of what pretrial motions and pleadings were valuable or necessary in a case is one essentially beyond the competence of a jury. For a jury to determine the necessity for and value of legal services in a nonjury case would virtually require a retrial of the case before the jury. The assessment of legal fees in divorce actions and custody cases, for instance, would be drawn into chaos if the law were otherwise. Were Dr. L. to prevail, we can imagine a court-appointed criminal defense attorney refusing to accept a fee awarded by the judge and arguing to a jury that the fee should have been far greater.

In a case such as this, the initial decision by the judge to appoint an attorney to act in the interests of the children, the determination by the judge as to the appropriate remuneration for those legal services and the assessment by the judge of the costs for those legal services simply do not represent a "civil action" within the remote contemplation of § 4–402(e).

JUDGMENT IN CASE NO. 171 REVERSED; JUDGMENT IN CASE NO. 710 AFFIRMED; COSTS TO BE PAID BY DR. L., THE APPELLEE IN CASE NO. 171.

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549 A.2d 762

Sue H. GREEN, et al.

v.

Scott S. BAIR, Sr.

No. 187, Sept. Term, 1988.

Court of Special Appeals of Maryland.

Nov. 4, 1988.

Certiorari Denied March 8, 1989.

Owners of medical building and physicians practicing within it sought zoning variance from setback requirements in municipal zoning code. The Westminster Board of Zoning Appeals granted the variance. The Circuit Court, Carroll County, Donald J. Gilmore, J., reversed. On appeal, the Court of Special Appeals, Robert M. Bell, J., held that physicians and building owner wives failed to demonstrate undue hardship which would justify grant of zoning variance from the setback requirement.

Affirmed.

Zoning and Planning ⇐504

Under Westminster Zoning Code, financial hardship suffered by physicians and their property owner wives due to space difficulties they suffered in medical building were insufficient to demonstrate either an inability to secure a reasonable return on or use of their property, or that hardship suffered was peculiar to property to demonstrate undue hardship and justify variance from zoning setback requirements.

William B. Dulany (David K. Bowersox and Dulany, Parker & Scott on the brief), Westiminster, for appellants.

Clark R. Shaffer (C. Rogers Hall, Jr. on the brief), Westminster, for appellee.

Argued before MOYLAN, ROBERT M. BELL, and WENNER, JJ.

ROBERT M. BELL, Judge.

This case reaches us on an appeal and cross-appeal from the judgment of the Circuit Court for Carroll County. The City of Westminster Board of Zoning Appeals, after a public hearing, granted, in part, the application, of Sue H. Green and Beulah C. Chang, appellants/cross-appellees, (hereinafter "appellants"), for variances from the City's set back requirements, thus permitting enlargement of an existing medical office building. Upon the appeal of Scott S. Bair, Sr., appellee/cross-appellant, (hereinafter "appellee"),

the circuit court reversed that decision. The appeal presents two questions, *i.e.*,

1. Was the December 29, 1986 decision of the Westminster Board of Zoning Appeals, granting variances for the petitioners/cross-respondents Green and Chang's property, supported by substantial, probative evidence of record and therefore, fairly debatable, making the circuit court's reversal of the Board's decision an impermissible substitution of the circuit court's judgment?

2. Does the language of the City of Westminster's Zoning Ordinance § 21–3, defining the term "variance" create an operative standard which the City of Westminster's Board of Zoning Appeals must apply in ruling on applications for variances, in addition to certain enumerated findings which the Board is directed to make pursuant to § 21–71 of that ordinance?

The cross-appeal presents only one:

Was the advertised notice of hearing adequate under Maryland law?

Inasmuch as we find no merit in appellants' argument, we will affirm the judgment of the circuit court. It is therefore unnecessary that we address the cross-appeal.

Appellants are the owners of land, zoned B–Business, located in Westminster, on which is constructed a medical office building, out of which their husbands conduct their pediatric practice. The medical office building was constructed in 1969 and the doctors have practiced in that building since that date. Although at the time that the building was constructed the City set back requirements were much more liberal, the current set back requirements prohibit the construction of a building closer than 30 feet from the right-of-way adjacent to the building's front or from the residential property bordering on the building's side. *See* Westminster City Zoning Code § 21–16(e).

After their husbands had practiced in the building as originally constructed for some 17 years, appellants filed an application for variances to reduce the set back requirements on those sides of the building adjacent to Washington Road and bordering on appellees' residential property.[1] At the hearing before the Board, testimony in support of the application was presented by one of the appellants, Mrs. Green, and her husband. Each of them testified as to the need for the variances and the hardship which would result if they were not granted. Both testified to the need to have the records generated by the practice close at hand and that there was no feasible alternatives to the expansion of the building that the grant of the variances would allow. Both also testified to the difficulty of continuing the existing practice without the variances. Mrs. Green additionally noted the need to accomodate the support staff. She observed, during her testimony that "it's serving well, but ... it can be a stressful situation in not having the room to function, and not having access to records. If you have to store your record[s] and your files elsewhere, it's greatly difficult to function." Dr. Green, on the other hand, focused on the morale problem that lack of space was causing. In addition to the diminution of property values, he also testified that changes in the medical practice and the existence of a malpractice crisis generated the need to keep more records, as well as required, that they be kept for longer periods of time. Dr. Green acknowledged that he could continue his present practice "with great difficulty" if the variances were not granted and that approval of the variances would increase the value of the property as well as make it more convenient for him to practice medicine.

The Board found this testimony persuasive and incorporated it into its decision. The Board was also "impressed that Dr. Green has expressly represented that there is no

1. The application actually sought variances from the sideline and rear line set back requirements; however, based upon the evidence presented at the hearing and interpreting the City's zoning ordinance, the Board determined that what was actually sought were variances from the front yard set back requirements and a side yard set back variance.

intention nor expectation that the patient load of he [sic] and Dr. Chang will be changed." It concluded:

> The Doctors have considered and explored alternatives to seeking the requested variances, including the rental of space off-site for record keeping, but have been unsuccessful in those efforts. Essentially, in this case, the Board is of the collective opinion that unless a variance can be granted, the continued operations and patient services of Drs. Green and Chang will be substantially compromised if not jeopardized. The medical practice is a permitted use in the B–Business zone, and the ability of doctors to store and retrieve their patient records on-site is customarily incidental to this use. The inability of Drs. Green and Chang to store and retrieve their patient records on-site deprives them of conducting their medical practice as it normally is undertaken by other medical practitioners. Indeed, the availability of those records on-site will enhance the ability of Drs. Greene and Chang to provide patient care.
>
> In sum, the Board is convinced and persuaded by the evidence of record, including but not limited to, the testimony of Dr. Green, that limited variances would not be contrary to the public interest and that there are conditions peculiar to the subject property which are not the result of the actions of the Applicants, and that a literal enforcement of the provisions of the Westminster Zoning and Subdivision Ordinance would result in an unnecessary and undue hardship. Indeed, the Board is of the opinion that for the foregoing reasons, the Applicants have satisfied their burden of proof and the requirements of the ordinance to justify in this case, limited variances.

Implicit in the Board's decision is the recognition that, to justify the variances, it had to find that failure to do so would result in "an unnecessary and undue hardship."

The court agreed with the Board that a showing of undue hardship was a necessary prerequisite to the grant of the variances. Nevertheless and notwithstanding its recognition that it must uphold the Board's decision "if it is not premised upon an error of law and if the agency's conclusions reasonably may be based upon the facts proven." *Ad + Soil, Inc. v. County Comm'rs*, 307 Md. 307, 338, 513 A.2d 893 (1986). *See also Heaps v. Cobb*, 185 Md. 372, 379, 45 A.2d 73 (1945); *Ginn v. Farley*, 43 Md.App. 229, 235, 403 A.2d 858 (1979); *Annapolis v. Annap. Waterfront Co.*, 284 Md. 383, 395, 396 A.2d 1080 (1979), it found that the Board's finding of "undue hardship" was "unreasonable". Relying upon the definition of "undue hardship" set out in *Anderson v. Board of Appeals*, 22 Md.App. 28, 38–9, 322 A.2d 220 (1974), and finding that the evidence failed to meet that test, it concluded:

> "If viewed in a most favorable light, Applicants' testimony revealed only that the variances would do no harm, and would allow them to conduct their business much more easily."

The Westminster City Code defines "variance" as

> A relaxation of the terms of this chapters where such "variance" will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the results of the actions of the applicant, a literal enforcement of this chapter would result in unnecessary and undue hardship.

Moreover,

> (1) such variances shall be authorized by the Board only upon finding by the Board that:
>
> a. There are exceptional or extraordinary circumstances or conditions applying to the property in question or to the intended use of the property that do not apply generally to other properties or classes of uses of the same zone;
>
> b. Such variance is necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same zone and in the same vicinity; and
>
> c. The authorizing of such variance will not be of substantial detriment to adjacent properties and will

not materially impair the purpose of this chapter or the public interest.

Section 21–71(c)(1). Only "area",[2] as opposed to "use", variances are permitted by the Code. *See* § 21–71(c)(2).

Viewing the statutory scheme as a whole makes patent that whether an undue hardship would result if the variances were not granted is an essential element to be considered by the Board when determining whether to grant or deny a variance. The definition of variance in § 21–3 applies whenever the term variance is used throughout the ordinance. Thus § 21–71(c)(1) cannot be read without reference to that definition. To do otherwise would be to fail to adhere to a venerable precept of statutory construction: "if there is no clear indication to the contrary, a statute must be read so that no part of it is rendered surplusage, superfluous, meaningless or nugatory". *Ford Motor Land Development v. Comptroller*, 68 Md.App. 342, 346, 511 A.2d 578 (1986). *See also Scott v. State*, 297 Md. 235, 246, 465 A.2d 1126 (1983); *Board of Education, Garrett County v. Lendo*, 295 Md. 55, 63, 453 A.2d 1185 (1982); *Baltimore Building & Construction Trades Council v. Barnes*, 290 Md. 9,

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2. Ordinarily, applicants seeking an area variance need only meet a standard of "practical difficulty". That standard was explained in *Anderson*, 22 Md.App. at 39, 322 A.2d 220:

> In order to justify a grant of an area variance the applicant need show only that:
>
> "1) Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
>
> "2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
>
> "3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured. *McLean v. Soley*, 270 Md. 208, 214–15, 310 A.2d 783, 787 (1973), quoting 2 Rathkopf, The Law of Zoning Planning, 45–28–29 (3d ed. 1972).

15, 427 A.2d 979 (1981). But this is precisely what appellants would have us do. Their argument is that since the requirement of "undue hardship" appears only in the definitional section, and not in the substantive provisions of the Code, the only evidence they were required to produce was that which would permit the Board to make the findings set out in § 21–71(c)(1). In short, they urge us to read out of the statute the words "undue hardship". That we decline to do.

There is, moreover, no logical impediment to our giving effect to both the definitional provision and the substantive one. We considered the showing required to meet the "undue hardship" standard in *Anderson* and concluded:

> Where the standard of undue hardship applies, the applicant, in order to justify the grant of the variance, must meet three criteria:
>
> 1) If he complied with the ordinance he would be unable to secure a reasonable return from or to make reasonable use of his property. *Pem Co. v. Baltimore City*, 233 Md. 372, 378, 196 A.2d 879, 882 (1964); *Marino v. City of Baltimore*, 215 Md. 206, 218, 137 A.2d 198, 202 (1957); *See Salisbury Bd. v. Bounds*, 240 Md. 547, 555, 214 A.2d 810, 815 (1965). Mere financial hardship or an opportunity to get an increased return from the property is not a sufficient reason for granting a variance. *Daihl v. County Board of Appeals*, 258 Md. 157, 167, 265 A.2d 227, 232 (1970); *Salisbury Bd. v. Bounds, supra*, 240 Md. at 555, 214 A.2d at 814; *Marino v. City of Baltimore, supra; Easter v. City of Baltimore*, 195 Md. 395, 400, 73 A.2d 491, 492 (1950).
>
> 2) The difficulties or hardships were peculiar to the property in question and contrast with those of other property owners in the same district. *Burns v. Baltimore City*, 251 Md. 554, 559, 248 A.2d 103, 106 (1968); *Marino v. City of Baltimore, supra; Easter v. City of Baltimore, supra.*

3) The hardship was not the result of the applicant's own actions. *Salisbury Bd. v. Bounds, supra; Marino v. City of Baltimore, supra; Gleason v. Keswick Impvt. Ass'n,* 197 Md. 46, 50–51, 78 A.2d 164, 165–66 (1951).

22 Md.App. at 38–9, 322 A.2d 220. Comparing this standard with the required showings under § 21–71(c)(1) reveals that there is an overlap between the two; but to the extent that the required showings differ from the undue hardship requirement, they are not inconsistent. In other words, the required findings can be made in addition to those required under the undue hardship standard. Thus, the Code creates a variance standard for the City of Westminster that is not wholly that applicable to use variances nor wholly that applicable to area variances, but one that contains elements of both. That it does so does not render the Code in anywise deficient or unenforceable. As the trial court recognized, "It is not for the court to decide the wisdom, *vel non,* of the zoning code, as adopted by the Mayor and common council, but rather to enforce it as it is written."

We agree with the trial court that appellants' evidence failed to demonstrate that they met the first two criteria required for showing undue hardship. It follows, therefore, that we also agree with the trial court that the evidence before the Board did not render that issue fairly debatable. Consequently, the trial court's judgment must be affirmed.[3]

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANTS.

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3. The trial court also found that even under the less onerous standard set out in § 21–71(c)(1), appellants would not prevail because "there is no evidence that the difficulties they are encountering are peculiar to the property in question, or contrast with those of any other successful business in the B–Business zone." We agree with that finding as well. Indeed, were appellants showing sufficient to grant a variance under § 21–71(c)(1)'s required findings, we, like appellees, find "it ... difficult to imagine a modern business that could not create the same record and obtain the same variance."

549 A.2d 766

MONTGOMERY COUNTY, Maryland, et al.

v.

James W. McDONALD, Jr.

No. 190, Sept. Term, 1988.

Court of Special Appeals of Maryland.

Nov. 7, 1988.

Police officer filed claims for workers' compensation benefits, under an occupational disease theory, for two heart attacks suffered by officer. The Workers' Compensation Commission held that officer's claims were barred by the two-year statute of limitations, and officer appealed. The Circuit Court, Montgomery County, Irma Raker, J., reversed the Commission, and County appealed. The Court of Special Appeals, Gilbert, C.J., held that the statute of limitations was tolled by County's failure "to at once report" the disability incurred by officer as result of his occupational disease.

Affirmed.

1. Workers' Compensation ⇐1280

When employer violates notice provision of statute which requires employer "to at once report" to Commission any disability incurred by employee from occupational disease, statute of limitations as to employee's claim for occupational disease benefits is tolled. Code 1957, Art. 101, §§ 1 et seq., 26 (b).

2. Workers' Compensation ⇐2080

Police officer's claims for occupational disease benefits in regard to heart attacks were not barred by running of two-year statute of limitations for such claims, as employer failed to comply with statute which required employer "to

Savings Fund Society, 127 Pa.Super. 28, 192 A. 139; Linden Methodist Episcopal Church v. City of Linden, 113 N.J.L. 188, 173 A. 593; Snow v. Johnston, 197 Ga. 146, 28 S.E.2d 270; Mueller v. C. Hoffmeister Undertaking & Livery Co., 343 Mo. 430, 121 S.W.2d 775.

[15] We have found no facts in this record so extraordinary as to persuade us to withdraw the case from application of the accepted rule. The ordinance under review is a clear case of "spot zoning." The property in dispute is situated in an area that has been zoned as residential ever since the enactment of the City Zoning Ordinance in 1931. The amending ordinance contains a proviso that the premises shall be used only as a funeral home and that no embalming shall be done on the premises. However, Paragraph 8 of the City Zoning Ordinance explicitly provides that no land or building in a residential use district shall be used for "undertaking business or establishment or funeral home."

The amending ordinance reclassifies a single lot in a district where undertaking establishments are not permitted, thus establishing a permissive district within the restricted district. Armacost, who has been engaged in the undertaking business in Howard Park for some years, contracted to purchase the property in dispute upon the condition that if he could not secure a permit to use it as a funeral home, the contract would be rescinded. In January, 1949, after getting the approval of a number of residents of the neighborhood for the establishment of the funeral home, he had the proposed ordinance introduced in the City Council. A number of residents appeared before the Committee on Buildings and Building Regulations, and no objections were heard to the ordinance. Cassel declares that he was one of the opponents who appeared at the hearing, but that the proponents outnumbered the opponents, and he did not voice any objection because it seemed "rather futile." However that may be, the ordinance was passed by the City Council in March, and eleven days after it was approved by the Mayor, the Buildings Engineer issued the permit.

At the trial of this case Cassel asserted positively that there is no need for a funeral home at 5118 Gwynn Oak Avenue. He showed that the property in dispute is only three blocks from Woodbine Avenue, which is in a first commercial use district. Charles E. Delosier, secretary of the State Board of Funeral Directors, who was called to the stand by appellees, acknowledged that there are three other funeral homes within a radius of about ten blocks. Armacost testified that he spent a large sum of money to paint, paper and wire the house, but neither this fact nor the allegation that the funeral home will be a convenience for the tenants in nearby apartment houses is sufficient to save the ordinance. It was urged that there are about 20,000 inhabitants of the Howard Park section, but Armacost admitted that he has conducted only about two funerals a month from the funeral home since he opened it. It is impossible to avoid the conclusion that the ordinance is an arbitrary and unreasonable discrimination for the reason that it does not operate alike on all persons residing within the residential area. As we are convinced that the ordinance is beyond the statutory power of the City Council, we must declare it void. If a funeral home were permitted here, it might be an opening wedge for other enterprises in this and other residential districts of the city.

For these reasons we must reverse the decree dismissing the bill of complaint and remand the case for the passage of a decree granting the relief prayed for by appellants.

Decree reversed and case remanded, with costs.

EASTER v. MAYOR & CITY COUNCIL OF BALTIMORE et al.

No. 176.

Court of Appeals of Maryland.

May 12, 1950.

Action by Andrew J. Easter against Mayor and City Council of Baltimore and others challenging validity of city's approval of construction of addition on front of store and dwelling. The Baltimore City Court, Emory H. Niles, J., rendered judgment for defendants and plaintiff appealed. The Court of Appeals, Henderson, J., held that granting of variance of setback requirements and occupancy rule was not warranted.

Reversed.

1. Municipal corporations ⇐621.39

Board of Zoning Appeals of City of Baltimore in granting special exceptions must consider the factors set out as standard in zoning ordinance, and its action must be reasonable in light of these and all other pertinent facts.

2. Municipal corporations ⇐621.39

The power of Board of Zoning Appeals of City of Baltimore under zoning ordinance to grant exceptions must be strictly construed.

3. Municipal corporations ⇐621.45

Burden of showing facts to justify an exception of variance under zoning ordinance rests upon applicants, and it must be shown that hardship affects particular premises and is not common to other property in neighborhood.

4. Municipal corporations ⇐621.21

Mere fact that variance would make property more profitable is not a sufficient ground to justify granting of variance from setback requirements of Baltimore Zoning Ordinance.

5. Municipal corporations ⇐621.25

That other buildings extended to front line of lot and lot was irregular did not authorize Board of Municipal and Zoning Appeals of City of Baltimore to grant a permit for construction of addition on front of store and dwelling in variance of setback rules and occupancy requirement on ground of hardship.

John F. Heath, Baltimore, for appellant.

Benjamin Kann and Malcolm J. Coan, Baltimore, for appellees J. P. Easter and wife.

Thomas N. Biddison, City Sol., Edwin, Harlan, Deputy City Sol., and Hamilton O'Dunne, Asst.City Sol., Baltimore, for appellee Mayor and City Council of Baltimore.

Before MARBURY, C. J., and DELAPLAINE, COLLINS, GRASON, HENDERSON and MARKELL, JJ.

HENDERSON, Judge.

This appeal is from a judgment of the Baltimore City Court affirming the action of the Board of Municipal and Zoning Appeals in granting a permit for the construction of a one-story and basement addition on the front of a store and dwelling at 6418 Belair Road, owned by John P. Easter. The only protestant, Andrew J. Easter, is a brother of the permittee, residing at 6420 Belair Road, where he conducts a tavern.

As stated by the trial Court, "The property is in a First Commercial Use, C. Area District, and the permit would allow the store front to be brought out to the building line, in contravention of paragraph 24 of the Zoning Ordinance, which requires a 10-foot minimum depth of front yard in the area in question, and of the percentage of occupancy requirements under paragraph 21, bringing the percentage of occupancy to 85% as opposed to 60%, as provided in the Ordinance. The Board of Municipal and Zoning Appeals granted the permit under the provision of Paragraph 33(c) on the ground that '* * * due to its peculiar location and surroundings it is a case of practical difficulty and unnecessary hardship, since the Tavern already obstructs the view of the store where the addition is now proposed'". The court thought there was "evidence sufficient to support the legal definition of a hardship and * * * in fact, it would be a hardship to allow one brother

to have a tavern all the way out to the street, and to deny the other brother the right to build his store out to the same line as the tavern."

The Board found that the store was "on the west side of Belair Road, 105 feet south of Easter Terrace. * * * Adjacent to the premises under appeal is a building containing a tavern which is built out to the front line of the lot. To the north between Easter Avenue and Kenwood Avenue there are several buildings constructed to the front lines of the lot and the proposed addition would not affect access of light and air to any neighboring properties, nor would it even cut off the view up and down the street. The lot in question is of very shallow depth and irregular in shape * * *." The store and tavern were built as semi-detached buildings. In 1935 Andrew J. Easter obtained a permit to build a sort of covered entrance-way out to the build-line. John P. Easter did not object, and there were no protests. In his present application John P. Easter states that since his brother "has built out in front of us it has hid our store making it difficult to rent." There is a small triangular vacant lot to the south of 6418, and a church property adjoining to the south, across an alley laid out but apparently not opened. The church is set back the required distance. Andrew J. Easter has applied for a permit, and obtained the approval of the Board, to develop the land to the north, comprising about six acres, as a shopping center with off-street parking facilities and the required set-back. If this project is carried out, he states that he proposes to remove the entrance in front of his tavern.

[1, 2] We may assume here, as we have assumed in previous cases, that the delegation to the Board of Zoning Appeals of the power to make special exceptions or variances is valid, and that the standards set up in Section 32(j) are adequate. Colati v. Jirout, 186 Md. 652, 656, 47 A.2d 613; Heath v. Mayor and City Council of Baltimore, 187 Md. 296, 49 A.2d 799; Heath v. Mayor and City Council of Baltimore, Md., 58 A.2d 896, 898. The Board must consider the factors set out in that section and "its action must be reasonable in the light of these and all other pertinent facts." Heath v. Mayor and City Council of Baltimore, supra, 187 Md. 305, 49 A.2d 804. The power to grant exceptions must be strictly construed. Colati v. Jirout, supra, 186 Md. page 659, 47 A.2d 613.

[3, 4] The burden of showing facts to justify an exception or variance rests upon the applicant, and it must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood. Rathkopf, Zoning, 2d Ed., p. 215; Levy v. Board of Standards and Appeals, 267 N.Y. 347, 196 N.E. 284. The mere fact that the variance would make the property more profitable is not a sufficient ground to justify a relaxation of setback requirements. Garden View Homes v. Board of Adjustment, 137 N.J.L. 44, 57 A.2d 677.

In the instant case there is no suggestion that the Board failed to "act as a fact-finding body" or to "give consideration to the rules, regulations, restrictions, guides and standards set forth" in the Ordinance (paragraph 33(c)). The question is whether the undisputed facts support the Board's action. The fact that the lot is irregular has no bearing on the question, nor is it material that three buildings, some distance to the north, extend to the building line. These may have been built before the passage of the Ordinance, or they may have been built under permit or without permit. As was said in Potts v. Board of Adjustment, 133 N.J.L. 230, 43 A.2d 850, 854: "Prior exceptions granted by the adjustment board are not in themselves controlling. Ill-advised or illegal variances do not furnish grounds for a repetition of the wrong. If that were not so, one variation would sustain if it did not compel others, and thus the general regulation eventually would be nullified. The annulment of zoning is a legislative function that is beyond the domain of the zoning board." See also the cases collected in a note 168 A.L.R. 13, 41–44. The same principle was announced and applied in Heath v. Mayor and City Council of Baltimore, supra, Md., 58 A.2d 896, 898, Mayor and City Council of Baltimore v. Byrd, Md., 62 A.2d 588, 591, and Cassel v. Mayor and City Council of Baltimore, Md., 73 A.2d 486.

The principal fact relied upon to justify an exception to the area and set-back rules, adopted in the general interest under the police power, is the existence of an exception on the adjoining lot. Undoubtedly this is detrimental to the applicant, although his case is somewhat weakened by his tacit acceptance of the situation over a period of years. But we think the detriment to the applicant must be weighed against the benefit to the community in maintaining the general plan. "It is by these gradual encroachments, individually of relative insignificance, that the integrity of the general scheme is undermined and ultimately shattered. One departure serves as justification for another * * *." Dubin v. Wich, 120 N.J.L. 469, 200 A. 751, 754. In the case of non-conforming uses, the ordinance tolerates their continuance, but looks towards their ultimate elimination. Colati v. Jirout, supra. The same principle applies to special exceptions. Heath v. Mayor and City Council of Baltimore, supra, Md., 58 A.2d 896. Use variances are doubtless more serious than dimensional changes, but that is only a matter of degree.

In People ex rel. Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 286, 155 N.E. 575, 577, it was contended that the existence of a garage immediately adjoining the proposed garage was sufficient justification for the grant of an exception on the ground of unnecessary hardship. But the Court, speaking through Chief Judge Cardozo, said: "We think the reasons assigned are insufficient to supply a basis for a departure from the map. They amount to nothing more than this, that a garage may be built because there is another one next door." See also Ventresca v. Exley, 358 Pa. 98, 56 A.2d 210, 212. No estoppel can be raised against the Board by reason of its approval of similar extensions in other cases. Appeal of Valicenti, 298 Pa. 276, 148 A. 308; Note 119 A.L.R. 1509, 1517.

[5] Under the circumstances we think the action of the Board cannot be sustained.

Judgment reversed, with costs.

REINDOLLAR et al. v. KAISER et ux.

No. 161.

Court of Appeals of Maryland.

May 10, 1950.

Robert M. Reindollar and others, as Commissioners of the State Roads Commission of Maryland, instituted a condemnation suit for land necessary for road purposes against Frederick A. Kaiser and wife in the Circuit Court, Howard County, James Clark, J. The Roads Commission appealed from a judgment assessing damages in the amount of $12,500. The Court of Appeals, Collins, J., held that the trial judge did not err in charging the jury either by minimizing the weight of appellant's evidence or by assuming facts not in evidence.

Judgment affirmed.

1. Eminent domain ⇐124, 138

In condemnation proceedings, measure of loss is value of land taken at time taken; and when land is part of larger tract, diminution in value of larger tract caused by taking particular segment thereof must also be considered.

2. Eminent domain ⇐222(5)

In condemnation proceedings it was not error, in charging jury, for trial judge to use word "only" to show minimum appraisement when he went on to inform jury that they had exclusive prerogative and duty to determine amount of damages.

3. Trial ⇐185

Review of evidence by trial judge in charge to jury should be impartial.

CLELAND et al. v. MAYOR & CITY COUNCIL OF BALTIMORE et al.

No. 30.

Court of Appeals of Maryland.

Nov. 2, 1951.

Three practicing physicians and their wives, co-owners of certain property applied for a permit to establish a parking lot on their property to be used for parking automobiles belonging to physicians and members of their staff who were using the physicians' offices. The application was opposed by Joseph P. Cleland, trustee, and others. The building inspection engineer declined to grant the permit and an appeal was taken to the Board of Municipal and Zoning Appeals where the application was approved and the objectors appealed. The Mayor and City Council of Baltimore and others were named appellees. The Baltimore City Court, W. Conwell Smith, C. J., affirmed the action of the Board and the objectors appealed. The Court of Appeals, Marbury, C. J., held that exceptions to the Zoning Act are not a matter of right and as it appeared that nothing would be served by granting permit but convenience of physicians and their employees, Board was not justified in granting an exception.

Order reversed and case remanded.

1. Municipal Corporations ⇐601(15)

Baltimore ordinance giving mayor and city council authority to provide by ordinance, on conditions, for establishment of open areas in a residential use district for parking of automobiles, did not impliedly repeal provisions of zoning ordinance permitting board of municipal and zoning appeals to grant use of same classification, necessary or incidental to a nonconforming use existing in a residential use district, within 50 feet from such nonconforming use, and permitting board to grant within 100 feet of a boundary line between use districts any use permitted in that one of such use districts which has lower classification.

2. Municipal Corporations ⇐621.43

Where counsel for applicant for permit to establish parking lot for physicians and their employees on property where physicians' offices were located made unsworn statement of situation to board of municipal and zoning appeals, and two physicians were then called, who adopted counsel's statement, physicians were subject to cross-examination on any statements made by counsel, and method of procedure was not to be commended as a general proposition.

3. Municipal Corporations ⇐621.17

Special exceptions to a zoning ordinance will never be granted to gratify mere convenience, there must be a necessity, and that necessity must be so urgent and the facts so extraordinary as to require withdrawal of that particular case from application of accepted rule.

4. Municipal Corporations ⇐601(23)

The spirit of the Baltimore zoning ordinance is against extension of nonconforming uses.

5. Municipal Corporations ⇐621.17

Rule that special exception to city zoning ordinance will never be granted to gratify convenience, and not only must necessity be urgent but facts in given case so extraordinary as to require withdrawal of case from application of accepted rule, applies to provision of Baltimore zoning ordinance authorizing board of municipal and zoning appeals to grant within 100 feet of a boundary line between two use districts any use permitted in that one of such use districts which has lower classification.

6. Municipal Corporations ⇐621.30

Convenience of physicians and their employees did not warrant granting of exception to zoning ordinance by Baltimore board of municipal and zoning appeals of property owner's application for permit to establish on property where physicians' offices were located in residential use area of parking lot for automobiles of physicians and their employees, although there was a pre-existing nonconforming use of that portion of property permitting its use for physicians' offices.

Norman C. Melvin, Jr., and Douglas H. Gordon, both of Baltimore, for appellants.

J. Cookman Boyd, Jr., Baltimore (F. Murray Benson, Baltimore, on the brief), for appellees Bennett, Johnson & Eaton and others.

Francis J. Valle, Asst. City Sol., Baltimore (Thomas N. Biddison, City Sol., Baltimore, on the brief), for appellees Mayor & City Council of Baltimore.

Before MARBURY, C. J., and DELAPLAINE, COLLINS, and HENDERSON, JJ.

MARBURY, Chief Judge.

Three practising physicians and their wives, co-owners of 4-6 East Madison Street, applied for a permit to establish a parking lot on their property to be used for parking cars belonging to the doctors and members of their staff who were using the doctors' offices at 4 East Madison Street. 4-6 East Madison Street is practically one lot, although it has two numbers. It is located in a residence zone, although there is a pre-existing non-conforming use of 4 East Madison Street, which has been used as doctors' offices since 1919. There is no building on that part of the lot known as 6 East Madison Street, except a garage which holds three automobiles. The building inspection engineer necessarily declined to grant the permit, and an appeal was taken to the Board of Municipal and Zoning Appeals, where the application was approved. An appeal was taken to the Baltimore City Court by the appellants, residents and taxpayers of the city, and owners of real estate near the property. The Baltimore City Court affirmed the action of the Board, and from its order the appeal comes here.

The order appealed from not only authorizes the use of the rear of 6 East Madison Street as a parking lot for the doctors and their employees, but also authorizes an entrance and exit to and from the rear of said property by a roadway on or over the sidewalk and front portion of the lot which is on East Madison Street. The property to the south adjoining the lot of the applicants is zoned first commercial, with the exception of the University Club property which is at the corner of Madison and Charles Streets, and is zoned residential.

[1] The Board of Municipal and Zoning Appeals attempted to act under the provisions of Paragraphs 12(b) and (c) of the zoning ordinance. (b) permits the Board to grant a use of the same classification, necessary or incidental to a non-conforming use now existing in a residential use district, within 50 feet from such non-conforming use. (c) permits the Board to grant within 100 feet of a boundary line between two use districts, any use permitted in that one of such use districts which has a lower classification. Appellants contend that the right to act under these provisions is taken away by the passage of Ordinance 1312, approved July 5, 1950. This ordinance adds Paragraph 14(a) to the zoning ordinance, and gives the Mayor and City Council authority to provide by ordinance, upon conditions for the establishment, maintenance and regulation of open areas in a residential use district, for the parking thereon of automobiles. We are unable to agree with appellant's contention in this respect, as we do not think this ordinance impliedly repeals Paragraphs 12(b) and 12(c).

[2] In their attack upon the action of the Board, the appellants contend that there was no admissible evidence before the Board. The basis for this is that counsel for the applicants made an unsworn statement of the situation, and then two of the doctors were called, who adopted counsel's statement. The doctors were, however, subject to cross-examination under these circumstances on any statements made by counsel, and, while this method of procedure is not to be commended as a general proposition, it was probably allowed in this case as a means of saving time, and we cannot say that there was not evidence of the facts before the Board when it acted. Assuming, therefore, that the statement of counsel became evidence after its adoption by the doctors, we find that the basis for the application is that these physicians are active orthopedic surgeons, and the pressure of parking space has become intolerable because they have to get to their place of business and get away when needed, are frequently called on emergencies, and, if they do not have access to their own cars, delay ensues. The entrance to the garage is through adjacent property and through an alley which, however, has of late years become blocked by trucks of commercial enterprises which border on it. The space in the garage is such that if three cars are there, and the first one in wants to get out, a difficult and awkward situation ensues. The proposal was to breach the wall along Madison Street, put in an ornamental iron gate and a ten-foot driveway which would lead to the back of the lot and the rear of the building on lot No. 4. Sometimes the applicants would want an ambulance to run in, but they primarily want the use of the parking space for the cars of nurses and other employees who work in the building on No. 4.

[3-5] Under Paragraph 12(b), the use to be granted must be necessary or incidental to a non-conforming use already existing. The non-conforming use was that of maintaining doctors' offices. There is nothing to show that it is necessary or incidental to such offices to have parking areas adjacent to them. It would no doubt be a great convenience to the applicants to have their cars, and the cars of their employees, parked in the rear of their offices, but this is neither usual nor necessary. Many physicians have offices in office buildings in the downtown sections of the city, and it is not necessary for them to have parking facilities on the same lot on which they practice their profession. This court has consistently held that special exceptions will never be granted to gratify mere convenience, that there must be a necessity, and that necessity must be so urgent, and the facts so extraordinary as to require the withdrawal of that particular case from the application of the accepted rule. That accepted rule is the division made in the zoning ordinance for various classes of use districts. It is part of a general plan which is not intended to be changed except in cases of urgent necessity. "It is evident that the spirit of the Baltimore City Zoning Ordinance is against the extension of non-conforming uses. It is generally accepted that a few non-conforming buildings and uses, allowed to continue as exceptions to the regulations in order to avoid injustice, will not be a substantial injury to the community if they are not allowed to multiply where they are harmful or improper; but non-conforming uses should not be perpetuated any longer than necessary, and the Zoning Board should make constant efforts to move them into the use districts where they properly belong." Colati v. Jirout, 186 Md. 652, 657, 47 A.2d 613, 615. See also Mayor and City Council of Baltimore v. Byrd, 191 Md. 632, 638, 62 A.2d 588; Heath v. Mayor and City Council of Baltimore, 190 Md. 478, 483-484, 58 A.2d 896. The same general rule applies to the exception to be permitted under Paragraph 12(c) within 100 feet of a boundary line between two use districts. We had such a situation in the recent case of Gleason v. Keswick Improvement Association, Md., 78 A.2d 164, where we ruled against the exception. Cf. Hoffman v. Mayor & City Council, Md., 79 A.2d 367.

The trial court relied upon the case of Akers v. Mayor and City Council of Baltimore, 179 Md. 448, 20 A.2d 181, for the statement that occupants of certain houses are not prohibited from parking cars in their yards. That, however, is quite different from the present application. What is desired here is not to permit the doctors to park their cars in the rear of their residences where they also maintain offices. It is to provide a general parking space for not only their cars in the rear of their offices, but also the cars of all their employees who work in the building. We are unable to find any case in which this court has held that that is a permissible use.

[6] In the instant case, we find no such compelling necessity as to justify the Board of Municipal and Zoning Appeals in granting an extension of the non-conforming use, or in utilizing the provisions of Section 12(c). It was not intended by the zoning act that whenever it was convenient or desirable for an individual owner to have a special exception, he should be allowed it by the Board. Exceptions are not a matter of right, and where it appears, as it does in this case, that nothing will be served but the convenience of the doctors and their employees, we do not think such a case, based upon convenience alone, would justify the Board in granting an exception.

Such action, if based upon insufficient reasons, is arbitrary and is in violation of the zoning law, and it cannot stand.

For these reasons, the action of the trial court will be reversed and the case remanded in order that that court may pass an order reversing the action of the Board of Municipal and Zoning Appeals and directing the dismissal of the petition.

Order reversed with costs and case remanded.



WILLIAMS v. McCARDELL et al.
No. 4.

Court of Appeals of Maryland.
Oct. 31, 1951.

Proceeding by Charles A. Williams, against J. Neil McCardell, and others, wherein it was sought to compel the Board of Trustees of the Employees' Retirement System of Baltimore City, to approve petitioner's application for accidental disability benefits. The Court of Common Pleas of Baltimore City, John T. Tucker, J., dismissed the petition, and the petitioner appealed. The Court of Appeals, Markell, J., held that the evidence sustained the finding that the petitioner's disability was not due to any accident or a series of accidents occurring in course of petitioner's employment as a fireman by the Baltimore City Fire Department.

Order affirmed.

1. Municipal Corporations ⇐200(9)

In proceeding by city fireman for accidental disability benefits for coronary thrombosis, evidence sustained finding that fireman's disability was not due to any single accident or series of accidents occurring in course of fireman's employment by city.

2. Administrative Law and Procedure ⇐763

Action of administrative board may be arbitrary or unlawful because facts found are unsupported by evidence or conclusions drawn are contrary to law or facts.

3. Administrative Law and Procedure ⇐741, 760, 791

Generally, courts are concerned with results rather than methods of administrative boards and review the action not the opinion of the board, and courts cannot set aside findings of facts supported by substantial evidence merely by calling findings arbitrary.

4. Mandamus ⇐187(9)

Where evidence in proceeding for mandamus commanding board of trustees of employee's retirement system to approve petitioner's application for accidental disability benefits presented no issue of fact to be submitted to jury, alleged error if any, in denying petitioner jury trial, on ground that he failed to pray therefor within time prescribed by rule of court, was not prejudicial.

O. Bowie Duckett, Baltimore (Samuel M. Campanaro Baltimore, on the brief), for appellant.

Thomas N. Biddison, City Solicitor and Daniel B. Leonard, Asst. City Solicitor, both of Baltimore, on the brief, for appellees.

Before MARBURY, C. J., and DELAPLAINE, COLLINS, GRASON, HENDERSON and MARKELL, JJ.

MARKELL, Judge.

This is an appeal from an order dismissing a petition for mandamus commanding respondents, the Board of Trustees of the Employees' Retirement System, to approve petitioner's application for accidental disability benefits from December 11, 1948.

In 1927 petitioner, then twenty-five years old, entered the Baltimore City Fire Department. In 1938 he was promoted to the rank of Lieutenant. On December 11, 1948 he was retired by the Department as totally and permanently unfit for duty. He is a member of the Employees' Retirement System.

Section 6 of the Employees' Retirement System ordinance (Ordinance No. 553, approved February 21, 1926; Baltimore City Code, 1927 Edition, Article 30, section 6) provides: "* * * Accidental Disability Benefit (5) Upon application of a member, * * * any member who has been totally and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty *at some definite time and place*, without wilful negligence on his part, shall be retired by the Board of Trustees, provided that the medical board shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that such member shall be retired. Allowance on Accidental Disability Retirement (6) Upon retirement for accidental disability a member * * * shall receive an accidental disability retirement allowance which shall consist of [a specified annuity and pension]" [Italics supplied.]

Petitioner made application for accidental disability benefits. On June 21, 1949 and September 22, 1949 his application was heard by respondents, on testimony and other evidence and arguments of counsel. On October 19, 1949 the application was denied, with a written opinion, on the ground that "the Board does not find that the incapacity of the applicant is the natural and proximate result of an accident occurring in the actual performance of duty at some definite time and place. This conclusion is based on the testimony and evidence presented to the Board and upon a consideration of the applicable authorities." Petitioner alleges that respondents' action in denying his application "is unwarranted and contrary to the applicable facts and law", and that in denying the application respondents "acted capriciously, arbitrarily, illegally and unreasonably * * *". The application for mandamus was heard on the testimony and other evidence before the Board. The petition was dismissed on two grounds, stated in Judge Tucker's opinion, [1] "There was very substantial evidence before the Board of Trustees of the Retirement System to support their decision that the incapacity of the petitioner was not the natural and proximate result of an accident; and for that reason alone their decision may not be disturbed by the court." [2] "There is another reason, however, that the petitioner may not obtain the relief for which he has prayed. The contention of the petitioner, which, he claims is supported by the testimony of his witnesses, Doctors Skolnick and Serra, is that during his 21 years of services in the Fire Department he sustained various injuries, some of which were accidental, and was subjected to considerable responsibility in protecting property and the lives of people, and it was the combination of these events and conditions that caused his eventual incapacitation. But, even if this contention were supported by uncontradicted evidence it would not entitle the petitioner to the special benefits under the above provisions of the ordinance, because the incapacity would not be the result of "an accident occurring * * * at some definite time and place'. * * * There is no substantial evidence to show that the petitioner's incapacity resulted from 'an accident at some definite time and place'." Judge Tucker held that by the ordinance "the cause of incapacity is limited to one accident at a definite time and place".

Petitioner's disability is due to coronary thrombosis. Petitioner contends this was caused—or aggravated—by accident; respondents contend it was not, and could not be, caused by accident. The Board "does not find" that it "is the natural and proximate result of an accident occurring in the actual performance of duty at some definite time and place". Judge Tucker holds that [1] "There was very substantial evidence before the Board * * * to support their decision" that it was not the natural and proximate result of an accident and [2] "there is no substantial evidence" that it resulted from one "accident at some definite time and place".

Petitioner testified to four "accidents" in the performance of duty, on October 20, 1928, January 18, 1940, August 28, 1942, and December 6, 1948, and six occasions, on April 22, 1942, January 9, 1943, February 12, 1943, November 17, 1948, November 29, 1948, and December 11, 1948, when he was examined (and in five of these instances went off duty) on account of

evidence concerning the physical condition of the road, claiming that those conditions would have shown an additional hazard to safety by any increased use of the road. Confining our ruling to the facts of this case, we hold the chancellor was correct. The only question to be determined was whether the Moores had a legal right to use the road for the benefit of parcel X, and, as we have already decided that they did, this argument of the appellants cannot prevail.

Decree affirmed in part, and reversed in part, and cause remanded for further proceedings not inconsistent with this opinion, appellants to pay the costs.



215 Md. 206

Frank C. MARINO et al.
v.
CITY OF BALTIMORE et al.

No. 79.

Court of Appeals of Maryland.

Dec. 30, 1957.

Proceeding to review action of board of municipal and zoning appeals, denying permit to construct a store building and adjacent parking area on unimproved lot of land in area zoned for residential use only. The Baltimore City Court, E. Paul Mason, J., entered order affirming action of board and property owners appealed. The Court of Appeals, Horney, J., held that question of whether to grant or deny exception under evidence was fairly debatable so that order of trial court must be affirmed.

Affirmed.

1. Municipal Corporations ⇐601(15), 621.8

All zoning regulation, including rezoning, as well as an exception and a variance, which are intended to relieve harshness of zonal restriction in a particular instance, is a lawful exercise of police power by sovereign state.

2. Municipal Corporations ⇐600

Individual right to use privately owned property is subordinate to paramount right of public whenever such use tends to affect injuriously the health, comfort, safety and general welfare of all persons in a community, providing, that such zoning restriction is itself lawful and not such as to permanently deprive property owner of all reasonable use of property.

3. Municipal Corporations ⇐621.8, 621.17

Exceptions to zoning regulations are granted sparingly, under exceptional circumstances, but existence of an unnecessary hardship usually justifies granting of an exception.

4. Municipal Corporations ⇐621.17

Criterion for determining unnecessary hardship is whether applicable zoning restriction when applied to property in setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with basic right of private ownership.

5. Municipal Corporations ⇐621.46

Where property owners sought an exception to zoning ordinance to permit them to construct commercial building in area zoned for residential use, property owners had burden of proving that they were entitled to an exception under ordinance.

6. Municipal Corporations ⇐621.46

Where property owners sought exception to zoning ordinance under Baltimore City ordinance allowing granting of exception when land proposed to be used does present, because of topography, grade or accessibility, practical difficulties or unnecessary hardships, it was incumbent upon owners to prove that their property zoned for residence was peculiar, preventing a reasonable return from or any reasonable use of their property for residential purposes, and that the difficulties or hardships were not the result of owners' own actions. Code Supp.1957, art. 66B, § 7(g) (2, 3).

7. Municipal Corporations ⇐621.21

Mere financial hardship or an opportunity to get an increased return from property is not sufficient reason for granting exception to zoning ordinance but financial advantage, although not controlling, is not entirely irrelevant.

8. Municipal Corporations ⇐621.17

Plight of owner of real property seeking exception to zoning ordinance must be due to unique circumstances and not to general conditions in the neighborhood.

9. Municipal Corporations ⇐621.39

A prior exception to zoning ordinance granted by municipality does not control the granting of a subsequent exception.

10. Eminent Domain ⇐2(1)

A zoning ordinance which permanently so restricts use of property that it cannot be used for any reasonable purpose goes beyond permissible regulation, and must be regarded as taking of property without compensation.

11. Municipal Corporations ⇐621.55

In proceeding by property owners for review of action by municipality in denying exception to zoning ordinance so as to permit owners to construct commercial buildings and adjacent parking area on lots zoned for residential use only, evidence sustained finding that board did not abuse its discretion in denying application for exception. Code Supp.1957, art. 66B, § 7 (g) (2, 3).

12. Municipal Corporations ⇐621.14

Traffic congestion is an element which the board should consider in deciding whether or not to grant variance to zoning ordinance. Code 1957, art. 66B, § 3.

13. Municipal Corporations ⇐621.58

Where question of whether to grant or deny exception to zoning ordinance is, under evidence, fairly debatable, order of trial court approving action of board must be affirmed.

14. Administrative Law and Procedure ⇐763

Court may not substitute its judgment as to the wisdom or soundness of action taken by the administrative body unless it is clear that such action was illegal, arbitrary or discriminatory.

Donald N. Rothman and Robert Hammerman, Baltimore (Gordon, Feinblatt & Rothman and David P. Gordon, Baltimore, on the brief), for appellants.

Henry Vogt, Baltimore, for Wm. J. Huber, and others, Intervenors.

Shirley B. Jones, Asst. City Sol., Baltimore (Thomas N. Biddison, City Sol. and Hugo A. Ricciuti, Deputy City Sol., Baltimore, on the brief), for City of Baltimore.

Before BRUNE, C. J., and HENDERSON, HAMMOND, PRESCOTT, and HORNEY, JJ.

HORNEY, Judge.

This is an appeal from an order of the Baltimore City Court affirming the action of the Board of Municipal Zoning Appeals, (the Board), denying a permit to construct a one-story store building and adjacent parking area on the unimproved lot of land owned by Frank C. Marino and Bernardine Marino, his wife, and the Marimar Company, Inc., (the Marinos), on the north side of Belvedere Avenue near the intersection of said Avenue with York Road, generally known as 522 East Belvedere Avenue.

The property is situated in a residential use district and has been so classified since the passage of the initial zoning act in 1931. Only semi-detached or single dwellings are

permitted but none has been constructed by the Marinos or previous owners. The plat filed with the record shows a first commercial use district on both sides of York Road to the north and south of Belvedere Avenue, an area which has been zoned commercial since the original zoning ordinance in 1931. The area between the easternmost boundary of the commercial district and the property for which an exception is sought, also owned by the Marinos, is zoned for residential use, but is now used for commercial purposes under a prior permit approved by the Board. The area immediately to the north of the property in question, above a slope, variously estimated to be ten to thirty feet high, is zoned and used for residential purposes. The sylvan area to the east, owned by the City, is also zoned residential, although a part of it may be used in the future as a portion of the proposed Northern Parkway Extension. Directly across the avenue from the Marino property there is a large parking lot, formerly zoned residential, but now used commercially. A department store is situated on the southeast corner of York Road and Belvedere Avenue, but it is within the first commercial use district referred to. Other nonresidential uses have, by way of exceptions, invaded the residential use district. However, the major part of the originally zoned residential district still remains zoned and is used for residences.

On October 5, 1953, an ordinance was introduced in the City Council of Baltimore City to rezone the property in question from residential to first commercial. On October 30, 1953, the Board approved and recommended passage of the proposed ordinance stating that "it is not suitable for residential development". The Planning Commission of Baltimore City suggested an amendment of the proposed ordinance to the effect that the eastern portion of the property should be restricted to a parking area for the building proposed to be erected on the western portion. The suggestion was acceptable to the Marinos, but on June 1, 1954, the ordinance as amended was rejected by the City Council.

At the hearing before the Board evidence was produced to the effect that the property was unsuitable for residential use; that to use it for that purpose would be wasteful, imprudent, economically unsound, and impossible to finance; and that the property was best suited for commercial use. There was also testimony that the value of the property for commercial use was ten times that for residential use, and that such use would not affect the value of neighboring properties. On the contrary there was evidence, some of it on cross examination, to the effect that the property was suitable for residential purposes; that houses costing from $12,000 to $15,000, if built, could be readily sold; and a banker testified that his savings and loan association would "entertain" an application for a loan for residential development of the property. The protestants, who testified, objected to any further encroachment by commercial interests because it would tend to depreciate the value of their properties. One witness, a real estate appraiser and broker, attempted to testify that the present use of the property as a "dump" and a "parking lot" created a health as well as a safety problem, but his testimony had little probative value. Because vacant lots scared him, another real estate developer, who had seen the property used as a dump inhabited by mice and rats and perhaps a few snakes, and used as a playground for children, thought the residential restriction had created a health, safety and morals hazard, but he was not an expert in either field.

There was some testimony, pro and con, before the Board as to the effect of traffic congestion in the area. In court, the director of traffic, who had made several traffic surveys of the cross-streets area of York Road and Belvedere Avenue, testified that it was a difficult intersection; that it was "strategic", and was considered among the "heaviest traveled corners" in the City—a count on September 1, 1956, showed that 47,988 vehicles passed through the area in a twenty-four hour period, 18,782 of which were going "to the east of York Road". Over a period of four years there were fifty-seven accidents at the intersection. He further testified that the parking lot across the avenue had created traffic congestion and that another on the Marino property would make it "doubly worse", and that the congestion is already great and the street arrangements are not such as permit a present solution of the problem. The traffic director was also of the opinion that the development of a large department store and parking lot in the area was a serious error traffic-wise which ought not to be repeated.

The authority of the Board to make an exception under the Enabling Act, [Code, Cum.Sup. (1957), Art. 66B, sec. 7(g) (2), (3)], and Section 36(b) and (c), [formerly 33(b) and 33(c)], of the Baltimore City Zoning Ordinance, (the ordinance), is not disputed. Furthermore, the City and the intervenors admit that in this case the proper tribunal to hear and determine the appeal from the Board was the Baltimore City Court.

Section 7(g) (3), supra, provides that the Board shall have the power, among others:

> "To authorize upon appeal in specific cases such variance from the terms of the ordinance as is necessary to avoid arbitrariness and so that the spirit of the ordinance shall be observed and substantial justice done."

The ordinance provides that the Board shall have power: (i), by Section 35(g) 2, to "hear and decide special exceptions * * *"; and (ii), by Section 35(g) 3, the same identical power as that granted by Section 7(g) (3), supra, of the enabling act. Section 36(b) and (c), supra, of the ordinance, with which we are primarily concerned, provide, in part, authority to:

> "(b). Grant a permit where the use or change of use of land, * * proposed to be used is limited as to its location because of the * * * topography, grade or accessibility."

[and]

> "(c). Grant a permit where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of any of the provisions of the * * * [zoning ordinance]."

Section 36(b) and (c), supra, also provide that the Board shall act as a fact-finding body and, in arriving at a decision, shall give consideration to the rules, regulations, restrictions, guides and standards set forth elsewhere in the ordinance.

Ordinarily, there is a marked distinction in the law of zoning between a *variance* and an *exception*,[1] but there is none in Baltimore City since an *exception*, apparently, overlaps a *variance* inasmuch as both may be granted where there are "practical difficulties or unnecessary hardships". This is the reason why many cases which arise in Baltimore City, such as this one, discuss exceptions and variances without differentiation.

[1, 2] Basically, of course, all zoning regulation, including rezoning, as well as an exception and a variance, which are intended to relieve the harshness of a zonal restriction in a particular instance, is a lawful exercise of its police power by the sovereign state. It is axiomatic that the individual right to use privately owned property is subordinate to the paramount right of the public whenever such use tends to affect injuriously the health, comfort, safety and general welfare of all persons in a community, provided, however, that such zonal restriction is itself lawful and not such as to permanently deprive the property owner of all reasonable use of his property.

1. See Montgomery County v. Merlands Club, 1953, 202 Md. 279, 288, 96 A.2d 261; Reed v. Board, 1931, 255 N.Y. 126, 174 N.E. 301, 303; Application of Devereux Foundation, Inc., 1945, 351 Pa. 478, 41 A.2d 744.

See Grant v. Mayor and City Council of Baltimore, 1957, 212 Md. 301, 315, 129 A.2d 363; and Walker v. Board of County Com'rs of Talbot County, 1955, 208 Md. 72, 87, 116 A.2d 393, and the cases therein cited; and City of Baltimore v. Cohn, 1954, 204 Md. 523, 105 A.2d 482.

[3, 4] As a general rule exceptions are granted sparingly, and under exceptional circumstances. To do otherwise would decimate zonal restrictions and eventually destroy all zoning regulations, and thus detrimentally affect the marketability of property within zoned areas. On the other hand, the existence of an unnecessary hardship usually justifies the granting of an exception. The criterion for determining unnecessary hardship is whether the applicable zoning restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership. As was stated in Carney v. City of Baltimore, 1952, 201 Md. 130, 137, 93 A.2d 74, 76–77:

> "The need sufficient to justify an exception must be substantial and urgent and not merely for the convenience of the applicant, inasmuch as the aim of the ordinance is to prevent exceptions as far as possible, and a liberal construction allowing exceptions for reasons that are not substantial and urgent would have the tendency to cause discrimination and eventually destroy the usefulness of the ordinance. * * *
>
> "The expression 'practical difficulties or unnecessary hardships' means difficulties or hardships which are peculiar to the situation of the applicant for the permit and are not necessary to carry out the spirit of the ordinance and which are of such a degree of severity that their existence amounts to a substantial and unnecessary injustice to the applicant."

[5, 6] We think that the primary question we must decide on this appeal is whether the Marinos met the burden of proving that they were entitled to an *exception* under Section 36(b) and (c), *supra*, of the ordinance. See Easter v. Mayor and City Council of Baltimore, 1950, 195 Md. 395, 73 A.2d 491; Gleason v. Keswick Imp. Ass'n, 1951, 197 Md. 46, 78 A.2d 164; Serio v. Mayor and City Council of Baltimore, 1956, 208 Md. 545, 119 A.2d 387. Although the Marinos based their application for an exception in part under Section 36(b), supra, on the claim that their property was *peculiar* in that its topography as well as the grade between it and the adjacent land to the north rendered it impossible to construct dwellings thereon, the testimony as to such peculiarities was so meager that it was not unreasonable for the Board and the trial court to have concluded that the property was not unique and therefore was not such as to justify an exception for those reasons. With respect to meeting the required burden under Section 36(c), supra, it was incumbent upon the Marinos to have shown (i) that if they complied with the ordinance they would not be able to secure a reasonable return from, or to make any reasonable use of, their property, (ii) that the difficulties or hardships were peculiar to the property in question in contrast with those of other property owners in the same district, and (iii) that the hardship was not the result of the applicants' own actions.

[7] Mere financial hardship or an opportunity to get an increased return from the property is not sufficient reason for granting an exception. Easter v. Mayor and City Council, supra. However, financial advantage, although not controlling, is not entirely irrelevant. Serio v. Mayor and City Council of Baltimore, supra. Obviously, if unnecessary hardships referred only to economic disadvantage, an exception might always have to be granted as a matter of course. Ellicott v. Mayor and City Council of Baltimore, 1942, 180 Md. 176, 23 A.2d 649; Gleason v. Keswick Imp. Ass'n, supra; Kracke v. Weinberg, 1951, 197 Md. 339, 79 A.2d 387; Serio v. Mayor and City Council of Baltimore, supra. Thus, an analysis of zoning cases demonstrates that the differences between a situation in which the applicant complains that he could secure a greater return from his property if granted an exception and a situation in which the applicant contends that it is impossible to secure a reasonable return from or to make a reasonable use of such property is one of degree rather than kind. In the first instance, his application would invariably be refused. But, in the second instance, if other conditions were met, an exception would likely be allowed. On the whole, this Court, as well as those in other jurisdictions, applies the same rules, but the decisions inevitably depend on the facts of each case.[2]

[8] The plight of the owner must be due to unique circumstances and not to general conditions in the neighborhood. The rule was accurately and succinctly stated by Judge Henderson in Easter v. Mayor & City Council, supra, when he said in 195 Md. at page 400, 73 A.2d at page 492. "* * * it must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood." Thus, it is clear that the Board, in refusing to grant the Marinos an exception, applied the correct principle of law when it said:

> "It is the Board's understanding * * * that in order to make an exception to the use regulations, so as to permit a commercial use in the residential zone, evidence must be produced to show that the practical difficulties and unnecessary hardships involved in the use of the land in question or in the making of improvements on such land must be peculiar to the property in question and the difficulties or hardships must not be such as prevail generally with respect to the use of other similarly situated areas * * *."

[9] While it is true that the Marinos did not purchase the property in question with the thought in mind of applying for an exception—actually they purchased it some years before they petitioned for an exception—they knew, of course, that it was restricted to residential use when they purchased it. More to the point, however, it is a fact that a prior application by them, which was granted, for a commercial use of a part of the property, is without doubt one of the reasons why the remainder is less adaptable now for residential use purposes. Certainly a prior exception granted by the Board does not control the granting of a subsequent exception. Easter v. Mayor & City Council, supra, 195 Md. at page 400, 73 A.2d 491.

[10, 11] The Marinos contend that there is no legal principle which requires that

2. Some of the leading cases in other jurisdictions on this issue in which *variance* was granted include: Nagaven Realties v. Banzhaf, 1933, 149 Misc. 361, 267 N.Y.S. 729; People ex rel. St. Albans-Springfield Corp. v. Connell, 1931, 257 N.Y. 73, 177 N.E. 313; Schaible v. Board of Adjustment, 1946, 134 N.J.L. 473, 49 A.2d 50. Cases in which *variance* was refused include: Fleming v. Prospect Park Board of Adjustment, 1935, 318 Pa. 582, 178 A. 813; Stevens v. Clark, 1926, 216 App.Div. 351, 215 N.Y.S. 190; 4672 Broadway Corp. v. Board of Standards and Appeals, 1928, 225 App.Div. 97, 232 N.Y.S. 266, affirmed 1929, 250 N.Y. 571, 166 N.E. 328; Joyce v. Dobson, 1933, 255 App.Div. 348, 8 N.Y.S.2d 768; Hickox v. Griffin, 1940, 298 N.Y. 365, 83 N.E.2d 836; Otto v. Steinhilber, 1939, 282 N.Y. 71, 24 N.E. 2d 851; Colorado Springs v. Miller, 1934, 95 Colo. 337, 36 P.2d 161; Levy v. Board of Standards and Appeals, 1935, 267 N.Y. 347, 196 N.E. 284; Young Women's Hebrew Ass'n v. Board of Standards and Appeals, 1935, 266 N.Y. 270, 194 N.E. 751; Jenney Mfg. Co. v. Zoning Board of Review, 1939, 63 R.I. 477, 9 A.2d 705; Ricci v. Zoning Board of Review, 1946, 72 R.I. 58, 47 A.2d 923.

the difficulties and hardships referred to in Section 36(c), supra, must be peculiar to their property and not applicable to other property in the same zoning district, citing N. W. Merchants Terminal v. O'Rourke, 1948, 191 Md. 171, 60 A.2d 743; Hoffman v. Mayor and City Council of Baltimore, 1951, 197 Md. 294, 79 A.2d 367; and City of Baltimore v. Cohn, supra. They also insist that the Board abused its discretion in denying an exception on the assumption that the evidence showed that their property was wholly unsuitable for residential use, relying principally, on the Terminal, Hoffman and Cohn cases, supra, to support this contention. Obviously, their interpretation of the Board's finding was erroneous, and the Marinos' contention that it is impossible to use their property for the purposes to which it is restricted by the ordinance is a debatable question. In the Terminal case, in which we applied the presumption of reasonableness to the facts in that particular case, we declared that the rezoning ordinance was invalid because it was unreasonable, arbitrary and contrary to Section 3 of Article 66B of the Code (1951). Likewise in the Hoffman case we held that it was unnecessary to consider the "exceptions" as such because we could and did determine the ordinance to be *pro tanto* invalid on the facts of that case. And in the Cohn case, again on the particular facts there present, we held that a particular application of a zoning ordinance may be held invalid when it restricts property to uses for which the property was not adapted. We did not consider the question of the existence of practical difficulties or unnecessary hardships in any of those cases. Instead we reaffirmed the established constitutional doctrine "that a zoning ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes beyond permissible regulation, and must be regarded as taking of property without compensation." City of Baltimore v. Cohn, supra, 204 Md. at page 530, 105 A.2d at page 486. As previously indicated the facts in the Terminal, Hoffman and Cohn cases were vastly different from the facts here. In the case at bar, there are insufficient facts to show indisputably that the residential use ordinance so restricts the use of their property that it cannot be used for any reasonable purpose. Nor are we persuaded that the Board abused its discretion in denying the Marinos' application for an exception for the reason that their property was unsuitable for residential use. In fact, we believe it is fairly debatable under the testimony in this case whether the owners are able to secure a reasonable return from, or to make any reasonable use of their property, of which more presently. Furthermore we do not believe that it was necessary for the Board to make a specific finding that the Marino property was suitable for residential use. Instead we think that such a finding was implicit in their sole finding that there were no practical difficulties or unnecessary hardships peculiar to the property in question.

[12] There is yet another aspect of this case which is an important factor, although not necessarily controlling. We have recognized repeatedly that traffic congestion is an element which the Board should consider when deciding whether to grant a variance. Hardesty v. Board of Zoning Appeals, 1956, 211 Md. 172, 126 A.2d 621; Temmink v. Board of Zoning Appeals, 1957, 212 Md. 6, 128 A.2d 256; Price v. Cohen, 1957, 213 Md. 457, 132 A.2d 125. In fact, the enabling act [Code (1951), Art. 66B, sec. 3], specifically provides, *inter alia*, that zoning regulations shall be made in accordance with a comprehensive plan and "designed to lessen congestion in the streets". The testimony before the Board on the question of traffic congestion was not extensive, but the weight of what there was is to the effect that at certain hours it is next to impossible to get through the Belvedere Avenue-York Road intersection except at a very slow pace. The testimony of the traffic director in court was to the same effect in that he testified that this intersection was considered to be among the heaviest traveled corners in the city. His opinion was based on the result of several traffic surveys of the area. It was also his opinion that the proposed commercialization of the whole of the Marino property would not help the situation. The Board did not assign the traffic problem as a reason for declining the exception but the trial court did. Such consideration was proper. It is apparent from the testimony of the traffic director, the only traffic expert who testified, that the layout of the streets in the area is not such as would permit a solution of the problem. And there was no evidence that a relocation of the streets was contemplated in the near future. We think it is clear that to grant the exception sought would tend to increase congestion in the streets, not to lessen it, as the clear mandate of the enabling act contemplates. Hardesty v. Zoning Board, supra; Temmink v. Board of Zoning Appeals, supra.

[13, 14] We believe that the question whether to grant or deny an exception under the evidence in this case was fairly debatable. This being so, the order of the trial court must be affirmed. A court may not substitute its judgment as to the wisdom or soundness of the action taken by an administrative body unless it is clear that such action was illegal, arbitrary or discriminatory. Serio v. Mayor and City Council of Baltimore, supra.

Since the Board has broad discretionary powers which a court cannot set aside without sound legal reasons, we are not persuaded that either the Board or the trial court erred in refusing to grant the Marinos an exception to the residential use restriction to which their property is presently subject. If it is a fact that the character of the neighborhood is gradually changing as a result of additional commercial uses from time to time, then the City Council might well extend the adjacent first commercial district to include the whole of the Marino property, but that is a legislative, not a judicial function. See Miller v. Silver, 1951, 278 App. Div. 962, 105 N.Y.S.2d 474, 475, in which it was said:

> "* * * where a claimed hardship is *common* to other properties in the area and not one special and peculiar to the specific property, the remedy is by change in the *zoning ordinance* itself." (Italics supplied.)

There is one remaining objection which requires a brief comment. We think that the admission in evidence of the agreement between the Marinos and certain neighborhood interests concerning the use of the property in question was at the most no more than a harmless error. All that it shows is that the Marinos had a different concept in 1946 as to the use of the property than they had in 1956 when they applied for another exception. Clearly the agreement had no evidentiary value bearing on the finding made by the Board and the question the trial court decided, which we are about to affirm. There is nothing in the record to indicate that the agreement was prejudicial or in any way influenced either the action of the Board or the decision of the trial court.

Order affirmed, the appellants to pay the costs.

WEST KEY NUMBER SYSTEM

Clarence E. TYLER

v.

WARDEN, BALTIMORE CITY JAIL.

Application No. 51.

Court of Appeals of Maryland.

Dec. 24, 1957.

Habeas corpus proceeding to secure release of prisoner in city jail. The Court of Appeals, Prescott, J., held that where defendant, confined in city jail, made ap-

[1] Section 239 provides, *inter alia*, that if an administrator shall not render the first administration account as required by law or shall not within three months after the date of his letters exhibit to the court an inventory, a summons, returnable in not less than eight nor more than thirty days may, ex officio, be issued against such administrator to show cause "wherefore such inventory has not been exhibited," or such account has not been rendered. And upon the return of the summons "summoned," or upon two citations being returned "non est" by the sheriff of the county wherein the party resided at the time of obtaining his letters, if the administrator does not appear at the return of the summons, or appearing, fails to show satisfactory cause, the court may revoke his letters.[2] This Court has frequently stated that the right to administer is a valuable one, and an administrator will not be removed except for "legal and specific causes, and after citation and opportunity to be heard in opposition to the motion." Johnson v. Macaboy, 226 Md. 23, 30, 171 A.2d 474, 478.

The order revoking Lombard's letters was dated July 17, 1963, and, among other things, contains this recital, "Whereas—by authority of Article 93, Section 239 * * *, two summons have been issued to the said Earl J. Lombard *and two citations have [been] returned "non est" by the sheriff* * * *." (Italics supplied.) The Orphans' Court, apparently, was acting upon the assumption that the recital was correct, but, unfortunately, we have been unable to verify the italicized portion above, after a careful examination of appellant's brief and of the transcript.

These examinations reveal the following sequence of events. Lombard seems to have been extremely lax in attending to his duties as administrator, and, at least as early as the latter part of 1962, the court, by telephone calls and letters attempted to get him to settle the estate. He repeatedly requested additional time, and, apparently, took the position that he was entitled to the same as a matter of right, if he had other matters that allegedly needed his attention. Finally, the court, on June 18, 1963, notified him, by registered letter, to be in court on June 21, 1963, to show cause why he should not be removed. This letter was unclaimed. It was followed by another registered letter, dated June 21, 1963, directing him to be in court no later than June 26, 1963, for the same purpose. It, too, was unclaimed. On June 28, 1963, the court passed an order commanding the sheriff to "cite and summon" Lombard to appear before the court on July 12, 1963. The return to this order was "non est." On July 12, 1963, the court passed another order, similar to that described above, which directed the sheriff to "cite and summon" Lombard to be in court on July 23, 1963. The return to this order was "summoned," without the date of its service being noted thereon. This, conceivably, could be a very important part of the return. (The record does reveal, however, that this return was "received" by the court on July 19, 1963.)

At this point, certain inexplicable procedure followed, which is determinative of our decision. Although the sheriff had the court's order commanding him to summon Lombard to be in court on July 23, 1963, to show cause, etc., on July 17, 1963, it passed the order, referred to above, reciting that two citations [had] been returned "non est," and revoking his letters. Thereafter, on July 19, 1963, still another order was passed by the court commanding the sheriff to cite and summon Lombard "forthwith" to be and appear before the court. This order was served upon Lombard on July 21, 1963, some four days after his letters had been revoked.

[2] From the above, it is obvious that no return of "summoned" to a citation and summons for an appearance by Lombard on, or before, July 17, 1963, was existent at the time of the order, and two returns of "non est" had not been made on, or before, that date. Hence, the provisions of the statute were not complied with. We must, therefore, reverse the order, but we shall do so without prejudice to further proceedings relative to removal after proper notice, should the Orphans' Court deem such procedure desirable.

Order reversed, without prejudice to further proceedings relative to the removal of the administrator: Costs to be paid by appellant.

2. For some of the cases in this Court considering the sufficiency of causes for removal, see Johnson v. Macaboy, 226 Md. 23, 30, 171 A.2d 474; Smith v. Waller, 225 Md. 94, 169 A.2d 454; Wheatley v. Fleischmann, 216 Md. 157, 140 A.2d 152; Fulford v. Fulford, 153 Md. 81, 137 A. 487.

233 Md. 640

Jesse Phillip HAWKINS

v.

WARDEN OF the MARYLAND PENITENTIARY.

Post Conviction No. 100.

Court of Appeals of Maryland.

Jan. 29, 1964.

Application for leave to appeal.

Before HENDERSON, HAMMOND, PRESCOTT, HORNEY and MARBURY, JJ.

PER CURIAM:

For reasons stated in the opinion of Judge Prendergast below, the application for leave to appeal is hereby denied.

Application denied.

233 Md. 372

PEM CONSTRUCTION CO.

v.

CITY OF BALTIMORE.

No. 108.

Court of Appeals of Maryland.

Jan. 28, 1964.

Proceeding on appeals from a decision of the Baltimore City Court, Joseph L. Carter, J., affirming the denial of a variation or special exception for two adjoining parcels of land in residential zone. The Court of Appeals, Sybert, J., held that evidence that residential use of the property would not be feasible according to developer's original plans because they would be difficult to sell did not establish an urgent necessity rather than a mere convenience and would not support the grant of a variance.

Affirmed.

1. Zoning ⇐497

Variance or special exception will not be granted on the basis of practical difficulties or unnecessary hardships if such are the result of the applicant's own action.

2. Zoning ⇐497

Contention that zoning restrictions cause peculiar hardships entitling landowner to a variance is not available to one who purchases realty with the intention of applying for a variance.

3. Zoning ⇐495

When an applicant seeks a zoning variance on the basis of practical difficulties or unnecessary hardships, he has the burden of establishing a substantial and urgent need which would justify the exception.

4. Zoning ⇐502

Evidence that residential use of property in residential zone would not be fea-

sible according to developer's original plan because houses constructed thereon would be difficult to sell did not establish an urgent necessity rather than a mere convenience and would not support the grant of a variance.

Sol C. Berenholtz, Baltimore, for appellant.

John A. Dewicki, Asst. City Sol. (Joseph Allen, City Sol. and George W. Baker, Jr., Deputy City Sol., on the brief) all of Baltimore, for appellee.

Before BRUNE, C. J., and HAMMOND, PRESCOTT, HORNEY and SYBERT, JJ.

SYBERT, Judge.

A developer appeals from a decision of the Baltimore City Court which affirmed a resolution of the Board of Municipal and Zoning appeals denying a variation or special exception so that two adjoining parcels of land located in a D–40 residential area could be used as parking lots for a nearby shopping center.

The appellant, Pem Construction Company, is the owner of both parcels, one known as 5451 Tippett Avenue (referred to on a plot plan as Parcel No. 2), and the other as 5401–43 Tippett Avenue (referred to on the plot plan as Parcel No. 3). Tippett Avenue, 50 feet wide, runs in an east-west direction.[1] Parcel No. 2 has a frontage on the north side of Tippett Avenue of about 233 feet, and is about 100 feet in depth. Parcel No. 3, to the east of Parcel No. 2 (the two tracts being separated by a 15 foot right of way), fronts approximately 192 feet on the north side of Tippett Avenue and has a depth of 85 feet. Reisterstown Road, an arterial highway, is one block south of Tippett Avenue and runs parallel thereto. One block north, and parallel to Tippett Avenue, is Price Avenue. Rogers Avenue is west of the area in dispute, and Lewiston Avenue is to the east; both of these streets run in a north-south direction. Fronting on the north side of Reisterstown Road (in the 5400 block) and on the east side of Rogers Avenue, there is a shopping center known as the Hilltop Shopping Center. The back of the shopping center is on the south side of Tippett Avenue, across from Parcel No. 2. Parcel No. 3 faces an existing commercial parking lot and various buildings across Tippett Avenue. The subject parcels are abutted by two-story masonry dwellings on Rogers Avenue to the west and on Price Avenue to the north. On the east, a 90 foot lot with an existing dwelling separates the tracts from Lewiston Avenue, on the east side of which there are two-story dwellings.

In 1946 the appellant owned a tract embracing what are now Parcel No. 2, the Hilltop Shopping Center area, and the land to the west and north of Parcel No. 2 (on which two-story masonry dwellings have been erected). At that time, as well as now, the shopping center area was zoned commercial and Parcel No. 2 and the land west and north thereof were zoned residential. The appellant proceeded to develop the residential areas first; the dwellings were built in 1946 and the shopping center in 1947. Houses were constructed west of Parcel No. 2, facing west on Rogers Avenue, and north thereof facing north on Price Avenue. Nothing was built on Parcel No. 2. Parcel No. 3 was not acquired by the appellant until 1960; the appellant has never owned the land opposite Parcel No. 3 across Tippett Avenue, nor the houses on Price Avenue which are north of Parcel No. 3.

The appellant seeks a variation or exception from the residential area restrictions so that Parcels Nos. 2 and 3 may be

1. Actually the streets run in a northeast-southwest or northwest-southeast direction, but for purposes of simplicity, the streets involved will be treated as running east-west or north-south.

used for the parking of motor vehicles in conjunction with the Hilltop Shopping Center. The applications for the two lots were heard together by the Board of Municipal and Zoning Appeals (Board) and by the lower court on appeal, and thus both cases are in one record and are treated as one here.

Originally the applications were rejected by the Building Inspection Engineer of Baltimore City (the Zoning Commissioner), and an appeal to the Board ensued. The requests for special exception or variance were made pursuant to Sec. 36 of the Baltimore City Zoning Ordinance which provides in part that the Board may:

"(b) Grant a permit where the use or change of use of land, buildings or structures proposed to be used is limited as to its location because of the size of buildings, size of yards, irregularity of shape of land or buildings, topography, grade or accessibility * * *.

"(c) Grant a permit where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of any of the provisions of this Article * * *."

The Board denied the applications on the basis that, *inter alia*, "any hardship that has been created for the appellant is self-induced and therefore does not warrant the Board in making any exception". The appellant then appealed to the Baltimore City Court, which affirmed the decision of the Board on the basis that, "the record clearly shows that whatever hardship the appellant has incurred has been the result of his own mistakes and wrongdoings," and that "the appellant knew at all times that Parcels 2 and 3 were zoned D–40 Residential, and the law is clear that one cannot purchase land in expectation of being granted a variance or special exception."

At the hearing before the Board several qualified experts appeared for the appellant. One testified that although it would be possible to build homes on the parcels in question, they could not be sold profitably, and that the best use of the land would be for parking. Another testified that it would not be feasible to build homes on the parcels and that it would be difficult to sell such homes if they were built because they would have to face the back of the shopping center, or the back of the houses on Price Avenue. Both experts felt that a parking lot would not impair the value of the adjoining properties. An officer of the appellant corporation, a qualified architect, testified that it would not be feasible to build homes on the two parcels. On cross-examination, he stated that originally tract No. 2 was to be used for residential purposes, but that through the years such use was determined to be impracticable. When asked who had made the mistake in the original decision to use the parcels for residential purposes, he stated that the mistake had been "in our own judgment".

Several protestants also testified at the hearing before the Board. Owners of houses on Price Avenue testified that when they bought their homes, a representative of the appellant corporation had expressly stated that homes would be built on Parcel No. 2, and one said she had received a letter to that effect. Other protestants opposed the granting of permits on the basis that it would depreciate the value of their homes and would create a traffic hazard.

[1–4] Even though this Court has held that a variance or special exception will not be granted on the basis of practical difficulties or unnecessary hardships if such were the result of the applicant's own action, Marino v. City of Baltimore, 215 Md. 206, 137 A.2d 198 (1957), and that where a person purchases realty with the intention of applying for a variance, he cannot contend that the zoning restrictions cause him such peculiar hardships as to entitle him to the variance, Gleason v. Keswick Improvement Ass'n., 197 Md. 46, 78 A.2d

164 (1951), there is another, more compelling reason why the applications were properly denied in this case. When an applicant seeks a variance on the basis of "practical difficulties or unnecessary hardships" (Sec. 36(c), supra), he has the burden of showing a substantial and urgent need which would justify the exception. As was stated in Cleland v. City of Baltimore, 198 Md. 440, 444, 84 A.2d 49, 51 (1951):

> "* * * This court has consistently held that special exceptions will never be granted to gratify mere convenience, that there must be a necessity, and that necessity must be so urgent, and the facts so extraordinary as to require the withdrawal of that particular case from the application of the accepted rule. That accepted rule is the division made in the zoning ordinance for various classes of use districts. It is part of a general plan which is not intended to be changed except in cases of urgent necessity. * * *"

In the present case the testimony produced by the appellant did not rule out the possibility of residential use of the parcels by utilizing a different plot plan, or of other uses permitted in residential districts. The evidence only showed that it would not be "feasible" to build houses according to the plan originally intended by the appellants because they would be difficult to sell. We believe that this testimony was insufficient to establish an urgent necessity, rather than mere convenience, and thus could not support the granting of a variance. Our most recent consideration of this problem was in City of Baltimore v. Polakoff, 233 Md. 1, 194 A.2d 819 (1963), in which we adhered to the rule stated in Cleland, supra. Cf. Carney v. City of Baltimore, 201 Md. 130, 93 A.2d 74 (1952); Heath v. Mayor and City Council of Baltimore, 190 Md. 478, 58 A.2d 896 (1948). The appellant here is in the same situation as were the appellants in Marino, where it was said (at p. 221 of 215 Md., at p. 204 of 137 A.2d): "* * * there are insufficient facts to show indisputably that the residential use ordinance so restricts the use of their property that it cannot be used for any reasonable purpose. * * *" Cf. City of Baltimore v. Cohn, 204 Md. 523, 105 A.2d 482 (1954). The facts before us fall substantially short of establishing a taking in a constitutional sense. Cf. Frankel v. City of Baltimore, 223 Md. 97, 101, 162 A.2d 447 (1960).

Although the appellant also asked for a variance under Sec. 36(b), supra, our examination of the record reveals no evidence of any limitation on the use of the land by "size of buildings, size of yards, irregularity of shape of land or buildings, topography, grade or accessibility" as would justify an exception. The premises in question do not appear to come within the purview of this section. Cf. Marino (at p. 217 of 215 Md., at p. 202 of 137 A.2d).

Judgment affirmed; appellant to pay the costs.



233 Md. 637

Monroe BANKS

v.

WARDEN OF the MARYLAND PENITENTIARY.

Post Conviction No. 89.

Court of Appeals of Maryland.

Jan. 28, 1964.

Application for leave to appeal.

Before HENDERSON, HAMMOND, PRESCOTT, HORNEY and MARBURY, JJ.

PER CURIAM:

For the reasons assigned by Judge Harlan in the court below, the application for leave to appeal will be denied.

Application denied.



233 Md. 344

Kathryn W. LEATHERBURY

v.

William E. LEATHERBURY.

No. 166.

Court of Appeals of Maryland.

Jan. 24, 1964.

Proceeding by second wife for divorce on ground that Alabama divorce obtained by husband in order to marry her was void. The Circuit Court, Montgomery County, Walter H. Moorman, J., dismissed the bill, and the wife appealed. The Court of Appeals, Hammond, J., held that second wife could not collaterally attack validity of Alabama decree obtained by husband in proceeding wherein both husband and first wife appeared and participated.

Order affirmed.

1. Divorce ⇐172

If one spouse did not participate in divorce proceeding, he or she or state may show that court granting divorce had no jurisdiction over that spouse.

2. Divorce ⇐168

If original defendant spouse in divorce proceeding seemingly then participated but in actuality did not, inattentive deluded or defrauded one may later collaterally attack divorce.

3. Evidence ⇐35

Where second wife who had burden of persuading Maryland court that Alabama would permit collateral attack by subsequent spouse on divorce decree granted by one of its courts did not give notice of her intention to rely on Alabama law under Uniform Judicial Notice of Foreign Law Act and there was no waiver of such requirement, neither Maryland circuit court nor Court of Appeals was required to notice judicially Alabama law other than to presume it was like that of Maryland. Code 1957, art. 35, §§ 47–53; Maryland Rules, Rule 885.

4. Divorce ⇐168

Under Alabama law, where both parties participate, divorce decree regular on its face but actually fraudulent is not void but voidable and neither party alone can collaterally attack it if he or she participated in its procurement.

5. Divorce ⇐354

Second wife who sought divorce in Maryland circuit court on ground that Alabama divorce obtained by husband in order to marry her was void could not collaterally attack validity of Alabama decree obtained by husband in proceeding wherein both husband and first wife appeared and participated.

George L. Quinn, Jr., Silver Spring, and John D. Connelly, Rockville, for appellant.

Edward L. Foster, Silver Spring, for appellee.

Before HENDERSON, HAMMOND, HORNEY, MARBURY and SYBERT, JJ.

HAMMOND, Judge.

A second wife appeals from the dismissal of her bill seeking a divorce on the claim that the Alabama divorce her husband obtained in order to marry her was void. The appellant and her present husband had dis-

ham, filed a bill of complaint for the sale in lieu of partition of real property. The said two infants, together with Mary Anna Graham and the defendant below, Michael J. Rybikowsky (why his name is Rybikowsky and not Ciuffreda is undisclosed by the record) are the four surviving children, heirs at law and next of kin of Alfred Michael Ciuffreda, who died intestate on September 8, 1960, while seized of the real estate here involved. The defendants below were Michael J. Rybikowsky, Theresa A. Nolan, the Emigrant Industrial Savings Bank, and the appellants Joseph B. Pino and his wife, Mary T. Pino. Theresa A. Nolan was the assignee of Rybikowsky's one-fourth interest in his father's estate under an assignment dated August 16, 1962. She in turn had assigned the one-fourth interest to appellants Pino under an assignment dated September 21, 1964. The validity of these assignments was established by the lower court, and is not questioned on this appeal. The Emigrant Industrial Savings Bank was the holder of a note secured by a deed of trust on the subject property.

On October 27, 1960, the administrator of Alfred Ciuffreda's estate erroneously contracted with the appellants to sell the property to them for a total purchase price of $15,000.00, including the balance owing on the trust note. In connection with this purported agreement the Pinos paid to a real estate broker the amount of $500.00 as a deposit and an additional $4,315.43 to the administrator. Pursuant to the agreement the appellants have occupied the subject property, making improvements, paying taxes and insurance, and making payments on the note secured by the deed of trust on the premises. As earlier pointed out, they subsequently acquired a one-fourth interest of one of the decedent's heirs.

The real property was sold on May 31, 1967, at public sale to Joseph B. Pino, one of the appellants, for the sum of $11,600.-00, subject to a balance of $3,554.21 due the Emigrant Industrial Savings Bank on its trust note. By order of the Circuit Court for Prince George's County dated November 18, 1966, the appellants and any other party were allowed to file claims for any allowances they felt they had "with respect to any part of the net proceeds resulting from said sale * * *." After such claims had been made by the appellants and the appellees had filed their opposition, the court referred the matter to the court auditor. The auditor filed reports granting certain of the claimed allowances and denying others. In addition to other claims allowed the Pinos, he allowed the aggregate amount of the monthly payments made by the Pinos on the trust note toward principal and interest. However, he disallowed their claim in the amount of $3,823.98, representing the curtailments they had made against the principal balance of said trust note. In their brief, appellants stated that these curtailments were made by them on January 5, 1962, in the amount of $911.99, and on February 2, 1962, in the amount of $2,911.-99, totaling $3,823.98. Thus the auditor allowed the aggregate of the individual monthly payments, but disallowed both large lump sum payments.

On October 3, 1967, the lower court issued an order ratifying the auditor's report. The appellants filed a motion for reconsideration of the court's order, and the auditor filed a supplementary memorandum in opposition. On October 27, 1967, the lower court denied the motion for reconsideration relying upon the authorities stated in the auditor's memorandum, and the Pinos have appealed to this Court.

[1] The issue presented is whether the lower court erred in ratifying the auditor's report which disallowed appellants' claim for contribution from the other co-tenants for lump sum curtailment payments made on the trust note which was secured by the subject property. We do not find the authorities relied upon by the lower court as determinative of this issue. The general rule in Maryland is that when one tenant pays a mortgage or other encumbrance upon the common property, he is entitled

to contribution from his co-tenants to the extent to which he has paid their share, and is entitled to an equitable lien for the amount due him. Meyers v. East End Loan & Sav. Assn., 139 Md. 607, 116 A. 453; Hogan v. McMahon, 115 Md. 195, 80 A. 695. See Withers v. Douglas, 206 Md. 141, 110 A.2d 513.

[2] The auditor allowed the Pinos a credit for the aggregate amount of the individual monthly payments, but disallowed their claim for the curtailment payments on the ground that these payments were for the exclusive benefit of their estate. We cannot agree that the other co-tenants received no benefit. The equity of the non-contributing co-tenants was increased by these payments just as it was increased by the monthly sums paid by the Pinos. The final result of both the curtailment payments and the monthly payments was to increase the co-tenants' *aliquot* share in the property. Equity will not allow the unjust enrichment of the appellees at the appellants' expense. The Restatement of Restitution, Section 105 (1937) provides:

"Protection of Things Owned by Payor and Another.

(1) Where two persons are tenants in common or joint tenants and one of them has taken reasonably necessary action for the preservation of the subject matter or of their common interests, he is entitled to indemnity or contribution, enforced by means of a lien upon the interest of the other

(a) if he made a request to the other to join in such preservation, or

(b) without such request, if action was immediately necessary and the other was not available.

(2) A person who through legal proceedings procures or preserves property in which he and another have on [sic] interest may be entitled to reasonable compensation for his services and restitution of his expenses in obtaining or preserving the property."

Comment b to this section states that "the rule applies to the payment of encumbrances against the common property * *."

For the above mentioned reasons the lower court's order of October 3, 1967, ratifying the auditor's report and account, is reversed in part to allow the appellants' contribution from the proportionate shares of the co-tenants for their curtailment payments.

Order affirmed in part and reversed in part and case remanded for modification of the Auditor's report in accordance with this opinion. Costs of this appeal to be charged against the interests of the appellees.



251 Md. 554

Andrew J. BURNS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE et al.

No. 405.

Court of Appeals of Maryland.

Dec. 4, 1968.

Appeal from ruling of the Baltimore City Court, J. Harold Grady, J., affirming resolution of zoning board approving application for variance. The Court of Appeals, Finan, J., held that factors upon which applicant's financial crisis depended, namely, current occupancy demands, general economic conditions and management, were factors which presented problems to other rental properties in the neighborhood and were not sufficiently peculiar to applicant's premises as to justify relaxation of zoning ordinance on basis of financial hardship, assuming, arguendo, that hardship may be the subject of valid consideration.

Judgment reversed.

1. Zoning ⇐536

Burden of showing facts to justify an exception or variance rests on applicant, and it must be shown that hardship affects particular premises and is not common to other property in neighborhood.

2. Zoning ⇐496

Factors upon which variance applicant's financial crisis depended, namely, current occupancy demands, general economic conditions and management, were factors which presented problems to other rental properties in neighborhood and were not sufficiently peculiar to applicant's premises as to justify relaxation of zoning ordinance on basis of financial hardship, assuming, arguendo, that hardship may be the subject of valid consideration.

J. Francis Ford, Baltimore (J. Joseph Curran, Jr., Baltimore, on the brief) for appellant.

Paul L. Betz, Baltimore (Charles Mindel and Buckmaster, White, Mindel & Clarke, Baltimore, on the brief) for Leroy Kappelman, and another part of appellees.

Simon Schonfield, Asst. City Solicitor (George L. Russell, Jr., City Solicitor, Baltimore on the brief) for Mayor and City Council of Baltimore, other appellee.

Before HAMMOND, C. J., and BARNES, McWILLIAMS, FINAN and SMITH, JJ.

FINAN, Judge.

This is an appeal from a ruling of the Baltimore City Court which affirmed the resolution of the Board of Municipal and Zoning Appeals (Board) approving the application of Leroy F. Kappelman, Ralph Lubrow and Marian Kappelman, a partnership (appellee), to add two single bedroom units in space already existing, in each of two apartment buildings owned by the appellee designated as Nos. 6103–05 and 6107–09 Bellona Avenue. Appellant is the owner of residential property in which he resides in Baltimore and his home is in close proximity to 6103–05 and 6107–09 Bellona Avenue.

The property designated as 6103–05 is located in an E–40 height and area district and the lot contains 25,918.64 square feet. Under sections 28 and 29 of the Zoning Ordinance (Baltimore City Code (1950 ed., as amended) Art. 40) this lot is sufficient to accomodate ten families. The property designated as 6107–09 contains a total of 31,830.49 square feet, of which 23,609.72 square feet is located in an E–40 height and area district which is sufficient to accommodate nine families and 8,220.77 square feet is located in an F–40 height and area district which is sufficient to accommodate one family. In 1965 each of the lots now designated as Nos. 6103–05 and 6107–09, were improved by a two-story, brick apartment building, 30 feet by 156 feet, housing ten families; the terrace level, two families and the first and second floors, four families each, all in double bedroom units. There was space provided for two additional single bedroom apartments in each of the buildings but they were not completed because under the restrictions of the Zoning Ordinance only ten family occupancy was permitted; consequently, the extra space was used for storage. Construction was completed on these buildings in January, 1965, and the first tenants took possession in April of that same year. In May, 1965, after the apartment units had been in operation for only one month, the appellee made a request for four additional single units, which request was denied because the Board felt that the apartments had not been operated for a sufficient length of time to show hardship. Two years later, in 1967, the appellee filed two applications, one for each property, requesting two additional single bedroom units in each building. The effect of its requests would be to increase the density so that twelve families would be allowed in each of the apartment houses instead of ten, as set out in sections 28 and 29 of the Zoning Ordinance. Again the appellee based its requests primarily on the basis of hardship. Both of appellee's requests were originally turned down by the Zoning Commissioner and appeals were taken to the Board. The Board, after combining the appeals and holding a hearing on them, found that the appellee had shown sufficient hardship under section 40(c) of the Zoning Ordinance (hardship provision) to justify the granting of a special exception and approved the applications.

The resolution of the Board was appealed to the Circuit Court for Baltimore City and there it was affirmed. It is from that ruling that this appeal is taken.

The main thrust of the appellee's hardship argument is that it has sustained a financial loss. In 1966 the loss was $21,363.66, including $21,200.00 depreciation and the projected loss for 1967 was $4,200.00, without taking into consideration depreciation.

This hardship argument was underpinned with evidence that in the general area of the apartments the demand for single bedroom units was seven (7) times that for double bedroom apartments; that if the apartments did not generate additional revenue, service for the tenants and the quality of maintenance would deteriorate with an accompanying detrimental effect on the appearance of the buildings; that appellee intended to provide the additional parking space which the increased occupancy would require; that since the construction of the apartments, Bellona Avenue had been widened by eight feet, thus minimizing any potential traffic congestion; and that the increase in density would not adversely affect the health, safety or welfare of the neighborhood.

Against these contentions the appellant points out that at the time the partnership purchased the property and erected the buildings, it knew full well that only ten (10) families could lawfully be housed on each of the areas in question.

The appellant also argues that the fact, that at the time the buildings were constructed, provision was made for additional space, readily convertible into four (4) extra apartments, raises the suspicion that this may have been by deliberate design in the hope that at some future time the zoning authorities could be persuaded to relax the regulations and allow the construction of the additional units, such as was approved by the Board and affirmed by the lower court.

The lower court in its oral opinion emphasized that the exception granted by the Board was of a "minimal nature." However, this in itself would not justify arbitrary and capricious action on the part of the Board in granting the exception to the Code, as contended by the appellant.

We think the Board did act arbitrarily in granting the exception and that the lower court erred in not reversing the Board's action as constituting an abuse of its discretion.

In City of Baltimore v. Polakoff, 233 Md. 1, 194 A.2d 819 (1963), a case wherein the owner-developer requested a special exception to allow him to construct a four story, 32 family, luxury apartment house, allegedly in demand, on a lot restricted by zoning to a density of 18 families, Judge Hammond (now Chief Judge) speaking for the Court said: "Mr. Polakoff did not meet the burden he bore as an applicant, showing no more than that the granting of the exception would do no harm and be a profitable convenience to him. Under the cases this is not enough. * * *." Id. 9, 194 A.2d 824. In Easter v. Mayor and City Council of Baltimore, 195 Md. 395, 73 A.2d 491 (1950), in reversing the lower court and the zoning board, both of which on the basis of hardship had granted a special exception to front yard requirements to permit an owner to extend a store front on a combination store and dwelling, we said: "* * * The mere fact that the variance would make the property more profitable is not a sufficient ground to justify a relaxation of setback requirements. * * *." Id. 400, 73 A.2d 492.

Assuming, *arguendo*, that straitened financial circumstances could be considered a hardship which would justify a relaxation of the ordinance, the appellee has actually presented a very thin case. In Board of County Commissioners v. Luria, 249 Md. 1, 238 A.2d 108 (1968), in reversing the circuit court which had in turn reversed the action of the Board of County Commissioners for Prince George's County, sitting as the District Council, which had denied a special exception for a gasoline filling station, we stated:

"* * * It is our view that such findings must be based on testimony, and that the applicant assumes the burden of adducing such testimony, even in a prima facie case. * * *." Id. at 3, 238 A.2d at 109.

See also Board of County Commissioners for Prince George's County v. Lightman, 251 Md. 86, 246 A.2d 261.

In the instant case the record reveals that during the year 1966, after allowing $22,100.00 for depreciation, the operation broke about even. The figures for 1967 were projected and presented an estimated $4,200.00 loss after taking depreciation. The testimony on occupancy was vague to the point that it did not close the door on the possibility of obtaining better income from the existing facilities.

[1, 2] Also, as we stated in *Easter*, supra:

"The burden of showing facts to justify an exception or variance rests upon the applicant, and it must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood. * * *." Id. at 400, 73 A.2d at 492.

Certainly, in the instant case, factors which contribute to the financial crisis complained of by the appellee depend on current occupancy demands, general economic conditions and management; all factors which may quickly vary. These are also factors which present problems common to other rental properties in the neighborhood and are not sufficiently peculiar to the appellee's premises as to justify the relaxation of the ordinance on the basis of financial hardship, assuming, for the sake of argument, that hardship may be the subject of valid consideration.

We are of the opinion that the lower court erred in affirming the action of the Board.

Judgment reversed, appellees to pay costs.



251 Md. 428

George M. FINLEY et ux.

v.

TEETER STONE, INC.

No. 355.

Court of Appeals of Maryland.

Nov. 19, 1968.

Owners of farm brought action against quarrying company for damage to farm as result of the pumping of percolating water from quarry by quarrying company. The Circuit Court for Carroll County, James Macgill, C. J., rendered a judgment for the quarrying company, and the owners of the farm appealed. The Court of Appeals, Barnes, J., held that where quarrying company, in operation of quarry, was required to pump water from quarry, drawing percolating water from adjoining farm and withdrawal of percolating water caused sink holes on farm and damaged farm, but there was no negligence by quarry company in its excavation of its quarry or any waste, malice, or sale of percolating waters, or other unreasonable use, quarrying company was not liable to owners of farm for damages resulting from pumping percolating waters from quarry.

Judgment affirmed.

1. Waters and Water Courses ⇐99

"Subterranean waters" are generally considered to be underground streams or percolating waters.

See publication Words and Phrases for other judicial constructions and definitions.

2. Waters and Water Courses ⇐99

To be classified as "underground stream" water must flow in a definite and fixed channel whose existence and location is either known or may be ascertained from indications on surface of land or by other means without subsurface excavations to determine such existence and location.

See publication Words and Phrases for other judicial constructions and definitions.

3. Waters and Water Courses ⇐99

"Percolating waters" are those which ooze, seep or filter through soil beneath surface, without a defined channel, or in a course that is unknown and not discoverable from surface indications without excavation for that purpose, and fact that they may, in their underground course, at places come together so as to form veins or rivulets does not destroy their character as percolating waters".

See publication Words and Phrases for other judicial constructions and definitions.

4. Waters and Water Courses ⇐107(3)

Unless it can be shown that underground water flows in a defined and known channel, it will be presumed to be percolating water.

5. Waters and Water Courses ⇐100, 101

While normally the use of underground streams is governed by same law as applies to those waters flowing in defined and fixed channels above the surface, a separate and distinct body of law has developed governing the use of percolating waters.

6. Waters and Water Courses ⇐106

The pumping of large quantities of water, incident to mining or quarrying operations is both reasonable and necessary.

7. Mines and Minerals ⇐121

Generally, landowner engaged in ordinary and usual mining operations is not responsible for damages resulting from diversion or destruction of flow of percolating waters.

8. Mines and Minerals ⇐122

Where quarrying company, in operation of quarry, was required to pump water from quarry, drawing percolating water from adjoining farm, and withdrawal of percolating water caused sink holes on farm and damaged farm, but there was no negligence by quarry company or any waste, malice, or sale of percolating waters, or other unreasonable use, quarrying company was not liable to owners of farm for damages resulting from pumping percolating waters from quarry.

9. Waters and Water Courses ⇐100, 101

Interference with support provided by water is not subject to same rules of absolute liability that are imposed on a landowner who deprives his neighbor of natural support provided by soils and other more solid materials.

Carl H. Lehmann, Jr., Baltimore, for appellants.

Richard A. Reid, Towson (Royston, Mueller, Thomas & McLean, Towson, and Charles O. Fisher and Walsh & Fisher, Westminster, on the brief), for appellee.

Before HAMMOND, C. J., and BARNES, McWILLIAMS, SINGLEY and SMITH, JJ.

the progress achieved toward implementation of the master plan.

(2) Preparing, at least every six years, recommending to the county council, and administering, a zoning map.

(3) Preparing and recommending to the county council rules and regulations governing the subdivision of land, and administering the subdivision rules and regulations as adopted.

(4) Preparing and recommending to the county council zoning rules and regulations which, together with the zoning map, shall constitute a zoning code.

(5) Administering the zoning code.

(b) The master plan shall be adopted as provided by section 523 of this Charter. All other plans, zoning maps, and rules and regulations recommended for adoption, amendment or repeal by the offices of planning and zoning, the planning board or the zoning commissioner shall, prior to taking effect as law, be approved by legislative act of the county council.
(Bill No. 83, 1978, § 2; approved by voters Nov. 7, 1978; effective Dec. 8, 1978; Bill No. 128, 1990, § 1; approved by voters Nov. 6, 1990; effective Dec. 7, 1990)

Sec. 523. The master plan and the zoning maps.

(a) *Definition and implementation of the master plan.* The master plan shall be a composite of mapped and written proposals setting forth comprehensive objectives, policies and standards to serve as a guide for the development of the county. Upon receipt of the master plan from the office of planning and zoning, the county council shall accept or modify and then adopt it by resolution.

(b) *Definition and implementation of the zoning maps.* The zoning maps shall show the boundaries of the proposed districts, divisions and zones into which the county is to be divided consistent with the master plan. Upon receipt of the zoning map from the office of planning and zoning, the county council shall accept or modify and then adopt it by legislative act.
(Bill No. 83, 1978, § 3) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

Sec. 524. Reorganization of office of planning and zoning.

Notwithstanding any other provisions of this Charter, the county council shall have the power by legislative act to reorganize the office of planning and zoning, to define the duties of the director of said office, to establish the powers, duties and compensation of the planning board, and to establish the duties and responsibilities of the zoning commissioner and deputy zoning commissioners, so that planning and zoning functions shall be conducted in the best interests of the county and its future development and growth.
(Bill No. 83, 1978, § 1; approved by voters Nov. 7, 1978; effective Dec. 8, 1978; Bill No. 128, 1990, § 1; approved by voters Nov. 6, 1990; effective Dec. 7, 1990)

Sec. 524.1. People's counsel.

(a) The county executive shall appoint a people's counsel who shall represent the interests of the public in general in zoning matter as hereinafter set forth, subject, however, to confirmation by the county council, and such person so appointed shall continue to serve as people's counsel until such time as he or she resigns or has been removed pursuant to the provisions herein contained:

(1) *Qualifications:* The people's counsel shall be a resident of Baltimore County, a member in good standing of the Maryland Bar, and actively engaged in the general practice of law for at least five (5) years prior to his appointment.

(2) *Removal:* The people's counsel may be removed at any time on the recommendation of the county executive and with the affirmative vote of not less than a majority plus one of the total number of county council members established by this Charter. (Bill No. 90, 1978, § 1) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

(3) *Powers and duties:* The people's counsel shall have the following powers and duties:

A. He shall appear as a party before the zoning commissioner of Baltimore County, his deputy, the county board

of appeals, the planning board, and the courts on behalf of the interests of the public in general, to defend any duly enacted master plan and/or comprehensive zoning maps as adopted by the county council, and in any matter or proceeding now pending or hereafter brought involving zoning reclassification and/or variance from or special exception under the Baltimore County Zoning Regulations, as now or hereafter in force and effect, in which he may deem the public interest to be involved. In defense of the zoning maps or master plan, he may appear as a party in interest before all state and federal agencies, boards, and courts on matters involving the preservation of the quality of the air, land, and water resources of Baltimore County, and/or may initiate such proceedings in the public interest. He shall have in such appearance, all the rights of counsel for a party in interest, including but not limited to the right to present his case, to cross examine, to object, to be heard, and to file and prosecute an appeal in his capacity as people's counsel from any order or act of the zoning commissioner of Baltimore County or his deputy, or of the county board of appeals to the courts as an aggrieved party pursuant to the provisions of Section 604 of this Charter to promote and protect the health, safety and general welfare of the community. The people's counsel may also prosecute an application before any state or federal court for injunctive and other relief incidental thereto, to enjoin violation of any Baltimore County zoning maps or master plan or as authorized by resolution by the county council. (Bill No. 90, 1978, § 1) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

B. He shall make such investigations as he may deem necessary to the intelligent performance of his duties imposed by subparagraph A. of this Section.

C. He shall have full access to the records of all county agencies, shall be entitled to call upon the assistance of county employees, and shall have the benefit of all other facilities or information of the county in carrying out his duties.

(4) *Employment of experts:* The people's counsel may hire from time to time, as needed, in connection with specific proceedings before the above named bodies, experts in the fields of planning, zoning, traffic, engineering, ecology and architecture, to the extent that county personnel cannot be utilized, and to expend such sums for compensation and/or expenses of these experts as shall be provided in the annual budget.

(5) *Salary and expenses:* He shall receive an annual salary and such sums as may be needed to carry out the powers and duties set forth herein as provided in the annual budget.

(Bill No. 104, 1960; Bill No. 61, 1974, § 1; Bill No. 90, 1978, § 1; approved by voters Nov. 7, 1978; effective Dec. 8, 1978; Bill No. 131, 1990, § 1; approved by voters Nov. 6, 1990, effective Dec. 7, 1990)

Annotation—The people's counsel has the right to appeal zoning decisions. People's Counsel for Baltimore County v. Williams, 45 Md. App. 617, 415 A.2d 585 (1974).

Subdivision 7. [Reserved.] *

DIVISION 3. DEPARTMENTS IN THE ADMINISTRATIVE SERVICES

Subdivision 1. Department of Public Works

Sec. 525. Director of public works.

The department of public works shall be administered by the director of public works who shall be a professional engineer registered under the laws of this state, and shall have had responsible charge of engineering works over a period of at least ten years prior to his appointment. He shall have such other qualifications as may be provided

*Editor's note—Subdivision 7, consisting of sections 524.2 and 524.3, was repealed by Bill No. 131, 1990, § 2, which was approved by the voters on Nov. 6, 1990, effective Nov. 6, 1990.

5/13/97

IN RE: PETITION FOR SPECIAL HEARING * BEFORE THE
NW/S Cromwell Bridge Road, 78' SW
of the c/l of Loch Raven Road * ZONING COMMISSIONER
(2260 Cromwell Bridge Road)
9th Election District * OF BALTIMORE COUNTY
4th Councilmanic District
* Case No. 97-332-SPH
Ronald Sanders
Petitioner *

* * * * * * * * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of a Petition for Special Hearing for that property known as 2260 Cromwell Bridge Road, located in the vicinity of Loch Raven Road near the Loch Raven Reservoir. The Petition was filed by the owner of the property, Ronald Sanders. The Petitioner seeks approval of a waiver to permit construction of a parking lot in a riverine floodplain, pursuant to Section 500.6 of the Baltimore County Zoning Regulations (B.C.Z.R.), Section 517.2 (510.2) of the Building Code, and Sections 26-276, 26-670, and 260-172(a)(3) of the Baltimore County Code (B.C.C.). In addition, the Petitioner seeks approval of an amendment to the previously approved site plan in Case No. 96-168-SPHA to reflect the proposed parking configuration. The subject property and relief sought are more particularly described on the site plan submitted, which was accepted into evidence as Petitioner's Exhibit 3, and the site grading plan submitted into evidence as Petitioner's Exhibit 4.

Appearing at the hearing on behalf of the Petition were Ronald Sanders, property owner, Joseph L. Larson, a principal with Spellman, Larson & Associates, the land use consultants firm which prepared the site plan and grading plan for this project, and Charles E. Brooks, Esquire, and Malcolm F. Spicer, Esquire, attorneys for the Petitioner. Also appearing in support of the Petition was Edwin S. Howe, III, a Professional

Date 5/13/97 By

Engineer with K.C.W. Consultants, Inc., who has expertise in the flood-plain regulations and proposed construction therein. A number of individuals attended the hearing and identified themselves as being in support of the Petition. In addition, several Protestants were present, including the Long Green Valley Association, and Lillian Jennifer, an individual, both of whom were represented by Leslie M. Pittler, Esquire.

Testimony and evidence offered revealed that the subject property consists of 2.113 acres, more or less, split zoned D.R.1 and B.L., and is improved with a one-story restaurant building, known as Sander's Corner. The subject building and use thereon have existed on the property for many years. The property is located at the northwest corner of Cromwell Bridge Road and Loch Raven Road, in the vicinity of the Loch Raven Watershed. The bulk of the property is zoned D.R.1, but for the footprint of the restaurant building which is zoned B.L. There is no doubt the B.L. zone on the property was assigned specifically to the building footprint in recognition of its long-standing commercial use.

Parking for the restaurant is located both on-site and across the street on the east side of Loch Raven Road. At the present time, the Petitioner has 37 parking spaces to support the restaurant use; however, this number falls well below that required by the B.C.Z.R. Testimony indicated that the restaurant, itself, consists of 4,548 sq.ft. of space, including a recent porch enclosure, and given this square footage, 73 parking spaces are required.

The zoning history of this site is significant, particularly, the opinion offered by Deputy Zoning Commissioner Timothy Kotroco on July 30, 1996 in Case No. 96-168-SPHA. In that case, the Petitioner sought special hearing relief to approve commercial parking in a residential zone, pursu-

ant to Section 409.8.B of the B.C.Z.R. The Petitioner also requested an amendment to the previously approved site plan in prior Case No. 91-256-SPH to reflect the proposed parking arrangement and existing improvements on the site, to confirm an existing parking area as nonconforming, and, in the alternative, to approve a modified parking plan, pursuant to Section 409.12 of the B.C.Z.R. In addition to the special hearing relief sought, the Petitioner requested a variance from Section 409.6.A.2 of the B.C.Z.R. to permit a reduction in the required number of parking spaces from 73 to 39.

For reasons set forth in that opinion, Deputy Commissioner Kotroco granted that portion of the special hearing requesting approval to allow commercial parking in a residential zone, to amend the previously approved site plan in prior Case No. 91-256-SPH, accordingly, and to confirm the existing nonconforming parking area. However, he denied that portion of the special hearing requesting approval of a modified parking plan, pursuant to Section 409.12 of the B.C.Z.R., and the variance request.

In his opinion, Deputy Commissioner Kotroco noted that the Petitioner proposed parking on the rear of the subject property, west of Loch Raven Road. He noted that this proposed parking area was located in the D.R.1 zoned portion of the site that required the special hearing approval which was, in fact, ultimately approved. However, Mr. Kotroco further stated that, "...the problem the Petitioner encounters in proposing a parking lot in this area, is that a 100-year floodplain bisects this portion of the property. Therefore, the proposed parking lot would be located within this 100-year floodplain. In addition to obtaining approval of such a parking arrangement, pursuant to this special hearing request, the Petitioner would also have to obtain approval and a waiver of the floodplain regulations from the Baltimore County Department of Public

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By

Works to allow this parking lot to exist within the floodplain. It is to be noted that as of the date of this hearing, the Petitioner has failed to request such a waiver from the Department of Public Works."

Further on in discussing his reasons for denying the Petition for Variance, Deputy Commissioner Kotroco noted that, "...the Petitioner has sufficient property on which to provide the required parking, provided he can obtain the necessary approval and waiver of floodplain regulations. Therefore, the Petition for Variance shall be denied." Lastly, Deputy Commissioner Kotroco concluded by stating, "As of the date of this hearing, the Petitioner has failed to obtain the requisite permission from the Department of Public Works and/or this Hearing Officer. Therefore, any relief granted herein shall be contingent upon the Petitioner obtaining the requisite approval to allow parking in the 100-year floodplain. A parking plan depicting the proposed parking area shall be submitted to the Department of Public Works (DPW) for review and approval within thirty (30) days of the date of this Order. In the event DPW does not grant a waiver of the floodplain regulations, then all of the relief granted herein shall be rescinded."

Based upon Deputy Commissioner Kotroco's findings, the Petitioner made application to the Department of Public Works for a recommended waiver to allow a parking lot in a riverine floodplain. Subsequently, the instant Petition for Special Hearing was filed. As noted above, this Petition was filed pursuant to Section 500.6 of the B.C.Z.R., which empowers the Zoning Commissioner to conduct hearings involving any violation or alleged violation or noncompliance with any zoning regulations, or the proper interpretation thereof. The Petition was also filed pursuant to Section 517.2 of the Baltimore County Code. This Section was enacted by

County Council Bill No. 173-93 and took effect on November 17, 1993. It is to be noted that Section 517.2 regulates the construction of structures in a floodplain. Although a parking lot is obviously not a structure, it is nonetheless an improvement and represents disturbance by grading and the construction of macadam.

Lastly, the Petition cites various sections of the Baltimore County Code. Section 26-172 (a)(3) allows the Hearing Officer (designated as the Zoning Commissioner by law) to grant waivers of the requirements of Divisions 3, 4 and 5 of the Development Regulations at the request of the Department Director. Section 26-276 prohibits development in a riverine floodplain, except under certain conditions. Finally, Section 26-670 specifically sets forth the criteria to be utilized when waivers from the floodplain regulations are requested.

In the instant case, testimony was offered on behalf of the Petition by Joseph L. Larson and Edwin S. Howe. Mr. Larson specifically discussed the history of this site, the proposed improvements to the property, and the evolution of the issues presented through the Petitions filed and considered by Mr. Kotroco. He opined that nearly the entire rear area of the site was located within a floodplain and that the request for waiver in this instance was appropriate. In his opinion, the proposed parking lot is necessary for the continued use of the restaurant, particularly in view of Deputy Commissioner Kotroco's decision denying the variance. Moreover, he opined that the construction of the parking lot would not cause a detriment to the property or surrounding area.

Mr. Larson's testimony was corroborated by Mr. Edwin Howe, a professional engineer, and an expert in floodplain matters. He believes

ORDER RECEIVED FOR FILING
Date 3/13/95
By [illegible]

that there will be no significant impact caused by the required fill and subsequent construction of the proposed parking lot.

In addition to the above testimony and evidence offered, the Petitioner submitted a copy of his letter to Charles R. Olsen, Director of the Department of Public Works, dated August 19, 1996. In essence, this letter sets forth the Petitioner's rationale in support of its waiver. Also submitted was Mr. Olsen's reply, dated January 23, 1997. That letter was offered for the purpose of satisfying the criteria that waivers can be granted only at the request of a Department Director. There was no objection or challenge that Mr. Olsen's letter represented such a recommendation and same will therefore be accepted as such.

The Protestants in this case did not offer any evidence. However, they oppose the requested waiver and as reasons therefor, argue that the Petitioner failed to comply with the requirements set forth in Section 26-670(a) of the Baltimore County Code. That Section provides that waivers shall be granted only upon a showing of good and sufficient cause; after a determination that failure to grant a waiver would result in exceptional hardship to the applicant; and, a determination 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. The Protestants conceded in their argument that the Petitioner produced sufficient testimony to support a finding that good and sufficient cause exists for the waiver and that the granting of a waiver would not increase flood heights, impact public safety, incur extraordinary public expense, create nuisances, cause fraud, or victimization of the

agree. The facts summarized above fully support such findings. The Protestants, however, claim that there has been no proof of exceptional hardship. The Protestants contend that the standard to determine exceptional hardship set forth in Cromwell v. Ward, 107 Md. App.1 (1995), applies.

I disagree that the standard to obtain variance relief as stated in Section 307 of the B.C.Z.R. is the same standard to obtain a waiver, pursuant to Section 26-670(a)(2) of the Baltimore County Code. Although obviously similar, the Council, in enacting these Sections, chose to employ different words. Proof of unreasonable hardship is required to obtain a variance, whereas, a showing of exceptional hardship is needed to obtain a waiver. Particularly with the long and well-known history of judicial review of the precise language of Section 307, the Council, in enacting Section 26-670, could have utilized identical language if it so desired. Clearly, it did not. Although similar in meaning and application, the words "unreasonable" and "exceptional" are not synonymous. Moreover, the Protestants cite no authority, and I know of none, where the requirements of Cromwell, supra, have been specifically applied to Section 26-670. For these reasons, I decline to do so.

The cardinal rule of statutory construction is to ascertain and carry out the intent of the legislature, which requires a consideration of the language of the enactment and giving that language its natural and ordinary meaning. Montgomery Co. vs. Beckman, 333 Md. 516 (1994). A review of the words used throughout Section 26-670 is helpful in determining what the legislature had in mind when it required a showing of exceptional hardship.

In this case, the Petitioner cannot obtain zoning variance relief and avoid the parking requirements for the reasons set forth in Deputy

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Date 2/13/96
By

Commissioner Kotroco's opinion. Moreover, as pointed out in the Petitioner's letter to Mr. Olsen, dated August 19, 1996, the granting of a waiver will, "...mitigate an ongoing traffic congestion and maneuverability problem ..." Obviously, without an additional parking area, these problems of congestion and maneuverability will continue. Moreover, the commercial operation would have to be reduced in size, an exceptional result.

I find that exceptional hardship would exist if the waiver were denied. The granting of the waiver to provide additional parking is appropriate in order to alleviate congestion and improve traffic conditions, not only on this site, but the public roads which lie adjacent thereto. This is not a matter of economic hardship, but a concern for public safety. The Council has recognized the commercial use of the existing building by zoning same B.L. To not permit parking adjacent to this use would be inappropriate. Thus, the request for a waiver shall be granted.

However, in granting the waiver, a condition shall be attached to the relief approved. Specifically, David Leikens of the Department of Environmental Protection and Resource Management (DEPRM) attended the hearing and participated therein. As he indicated, any relief granted within the instant Petition should be conditioned upon the Petitioner obtaining a variance from DEPRM's requirements relating to the disturbance of the subject property to build the parking lot. Specifically, although a zoning variance is not necessary, a variance from DEPRM's requirements as set forth in Title 14 of the Baltimore County Code is required. Thus, the Petition for Special Hearing shall be granted, subject to the Petitioner obtaining a variance from DEPRM.

Pursuant to the advertisement and posting of the property, and

public hearing held thereon, and for the reasons set forth above, the relief requested in the special hearing shall be granted.

THEREFORE, IT IS ORDERED by the Deputy Zoning Commissioner for Baltimore County this 13th day of May, 1997 that the Petition for Special Hearing seeking approval of a waiver to permit construction of a parking lot in a riverine floodplain, pursuant to Section 500.6 of the Baltimore County Zoning Regulations (B.C.Z.R.), Section 517.2 (510.2) of the Building Code, and Sections 26-276, 26-670, and 260-172(a)(3) of the Baltimore County Code (B.C.C.), and an amendment to the previously approved site plan in Case No. 96-168-SPHA to reflect the proposed parking configuration, in accordance with Petitioner's Exhibits 3 and 4, be and is hereby GRANTED, subject to the following restrictions:

1) The Petitioners may apply for their building permit and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, the relief granted herein shall be rescinded.

2) The relief granted herein is conditioned upon the Petitioner obtaining a variance from the internal standards of the Department of Environmental Protection and Resource Management (DEPRM), as set forth in Title 14 of the Baltimore County Code is required.

3) The Petitioner shall not, in the future, increase the square footage of the commercial use on this property without first obtaining approval through a Petition for Special Hearing to amend the site plan approved herein (Petitioner's Exhibit 3) and the requisite public hearing for same.

4) When applying for any permits, the site plan filed must reference this case and set forth and address the restrictions of this Order.

LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs

Date 5/13/97
By

Baltimore County
Zoning Commissioner
Office of Planning and Zoning

Suite 112, Courthouse
400 Washington Avenue
Towson, Maryland 21204
(410) 887-4386

May 13, 1997

Charles E. Brooks, Esquire
Malcolm F. Spicer, Esquire
610 Bosley Avenue
Towson, Maryland 21204

RE: PETITION FOR SPECIAL HEARING
NW/S Cromwell Bridge Road, 78' SW of the c/l of Loch Raven Road
(2260 Cromwell Bridge Road)
9th Election District - 4th Councilmanic District
Ronald Sanders - Petitioner
Case No. 97-332-SPH

Dear Messrs. Brooks & Spicer:

Enclosed please find a copy of the decision rendered in the above-captioned matter. The Petition for Special Hearing has been granted in accordance with the attached Order.

In the event any party finds the decision rendered is unfavorable, any party may file an appeal to the County Board of Appeals within thirty (30) days of the date of this Order. For further information on filing an appeal, please contact the Zoning Administration and Development Management office at 887-3391.

Very truly yours,

LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs
cc: Mr. Ronald Sanders
2260 Cromwell Bridge Road, Baltimore, Md. 21234

Leslie M. Pittler, Esquire,
29 W. Susquehanna Avenue, Suite 610, Towson, Md. 21204

Mr. Joseph Larson, Spellman, Larson & Associates, Inc.
105 W. Chesapeake Avenue, Suite 109, Towson, Md. 21204

Mr. Edwin S. Howe, III, KCW Consultants, Inc.
3104 Timanus Lane, Suite 101, Baltimore, Md. 21244

People's Counsel; Case File

Printed with Soybean Ink
on Recycled Paper

Petition for Special Hearing

to the Zoning Commissioner of Baltimore County

for the property located at 2260 Cromwell Bridge Road

which is presently zoned BL & DR-1

97-332-SPH

This Petition shall be filed with the Office of Zoning Administration & Development Management.
The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition for a Special Hearing under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

a Waiver pursuant to Section 500.6, BCZR; Section 517.2 (510.2), Building Code; and Sections 26-276, 26-670, 26-172 (a) (3), BCC to permit construction of a parking lot in a riverine floodplain and also to amend the previously approved Site Plan in Case No. 96-168 SPHA

Property is to be posted and advertised as prescribed by Zoning Regulations.
I, or we, agree to pay expenses of above Special Hearing advertising, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

I/We do solemnly declare and affirm, under the penalties of perjury, that I/we are the legal owner(s) of the property which is the subject of this Petition.

Contract Purchaser/Leasee:

DNA
(Type or Print Name)

DNA
Signature

DNA
Address

DNA
City State Zipcode

Legal Owner(s):

Ronald Sanders
(Type or Print Name)

Ronald Sanders
Signature

(Type or Print Name)

Signature

Attorney for Petitioner:

Charles E. Brooks
(Type or Print Name)

Signature

610 Bosley Ave. 296-2600
Address Phone No.

Towson MD 21204
City State Zipcode

2260 Cromwell Bridge Rd 825-5187
Address Phone No.

Baltimore MD 21234
City State Zipcode

Name, Address and phone number of representative to be contacted.

Charles E. Brooks
Name

610 Bosley Ave 296-2600
Address Phone No.

Towson MD 21204

OFFICE USE ONLY

ESTIMATED LENGTH OF HEARING _____
unavailable for Hearing

the following dates _____ Next Two Months

ALL _____ OTHER _____

REVIEWED BY: JRP DATE 2-7-97

Zoning Administration & Development Management

332

SPELLMAN, LARSON & ASSOCIATES, INC.

ROBERT E. SPELLMAN, P.L.S.
JOSEPH L. LARSON
JO ANN W. ROGGE

SUITE 109 — JEFFERSON BUILDING
105 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
TEL (410) 823-3535
FAX (410) 823-5215

97-332-SPH

DESCRIPTION FOR ZONING SANDERS CORNER NO 2260 CROMWELL BRIDGE ROAD, 9TH DISTRICT, BALTIMORE COUNTY MARYLAND, PARCEL 1

Beginning for the same at a point on the northwest side of Cromwell Bridge Road at the distance of 78 feet, more or less, measured southwesterly from a point on the southwest side of Loch Raven Road if the northwest side of Cromwell Bridge Road was extended northeasterly and running thence southwesterly binding on the northwest side of Cromwell Bridge Road south 55 Degrees 32 Minutes 00 Seconds west 103.53 feet south 55 Degrees 15 Minutes 00 Seconds west 130.12 feet and south 55 Degrees 15 Minutes 00 Seconds west 15.25 feet thence leaving the northwest side of Cromwell Bridge Road and running north 24 Degrees 15 Minutes 54 Seconds west 182.97 feet and north 43 Degrees 36 Minutes 00 Seconds east 127.95 feet to a point on the southwest side of Loch Raven Road and running thence and binding on the southwest side of Loch Raven Road south 58 Degrees 30 Minutes 00 Seconds east 24.37 feet south 56 Degrees 08 Minutes 00 Seconds east 15.00 feet south 58 Degrees 35 Minutes 00 Seconds east 15.00 feet south 62 Degrees 30 Minutes 00

332

SPELLMAN, LARSON & ASSOCIATES, INC.

SUITE 109 — JEFFERSON BUILDING
105 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
TEL (410) 823-3535
FAX (410) 823-5215

ROBERT E. SPELLMAN, P.L.S.
JOSEPH L. LARSON
JO ANN W. ROGGE

DESCRIPTION FOR ZONING SANDERS CORNER NO 2260 CROMWELL BRIDGE ROAD, 9TH DISTRICT, BALTIMORE COUNTY MARYLAND, PARCEL 1

Seconds east 15.00 feet south 66 Degrees 50 Minutes 00
Seconds east 15.00 feet south 69 Degrees 17 Minutes 00
Seconds east 15.00 feet south 72 Degrees 30 Minutes 00
Seconds east 15.00 feet south 76 Degrees 01 Minutes 00
Seconds east 15.00 feet south 80 Degrees 12 Minutes 00
Seconds east 50.00 feet and south 75 Degrees 29 Minutes 00
Seconds east 20.00 feet and running thence and binding on the southwest side of Loch Raven Road as relocated south 59 Degrees 59 Minutes 00 Seconds east 15.00 feet south 40 Degrees 19 Minutes 00 Seconds east 10.00 feet south 18 Degrees 21 Minutes 00 Seconds east 10.00 feet south 21 Degrees 07 Minutes 00 Seconds west 15.00 feet and south 44 Degrees 24 Minutes 00 Seconds west 15.00 feet to the place of beginning.

Containing 0.913 acres of land, more or less.

10/03/95

STATE OF MARYLAND
ROBERT E. SPELLMAN
No. 450?0
REGISTERED
PROFESSIONAL LAND SURVEYOR

SPELLMAN, LARSON & ASSOCIATES, INC.

ROBERT E. SPELLMAN, P.L.S.
JOSEPH L. LARSON
JO ANN W. ROGGE

SUITE 109 — JEFFERSON BUILDING
105 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
TEL (410) 823-3535
FAX (410) 825-5215

DESCRIPTION FOR ZONING SANDERS CORNER NO 2260 CROMWELL BRIDGE ROAD, 9TH DISTRICT, BALTIMORE COUNTY MARYLAND, PARCEL 2

Beginning for the same at a point formed by the intersection of the center line of Cromwell Bridge Road and the center line of Loch Raven Road running thence and binding in the bed of Loch Raven Road north 84 Degrees 28 Minutes 00 Seconds west 50.00 feet north 73 Degrees 56 Minutes 00 Seconds west 50.00 feet north 72 Degrees 21 Minutes 00 Seconds west 100.00 feet north 51 Degrees 58 Minutes 00 Seconds west 60.00 feet and north 41 Degrees 11 Minutes 00 Seconds west 88.40 feet thence leaving the bed of Loch Raven Road and running north 83 Degrees 16 Minutes 00 Seconds east 237.70 feet north 64 Degrees 32 Minutes 00 Seconds east 42.36 feet south 21 Degrees 33 Minutes 00 Seconds east 38.14 feet south 35 Degrees 39 Minutes 00 Seconds east 59.00 feet north 68 Degrees 31 Minutes 00 Seconds east 95.00 feet and south 20 Degrees 00 Minutes 00 Seconds east 52.00 feet to a point in Cromwell Bridge Road and running thence and binding in the bed of Cromwell Bridge Road south 67 Degrees 47 Minutes 00 Seconds west 153.00 feet to the place of beginning.

Containing 1.20 acres of land, more or less.

10/03/95

STATE OF MARYLAND
ROBERT E. SPELLMAN
No. 4503
REGISTERED
PROFESSIONAL LAND SURVEYOR

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET & FINANCE
MISCELLANEOUS RECEIPT

No. 038246

DATE 6/9/97 ACCOUNT R-001-615D

AMOUNT $ 210.00

RECEIVED FROM: Leslie M. Pittler, Esquire

FOR: Appeal #97-332-SPH

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER

RYE

CASHIER'S VALIDATION

PAID RECEIPT
PROCESS ACTUAL TIME
6/06/1997 6/10/1997 09:22:00
REG M30B CASHIER BTRY BXT DRAWER 5
MISCELLANOUS CASH RECEIPT
Receipt # 000061 OFLN
CR NO. 038246
$210.00 CHECK
Baltimore County, Maryland

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT

No. 028601

DATE 7-7-97 ACCOUNT R-001-615-000

AMOUNT $ 250.00

RECEIVED FROM: Sander's Corner

040 -- SPH -- $250.00

FOR: Item # 332 Taken by: JEF

01A00A0035M CHRG $250.00
BA COLLECTION 07-07-97

VALIDATION OR SIGNATURE OF CASHIER

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER

CERTIFICATE OF POSTING

RE: Case No.: 97-332-SPH

Petitioner/Developer: SANDERS, ETAL
C/O JOE LARSON
FAX- 9255215

Date of Hearing/Closing: 3/14/97

Baltimore County Department of
Permits and Development Management
County Office Building, Room 111
111 West Chesapeake Avenue
Towson, MD 21204

Attention: Ms. Gwendolyn Stephens

Ladies and Gentlemen:

This letter is to certify under the penalties of perjury that the necessary sign(s) required by law were posted conspicuously on the property located at #2260 CROMWELL BRIDGE RD. SANDERS CORNER.

The sign(s) were posted on 2/21/97
(Month, Day, Year)

Sincerely,

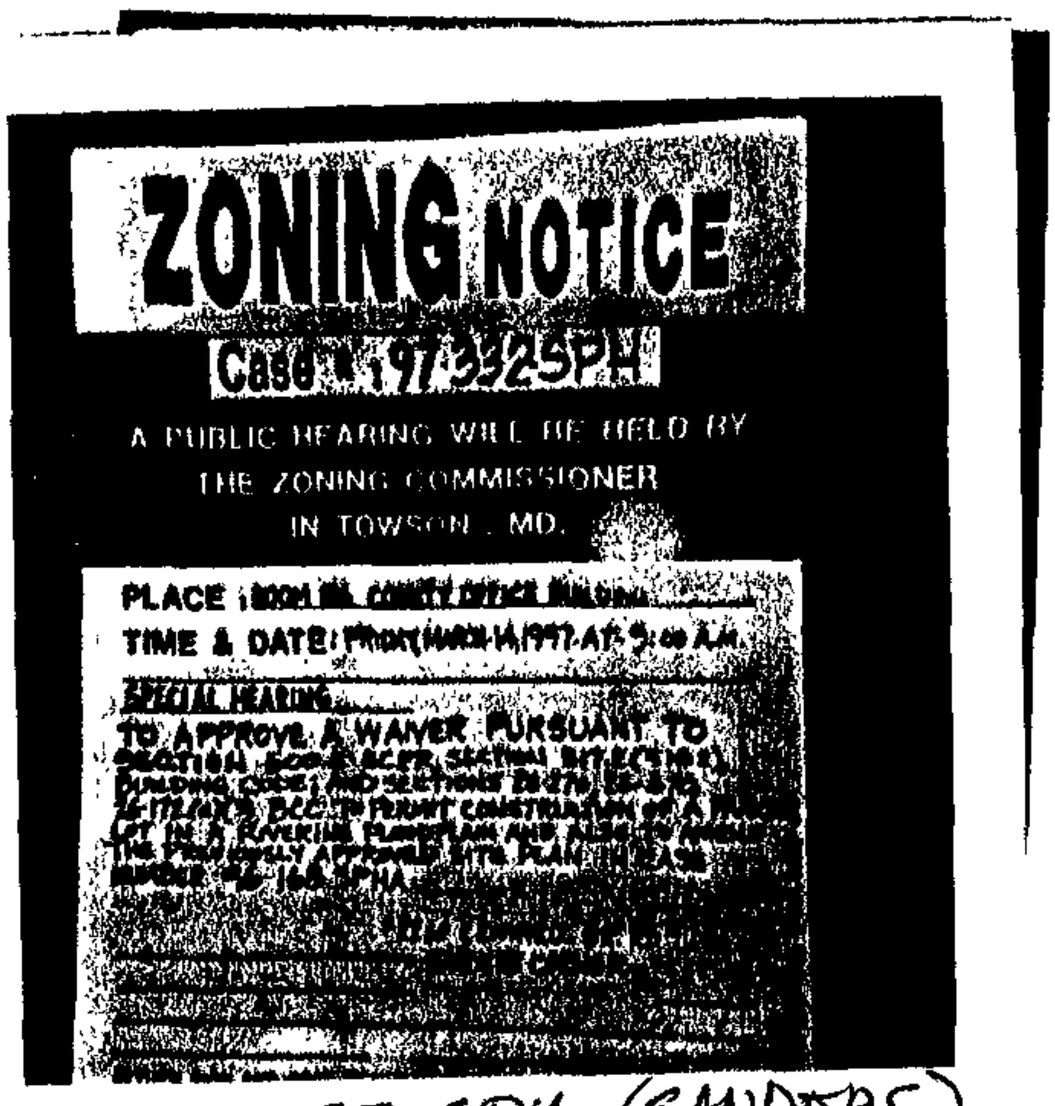
Patrick M O'Keefe 2/22/97
(Signature of Sign Poster and Date)

Patrick M. O'Keefe
(Printed Name)

523 Penny Lane
(Address)

Hunt Valley, MD 21030
(City, State, Zip Code)

(410) 666-5366 Pager (410) 646-8354
(Telephone Number)



97-332 SPH (SANDERS)
#2260 CROMWELL BR. RD.
HRG 3/14/97 @ 9:00 PZ 2/21/97

CERTIFICATE OF POSTING

RE: Case No.: 97-332-S.P.H.

Petitioner/Developer: RONALD SANDERS
C/O CHARLES E. BROOKS, ESQ.

Date of Hearing/Closing: 4/21/97

Baltimore County Department of
Permits and Development Management
County Office Building, Room 111
111 West Chesapeake Avenue
Towson, MD 21204

Attention: Ms. Gwendolyn Stephens

Ladies and Gentlemen:

This letter is to certify under the penalties of perjury that the necessary sign(s) required by law were posted conspicuously on the property located at #2260 CROMWELL BRIDGE RD. SANDERS CORNER

REASSIGNMENT-REPOST

The sign(s) were posted on 4/4/97
(Month, Day, Year)

Sincerely,

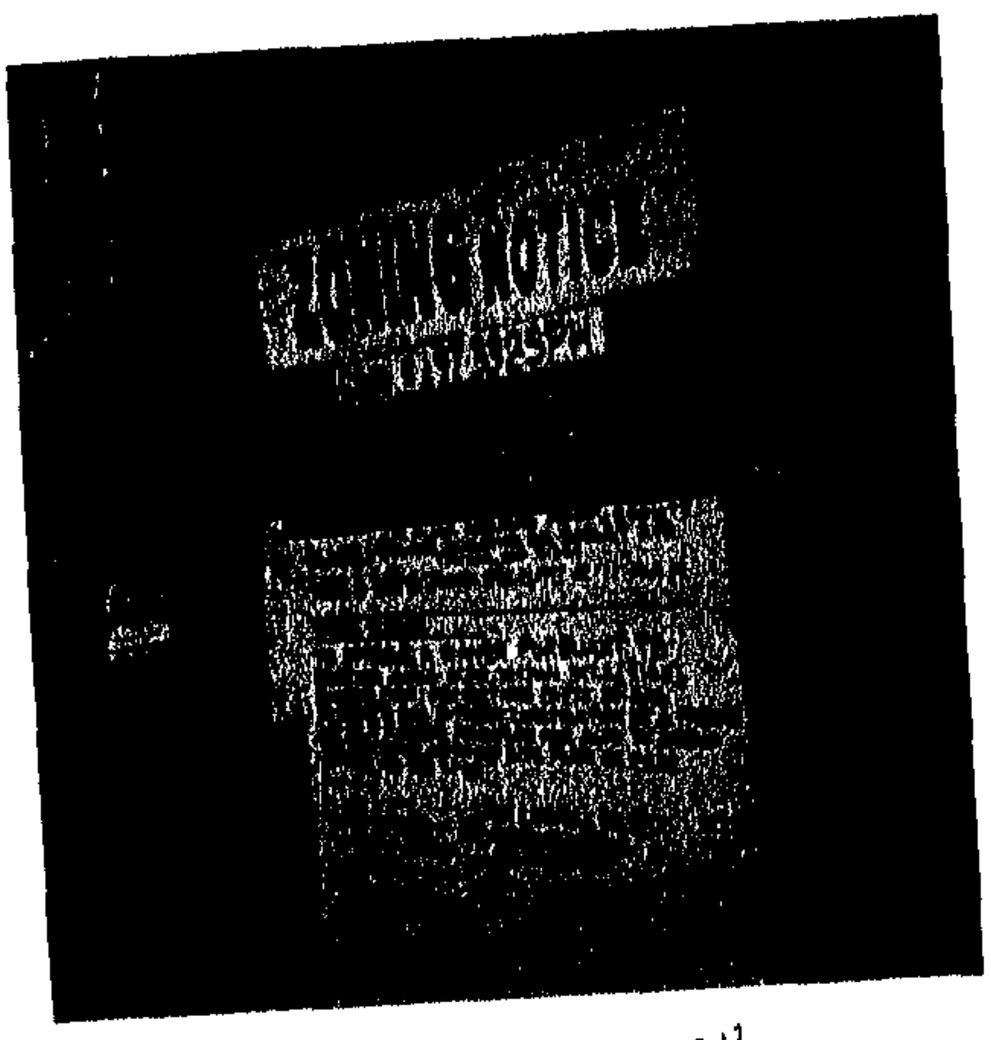
Patrick M. O'Keefe 4/5/97
(Signature of Sign Poster and Date)

Patrick M. O'Keefe
(Printed Name)

523 Penny Lane
(Address)

Hunt Valley, MD 21030
(City, State, Zip Code)

(410) 666-5366 Pager (410) 646-8354
(Telephone Number)



97-332-SPH

CERTIFICATE OF POSTING

RE: Case No.: 97-332-SPH

Petitioner/Developer: SANDERS' CORNER

Date of Hearing/Closing: _____

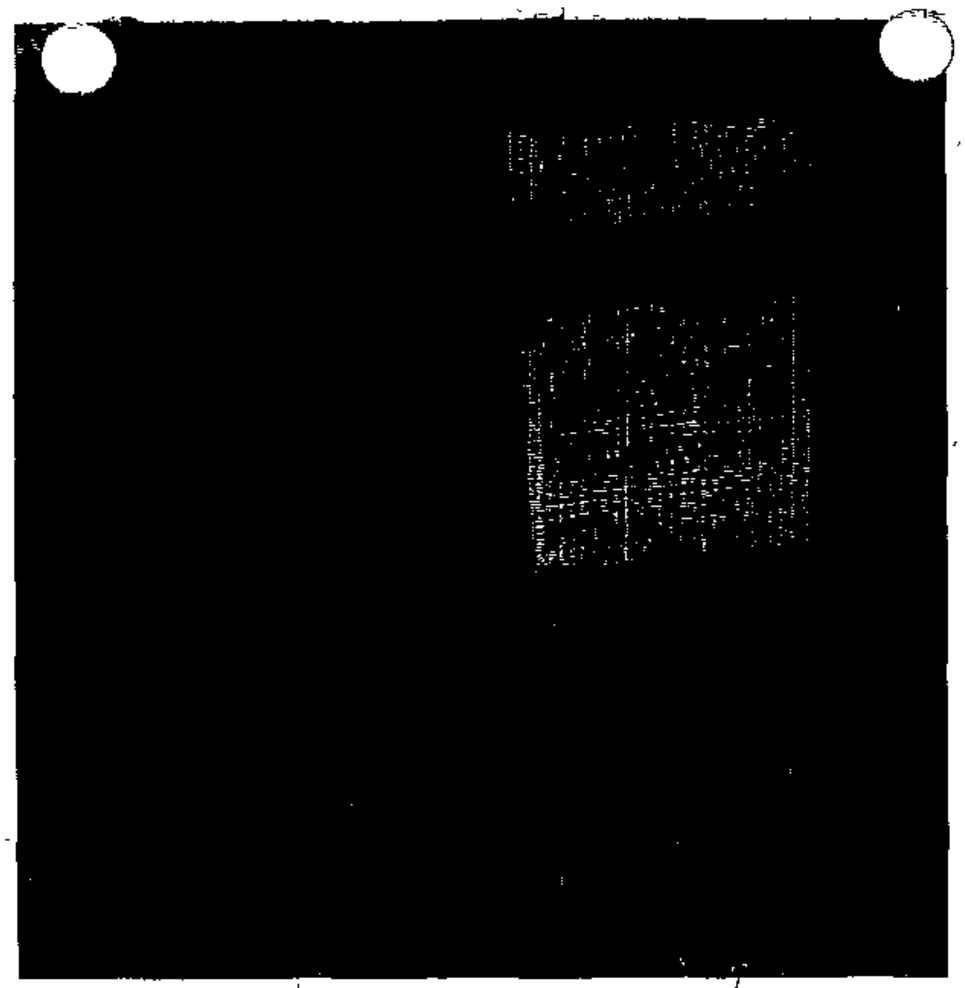
Baltimore County Department of
Permits and Development Management
County Office Building, Room 111
111 West Chesapeake Avenue
Towson, MD 21204

Attention: Ms. Gwendolyn Stephens

Ladies and Gentlemen:

This letter is to certify under the penalties of perjury that the necessary sign(s) required by law were posted conspicuously on the property located at 2260 CROMWELL BRIDGE RD.

The sign(s) were posted on 6/24/97
(Month, Day, Year)



Sincerely,

(Signature of Sign Poster and Date)

GARY Freund
(Printed Name)

(Address)

(City, State, Zip Code)

(Telephone Number)

NOTICE OF HEARING

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County will hold a public hearing in Towson, Maryland on the property identified herein as follows:

Case: #97-332-SPH
2260 Cromwell Bridge Road
Sanders Corner
NW/S Cromwell Bridge Road, 78' from c/1 of SW/S Loch Raven Road
9th Election District
4th Councilmanic
Legal Owner(s): Ronald Sanders

Special Hearing to approve a waiver pursuant to Section 500.6 BCZR; Section 517.2(510.2); Building Code; and Sections 26-276, 26-670, 26-172(a)(3), BCC to permit construction of a parking lot in a riverline floodplain and also to amend the previously approved site plan in case number 96-168-SPHA.
Hearing: Friday, March 14, 1997 at 9:00 a.m. in Room 106, County Office Building.

LAWRENCE E. SCHMIDT
Zoning Commissioner for Baltimore County

NOTES: (1) Hearings are Handicapped Accessible; for special accommodations Please Call 887-3353.
(2) For information concerning the File and/or Hearing, Please Call 887-3391.

2/306 Feb. 20 C121603

CERTIFICATE OF PUBLICATION

TOWSON, MD., 2/20, 1997

THIS IS TO CERTIFY, that the annexed advertisement was published in THE JEFFERSONIAN, a weekly newspaper published in Towson, Baltimore County, Md., once in each of 1 successive weeks, the first publication appearing on 2/20, 1997.

THE JEFFERSONIAN,

A. Henrickson

LEGAL AD. - TOWSON

[redacted]

Baltimore County
Department of Permits and
Development Management

Development Processing
County Office Building
111 West Chesapeake Ave
Towson, Maryland 21204

ZONING HEARING ADVERTISING AND POSTING REQUIREMENTS & PROCEDURES

Baltimore County zoning regulations require that notice be given to the general public/neighboring property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of which, lies with the petitioner/applicant) and placement of a notice in at least one newspaper of general circulation in the County.

This office will ensure that the legal requirements for advertising are satisfied. However, the petitioner is responsible for the costs associated with this requirement.

Billing for legal advertising, due upon receipt, will come from and should be remitted directly to the newspaper.

NON-PAYMENT OF ADVERTISING FEES WILL STAY ISSUANCE OF ZONING ORDER.

ARNOLD JABLON, DIRECTOR

For newspaper advertising:

Item No.: 332

Petitioner: RON SANDERS

Location: 2260 CROMWELL BRIDGE RD.

PLEASE FORWARD ADVERTISING BILL TO:

NAME: RON SANDERS

ADDRESS: 2260 CROMWELL BRIDGE RD.
BALTIMORE, MD. 21234

PHONE NUMBER: 825-5187

AJ:ggs

(Revised 09/24/96)

Exhibit B

ITEM # 332

Request for Zoning: Variance, Special Exception, or Special Hearing

Date to be Posted: Anytime before but no later than _____.

Format for Sign Printing, Black Letters on White Background:

ZONING NOTICE

Case No.: 97-332 -SPH

A PUBLIC HEARING WILL BE HELD BY THE ZONING COMMISSIONER IN TOWSON, MD

PLACE: _____

DATE AND TIME: _____

REQUEST: Special Hearing for a waiver pursuant to Section 500.6 BCZR; Section 517.2 (510.2) Building Code; and Sections 26-276, 26-670 26-172(a)(3) BCC to permit construction of a parking lots in a riverine floodplain & also to amend the previously approved site plan in Case # 96-163 SPHA.

POSTPONEMENTS DUE TO WEATHER OR OTHER CONDITIONS ARE SOMETIMES NECESSARY.
TO CONFIRM HEARING CALL 887-3391.

DO NOT REMOVE THIS SIGN AND POST UNTIL DAY OF HEARING UNDER PENALTY OF LAW

HANDICAPPED ACCESSIBLE

9/96
post.4.doc

Baltimore County
Department of Permits and
Development Management

Development Processing
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204

February 19, 1997

NOTICE OF HEARING

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 97-332-SPH
2260 Cromwell Bridge Road
Sanders Corner
NW/S Cromwell Bridge Road, 78' from c/l of SW/S Loch Raven Road
9th Election District - 4th Councilmanic
Legal Owner(s): Ronald Sanders

Special Hearing to approve a waiver pursuant to Section 500.6 BCZR; Section 517.2(510.2), Building Code; and Sections 26-276, 26-670, 26-172(a)(3), BCC to permit construction of a parking lot in a riverine floodplain and also to amend the previously approved site plan in case number 96-168-SPHA.

HEARING: FRIDAY, MARCH 14, 1997 at 9:00 a.m. in Room 106, County Office Building.

Arnold Jablon
Director

cc: Ronald Sanders
Charles E. Brooks, Esq.

NOTES: (1) YOU MUST HAVE THE ZONING NOTICE SIGN POSTED ON THE PROPERTY BY FEBRUARY 27, 1997.
(2) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMMODATIONS PLEASE CALL 887-3353.
(3) FOR INFORMATION CONCERING THE FILE AND/OR HEARING, CONTACT THIS OFFICE AT 887-3391.

Printed with Soybean Ink
on Recycled Paper

10/24/01
10 a
V

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

***** HEARING ROOM - Room 48 *****
Basement - Old Courthouse
400 Washington Avenue

APPEAL HEARINGS SCHEDULED FOR THE WEEK OF OCTOBER 29, 2001

Tues. 10/30 **10 a.m.** **Case No. CR-02-120-A** **/ HEARING**
In the Matter of:
Pennrose Properties, Inc. – CP; Dr. Mirza Hussain Ali Baig – Legal Owner
2nd Election District; 2nd Councilmanic District
Petition for Reclassification; Variance – Documented Site Plan

---

Wed. 10/31 **9:30 a.m.** **Case No. 96-168-SPHA and 97-332-SPH** **/DELIBERATION**
In the Matter of:
Ronald Sanders – Petitioner
2260 Cromwell Bridge Road
9th Election District; 6th Councilmanic District
[on Remand from Circuit Court /Order of CSA; argued 10/03/01]

10:00 a.m. **Case No. CBA-01-102** **/HEARING**
In the Matter of:
Deborah L. Lamb
720 Central Avenue Sykesville MD 21784
RE: ERS Decision

Thurs. 11/01 **CBA-00-161 W/D by Appellant; 99-491-SPH PP'd to February 2002**
/NO HEARINGS THIS DATE

TO: Executive Office, Law Office, Director /PDM; People's Counsel, Planning Office, Information Desk; County Council, Board Members, Court Reporter

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WCR

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

***** HEARING ROOM - Room 48 *****
Basement - Old Courthouse
400 Washington Avenue

APPEAL HEARINGS SCHEDULED FOR THE WEEK OF OCTOBER 1, 2001

Tues. 10/02 9:30 a.m. **Case No. CBA-01-139 (REF CC #00-1366) /Hearing**
In the Matter of:
Eric Dorn – Owner 12 E. Burke Avenue
RE: Code Enforcement Hearing /§ 1-7 BCC

10:00 a.m. **Case No. M.C. 01-3** **/Hearing**
In the Matter of:
The Southern Land Co. –CP; John G. Kraft et al -Owners
W/s Perry Hall Road 5th Councilmanic District

Wed. 10/03 9:30 a.m. **Case No. 00-332-A** **/Deliberation**
In the Matter of:
Nadine Lee Miller
4089 Piney Grove Road (Heard 12/13/00; 7/24 and 7/2501)

10:00 a.m. **Case No. R-01-434** **/Open & Continue on Record**
In the Matter of:
Balto County Revenue Authority et al – Owners; BP Amoco Corp – CP
520 Reisterstown Road 3rd E; 2nd Councilmanic District

10:30 a.m. **Cases No. 96-168-SPHA and No. 97-332-SPH** **/Oral Argument /Remand**
In the Matter of:
Ronald Sanders –Petitioner
2260 Cromwell Bridge Rd 9th E; 6th Councilmanic District

Thurs. 10/04 9:30 a.m. **Case No. 01-47-SPHX** **/Deliberation**
In the Matter of:
AT&T Wireless Services – CP; Hubert A. Bellman –Owner
19807 York Road 7th E; 3rd Councilmanic District
(Heard 9/12/01)

10 a.m. (Case No. 01-007-XA /Zidan postponed to 1/30/02)

TO: Executive Office, Law Office, Director /PDM, People's Counsel, Planning Office, Information Desk, County Council, Board Members, Court Reporter

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County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
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TOWSON, MARYLAND 21204
410-887-3180

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NOV 24 1997
PDM

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

November 20, 1997

NOTICE OF ASSIGNMENT /additional date

CASE #: 96-168-SPHA **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(SPH granted in part /denied in part; VAR denied.)

CASE #: 97-332-SPH **IN THE MATTER OF: RONALD SANDERS -Petitioner**
2260 Cromwell Bridge Road 9th E; 6th C

(Special hearing GRANTED by Z.C. /parking lot.)

ASSIGNED FOR: WEDNESDAY, DECEMBER 10, 1997 at 9:30 a.m.

NOTICE: **This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.**

Please refer to the Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

Kathleen C. Bianco
Administrator

---

cc: Counsel for Appellant /Petitioner: Leslie M. Pittler, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Counsel for Appellants/Protestants: Charles E. Brooks, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer, et al
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

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County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
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TOWSON, MARYLAND 21204
(410) 887-3180

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Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

June 24, 1997

AMENDED NOTICE OF ASSIGNMENT

CASE #: 96-168-SPHA **IN THE MATTER OF:** RONALD SANDERS -Petitioner
2260 Cromwell Bridge Road 9th E; 6th C

(SPH granted in part /denied in part; VAR denied.)

Notice for subject hearing is herewith **AMENDED** to include assignment of the following matter:

CASE #: 97-332-SPH **IN THE MATTER OF:** RONALD SANDERS -Petitioner
2260 Cromwell Bridge Road 9th E; 6th C

(Special hearing GRANTED by Z.C. /parking lot.)

Both of the above cases to be consolidated for hearing; and

ASSIGNED FOR: **WEDNESDAY, JULY 9, 1997 at 10:00 a.m.**

NOTICE: **This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.**

No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c). For further information, see Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

Kathleen C. Bianco
Legal Administrator

---

cc: Counsel for Appellant /Petitioner: Leslie M. Pittler, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Counsel for Appellants/Protestants: Charles E. Brooks, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer, et al
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

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Baltimore County
Department of Permits and
Development Management

Development Processing
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204

February 28, 1997

NOTICE OF POSTPONEMENT

CASE NUMBER: 97-332-SPH
PETITIONER(S): Ronald Sanders
LOCATION: 2260 Cromwell Bridge Road

The above matter, previously assigned to be hearing on March 14, 1997 has been postponed at the request of Joseph L. Larson, on behalf of the petitioner.

Notification of the new hearing date will be forwarded shortly.

Please be advised that if the property has been posted with the March 14th date, you must alter the sign to give notice of the postponement.

Arnold Jablon
Director

cc: Joseph L. Larson
Ronald Sanders
Charles Brooks, Esq.
Leslie Pittler, Esq.

AJ:ggs

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on Recycled Paper

Baltimore County
Department of Permits and
Development Management

Development Processing
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204

March 24, 1997

NOTICE OF REASSIGNMENT
NO FURTHER POSTPONEMENT WILL BE GRANTED

CASE NUMBER: 97-332-SPH
2260 Cromwell Bridge Road
Sanders Corner
NW/S Cromwell Bridge Road, 78' from c/l of SW/S Loch Raven Road
9th Election District - 4th Councilmanic
Legal Owner(s): Ronald Sanders

Special Hearing to approve a waiver pursuant to Section 500.6 BCZR; Section 517.2(510.2), Building Code; and Sections 26-276, 26-670, 26-172(a)(3), BCC to permit construction of a parking lot in a riverine floodplain and also to amend the previously approved site plan in case number 96-168-SPHA.

HEARING: MONDAY, APRIL 21, 1997 at 11:00 a.m., 4th floor hearing room, County Courts Building, 401 Bosley Avenue.

ARNOLD JABLON
DIRECTOR

cc: Ronald Sanders
Charles E. Brooks, Esq.
Leslie M. Pittler, Esq.
Joseph Larson

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on Recycled Paper

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
(410) 887-3180

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

April 2, 1997

SECOND NOTICE OF POSTPONEMENT & REASSIGNMENT

CASE #: 96-168-SPHA

IN THE MATTER OF: RONALD SANDERS -Petitioner
2260 Cromwell Bridge Road 9th E; 6th C

(SPH granted in part /denied in part; VAR denied.)

which was scheduled for hearing on April 24, 1997 has been **POSTPONED** at the request of Counsel for Appellants /Protestants, and without objection by People's Counsel or Counsel for Appellant /Petitioner; and has been

REASSIGNED FOR: WEDNESDAY, JULY 9, 1997 at 10:00 a.m.

NOTICE: This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.

No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c). For further information, see Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

Kathleen C. Bianco
Legal Administrator

Postponed 4/24/97 to 97-332-SPH per request of Counsel

cc: Counsel for Appellant /Petitioner: Leslie M. Pittler, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.

Counsel for Appellants/Protestants: Charles E. Brooks, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer, et al
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt

Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

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KLW

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
(410) 887-3180

Def. #11
Continued
Hearing
see file

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

June 24, 1997

AMENDED NOTICE OF ASSIGNMENT

CASE #: 96-168-SPHA

IN THE MATTER OF: RONALD SANDERS -Petitioner
2260 Cromwell Bridge Road 9th E; 6th C

(SPH granted in part /denied in part; VAR denied.)

Notice for subject hearing is herewith **AMENDED** to include assignment of the following matter:

CASE #: 97-332-SPH

IN THE MATTER OF: RONALD SANDERS -Petitioner
2260 Cromwell Bridge Road 9th E; 6th C

(Special hearing GRANTED by Z.C. /parking lot.)

Both of the above cases to be consolidated for hearing; and

ASSIGNED FOR: **WEDNESDAY, JULY 9, 1997 at 10:00 a.m.**

NOTICE: **This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.**

No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c). For further information, see Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

Kathleen C. Bianco
Legal Administrator

---

cc: Counsel for Appellant /Petitioner: Leslie M. Pittler, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Counsel for Appellants/Protestants: Charles E. Brooks, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer, et al
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

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County Board of Appeals of Baltimore County
OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180

December 10, 1997

NOTICE OF DELIBERATION

Having concluded this matter after three days of hearing (July 9, November 19, and December 10, 1997, public deliberation has been scheduled by the Board as follows:

RONALD SANDERS - Petitioner
Case No. 96-168-SPHA and Case No. 97-332-SPH

DATE AND TIME : Tuesday, February 3, 1998 @ 9:30 a.m.

LOCATION : Room 48, Basement, Old Courthouse

(NOTE: CLOSING BRIEFS AND PROPOSED FINDINGS OF FACT ARE DUE FROM COUNSEL ON MONDAY, JANUARY 12, 1998 (Original and three (3) copies.)

Kathleen C. Bianco
Administrator

---

cc: Counsel for Appellant /Petitioner: Charles E. Brooks, Esquire
Appellant /Petitioner (VAR only) : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Counsel for Appellants/Protestants: Leslie M. Pittler, Esquire
Appellants/Protestants (SPH only) : Lillian Jennifer
Charlotte W. Pine
Carol Trela /Long Green Valley

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia Barnhart, County Attorney

Copied: K.L.W.

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County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

Hearing Room - Room 48
Old Courthouse, 400 Washington Avenue

July 24, 2001

NOTICE OF ASSIGNMENT / ARGUMENT ON REMAND

CASE #: 96-168-SPHA **IN THE MATTER OF:** RONALD SANDERS -Petitioner
2260 Cromwell Bridge Road 9th E; 6th C

AND

CASE #: 97-332-SPH **IN THE MATTER OF:** RONALD SANDERS -Petitioner
2260 Cromwell Bridge Road 9th E; 6th C

NOTICE: This hearing has been scheduled for the purpose of receiving oral argument from counsel on issues of remand /Remanded to the Board by Order of the Circuit Court, pursuant to Order of the Court of Special Appeals.

WRITTEN BRIEFS TO BE FILED BY COUNSEL –
MONDAY, SEPTEMBER 10, 2001 (Original and two (2) copies)

ASSIGNED FOR: **WEDNESDAY, OCTOBER 3, 2001 at 10:30 a.m.**

Please refer to the Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

Kathleen C. Bianco
Administrator

---

cc: Counsel for Petitioner : G. Scott Barhight, Esquire
Jennifer R. Busse, Esquire
Petitioner : Ronald Sanders

Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.

Lillian Jennifer

People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM

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on Recycled Paper

Baltimore County
Department of Permits and
Development Management

Development Processing
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204

March 11, 1997

Charles E. Brooks, Esquire
610 Bosley Avenue
Towson, MD 21204

RE: Item No.: 332
Case No.: 97-332-SPH
Petitioner: Ronald Sanders

Dear Mr. Brooks:

The Zoning Advisory Committee (ZAC), which consists of representatives from Baltimore County approval agencies, has reviewed the plans submitted with the above referenced petition, which was accepted for processing by Permits and Development Management (PDM), Zoning Review, on February 7, 1997.

Any comments submitted thus far from the members of ZAC that offer or request information on your petition are attached. These comments are not intended to indicate the appropriateness of the zoning action requested, but to assure that all parties (zoning commissioner, attorney, petitioner, etc.) are made aware of plans or problems with regard to the proposed improvements that may have a bearing on this case. Only those comments that are informative will be forwarded to you; those that are not informative will be placed in the permanent case file.

If you need further information or have any questions regarding these comments, please do not hesitate to contact the commenting agency or Roslyn Eubanks in the zoning office (887-3391).

Sincerely,

W. Carl Richards, Jr.
Zoning Supervisor

WCR/re
Attachment(s)

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on Recycled Paper

____ Attach original petition Due Date 2/24/97

To: Arnold L. Jablon

From: Robert A. Wirth RAW/gf

Subject: Zoning Item # 332

Sanders Corner

Zoning Advisory Committee Meeting of 2/18/97

___ The Department of Environmental Protection and Resource Management has no comments on the above-referenced zoning item.

___ The Department of Environmental Protection and Resource Management requests an extension for the review of the above-referenced zoning item to determine the extent to which environmental regulations apply to the site.

_X__ The Department of Environmental Protection and Resource Management offers the following comments on the above-referenced zoning item:

_X__ Development of the property must comply with the Regulations for the Protection of Water Quality, Streams, Wetlands and Floodplains (Sections 14-331 through 14-350 of the Baltimore County Code).

_X__ Development of this property must comply with the Forest Conservation Regulations (Sections 14-401 through 14-422 of the Baltimore County Code).

___ Development of this property must comply with the Chesapeake Bay Critical Area Regulations (Sections 26-436 through 26-461, and other Sections, of the Baltimore County Code).

_X__ The plan submitted with this petition shows a 100-year floodplain that the previous petitions did not. A variance to the regulations for the protection of water quality, streams, wetlands and floodplains is required in order to disturb the 100-year floodplain and through the Forest Buffer Easement. The developer should provide a plan showing the correct Forest Buffer Easement and apply for a variance of the above-referenced regulations. The Buffer will be a minimum of 25 feet outside of the 100-year floodplain/drainage and utility easement.

Maryland Department of Transportation
State Highway Administration

David L. Winstead
Secretary
Parker F. Williams
Administrator

Ms. Roslyn Eubanks
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County 2·21·97
Item No. 332 JRF

Dear Ms. Eubanks:

This office has reviewed the referenced item and we have no objection to approval as it does not access a State roadway and is not affected by any State Highway Administration projects.

Please contact Larry Gredlein at 410-545-5606 if you have any questions.

Thank you for the opportunity to review this item.

Very truly yours,

R. J. Gredlein

for Ronald Burns, Chief
Engineering Access Permits
Division

LG

My telephone number is _____

Maryland Relay Service for Impaired Hearing or Speech
1-800-735-2258 Statewide Toll Free

Mailing Address: P.O. Box 717 • Baltimore, MD 21203-0717
Street Address: 707 North Calvert Street • Baltimore, Maryland 21202

B A L T I M O R E C O U N T Y, M A R Y L A N D

INTEROFFICE CORRESPONDENCE

TO: Arnold Jablon, Director
Department of Permits & Development Management

Date: February 26, 1997

FROM: Robert W. Bowling, Chief
Development Plans Review Division

SUBJECT: Zoning Advisory Committee Meeting
for February 24, 1997
Item No. 332

The Development Plans Review Division has reviewed the subject zoning item. Loch Raven Drive is maintained by the City of Baltimore. The Developer is directed to contact Baltimore City for any required improvements to Loch Raven Drive.

Per letter dated January 23, 1997 from Charles R. Olsen, Baltimore County Director of Public Works, "this department does not oppose the placement of fill and parking lot construction as proposed for this site".

The two parallel parking spaces along Cromwell Bridge Road should be eliminated as were shown on the approved C.R.G. plan dated January 21, 1991.

LANDSCAPE COMMENTS:

A modification to Sec. IX.C.2.b.(1) of the Baltimore County Landscape Manual (7% interior landscape area) is necessary to support the request. A landscape plan must be approved before the grading permit may be released.

RWB:HJO:jrb

cc: File

ZONE501

Baltimore County Government
Fire Department

700 East Joppa Road
Towson, MD 21286-5500

Office of the Fire Marshal
(410) 887-4880

DATE: February 28, 1997

Arnold Jablon, Director
Zoning Administration and Development Management
Baltimore County Office Building
Towson, MD 21204
MAIL STOP-1105

RE: Property Owner: SEE BELOW
Location: DISTRIBUTION MEETING OF OCT. 07, 1996.

Item No.: SEE BELOW Zoning Agenda:

Gentlemen:

Pursuant to your request, the referenced property has been surveyed by this Bureau and the comments below are applicable and required to be corrected or incorporated into the final plans for the property.

8. The Fire Marshal's Office has no comments at this time, IN REFERENCE TO THE FOLLOWING ITEM NUMBERS:

Item Numbers: 320, 321, 323, 324, 325, 331, 332,

REVIEWER: LT. ROBERT P. SAUERWALD
Fire Marshal Office, PHONE 887-4881, MS-1102F

cc: File

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on Recycled Paper

B A L T I M O R E C O U N T Y , M A R Y L A N D

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon, Director
Permits and Development
Management

DATE: February 25, 1997

FROM: Pat Keller, Director
Office of Planning

SUBJECT: Petitions from Zoning Advisory Committee

The Office of Planning has no comments on the following petition(s):

Item Nos. 324 and 332

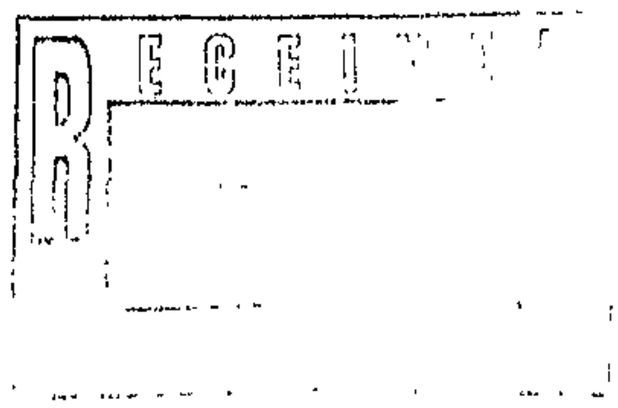
If there should be any further questions or if this office can provide additional information, please contact Jeffrey Long in the Office of Planning at 887-3495.

Prepared by: Jeffrey W. Long

Division Chief: Gary L. Kerns

PK/JL

ITEM324/PZONE/ZAC1



P.P.

RE: PETITION FOR SPECIAL HEARING 2260 Cromwell Bridge Rd (Sanders Corner), NW/S Cromwell Bridge Rd, 78' from c/l of SW/S Loch Raven Road 9th Election District, 4th Councilmanic	*	BEFORE THE ZONING COMMISSIONER OF BALTIMORE COUNTY
Ronald Sanders Petitioner	*	CASE NO. 97-332-SPH

* * * * * * * * * * * * *

ENTRY OF APPEARANCE

Please enter the appearance of the People's Counsel in the above-captioned matter. Notice should be sent of any hearing dates or other proceedings in this matter and of the passage of any preliminary or final Order.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Carole S. Demilio

CAROLE S. DEMILIO
Deputy People's Counsel
Room 47, Courthouse
400 Washington Avenue
Towson, MD 21204
(410) 887-2188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March, 1997, a copy of the foregoing Entry of Appearance was mailed to Charles E. Brooks, Esq., 610 Bosley Avenue, Towson, MD 21204, attorney for Petitioner.

Peter Max Zimmerman

PETER MAX ZIMMERMAN

Baltimore County
Department of Permits and
Development Management

Development Processing
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204

June 12, 1997

Charles E. Brooks, Esquire
610 Bosley Avenue
Towson, MD 21204

RE: Petition for Special Hearing
NW/S Cromwell Bridge Rd., 78' SW of the c/l of Loch Raven Rd.
(2260 Cromwell Bridge Rd.)
9th Election District
4th Councilmanic District
Ronald Sanders-Petitioner
Case No. 97-332-SPH

Dear Mr. Brooks:

Please be advised that an appeal of the above-referenced case was filed in this office on June 6, 1997 by Leslie M. Pittler, Esquire on behalf of Lillian D. Jennifer. All materials relative to the case have been forwarded to the Baltimore County Board of Appeals (Board).

If you have any questions concerning this matter, please do not hesitate to call 410-887-3180.

Sincerely,

ARNOLD JABLON
Director

AJ:rye

c: Mr. Edwin S. Howe, III
People's Counsel

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on Recycled Paper

LESLIE M. PITTLER

ATTORNEY-AT-LAW

SUITE 610
29 WEST SUSQUEHANNA AVENUE
TOWSON, MARYLAND 21204
(410) 823-4455

FACSIMILE
(410) 583-2437

June 6, 1997

Arnold Jablon, Director
Department of Permits and Development Management
111 W. Chesapeake Avenue
Towson, Maryland 21204

Re: PETITION FOR SPECIAL HEARING
2260 Cromwell Bridge Road (Sanders Corner),
NW/S Cromwell Bridge Road, 78' SW of c/l
Loch Raven Road, 9th Election District, 6th Councilmanic
RONALD SANDERS, Petitioner
Case No. 97-332-SPH

Dear Mr. Jablon:

Please enter an appeal on behalf of Lillian D. Jennifer to the County Board of Appeals from the Findings of Fact and Conclusions of Law and Order dated May 13, 1997 of the Baltimore County Zoning Commissioner in the above-entitled case, relating to the Petition For Special Hearing.

Enclosed is our check in the amount of $210.00 for the filing fee. Please forward copies of any papers pertinent to the appeal as necessary and appropriate.

Very truly yours,

Leslie M. Pittler

Lillian D. Jennifer
2200 Cromwell Bridge Road
Baltimore, Maryland 21234
(410) 823-2159

cc: Charles E. Brooks, Esquire
People's Counsel for Baltimore County

RECEIVED
6 1997
PDM

APPEAL

Petition for Special Hearing
NW/S Cromwell Bridge Road, 78' SW of the c/l of Loch Raven Road
(2260 Cromwell Bridge Road)
9th Election District - 4th Councilmanic District
Ronald Sanders - Petitioner
Case No. 97-332-SPH

Petition for Special Hearing

Description of Property

Certificates of Posting

Certificate of Publication

Entry of Appearance of People's Counsel

Zoning Advisory Committee Comments

Petitioner's Sign-In Sheets

Petitioners' Exhibits:
1 - Letter from Joseph Larson, Esquire to Charles R. Olsen dated August 19, 1996
2 - Letter from Charles R. Olsen to Joseph Larson, Esquire dated January 23, 1997
3 - Plat to Accompany Petition for Special Hearing
4 - Site Grading Plan
5 - C.R.G. Plan
6 - Brief Resume of Key Persons, Specialists, and Individual consultants Anticipated for this Project

Deputy Zoning Commissioner's Order for Case Number 96-168-SPHA dated July 30, 1996 (Granted in Part, Denied in Part)

Zoning Commissioner's Order dated May 13, 1997 (Granted)

Notice of Appeal received on June 6, 1997 from Leslie M. Pittler, Esquire on behalf of Lillian D. Jennifer

c: Mr. Ronald Sanders, 2260 Cromwell Bridge Road, Baltimore, MD 21234
Leslie M. Pittler, Esquire, 29 W. Susquehanna Avenue, Suite 610, Towson, MD 21204
Joseph Larson, Esquire, Spellman, Larson & Associates, Inc., 105 W. Chesapeake Avenue, Suite 109, Towson, MD 21204
Mr. Edwin S. Howe, III, KCW Consultants, Inc., 3104 Timanus Lane, Suite 101, Baltimore, MD 21244
People's Counsel of Baltimore County, M.S. 2010
Lawrence Schmidt, Zoning Commissioner
Arnold Jablon, Director of PDM

Ronald Sanders

96-168-SPHA
& 97-332-SPHA

Civil Action No. 3-C-98-05437

96-168-SPHA

October 17, 1995 Petitions for SPH & VAR filed by Charles E. Brooks, Esquire, on behalf of Ronald Sanders - SPH /to allow comm. parking in a residential zone; to amend a site plan No. 91-256-SPH; and in the alternative, to approve a modified parking plan; and VAR /to permit a reduction in parking spaces from 72 to 39 spaces.

July 30, 1996 Order of the Z.C.; Petition for Special Hearing was GRANTED w/ Rs in part, and DENIED in part; Petition for Variance is DENIED.

August 28 Notice of Appeal filed by Leslie M. Pittler, Esquire, on behalf of Lillian D. Jenifer and the Long Green Valley Association.

August 29 Notice of Appeal filed by Charles Brooks, Esq. for Sanders.

No. 97-332-SPH

February 7, 1997 Petition for Special Hearing filed by Charles E. Brooks, Esquire, on behalf of Ronald Sanders, for approval of a waiver to permit construction of a parking lot in a riverine floodplain.

May 13 Order of the Z.C.; Petition for Special Hearing was GRANTED w/ Rs.

June 12 Notice of Appeal filed by Leslie M. Pittler, Esquire, on behalf of Lillian D. Jenifer, Protestant.

96-168-SPHA and 97-332-SPH

June 18, 1997 Letter from Charles Brooks requesting consolidation of Case No. 96-168-SPHA and Case No. 97-332-SPH, (both to be heard 7/9/97).

July 9 Hearing begun by the Board; continued by agreement of counsel.
November 19 Hearing before the Board of Appeals (Day #1).
December 10 Hearing before the Board of Appeals (Day #2 - concluded).

January 9, 1998 People's Counsel's Memorandum filed.

January 12 Petitioner's Memorandum of Proposed Findings of Fact and Conclusions of Law filed by M. Spicer on behalf of Sanders.

February 3 Open deliberation conducted by the Board.

May 1 Opinion and Order issued by the Board; Petition for Special Hearing is DENIED; nonconforming use status to the parking is GRANTED; Petition for Variance is GRANTED with restrictions.

May 29 ✓E Petition for Judicial Review filed in the CCt by G. Scott Barhight, Counsel for Ronald Sanders. (Copy rec'd by CBA 6/5/98).

July 17, 1998 ✓ Record of Proceedings and transcript of testimony filed in the Circuit Court for Baltimore County.

July 27, 1999 ✓E Opinion issued by the CCt; CBA AFFIRMED in pt and REVERSED in pt.; REMANDED to CBA as to SPH /Flood Plain issue.

August 18, 1999 ✓E Notice of Appeal filed in the Court of Special Appeals by David K. Gildea and G. Scott Barhight, as counsel for Ronald Sanders.

Sep. 20, 2000 ✓E Opinion issued by the CSA; Judgment of the Circuit Court for Baltimore County Affirmed in part, Reversed in part; case remanded to that to that court with instructions to vacate the decision of the Baltimore County Board of Appeals and Remand the case to that body for further proceedings in accordance with this opinion.

Nov. 29, 2000 Order issued by the CCt; consistent with the opinion of the CSA filed 9/20/00, the decision of the CBA is vacated and case is REMANDED to the CBA for further proceedings.

11/26/96-Notice of Assignment for hearing scheduled for Tuesday January 28, 1997 at 10:00 a.m. sent to following:

Leslie M. Pittler, Esquire
Ronald Sanders
Spellman, Larson & Assoc., Inc.
Charles E. Brooks, Esquire
Lillian Jennifer, et al
Charlotte W. Pine
Carol Trela /Long Green Valley
People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM
Virginia W. Barnhart, County Attorney

1/21/97 - Letter from Charles Brooks, Esquire, requesting postponement of hearing for 1/28/97; still awaiting approval from BCo as to usage of flood plain area for parking facility; to hear all matters together. No objection from either L. Pittler or P. Zimmerman to the granting of same.

- Notice of PP and Reassignment sent to parties; matter rescheduled to Thursday, April 24, 1997 at 10:00 a.m.

4/02/97 -Letter of PP filed by Charles Brooks, citing hearing pending before the Zoning Commissioner in reference to the request for a waiver of flood plain regulations; no objection from PMZ or L. Pittler; to bereassigned.

- Second Notice of PP and Reassignment sent to parties; matter rescheduled to Wednesday, July 9, 1997 at 10:00 a.m.

6/18/97 -Letter from Charles Brooks requesting consolidation of Case No. 96-168-SPHA and Case No. 97-332-SPH, both to be heard at one hearing on assigned date of July 9, 1997. Awaiting receipt of second appeal file.

6/24/97 -Amended Notice of Assignment sent to parties; both cases to be heard on assigned date of Wednesday, July 9, 1996 at 10:00 a.m.

7/09/97 -Hearing begun before Board; continued by agreement of counsel; to be rescheduled for hearing upon notification by Counsel that DEPRM has reached a decision in matter related to this case. To be reset upon request

9/25/97 -Pursuant to request from Mr. Sanders to schedule, these matters to be assigned, as consolidated hearing, to Wednesday, November 19, 1997 at 10:00 a.m. Notice of Assignment sent to parties.

11/19/97 -Additional amount of time needed to complete testimony in this matter; scheduled for Wednesday, 12/10/97 at 9:30 a.m.; notice to be sent.

11/20/97 -Notice of Assignment /Additional Date - sent to parties; scheduled for Wednesday, December 10, 1997 at 9:30 a.m. for conclusion of this case.

For past Notices of Assignment, see 96-168-SPHA

12/10/97 -Hearing concluded before Board. Closing briefs and proposed findings of fact due from counsel January 12, 1998. To be scheduled for deliberation.

12/24/97 -Letter from P. Zimmerman -- submitting copy of consultant agreement for design of "Phase I Stream Restoration for the reach of Minebank Run from Goucher Boulevard to I-695."

1/09/98 -People's Counsel Memorandum filed P. Zimmerman and C. Demilio.

1/12/98 - Petitioner's Memorandum of Proposed Findings of Fact and Conclusions of Law filed by M. Spicer on behalf of Petitioner, Ronald H. Sanders.

1/13/98 -Copies to K.L.W. by mail.

2/03/98 -Deliberation concluded; Unanimous decision /approved nonconforming use; granted variance to reduce parking spaces; denied flood plain waiver; denied forest buffer waiver. Written opinion/order to be issued by Board; appellate period to run from date of that written Order. (K.L.W.)

9/20/2000 – Opinion/Order of the Court of Special Appeals – Case remanded to the Circuit Court to remand to the CBA pursuant to CSA Opinion.

11/30/00 – Received Order of James T. Smith, Jr., Judge, Circuit Court, remanding to CBA for further proceedings consistent with CSA Opinion.

1/03/2001 – Motion to Proceed on the Record and Permit the Submission of Briefs and Oral Argument filed by Jennifer Busse, Esquire, WHITEFORD, TAYLOR & PRESTON on behalf of Petitioner Sanders.

1/17/01 – People's Counsel's Answer to Petitioner /Appellant's Motion to Proceed on the Record, Etc. filed by the Office of People's Counsel.

2/01/01 – Petitioner./Appellant's Reply to People's Counsel's Answer to Petitioner /Appellant's Motion to Proceed on the Record, Etc. filed by Jennifer R. Busse, Esquire.

NOTE TO FILE: Further action by the Board on this remand will take place some time after mid-March 2001 – as one of the Board members involved in this case will be on medical leave for surgery until that time.

3/09/01 – Letter from G. Scott Barhight, Esquire – requesting ruling on his Motion to Proceed on the Record and Permit the Submission of Briefs and Oral Argument – Board's decision re this Motion will affect preparation for hearing.

7/03/01 – Request to schedule hearing from G. Scott Barhight, Esquire.

7/24/01 – WRITTEN BRIEFS DUE FROM COUNSEL MONDAY 9/10/01 -- Notice of Assignment /ARGUMENT ON REMAND scheduled for Wednesday, October 3, 2001 at 10:30 a.m. sent to following (oral argument from counsel pursuant to remand order from CCt /CSA):

G. Scott Barhight, Esquire
Jennifer R. Busse, Esquire
Ronald Sanders
Spellman, Larson & Assoc., Inc.
Edwin S. Howe III /KCW Consultants, Inc.
Lillian Jennifer
People's Counsel for Baltimore County
Pat Keller
Lawrence E. Schmidt
Arnold Jablon, Director /PDM

8/23/01 – Letter from People's Counsel; requesting extension of one week to Monday, September 17, 2001 as date for filing briefs in this matter; also stating that J. Busse has no objection to this extension request.

8/27/01 – Letter to counsel – extension requested by PC is granted; memos are due Monday, September 17, 2001.

9/17/01 – Petitioner's /Appellant's Brief on Remand filed by Jennifer Busse, Esquire; People's Counsel's Brief on Remand filed by PC. Copies to S and L on 9/19/01; to W prior to 9/20/01. Originals filed in brown wallet in exhibit/file closet.

10/03/01 – Hearing before the Board /oral argument /issues on remand from Circuit Court pursuant to Order of Court of Special Appeals (L.W.S.); deliberation to be assigned and notice sent.

10/09/01 – Notice of Deliberation sent to parties; assigned for Wednesday, October 31, 2001 at 9:30 a.m. FYI copy to L.W.S.

10/31/01 – Deliberation concluded (Wescott, Stahl, Worrall); Granted – flood plain waiver for parking (County Council re-zoned to B.L.; parking allowed by right if waiver can be obtained – meets criteria for waiver) for safety reasons, parking in flood plain provides more public safety than would reduced parking allowed w/variance; as to variance – no longer needed – however, in response to CSA remand, in which uniqueness was affirmed but questions raised as to detail on practical difficulty, Board clarified that which constituted practical difficulty; remains legal nonconforming use for parking; parking continues; only business has changed. Two other issues were determined to be moot. Order to be issued; appellate period to run from date of written order.

Baltimore County
Department of Public Works

Office of the Director
111 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3300
Fax: (410) 887-3406

97-332-SPH

January 23, 1997

Spellman, Larson & Associates, Inc.
Suite 107, Jefferson Building
105 West Chesapeake Avenue
Towson, Maryland 21204

Attn.: Mr. Joseph L. Larson, President

Subject: Sanders Restaurant
Case No. 96-168-SPHA

Dear Mr. Larson:

Our office has completed its review of the additional information submitted with your letter of January 7, 1997. As a result of this review, this department does not oppose the placement of fill and parking lot construction as proposed for this site.

Sincerely,

Charles R. Olsen
Director

CRO/DLT/s

cc: Timothy M. Kotroco, Deputy Zoning Commissioner
Arnold Jablon
Tom Hamer
John Maple
Leslie M. Pittler (Suite 610, 29 West Susquehanna Avenue, Towson, MD 21204)
Charles E. Brooks (Brooks & Spicer, 610 Bosley Avenue, Towson, MD 21204)

#332

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on Recycled Paper

PETITION PROBLEMS

97-332-SPH

#319 --- JRF

1. No address or telephone number for legal owner.
2. Need title of person signing for legal owner.
3. Sign form incomplete.

#320 --- JRF

1. Notary section is incomplete.
2. Area is 9.991 +/- WHAT??? (acres, square feet, miles?).

#321 --- JLL

1. Sign form incorrect.

#322 --- JCM

1. Sign form not completed.

#323 --- RT

1. No section number or wording on petition form.

#324 --- JRA

1. Sign form incorrect.

#325 --- JLL

1. Sign form incorrect.

#331 --- JCM

1. Need attorney - legal owner is incorporated.
2. Sign form incorrect.

#332 --- JRF

1. Not marked "floodplain" on folder.

#333 --- RT

1. No telephone number for legal owner.
2. No sign form in folder.

#334 --- JRF

1. Need typed name and title of person signing for contract purchaser.
2. Sign forms incorrect.

#335 --- RT

1. Sign form incorrect.

Baltimore County Government
Department of Economic Development

400 Washington Avenue
Towson, MD 21204

(410) 887-8000
Fax (410) 887-8017

MEMORANDUM

To: Permits and Development Management

From: Peter Swanson
Department of Economic Development

Date: February 24, 1997

Re: 2/24/97 Zoning Advisory Committee Meeting
Sanders' Corner Restaurant (Item Number 332)

The Department of Economic Development has had the opportunity to meet with Ron Sanders to understand the issues regarding the construction of additional parking area for his restaurant establishment. In order to construct additional parking for Sanders' Corner Restaurant, a waiver is required, given the proximity to a riverine floodplain.

Sanders' Corner Restaurant currently employs 30-35 people and has been in operation at this location for a number of years. The expansion of this parking lot will support the continued viability of this business and seems to be in accordance with the County's Master Plan for the area, given the County's planned increase in recreational activity in the Cromwell Valley area.

BALTIMORE COUNTY, MARYLAND

Inter-Office Correspondence

fee copy

TO: K. Howanski
L. Stahl
M. Worrall

DATE: January 13, 1998

FROM: Kathi

SUBJECT: In the Matter of Ronald Sanders -Petitioner; Case No. 96-168-SPHA and 97-332-SPHA / Closing Briefs and Findings of Fact as filed by Parties

Attached for your review and information are copies of the following documents which were filed in the subject matter, as requested by the Board at the conclusion of its hearing on December 10th:

1) People's Counsel's Memorandum filed January 9, 1998 by Peter Max Zimmerman, People's Counsel for Baltimore County, and Carole S. Demilio, Deputy People's Counsel.

2) Petitioner's Memorandum of Proposed Findings of Fact and Conclusions of Law filed January 12, 1998 by Malcolm F. Spicer, Esquire, on behalf of Ronald H. Sanders.

Deliberation in this matter is scheduled for Tuesday, February 3, 1998 at 9:30 a.m.

Should you have any questions regarding this case, or any attachment, etc., please let me know.

kathi

Attachments

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

August 27, 2001

Peter Max Zimmerman, People's Counsel
for Baltimore County
Carole S. Demilio, Deputy People's Counsel
Room 47, Old Courthouse
400 Washington Avenue
Towson, MD 21204

Dear Counsel:

RE: *In the Matter of: Ronald Sanders* -Petitioner
Case No. 96-168-SPHA and Case No. 97-332-SPH

In response to your letter of August 23, 2001, your request for a one-week extension for filing of briefs in the subject matter has been granted. Briefs are now due from all counsel on Monday, September 17, 2001.

Should you have any questions, please call me.

Very truly yours,

Kathleen C. Bianco
Administrator

cc: Jennifer R. Busse, Esquire
G. Scott Barhight, Esquire

FILE

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on Recycled Paper

COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY

MINUTES OF DELIBERATION

IN THE MATTER OF: Ronald Sanders -Petitioner
Case No. 96-168-SPHA and Case No. 97-332-SPH

DATE : Tuesday, February 3, 1998 @ 9:30 a.m.

BOARD /PANEL : Kristine K. Howanski, Chairman (KKH)
Margaret Worrall (MW)
Lawrence M. Stahl (LMS)

SECRETARY : Kathleen C. Bianco
Administrator

PURPOSE: To deliberate Case No. 96-168-SPHA and Case No. 97-332-SPH /Ronald Sanders -Petitioner. Testimony and evidence received in this case on July 9, November 19, and December 10, 1997.

Those present at this deliberation included Charles E. Brooks, Esquire, Counsel for Appellant /Petitioner; Ronald Sanders, Appellant /Petitioner; Lillian Jennifer, Appellant /Protestant; and Carole S. Demilio, Deputy People's Counsel for Baltimore County.

KKH: We are here on Case No. 96-168-SPHA and 97-332-SPH in the matter of Ronald Sanders, and we would have to see or consider basically whether or not we would permit commercial parking in a residential zone pursuant to special exception and whether or not we would approve the earlier approval of the flood plain waiver; there was also the forest buffer waiver. Margaret, would you want to start?

MW: I have to start out by saying I have not reached an absolute determination here. I think there are a lot of questions, and I have questions I want to ask and hear what or how the two of you view this, and tell you what my inclinations are. Basic questions in this case relate to parking requirements and difficulties at Sanders Corner where there is a restaurant currently operating. Petitioner requests commercial parking in a residential zone and that request is accompanied by a waiver for flood plain and forest buffer incursion or in the alternative, grant parking variance to reduce the spaces from 73 to 39.

There also appeared to be a question raised about the standing of the People's Counsel. I do have an opinion on that. I don't think that is a problem here at all. It seems to me they defend the master plan and the zoning maps. These issues are integral to this case. I don't think there is a problem with People's Counsel's standing, as far as I'm concerned.

I was cognizant of the history of the property -- there was extensive testimony and evidence -- how it had been used as an ice cream and carry out local business of some limited use, and that then there came the time when it was requested that the property be rezoned from residential use to a commercial use to reflect that commercial use that was already there and had been nonconforming use. Looking at the way the County Council did that led me to try to figure out the intent. They split-zoned the property; zoned the footprint B.L. and remainder as D.R. 1, which is the lowest D.R. zoning density there is.

No other part of the Cromwell Valley is commercial, and, indeed, most recently the County Council has seen fit to spend quite a bit of money to purchase several hundred acres as park to preclude further development along this area along Mine Branch Run. I believe the County Council intended to permit use of the subject property as it had been for many years. By split-zoning, they were attempting to limit growth as a commercial site.

Petitioner has expanded the property considerably both in use of the property and in physical size, and evidently has created parking needs beyond the needs of an ice cream parlor and carry out. There was testimony about parking and by virtue of request for variance, the Petitioner says 39 parking spaces would be appropriate for the current use of the building.

Petitioner has received nonconforming use status for parking in residential zone for the south side /Cromwell Bridge Road, across from the restaurant. This seems to me to be appropriate; however, we are not called upon to judge that. Parking adjacent to and in the front of the building has been and was used since its beginning, and it would, therefore, be my thought that this could continue to be used for commercial parking.

Now this brings us to the question of parking in the flood plain area -- as Petitioner's memorandum indicates -- parking facilities in residential zones are in the nature of special exception use. I find real concern with waivers and variances to what are conditional uses to begin with, and uses intended to place limits on the property.

This, along with the County's Council's decision to split-zone, causes me some concern. I am convinced by People's Counsel that there are standards to be followed and waivers do not do that. Concerns about environmental failure; Mine

Branch Run; restoration of the stream which is ongoing.

In order to have commercial parking in residential zone, Petitioner must satisfy the environmental standards without a waiver or variance. I can see nothing unique about this area of the flood plain property compared to other properties joining Mine Branch Run. Any hardships that may have been created appear to me to be self-inflicted. When the size of the operation was expanded, he needed to consider parking. And, yes, he could not do parking in the area outside of the flood plain -- maybe he could not have expanded so much. The same thing applies to forest encroachment.

Therefore, I do not find convincing and indeed questioned the parking lot for Cromwell Valley Park. But we are not here to make a determination on that flood plain area, but on this area. Therefore, it would be my inclination to deny the request for parking in the flood plain.

As for the variance to reduce parking spaces from 73 to 39, which is the alternative request, because it is a variance, I looked to Cromwell v. Ward standards, and there is some argument here which is valid that taking the site outside of the flood plain -- everything outside of the flood plain -- there is a character of that area which is steeply sloping and makes it unusable for parking. If it were all flat, it's possible Petitioner may have been able to use it for additional parking. Perhaps it's unique in its character in that way -- steeply sloped and not usable by adjacent commercial use. I can see where the inability to use portions of his very limited site could create hardship.

There do not appear to be any environmental issues here regarding forest buffer and encroachment on the stream. Also, as far as harm to the community, other parts of this site have been used without any problems to the community. I would be inclined to grant the variance for parking. As to expansion of actual structure, this was permitted by the fact that the County Council rezoned the footprint of the building to B.L., and it does not have the nonconforming use 25% growth area restriction.

But, again, I believe the County Council intended, or it appears to me it was their judgement that by just rezoning the footprint of the building they then expected the Petitioner to comply with appropriate restrictions on the rest of the property.

KKH: I have to say, I'll wait for Larry, but I had the same initial

reactions -- I found the testimony regarding the flood plain actually troubling; I did find the steepness issue to have a certain appeal to me in terms of presenting unique situation. My gut reaction at this point was similar, but let's hear what you have to say.

LMS: Once again, and I think the fact that we are all struggling with this is that, it seems to me, I don't have any answer either. There are things that concern me. First let's do each one -- I agree with you, Margaret, People's Counsel has standing to be in this case. Whether real issue or a red herring issue, I would expect People's Counsel, if it chose to do so, to be involved.

As to the case itself, we have the County Council zoning something B.L. and I find it hard to believe that, when something is zoned a particular way, someone should be surprised when someone tries to use that zoning to the full extent. When you approve a footprint for a certain amount of space then you cannot complain later that he went ahead and used it. That is the parameters you allowed to exist. It's like taking you to the river but now letting you drink.

Unfortunately, whether the intention or not, and that is probably one of the major problems I have, trying to figure out the logic and intent -- I'm having a hard time finding the basic logical string. Things seemed to have been done in a vacuum. First the Zoning Commissioner and now this Board is being asked to bring it all together in a logical way. On the one hand, you have the flood plain and, again, I don't like waivers of flood plains -- it's a dangerous thing to do. It's the reason flood plains are set up. I lived in a house in the middle of a flood plain which was ultimately taken down. It's an empty lot now. The flood plain is set up for a particular reason. And that's a good reason. It's a good environmental and land and water control reason. Notwithstanding the fact that the County has approved it, which again sends a contradictory signal to what good zoning and land planning should be. But by the same token, the law provides us with various methods to say, okay, you can use the B.L. property to the extent and for the purpose you are being allowed by dealing with the parking issue in other ways.

I believe that the nonconforming use issues are relatively simple. The restaurant's been there a long time, as an ice cream parlor, and so forth. It's always had parking; there's been parking back to 1945 - across the street and in front - the whole argument now, that it's much more and different character, does not really move me. I'm comfortable with the

fact that areas that are being used with the exception of the flood plain area have always been used for parking and I have no problem with them remaining. Interestingly, I tried to do what you did. If you do not want to mess with the flood plain, is there another way to deal with it. Another way is a variance. If you allow variance then you are saying that the rule for a certain number of people you need certain amount of parking is not what you are going to have; being asked to reduce the amount of parking that was previously decided to be needed.

The alternative for us is to say, yes, that's right but in this case you need less parking; possible overflow problems; where you put the cars problems; have to assume that the business in expanded mode will be successful. That translates to people and cars coming. It's why you have 73 parking spaces instead of 39.

Variances are not something we grant a lot of, for a lot of reasons - because of Cromwell. I am reticent to do it; changing actual zoning rule or standard that is there and that is a reason. I do not want to be a mini-county council in rezoning. That's what the County Council does. However, we are given the power to do variances. I am in a quandary. I do not want to give a flood plain waiver; variance is the lesser of two evils.

I'm not addressing the nonconforming use; we all agree on that issue.

KKH: Yes, we all appear to agree on the nonconforming issue.

LMS: He should be allowed to use it but I'm not convinced yet as to how he should do that. If we do not allow him to use it, we are essentially saying to anyone who gets a change in zoning or goes to a site zoned a particular way, you cannot use it although it's zoned that way.

Question: If he expanded it, should not he have been aware of parking? That rings a chord -- no one does things in a vacuum, although the State and County seem to have done that. But when you are saying to someone, you are zoned to use it and then require them to do other things in order to make the zoning operative, then you have not really changed the zoning. That footprint zoning did not exist if it is contingent upon getting other zoning changes.

KKH: I think that's a little disingenuous. They would have room to expand within that footprint and still meet parking

requirements.

LMS: They bit off more than they could chew.

KKH: But now that we have been given this mess, we cannot stand there and point fingers. What do we do?

LMS: By the way, I had no particular end to what I was saying.

KKH: This is not a situation where I feel, I guess I do feel if allowed to run his business -- it existed there, and he was given permission by the County Council who to some extent saw him continuing and expanding his business. The fact that he went beyond that -- what the law does, we do not know if that conflicts with what the County Council thought at that time or conflicts with what Mr. Sanders thought at that time. Only that he did this.

I do have a sense that the nonconforming use will continue. I guess I am - as to variances - looking at variances as evils, that is the least evil. In that particular instance, unlike other situations, you can make a case for hardship not their own fault - the steepness issue - in terms of variance. I don't think we will ever feel totally comfortable about this case.

MW: I have to admit that the parking variance appears to have some validity. It worries me because of past history -- where the extra cars, the overflow cars, will park anyway. People will not drive in there and not park in a bad spot.

LMS: We have to assume that if a man has a certain number of seats in the restaurant he will try to fill them.

NOTE: At this point, the Board deliberated at length among themselves, referring to exhibits and notes on the bench at length. A portion of the following notes were taken during this portion of deliberation.

MW: Did we, and I have to go back, did we have any testimony from the Petitioner indicating 39 parking spaces is adequate?

MW: Seems to me there was some testimony. And what is the capacity of the restaurant. Can we draw anything from that that would be helpful?

LMS: Certainly it was not the first day. Either the second day or third day. I have a note from the second day of hearing that

was a question -- was the limiting of the B.L. zone just to the footprint maybe a back-door way? But he's still allowed to put it there.

KKH: Still allowed to put certain amount there and still satisfy parking.

MW: Better approach indeed would have been to go back and request that additional D.R. 1 be rezoned to B.L.

LMS: I think it's the last day. Moore's the last day.

MW: Six tables of 33 people inside -- inside to accommodate 33 people in the original area, with the enclosure...

KKH: Counted the parking spaces shown, just to make sure.

LMS: Moore did not talk about number of parking spaces; he talked about traffic or changing directions from the vehicles in front.

Most of their experts were the last day. Hau talked about it from street point of view.

MW: There was also testimony from Gerber that when the County Council rezoned it in this method, it was typical at that time to do it this way. Before setback limits, and so forth. Used with the assumption that parking would be permitted.

LMS: With street parking to be allowed; otherwise it makes it unusable in that form. I made a note for myself that when you zone for commercial you must have parking to support it.

Parking notes from Larson: After exhibits, Petitioner's #8, there was a discussion about master plan, Cromwell Valley Park shows parking area -- to get the total of 73 required for the size of the restaurant and enclosed porch - requested variance. There was Pete's cross-examination...

MW: It was also an old nonconforming use which changed in some way. In 1988 when it was zoned B.L. it had burned out and had to be completely rebuilt.

LMS: If they were doing it for the issue of rebuilding it, maybe gave no thought to the issue of providing parking for the use. Obvious consequence of the rezoning. I cannot believe they did not play out the hand but like Gerber said, if granting the parking was so easy, and at that time the area behind was not a flood plain because there was no such animal...

They are either saying give us the property to have what zoning requires for B.L. or let us keep what we have and say that is enough.

KKH: There are 33 tables now.

LMS: We need to bite the bullet and say it is the most rational way to proceed with regard to the flood plain. Or we give him the variance and let him deal with it without parking spaces. Or tell him to tear it down. But how can you tell someone to tear something down that's allowed by the zoning?

KKH: I would be more comfortable with the variance.

MW: They can come back next CZMP and get it reclassified.

LMS: Cannot reclassify the flood plain.

KKH: No, the D.R. -- reclassify to B.L.

LMS: But it would still be a variance -- I'm just afraid it will exacerbate the situation, granting the variance to 39.

MW: That's only speculation. That's all conjecture.

KKH: Am I willing to inflict this on the flood plain because of our speculation?

LMS: I agree with you. Can we agree that we are not going to change B.L. zone footprint -- limit number of people and therefore the number of spaces needed?

KKH: I don't think that's what is before us.

LMS: As a practical result -- can this be the end result?

MW: That could be the end result of what we do.

KKH: I hate a situation that did not start out -- our solution as I think about it - I don't like the idea that when you have a situation that starts unattractively, regardless of fault, that our result is to do a flood plain waiver.

MW: But are we splitting the baby in giving parking variance?

KKH: This is what we have been handed. We have only been handed this.

LMS: If we were given the right to change D.R., we might have been

able to carve out additional parking --

MW: No -- you are still dealing with limited amount of space and you would still be dealing with parking variance, even if it was B.L. That is not the solution. It just makes it more understandable.

LMS: So we have to do one thing or another. Let's play out the scenario. If we let him park in the flood plain, we set precedent. Probably do some damage to the environment and would probably go against the spirit of the Code as it was set up.

KKH: This is not the case I think we do that.

LMS: Let's play out the variance -- he parks less cars there for the number of tables. It either works out fine because of flow of business works out fine. Or it's successful business which is possibility and you have a lot of cars there -- let's say 73 spaces is what you need. Let's presume there will be 60 or 70 cars there -- that's what is indicated when you say you need certain number. Let's presume there is now 25 cars parking in that area.

KKH: That is what we are doing now.

LMS: Therein may lie the answer. And if people come -- all guesswork -- but if people cannot park, this will discourage the flow of business. He will have to deal with that problem and resolve it. So the issue still needs to be dealt with -- how does he deal with that issue?

KKH: It's his issue; he's a business person.

LMS: Can he apply for reclassification?

MW: That does not change it. A certain number of spaces are there. You have to deal with that. Do you get any less parking spaces allowed because of one kind of zone? I don't think so. If they decide a certain number of spaces and ingress/egress of people is the same.

LMS: When you don't fool with the flood plain, you don't grant waiver.

MW: It would appear to be but business would have to limit itself to a number of occupants relative to the number of parking spaces.

KKH: But if they come in 10 years from now? That's what I don't like. He was just saying that we do not know what they will decide in the future; I guess I'm just reflecting my information on this.

LMS: Presuming we grant the variance, let's see what you would be doing. Just for argument's sake.

MW: According to Gerber's testimony, which was uncontradicted...

KKH: Does have steepness -- no neighbors -- does put forth a case for uniqueness.

LMS: Assuming he has uniqueness, then we come to self-inflicted.

MW: We would have to consider your idea of zoned B.L. and may be then should be permitted. The unique qualities of the property inflict a certain economic limit and hardship and practical difficulty to expand the property to what is allowed by the zoning, which brings us down to spirit and intent. Spirit and intent of B.L. or even D.R. 1 is to impose particular limits; would be limited by granting variance.

KKH: I think that's where I might come in -- would do justice more to honoring D.R. portion of it since there is an anomaly use there. It is not a commercial area.

LMS: I think it's been a fixture of the area for so long.

MW: Appears in my mind to be the current throughout everything on this property has been the recognition of the fact that it exists but its existence needs to be limited.

I probably -- if this had been 1992 -- probably would have been RCC -- rather than this. But that opportunity did not lend itself; was not available to the County Council.

LMS: So as far as trying to figure out their intent -- do we say they did it simply because they...so that if something happened?

KKH: It's really in between -- if we take what they did on its size, they not only approved existing size but approved expansion but that was not defined. It's a hybrid -- wanted to approve some expansion but not beyond what they permitted by the B.L. footprint.

MW: There was an ice cream store originally there and it did not take up the entire building. Upon rezoning, became closed-in

business.

As near as I can tell, there was no reason to redo this -- why not just rezone ice cream...

KKH: They did intend some limited expansion - but wanted it to stop there.

MW: But Gerber's testimony as Planning Director at that time...

LMS: We would have to presume that they understood that if someone utilized it they would have to address it in conjunction with the other requirements like parking...

KKH: I think that is a fair assumption.

LMS: You get into parking and know you need it...

KKH: Right now, I would be casting my vote for the variance and not for the waiver.

I have not heard anything that makes me...

MW: Although I recognize the intention...

KKH: I think the other one has more potential for problem than this.

LMS: I agree with you.

MW: Problems came to my mind as far as parking in the flood plain -- what happens to public safety with parking, insurance, those things?

KKH: I was not persuaded by the testimony as to that...

MW: Building was allowed in flood plain areas for years until it was stopped. What is your inclination?

KKH: I seem to have reached my decision --

LMS: We can say what we agree and what we have not agreed -- that would be either the flood plain or the variance. It is what we are left with.

KKH: Right now it looks like approval of nonconforming use; denial of flood plain and forest buffer and approval of parking variance. 168 - it's not the whole thing.

LMS: 168 was approval of commercial parking in residential zone; and to amend previous; was asking that we accept it as nonconforming; grant special hearing as to that, and grant variance.

MW: But we are not granting amendment to previous approval; that would be the flood plain. But in the alternative...

LMS: Instead of approving that part of the flood plain, we approve the variance.

KKH: That's right. That's it. We have reached our conclusion. Having put together an opinion, anyone aggrieved will have 30 days from which to file an appeal.

Summary: We are approving the nonconforming use of parking spaces on the other side. Granting the variance to reduce parking spaces; denying flood plain waiver; denying forest buffer request. We are granting the alternative - not allowing anything to be done on the flood plain; he will not be allowed to use it; he cannot utilize it.

****

Respectfully submitted,

Kathleen C. Bianco

BOARD OF APPEALS OF BALTIMORE COUNTY
MINUTES OF DELIBERATION

IN THE MATTER OF:	Ronald Sanders – Case No. 96-168-SPHA and Case No. 97-332-SPH On Remand from CSA via Circuit Court	
DATE :	Wednesday, October 31, 2001	
BOARD /PANEL :	Lawrence S. Wescott	(LSW)
	Lawrence M. Stahl	(LMS)
	Margaret Worrall	(MW)
RECORDED BY :	Kathleen C Bianco /Administrator	

PURPOSE: To deliberate, on remand from the Circuit Court via mandate by the Court of Special Appeals:

(1) the variance – for findings regarding the practical difficulty and unreasonable hardship aspect of Sanders' variance request (CSA found sufficient in your opinion to support the "uniqueness" aspect of the variance but not the "practical difficulty" aspect); and

(2) the floodplain waiver – for the Board to articulate its reasoning and legal standards for its decision regarding both the floodplain waiver and commercial use permit; and

(3) on cross appeal – legal nonconforming use as to parking lot on eastern portion of the property – the Board failed to address the issue of whether the expansion "changed" the use of the building from a carry-out store to a full service restaurant; did the this terminate the nonconforming use status of the existing parking lots.

The Board convened for deliberation, having concluded this matter on remand on 10/03/01.

This panel consisted of Lawrence S. Wescott, Chairman (replacing Kristine Howanski who completed the original panel); Lawrence Stahl and Margaret Worrall (two original panel members). Complete record extracts and copies of all exhibits were provided to the Board upon remand.

Panel members discussed:

- Originally five issues; now down to above three; as to commercial parking permit – rezoned to B.L.; now moot. As to forest buffer variance – not timely appeal – not an issue.
- Remaining issues: flood plain waiver; parking variance as alternative to flood plain waiver; and nonconforming status.

✓ As to east side parking variance – nonconforming use
Agreed with Judge Smith – parking is parking; still a nonconforming use. While use of building changed, no effect on parking; no change on east side parking use; separately deeded /zoned parcel. Established in 1991 case; not appealed; no change in that parking use.

✓ As to flood plain waiver
CSA found findings insufficient for CBA to deny; did not explain statement.
Original decision as a balance; part of County policy to protect flood plains
Variance issue v flood plain waiver

County Council took action – deemed it okay for this place to be here; zoned to B.L.
Reviewed 26-171 re waiver; good and sufficient cause
Reviewed - will not increase flood heights
will not impact public safety
will not incur public exp
no nuisance
no fraud
no conflict w/laws
Parking lot does not impact #3

✓ Alternative of variance is more detrimental than parking in flood plain
If you have large group, would ultimately park on Loch Raven Drive
Acknowledged parking problem in area
CSA confirmed unique; CC changed zoning
If alternative variance is considered – only need to look at practical difficulty per remand; CSA confirms unique

✓ However – zoning change was granted
Variance would not be need with flood plain waiver
Agreed Petitioner qualifies for waiver
Parking lot does not affect flood plain
Fact that Petitioner can operate without it – indicates it's not economic but safety reasons
Better to have parking in flood plain; grants all spaces; variance would only grant 39; becomes safety issue
Reviewed transcript and Gerber's testimony
People's Counsel's question resulted in: Council did not want development in flood plain – that's why the whole property was not zoned B.L. Than the County Council did in fact rezone it to B.L.; flood plain parking was not included as B.L. when PC questioned Gerber; now it is; indicates intent to allow parking in the flood plain
- Council knew what the property was
- Knew it had expanded
- Re-zoned to B.L. – by right w/waiver
- Could not remove flood plain, but w/B.L., could go for waiver
- The fact that part was rezoned to B.L. by CC – last statement by CC; cannot appeal CC change in zoning
- Safety issue – to do it with waiver and proper amount of parking than with insufficient parking

Determination as to flood plain waiver – Unanimous – GRANTED.

✓ As to variance request
Practical difficulty – flood plain issue was there
Had denied flood plain waiver; created practical difficulty
Reviewed spirit and intent

Determination as to variance request – flood plain waiver had been denied – created practical difficulty. CSA affirmed uniqueness found in Board's original Order – remanded for findings on practical difficulty; meets requirements for variance; also reviewed spirit and intent and Master Plan.

FINAL DECISION:

Flood Plain Waive request is **GRANTED** to allow parking in flood plain now zoned B.L. As to practical difficulty found in original Order of the Board – denial of flood plain waiver created practical difficulty. But variance is not needed with grant of flood plain waiver.

NOTE: These minutes, which will become part of the case file, are intended only to indicate for the record that a public deliberation took place this date regarding this zoning case /remand. The Board's final decision and the facts and findings thereto will be set out in the written Opinion and Order to be issued by this Board. Appellate period to run from date of written Order.

Respectfully submitted

Kathleen C. Bianco

Kathleen C. Bianco, Administrator
County Board of Appeals

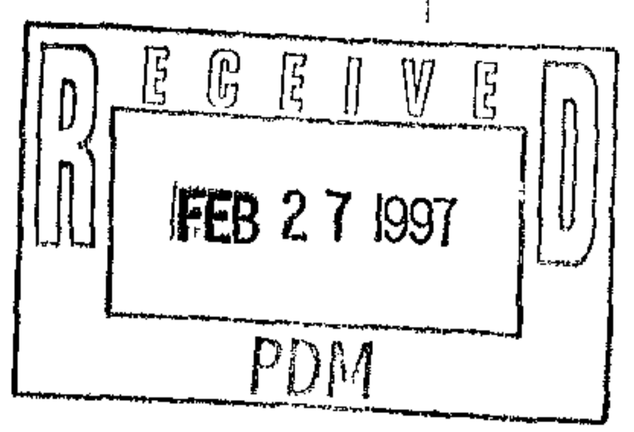
Gwen Stephens
97-870

LESLIE M. PITTLER

ATTORNEY-AT-LAW

SUITE 610
29 WEST SUSQUEHANNA AVENUE
TOWSON, MARYLAND 21204
(410) 823-4455

FACSIMILE
(410) 583-2437



97-332-SPH

February 27, 1997

Mr. Arnold Jablon
Director
Department of Permits and
Development Management
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

Re: In the Matter of Ronald Sanders
Zoning Case No. 96-168-SPH
Waiver of Flood Plan Case No. 97-332-SPH

Dear Mr. Jablon:

I have been advised by your department that case no. 97-332 SPH is scheduled for hearing before the Zoning Commissioner or the Deputy Zoning Commissioner for 9:00 a.m., March 14, 1997. In a recent telephone call from the Petitioners attorney, Mr. Brooks, he indicated that their engineer Mr. Larsen was going to request a postponement. However, Gwen advises that she is aware of no such request.

Therefore, I am prepared to go forward on March 14, 1997, at 9:00 a.m. and will set my schedule accordingly.

Very truly yours,

Leslie M. Pittler

LMP/pgb

LESLIE M. PITTLER

ATTORNEY-AT-LAW

SUITE 610
29 WEST SUSQUEHANNA AVENUE
TOWSON, MARYLAND 21204
(410) 823-4455

FACSIMILE
(410) 583-2437

June 6, 1997

Arnold Jablon, Director
Department of Permits and Development Management
111 W. Chesapeake Avenue
Towson, Maryland 21204

Re: PETITION FOR SPECIAL HEARING
2260 Cromwell Bridge Road (Sanders Corner),
NW/S Cromwell Bridge Road, 78' SW of c/l
Loch Raven Road, 9th Election District, 6th Councilmanic
RONALD SANDERS, Petitioner
Case No. 97-332-SPH

Dear Mr. Jablon:

Please enter an appeal on behalf of Lillian D. Jennifer to the County Board of Appeals from the Findings of Fact and Conclusions of Law and Order dated May 13, 1997 of the Baltimore County Zoning Commissioner in the above-entitled case, relating to the Petition For Special Hearing.

Enclosed is our check in the amount of $210.00 for the filing fee. Please forward copies of any papers pertinent to the appeal as necessary and appropriate.

Very truly yours,

Leslie M. Pittler

Lillian D. Jennifer
2200 Cromwell Bridge Road
Baltimore, Maryland 21234
(410) 823-2159

cc: Charles E. Brooks, Esquire
People's Counsel for Baltimore County

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6 1997
PDM

97-86R

SPELLMAN, LARSON
& ASSOCIATES, INC.

ROBERT E. SPELLMAN, P.L.S.
JOSEPH L. LARSON
JO ANN W. ROGGE

97-332-SPH

SUITE 109 — JEFFERSON BUILDING
105 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
TEL (410) 823-3535
FAX (410) 825-5215

February 22, 1997

Ms Gwen Stevens, Zoning Supervisor
Department of Permits & Development
Management
Baltimore County
County Office Building
Towson MD 21204

Re: Sanders Corner
Cromwell Bridge Road
Case No. 97-332.SPH
Job No. 94008

Dear Gwen:

I wish to herein formally request a postponement of the above-captioned Case due to the fact that the property owner will be out of town on the date of the scheduled Hearing.

I have been in touch with counsel for both sides in this Case and have been advised that due to their commitments I am respectfully requesting the Case to be set in for Hearing after April 7, 1997.

I appreciate your kind consideration and indulgence in this matter and should you have any questions regarding this Petition please feel free to contact me at any time.

Very truly yours,

Joseph L Larson
President

cc: Charles Brooks
Ron Sanders
Les Pittler

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PDM

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FAX 202 331-0573

1317 KING STREET
ALEXANDRIA, VIRGINIA 22314-2928
TELEPHONE 703 836-5742
FAX 703 836-0265

COPY

August 17, 1999

Via Hand Delivery
ATTN: CIVIL CLERK
Circuit Court for Baltimore County
County Courts Building
401 Bosley Avenue
Towson, Maryland 21204

Re: In the Matter of Ronald Sanders, Petition
Civil Action No.: 3-C-98-05437
Our File No.: 05357/00001

Dear Sir/Madame Clerk:

You will please find enclosed for filing in the above referenced case a Notice of Appeal and this firm's check in the amount of $110.00. I have included a copy of the Notice and would appreciate it if you would date stamp the copy and send it back with the messenger.

Please contact the undersigned should you require any further information. With kind regards, I am

Very truly yours,

David K. Gildea

DKG:bhb
Enclosures
cc: County Board of Appeals (w/enclosure)
Peter Max Zimmerman, Esquire (w/enclosure)
147106

RECEIVED
COUNTY BOARD OF APPEALS
99 AUG 18 PM 1:01

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July 3, 2001

RECEIVED
BOARD OF APPEALS
JUL -5 AM 11:48

Lawrence Wescott, Esq.
Chairman, Board of Appeals for Baltimore County
Room 49, Old Courthouse
400 Washington Avenue
Towson, Maryland 21204

Re: Scheduling Before the Board
In the Matter of : Ronald Sanders
Zoning Cases #: 96-168-SPHA and 97-332-SPH:

Dear Chairman Wescott:

Please accept this letter as my request that the above-referenced case be scheduled for a hearing and that the Board rule on the outstanding Motion filed in this matter. The delay in the ruling on the pending Motion and the delay in scheduling this matter before the Board is creating prejudice for my client.

As you may be aware, 7 months have passed since this matter was remanded to the Board of Appeals. Additionally, 4 months have passed since I requested a hearing on Sanders' Motion to Proceed on the Record and Permit the Submission of Briefs and Oral Argument. As of yet, we have not received any word from the Board as to the scheduling of this matter. As you can imagine, my client is anxious to procedure with this appeal. I recognize that the Board is busy and that the time in which an appeal such as this one must be heard is not prescribed. Nevertheless, since the beginning of the year, I have noticed that there is a delay in the scheduling of matters before the Board and clients, understandably so, are frustrated with this delay.

Below is a summary of the procedural status of this matter:

- September 20, 2000 – the Court of Special Appeals filed its Unreported Opinion in this matter. The Court decided the forest buffer variance permit issue if favor of my client and remanded the following issues: the parking variance issue, the commercial parking permit issue, the non-conforming use

status of the parking lot in front of and adjacent to the restaurant building issue, and the floodplain waiver issue.

- October 10, 2000 – the Baltimore County Council's decision to re-zone .6 of an acre of Sanders' property to BL became effective, thereby making the appeal of the grant of non-conforming use status to the parking lot adjacent to the restaurant on the western side of the Loch Raven Drive moot.

- November 29, 2000 - Matter remanded to the Board of Appeals from the Circuit Court consistent with the Opinion of the Court of Special Appeals.

- January 3, 2000 - Sanders withdrew his Petition for Special Hearing requesting approval of a commercial use permit for parking in a residential zone, thereby eliminating the ability for the Board to rule on the commercial parking permit issue.

- January 3, 2000 – Whiteford, Taylor & Preston submitted Sanders' Motion to Proceed on the Record and Permit the Submission of Briefs and Oral Argument.

- January 17, 2000 – People's Counsel submitted their Answer to Sanders' Motion.

- February 1, 2001 - Whiteford, Taylor & Preston submitted Sanders' Reply to Peoples' Counsel's Answer.

- March 7, 2001 – Whiteford, Taylor & Preston wrote to Mr. Wescott respectfully requesting a hearing on our Motion to Proceed on the Record and Permit the Submission of Briefs and Oral Argument.

Please contact me at your earliest convenience if there is any additional information you require, or if you have any questions with regard to this matter. Thank you for your time and cooperation.

Sincerely,

G. Scott Barhight

G. Scott Barhight

GSB:jrb
cc: Mr. Ronald H. Sanders
Ms. Kathi Bianco

229204v2

LAW OFFICES
BROOKS & SPICER
610 BOSLEY AVENUE
TOWSON, MARYLAND 21204

(410) 296-2600

CHARLES E. BROOKS
MALCOLM F. SPICER, JR.

TELEFAX
(410) 296-2979

June 26, 1997

Kristine K. Howanski, Chairman
County Board of Appeals, Rm. 49
Old Court House
Washington Avenue
Towson, Maryland 21204

Re: Case No. 96-160 SPHA
and Case No. 97-332 SPH
Ronald Sanders, Petitioner

Dear Ms. Howanski:

On behalf of the Petitioner, it is respectfully requested that Ms. Donna Felling, a newly appointed member of The Board of Appeals, not be made a member of the panel considering these cases in view of her involvement with the Summerfield Farms Association, Inc. which has, in the past, been in opposition to Mr. Sander's restaurant.

I am quite certain that Ms. Felling would recuse herself from these cases without our request and I am only bringing this to your attention so that arrangements may be made in advance of The Board Hearing on July 9, 1997.

Sincerely yours,

Charles E. Brooks

CEB\MFS\ccb
cc: Ronald Sanders
Peter Zimmerman, Esquire
Leslie Pittler, Esquire

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COUNTY
97 JUN 30 PM 12:55

Now D. Felling not
serving on
to this panel
Kristine
Letter

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CHARLES E. BROOKS
MALCOLM F. SPICER, JR.

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6/23/97
Chairman Schuetz signed
out without PDM in
receipt of the file
Thanks
ASAP.

June 16, 1997

Robert O. Schuetz, Chairman
County Board of Appeals
of Baltimore County
Room 49, 400 Washington Avenue
Towson, Maryland 21204

Re: Sanders Case No. 96-168-SPHA
and Sanders Case No. 97-332-SPH

Dear Chairman:

Case No. 96-168-SPHA is now pending before the Board of Appeals and is scheduled for hearing on July 9, 1997 at 10:00 AM.

An appeal was just noted by a Protestant in Case No. 97-332-SPH. Both cases involve the same property and same parties, namely: Sanders Corner located at 2260 Cromwell Bridge Road, Ronald Sanders Petitioner and Lillian Jennifer, Protestant.

Please consider this letter as a request to consolidate these two appeals for one hearing on July 9th. Both People's Counsel and Leslie M. Pittler, Esquire have been appraised of this situation and have indicated they have no objection to the consolidation requested.

Sincerely yours,

Charles E. Brooks

CEB\MFS\ccb
cc: Ronald Sanders
People's Counsel
Leslie M. Pittler

97 JUN 18 PM 12:27

/ Ronald Sanders 2260 Cromwell Bridge Rd.
Balto. 21234

PLEASE PRINT CLEARLY

PETITIONER(S) SIGN-IN SHEET

NAME	ADDRESS
Bernadette Huebler	2109 Laurel Brook Rd. Hallstox 21047
Francis A Huebler	Fallston 2109 Laurel Brook Rd MD 21047
David G. Greenwood	415 Dunkirk Rd 21212
Jim Colbeck	721 Yorktowne DR. 21204
UMT Russell	Cor KINGSTON RD 21212
Joyce K Edington	23 Collingwood 21131
DAVE H Edington	" " "
ROGER W. FINK	2615 POT SPRING 21093
Mary E Bet	227 Meadowvale Rd 21093
Gladis B. Alcarese	225 Meadowvale Rd. 21093
Lloyd D Stanley	2 Southerly ct. 21286
Honey Haugh	" " "
Marge Bendetti	7 Winterberry Ct. Glen Arm 21057
Jack Bendetti	Do.
Walter M. Hill	3 W. Lee St Balto 21201
Helen E Saunders	1719 Belmee Dr F.H 21050
Mary C. Robinson	608 Hornerest Rd. 21204
Frank J. Ukena Lorch	907 Towne Dr
Bill Keller	1002 DUNBLANE RD. 21286
Wm T Robinson	608 HORNCREST RD 21204
J. Ralph Bridges	1127 CONCORDIA DR. 21286
Victor Fielder	500 RAVEN ROCK CT PARKTON MD
EDWIN S. HOWE III P.E.	KCW CONSULTANTS INC. 3104 TITANUS LANE SUITE 10 BALT MD 21244
JOSEPH LARSON	Spellman - Larson 105 W. Chesapeake Ave 21204
Alice Morgan	9815 Woburn Rd 21234

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PETITIONER(S) SIGN-IN SHEET

NAME	ADDRESS
GEORGE W. MORGAN SR	8615 GLOVERTOWN RD 21234

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the progress achieved toward implementation of the master plan.

(2) Preparing, at least every six years, recommending to the county council, and administering, a zoning map.

(3) Preparing and recommending to the county council rules and regulations governing the subdivision of land, and administering the subdivision rules and regulations as adopted.

(4) Preparing and recommending to the county council zoning rules and regulations which, together with the zoning map, shall constitute a zoning code.

(5) Administering the zoning code.

(b) The master plan shall be adopted as provided by section 523 of this Charter. All other plans, zoning maps, and rules and regulations recommended for adoption, amendment or repeal by the offices of planning and zoning, the planning board or the zoning commissioner shall, prior to taking effect as law, be approved by legislative act of the county council.
(Bill No. 83, 1978, § 2; approved by voters Nov. 7, 1978; effective Dec. 8, 1978; Bill No. 128, 1990, § 1; approved by voters Nov. 6, 1990; effective Dec. 7, 1990)

Sec. 523. The master plan and the zoning maps.

(a) *Definition and implementation of the master plan.* The master plan shall be a composite of mapped and written proposals setting forth comprehensive objectives, policies and standards to serve as a guide for the development of the county. Upon receipt of the master plan from the office of planning and zoning, the county council shall accept or modify and then adopt it by resolution.

(b) *Definition and implementation of the zoning maps.* The zoning maps shall show the boundaries of the proposed districts, divisions and zones into which the county is to be divided consistent with the master plan. Upon receipt of the zoning map from the office of planning and zoning, the county council shall accept or modify and then adopt it by legislative act.
(Bill No. 83, 1978, § 3) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

Sec. 524. Reorganization of office of planning and zoning.

Notwithstanding any other provisions of this Charter, the county council shall have the power by legislative act to reorganize the office of planning and zoning, to define the duties of the director of said office, to establish the powers, duties and compensation of the planning board, and to establish the duties and responsibilities of the zoning commissioner and deputy zoning commissioners, so that planning and zoning functions shall be conducted in the best interests of the county and its future development and growth.
(Bill No. 83, 1978, § 1; approved by voters Nov. 7, 1978; effective Dec. 8, 1978; Bill No. 128, 1990, § 1; approved by voters Nov. 6, 1990; effective Dec. 7, 1990)

Sec. 524.1. People's counsel.

(a) The county executive shall appoint a people's counsel who shall represent the interests of the public in general in zoning matter as hereinafter set forth, subject, however, to confirmation by the county council, and such person so appointed shall continue to serve as people's counsel until such time as he or she resigns or has been removed pursuant to the provisions herein contained:

(1) *Qualifications:* The people's counsel shall be a resident of Baltimore County, a member in good standing of the Maryland Bar, and actively engaged in the general practice of law for at least five (5) years prior to his appointment.

(2) *Removal:* The people's counsel may be removed at any time on the recommendation of the county executive and with the affirmative vote of not less than a majority plus one of the total number of county council members established by this Charter. (Bill No. 90, 1978, § 1) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

(3) *Powers and duties:* The people's counsel shall have the following powers and duties:

A. He shall appear as a party before the zoning commissioner of Baltimore County, his deputy, the county board

of appeals, the planning board, and the courts on behalf of the interests of the public in general, to defend any duly enacted master plan and/or comprehensive zoning maps as adopted by the county council, and in any matter or proceeding now pending or hereafter brought involving zoning reclassification and/or variance from or special exception under the Baltimore County Zoning Regulations, as now or hereafter in force and effect, in which he may deem the public interest to be involved. In defense of the zoning maps or master plan, he may appear as a party in interest before all state and federal agencies, boards, and courts on matters involving the preservation of the quality of the air, land, and water resources of Baltimore County, and/or may initiate such proceedings in the public interest. He shall have in such appearance, all the rights of counsel for a party in interest, including but not limited to the right to present his case, to cross examine, to object, to be heard, and to file and prosecute an appeal in his capacity as people's counsel from any order or act of the zoning commissioner of Baltimore County or his deputy, or of the county board of appeals to the courts as an aggrieved party pursuant to the provisions of Section 604 of this Charter to promote and protect the health, safety and general welfare of the community. The people's counsel may also prosecute an application before any state or federal court for injunctive and other relief incidental thereto, to enjoin violation of any Baltimore County zoning maps or master plan or as authorized by resolution by the county council. (Bill No. 90, 1978, § 1) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

B. He shall make such investigations as he may deem necessary to the intelligent performance of his duties imposed by subparagraph A. of this Section.

C. He shall have full access to the records of all county agencies, shall be entitled to call upon the assistance of county employees, and shall have the benefit of all other facilities or information of the county in carrying out his duties.

(4) *Employment of experts:* The people's counsel may hire from time to time, as needed, in connection with specific proceedings before the above named bodies, experts in the fields of planning, zoning, traffic, engineering, ecology and architecture, to the extent that county personnel cannot be utilized, and to expend such sums for compensation and/or expenses of these experts as shall be provided in the annual budget.

(5) *Salary and expenses:* He shall receive an annual salary and such sums as may be needed to carry out the powers and duties set forth herein as provided in the annual budget.

(Bill No. 104, 1960; Bill No. 61, 1974, § 1; Bill No. 90, 1978, § 1; approved by voters Nov. 7, 1978; effective Dec. 8, 1978; Bill No. 131, 1990, § 1; approved by voters Nov. 6, 1990, effective Dec. 7, 1990)

Annotation—The people's counsel has the right to appeal zoning decisions. People's Counsel for Baltimore County v. Williams, 45 Md. App. 617, 415 A.2d 585 (1974).

Subdivision 7. [Reserved.] *

DIVISION 3. DEPARTMENTS IN THE ADMINISTRATIVE SERVICES

Subdivision 1. Department of Public Works

Sec. 525. Director of public works.

The department of public works shall be administered by the director of public works who shall be a professional engineer registered under the laws of this state, and shall have had responsible charge of engineering works over a period of at least ten years prior to his appointment. He shall have such other qualifications as may be provided

*Editor's note—Subdivision 7, consisting of sections 524.2 and 524.3, was repealed by Bill No. 131, 1990, § 2, which was approved by the voters on Nov. 6, 1990, effective Nov. 6, 1990.

legal services and the value of the legal services are exclusively for the judge to determine.

A legally trained judge is far better able than a jury to assess the quality of legal services. The issue of what pretrial motions and pleadings were valuable or necessary in a case is one essentially beyond the competence of a jury. For a jury to determine the necessity for and value of legal services in a nonjury case would virtually require a retrial of the case before the jury. The assessment of legal fees in divorce actions and custody cases, for instance, would be drawn into chaos if the law were otherwise. Were Dr. L. to prevail, we can imagine a court-appointed criminal defense attorney refusing to accept a fee awarded by the judge and arguing to a jury that the fee should have been far greater.

In a case such as this, the initial decision by the judge to appoint an attorney to act in the interests of the children, the determination by the judge as to the appropriate remuneration for those legal services and the assessment by the judge of the costs for those legal services simply do not represent a "civil action" within the remote contemplation of § 4–402(e).

JUDGMENT IN CASE NO. 171 REVERSED; JUDGMENT IN CASE NO. 710 AFFIRMED; COSTS TO BE PAID BY DR. L., THE APPELLEE IN CASE NO. 171.

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549 A.2d 762

Sue H. GREEN, et al.

v.

Scott S. BAIR, Sr.

No. 187, Sept. Term, 1988.

Court of Special Appeals of Maryland.

Nov. 4, 1988.

Certiorari Denied March 8, 1989.

Owners of medical building and physicians practicing within it sought zoning variance from setback requirements in municipal zoning code. The Westminster Board of Zoning Appeals granted the variance. The Circuit Court, Carroll County, Donald J. Gilmore, J., reversed. On appeal, the Court of Special Appeals, Robert M. Bell, J., held that physicians and building owner wives failed to demonstrate undue hardship which would justify grant of zoning variance from the setback requirement.

Affirmed.

Zoning and Planning ⇐504

Under Westminster Zoning Code, financial hardship suffered by physicians and their property owner wives due to space difficulties they suffered in medical building were insufficient to demonstrate either an inability to secure a reasonable return on or use of their property, or that hardship suffered was peculiar to property to demonstrate undue hardship and justify variance from zoning setback requirements.

William B. Dulany (David K. Bowersox and Dulany, Parker & Scott on the brief), Westiminster, for appellants.

Clark R. Shaffer (C. Rogers Hall, Jr. on the brief), Westminster, for appellee.

Argued before MOYLAN, ROBERT M. BELL, and WENNER, JJ.

ROBERT M. BELL, Judge.

This case reaches us on an appeal and cross-appeal from the judgment of the Circuit Court for Carroll County. The City of Westminster Board of Zoning Appeals, after a public hearing, granted, in part, the application, of Sue H. Green and Beulah C. Chang, appellants/cross-appellees, (hereinafter "appellants"), for variances from the City's set back requirements, thus permitting enlargement of an existing medical office building. Upon the appeal of Scott S. Bair, Sr., appellee/cross-appellant, (hereinafter "appellee"),

the circuit court reversed that decision. The appeal presents two questions, *i.e.*,

1. Was the December 29, 1986 decision of the Westminster Board of Zoning Appeals, granting variances for the petitioners/cross-respondents Green and Chang's property, supported by substantial, probative evidence of record and therefore, fairly debatable, making the circuit court's reversal of the Board's decision an impermissible substitution of the circuit court's judgment?

2. Does the language of the City of Westminster's Zoning Ordinance § 21–3, defining the term "variance" create an operative standard which the City of Westminster's Board of Zoning Appeals must apply in ruling on applications for variances, in addition to certain enumerated findings which the Board is directed to make pursuant to § 21–71 of that ordinance?

The cross-appeal presents only one:

Was the advertised notice of hearing adequate under Maryland law?

Inasmuch as we find no merit in appellants' argument, we will affirm the judgment of the circuit court. It is therefore unnecessary that we address the cross-appeal.

Appellants are the owners of land, zoned B–Business, located in Westminster, on which is constructed a medical office building, out of which their husbands conduct their pediatric practice. The medical office building was constructed in 1969 and the doctors have practiced in that building since that date. Although at the time that the building was constructed the City set back requirements were much more liberal, the current set back requirements prohibit the construction of a building closer than 30 feet from the right-of-way adjacent to the building's front or from the residential property bordering on the building's side. *See* Westminster City Zoning Code § 21–16(e).

After their husbands had practiced in the building as originally constructed for some 17 years, appellants filed an application for variances to reduce the set back requirements on those sides of the building adjacent to Washington Road and bordering on appellees' residential property.[1] At the hearing before the Board, testimony in support of the application was presented by one of the appellants, Mrs. Green, and her husband. Each of them testified as to the need for the variances and the hardship which would result if they were not granted. Both testified to the need to have the records generated by the practice close at hand and that there was no feasible alternatives to the expansion of the building that the grant of the variances would allow. Both also testified to the difficulty of continuing the existing practice without the variances. Mrs. Green additionally noted the need to accomodate the support staff. She observed, during her testimony that "it's serving well, but ... it can be a stressful situation in not having the room to function, and not having access to records. If you have to store your record[s] and your files elsewhere, it's greatly difficult to function." Dr. Green, on the other hand, focused on the morale problem that lack of space was causing. In addition to the diminution of property values, he also testified that changes in the medical practice and the existence of a malpractice crisis generated the need to keep more records, as well as required, that they be kept for longer periods of time. Dr. Green acknowledged that he could continue his present practice "with great difficulty" if the variances were not granted and that approval of the variances would increase the value of the property as well as make it more convenient for him to practice medicine.

The Board found this testimony persuasive and incorporated it into its decision. The Board was also "impressed that Dr. Green has expressly represented that there is no

1. The application actually sought variances from the sideline and rear line set back requirements; however, based upon the evidence presented at the hearing and interpreting the City's zoning ordinance, the Board determined that what was actually sought were variances from the front yard set back requirements and a side yard set back variance.

intention nor expectation that the patient load of he [sic] and Dr. Chang will be changed." It concluded:

> The Doctors have considered and explored alternatives to seeking the requested variances, including the rental of space off-site for record keeping, but have been unsuccessful in those efforts. Essentially, in this case, the Board is of the collective opinion that unless a variance can be granted, the continued operations and patient services of Drs. Green and Chang will be substantially compromised if not jeopardized. The medical practice is a permitted use in the B–Business zone, and the ability of doctors to store and retrieve their patient records on-site is customarily incidental to this use. The inability of Drs. Green and Chang to store and retrieve their patient records on-site deprives them of conducting their medical practice as it normally is undertaken by other medical practitioners. Indeed, the availability of those records on-site will enhance the ability of Drs. Greene and Chang to provide patient care.
>
> In sum, the Board is convinced and persuaded by the evidence of record, including but not limited to, the testimony of Dr. Green, that limited variances would not be contrary to the public interest and that there are conditions peculiar to the subject property which are not the result of the actions of the Applicants, and that a literal enforcement of the provisions of the Westminster Zoning and Subdivision Ordinance would result in an unnecessary and undue hardship. Indeed, the Board is of the opinion that for the foregoing reasons, the Applicants have satisfied their burden of proof and the requirements of the ordinance to justify in this case, limited variances.

Implicit in the Board's decision is the recognition that, to justify the variances, it had to find that failure to do so would result in "an unnecessary and undue hardship."

The court agreed with the Board that a showing of undue hardship was a necessary prerequisite to the grant of the variances. Nevertheless and notwithstanding its recognition that it must uphold the Board's decision "if it is not premised upon an error of law and if the agency's conclusions reasonably may be based upon the facts proven." *Ad + Soil, Inc. v. County Comm'rs*, 307 Md. 307, 338, 513 A.2d 893 (1986). *See also Heaps v. Cobb*, 185 Md. 372, 379, 45 A.2d 73 (1945); *Ginn v. Farley*, 43 Md.App. 229, 235, 403 A.2d 858 (1979); *Annapolis v. Annap. Waterfront Co.*, 284 Md. 383, 395, 396 A.2d 1080 (1979), it found that the Board's finding of "undue hardship" was "unreasonable". Relying upon the definition of "undue hardship" set out in *Anderson v. Board of Appeals*, 22 Md.App. 28, 38–9, 322 A.2d 220 (1974), and finding that the evidence failed to meet that test, it concluded:

> "If viewed in a most favorable light, Applicants' testimony revealed only that the variances would do no harm, and would allow them to conduct their business much more easily."

The Westminster City Code defines "variance" as

> A relaxation of the terms of this chapters where such "variance" will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the results of the actions of the applicant, a literal enforcement of this chapter would result in unnecessary and undue hardship.

Moreover,

> (1) such variances shall be authorized by the Board only upon finding by the Board that:
>
> a. There are exceptional or extraordinary circumstances or conditions applying to the property in question or to the intended use of the property that do not apply generally to other properties or classes of uses of the same zone;
>
> b. Such variance is necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same zone and in the same vicinity; and
>
> c. The authorizing of such variance will not be of substantial detriment to adjacent properties and will

not materially impair the purpose of this chapter or the public interest.

Section 21–71(c)(1). Only "area",[2] as opposed to "use", variances are permitted by the Code. *See* § 21–71(c)(2).

Viewing the statutory scheme as a whole makes patent that whether an undue hardship would result if the variances were not granted is an essential element to be considered by the Board when determining whether to grant or deny a variance. The definition of variance in § 21–3 applies whenever the term variance is used throughout the ordinance. Thus § 21–71(c)(1) cannot be read without reference to that definition. To do otherwise would be to fail to adhere to a venerable precept of statutory construction: "if there is no clear indication to the contrary, a statute must be read so that no part of it is rendered surplusage, superfluous, meaningless or nugatory". *Ford Motor Land Development v. Comptroller*, 68 Md.App. 342, 346, 511 A.2d 578 (1986). *See also Scott v. State*, 297 Md. 235, 246, 465 A.2d 1126 (1983); *Board of Education, Garrett County v. Lendo*, 295 Md. 55, 63, 453 A.2d 1185 (1982); *Baltimore Building & Construction Trades Council v. Barnes*, 290 Md. 9,

2. Ordinarily, applicants seeking an area variance need only meet a standard of "practical difficulty". That standard was explained in *Anderson*, 22 Md.App. at 39, 322 A.2d 220:

> In order to justify a grant of an area variance the applicant need show only that:
>
> "1) Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
>
> "2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
>
> "3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured. *McLean v. Soley*, 270 Md. 208, 214–15, 310 A.2d 783, 787 (1973), quoting 2 Rathkopf, The Law of Zoning Planning, 45–28–29 (3d ed. 1972).

15, 427 A.2d 979 (1981). But this is precisely what appellants would have us do. Their argument is that since the requirement of "undue hardship" appears only in the definitional section, and not in the substantive provisions of the Code, the only evidence they were required to produce was that which would permit the Board to make the findings set out in § 21–71(c)(1). In short, they urge us to read out of the statute the words "undue hardship". That we decline to do.

There is, moreover, no logical impediment to our giving effect to both the definitional provision and the substantive one. We considered the showing required to meet the "undue hardship" standard in *Anderson* and concluded:

> Where the standard of undue hardship applies, the applicant, in order to justify the grant of the variance, must meet three criteria:
>
> 1) If he complied with the ordinance he would be unable to secure a reasonable return from or to make reasonable use of his property. *Pem Co. v. Baltimore City*, 233 Md. 372, 378, 196 A.2d 879, 882 (1964); *Marino v. City of Baltimore*, 215 Md. 206, 218, 137 A.2d 198, 202 (1957); *See Salisbury Bd. v. Bounds*, 240 Md. 547, 555, 214 A.2d 810, 815 (1965). Mere financial hardship or an opportunity to get an increased return from the property is not a sufficient reason for granting a variance. *Daihl v. County Board of Appeals*, 258 Md. 157, 167, 265 A.2d 227, 232 (1970); *Salisbury Bd. v. Bounds, supra*, 240 Md. at 555, 214 A.2d at 814; *Marino v. City of Baltimore, supra; Easter v. City of Baltimore*, 195 Md. 395, 400, 73 A.2d 491, 492 (1950).
>
> 2) The difficulties or hardships were peculiar to the property in question and contrast with those of other property owners in the same district. *Burns v. Baltimore City*, 251 Md. 554, 559, 248 A.2d 103, 106 (1968); *Marino v. City of Baltimore, supra; Easter v. City of Baltimore, supra.*

3) The hardship was not the result of the applicant's own actions. *Salisbury Bd. v. Bounds, supra; Marino v. City of Baltimore, supra; Gleason v. Keswick Impvt. Ass'n,* 197 Md. 46, 50–51, 78 A.2d 164, 165–66 (1951).

22 Md.App. at 38–9, 322 A.2d 220. Comparing this standard with the required showings under § 21–71(c)(1) reveals that there is an overlap between the two; but to the extent that the required showings differ from the undue hardship requirement, they are not inconsistent. In other words, the required findings can be made in addition to those required under the undue hardship standard. Thus, the Code creates a variance standard for the City of Westminster that is not wholly that applicable to use variances nor wholly that applicable to area variances, but one that contains elements of both. That it does so does not render the Code in anywise deficient or unenforceable. As the trial court recognized, "It is not for the court to decide the wisdom, *vel non,* of the zoning code, as adopted by the Mayor and common council, but rather to enforce it as it is written."

We agree with the trial court that appellants' evidence failed to demonstrate that they met the first two criteria required for showing undue hardship. It follows, therefore, that we also agree with the trial court that the evidence before the Board did not render that issue fairly debatable. Consequently, the trial court's judgment must be affirmed.[3]

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANTS.

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3. The trial court also found that even under the less onerous standard set out in § 21–71(c)(1), appellants would not prevail because "there is no evidence that the difficulties they are encountering are peculiar to the property in question, or contrast with those of any other successful business in the B–Business zone." We agree with that finding as well. Indeed, were appellants showing sufficient to grant a variance under § 21–71(c)(1)'s required findings, we, like appellees, find "it ... difficult to imagine a modern business that could not create the same record and obtain the same variance."

549 A.2d 766

MONTGOMERY COUNTY, Maryland, et al.

v.

James W. McDONALD, Jr.

No. 190, Sept. Term, 1988.

Court of Special Appeals of Maryland.

Nov. 7, 1988.

Police officer filed claims for workers' compensation benefits, under an occupational disease theory, for two heart attacks suffered by officer. The Workers' Compensation Commission held that officer's claims were barred by the two-year statute of limitations, and officer appealed. The Circuit Court, Montgomery County, Irma Raker, J., reversed the Commission, and County appealed. The Court of Special Appeals, Gilbert, C.J., held that the statute of limitations was tolled by County's failure "to at once report" the disability incurred by officer as result of his occupational disease.

Affirmed.

1. Workers' Compensation ⇐1280

When employer violates notice provision of statute which requires employer "to at once report" to Commission any disability incurred by employee from occupational disease, statute of limitations as to employee's claim for occupational disease benefits is tolled. Code 1957, Art. 101, §§ 1 et seq., 26 (b).

2. Workers' Compensation ⇐2080

Police officer's claims for occupational disease benefits in regard to heart attacks were not barred by running of two-year statute of limitations for such claims, as employer failed to comply with statute which required employer "to

Savings Fund Society, 127 Pa.Super. 28, 192 A. 139; Linden Methodist Episcopal Church v. City of Linden, 113 N.J.L. 188, 173 A. 593; Snow v. Johnston, 197 Ga. 146, 28 S.E.2d 270; Mueller v. C. Hoffmeister Undertaking & Livery Co., 343 Mo. 430, 121 S.W.2d 775.

[15] We have found no facts in this record so extraordinary as to persuade us to withdraw the case from application of the accepted rule. The ordinance under review is a clear case of "spot zoning." The property in dispute is situated in an area that has been zoned as residential ever since the enactment of the City Zoning Ordinance in 1931. The amending ordinance contains a proviso that the premises shall be used only as a funeral home and that no embalming shall be done on the premises. However, Paragraph 8 of the City Zoning Ordinance explicitly provides that no land or building in a residential use district shall be used for "undertaking business or establishment or funeral home."

The amending ordinance reclassifies a single lot in a district where undertaking establishments are not permitted, thus establishing a permissive district within the restricted district. Armacost, who has been engaged in the undertaking business in Howard Park for some years, contracted to purchase the property in dispute upon the condition that if he could not secure a permit to use it as a funeral home, the contract would be rescinded. In January, 1949, after getting the approval of a number of residents of the neighborhood for the establishment of the funeral home, he had the proposed ordinance introduced in the City Council. A number of residents appeared before the Committee on Buildings and Building Regulations, and no objections were heard to the ordinance. Cassel declares that he was one of the opponents who appeared at the hearing, but that the proponents outnumbered the opponents, and he did not voice any objection because it seemed "rather futile." However that may be, the ordinance was passed by the City Council in March, and eleven days after it was approved by the Mayor, the Buildings Engineer issued the permit.

At the trial of this case Cassel asserted positively that there is no need for a funeral home at 5118 Gwynn Oak Avenue. He showed that the property in dispute is only three blocks from Woodbine Avenue, which is in a first commercial use district. Charles E. Delosier, secretary of the State Board of Funeral Directors, who was called to the stand by appellees, acknowledged that there are three other funeral homes within a radius of about ten blocks. Armacost testified that he spent a large sum of money to paint, paper and wire the house, but neither this fact nor the allegation that the funeral home will be a convenience for the tenants in nearby apartment houses is sufficient to save the ordinance. It was urged that there are about 20,000 inhabitants of the Howard Park section, but Armacost admitted that he has conducted only about two funerals a month from the funeral home since he opened it. It is impossible to avoid the conclusion that the ordinance is an arbitrary and unreasonable discrimination for the reason that it does not operate alike on all persons residing within the residential area. As we are convinced that the ordinance is beyond the statutory power of the City Council, we must declare it void. If a funeral home were permitted here, it might be an opening wedge for other enterprises in this and other residential districts of the city.

For these reasons we must reverse the decree dismissing the bill of complaint and remand the case for the passage of a decree granting the relief prayed for by appellants.

Decree reversed and case remanded, with costs.

EASTER v. MAYOR & CITY COUNCIL OF BALTIMORE et al.

No. 176.

Court of Appeals of Maryland.

May 12, 1950.

Action by Andrew J. Easter against Mayor and City Council of Baltimore and others challenging validity of city's approval of construction of addition on front of store and dwelling. The Baltimore City Court, Emory H. Niles, J., rendered judgment for defendants and plaintiff appealed. The Court of Appeals, Henderson, J., held that granting of variance of setback requirements and occupancy rule was not warranted.

Reversed.

1. Municipal corporations ⇐621.39

Board of Zoning Appeals of City of Baltimore in granting special exceptions must consider the factors set out as standard in zoning ordinance, and its action must be reasonable in light of these and all other pertinent facts.

2. Municipal corporations ⇐621.39

The power of Board of Zoning Appeals of City of Baltimore under zoning ordinance to grant exceptions must be strictly construed.

3. Municipal corporations ⇐621.45

Burden of showing facts to justify an exception of variance under zoning ordinance rests upon applicants, and it must be shown that hardship affects particular premises and is not common to other property in neighborhood.

4. Municipal corporations ⇐621.21

Mere fact that variance would make property more profitable is not a sufficient ground to justify granting of variance from setback requirements of Baltimore Zoning Ordinance.

5. Municipal corporations ⇐621.25

That other buildings extended to front line of lot and lot was irregular did not authorize Board of Municipal and Zoning Appeals of City of Baltimore to grant a permit for construction of addition on front of store and dwelling in variance of setback rules and occupancy requirement on ground of hardship.

John F. Heath, Baltimore, for appellant.

Benjamin Kann and Malcolm J. Coan, Baltimore, for appellees J. P. Easter and wife.

Thomas N. Biddison, City Sol., Edwin, Harlan, Deputy City Sol., and Hamilton O'Dunne, Asst. City Sol., Baltimore, for appellee Mayor and City Council of Baltimore.

Before MARBURY, C. J., and DELAPLAINE, COLLINS, GRASON, HENDERSON and MARKELL, JJ.

HENDERSON, Judge.

This appeal is from a judgment of the Baltimore City Court affirming the action of the Board of Municipal and Zoning Appeals in granting a permit for the construction of a one-story and basement addition on the front of a store and dwelling at 6418 Belair Road, owned by John P. Easter. The only protestant, Andrew J. Easter, is a brother of the permittee, residing at 6420 Belair Road, where he conducts a tavern.

As stated by the trial Court, "The property is in a First Commercial Use, C. Area District, and the permit would allow the store front to be brought out to the building line, in contravention of paragraph 24 of the Zoning Ordinance, which requires a 10-foot minimum depth of front yard in the area in question, and of the percentage of occupancy requirements under paragraph 21, bringing the percentage of occupancy to 85% as opposed to 60%, as provided in the Ordinance. The Board of Municipal and Zoning Appeals granted the permit under the provision of Paragraph 33(c) on the ground that '* * * due to its peculiar location and surroundings it is a case of practical difficulty and unnecessary hardship, since the Tavern already obstructs the view of the store where the addition is now proposed'". The court thought there was "evidence sufficient to support the legal definition of a hardship and * * * in fact, it would be a hardship to allow one brother

to have a tavern all the way out to the street, and to deny the other brother the right to build his store out to the same line as the tavern."

The Board found that the store was "on the west side of Belair Road, 105 feet south of Easter Terrace. * * * Adjacent to the premises under appeal is a building containing a tavern which is built out to the front line of the lot. To the north between Easter Avenue and Kenwood Avenue there are several buildings constructed to the front lines of the lot and the proposed addition would not affect access of light and air to any neighboring properties, nor would it even cut off the view up and down the street. The lot in question is of very shallow depth and irregular in shape * * *." The store and tavern were built as semi-detached buildings. In 1935 Andrew J. Easter obtained a permit to build a sort of covered entrance-way out to the build-line. John P. Easter did not object, and there were no protests. In his present application John P. Easter states that since his brother "has built out in front of us it has hid our store making it difficult to rent." There is a small triangular vacant lot to the south of 6418, and a church property adjoining to the south, across an alley laid out but apparently not opened. The church is set back the required distance. Andrew J. Easter has applied for a permit, and obtained the approval of the Board, to develop the land to the north, comprising about six acres, as a shopping center with off-street parking facilities and the required set-back. If this project is carried out, he states that he proposes to remove the entrance in front of his tavern.

[1, 2] We may assume here, as we have assumed in previous cases, that the delegation to the Board of Zoning Appeals of the power to make special exceptions or variances is valid, and that the standards set up in Section 32(j) are adequate. Colati v. Jirout, 186 Md. 652, 656, 47 A.2d 613; Heath v. Mayor and City Council of Baltimore, 187 Md. 296, 49 A.2d 799; Heath v. Mayor and City Council of Baltimore, Md., 58 A.2d 896, 898. The Board must consider the factors set out in that section and "its action must be reasonable in the light of these and all other pertinent facts." Heath v. Mayor and City Council of Baltimore, supra, 187 Md. 305, 49 A.2d 804. The power to grant exceptions must be strictly construed. Colati v. Jirout, supra, 186 Md. page 659, 47 A.2d 613.

[3, 4] The burden of showing facts to justify an exception or variance rests upon the applicant, and it must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood. Rathkopf, Zoning, 2d Ed., p. 215; Levy v. Board of Standards and Appeals, 267 N.Y. 347, 196 N.E. 284. The mere fact that the variance would make the property more profitable is not a sufficient ground to justify a relaxation of setback requirements. Garden View Homes v. Board of Adjustment, 137 N.J.L. 44, 57 A.2d 677.

In the instant case there is no suggestion that the Board failed to "act as a fact-finding body" or to "give consideration to the rules, regulations, restrictions, guides and standards set forth" in the Ordinance (paragraph 33(c)). The question is whether the undisputed facts support the Board's action. The fact that the lot is irregular has no bearing on the question, nor is it material that three buildings, some distance to the north, extend to the building line. These may have been built before the passage of the Ordinance, or they may have been built under permit or without permit. As was said in Potts v. Board of Adjustment, 133 N.J.L. 230, 43 A.2d 850, 854: "Prior exceptions granted by the adjustment board are not in themselves controlling. Ill-advised or illegal variances do not furnish grounds for a repetition of the wrong. If that were not so, one variation would sustain if it did not compel others, and thus the general regulation eventually would be nullified. The annulment of zoning is a legislative function that is beyond the domain of the zoning board." See also the cases collected in a note 168 A.L.R. 13, 41–44. The same principle was announced and applied in Heath v. Mayor and City Council of Baltimore, supra, Md., 58 A.2d 896, 898, Mayor and City Council of Baltimore v. Byrd, Md., 62 A.2d 588, 591, and Cassel v. Mayor and City Council of Baltimore, Md., 73 A.2d 486.

The principal fact relied upon to justify an exception to the area and set-back rules, adopted in the general interest under the police power, is the existence of an exception on the adjoining lot. Undoubtedly this is detrimental to the applicant, although his case is somewhat weakened by his tacit acceptance of the situation over a period of years. But we think the detriment to the applicant must be weighed against the benefit to the community in maintaining the general plan. "It is by these gradual encroachments, individually of relative insignificance, that the integrity of the general scheme is undermined and ultimately shattered. One departure serves as justification for another * * *." Dubin v. Wich, 120 N.J.L. 469, 200 A. 751, 754. In the case of non-conforming uses, the ordinance tolerates their continuance, but looks towards their ultimate elimination. Colati v. Jirout, supra. The same principle applies to special exceptions. Heath v. Mayor and City Council of Baltimore, supra, Md., 58 A.2d 896. Use variances are doubtless more serious than dimensional changes, but that is only a matter of degree.

In People ex rel. Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 286, 155 N.E. 575, 577, it was contended that the existence of a garage immediately adjoining the proposed garage was sufficient justification for the grant of an exception on the ground of unnecessary hardship. But the Court, speaking through Chief Judge Cardozo, said: "We think the reasons assigned are insufficient to supply a basis for a departure from the map. They amount to nothing more than this, that a garage may be built because there is another one next door." See also Ventresca v. Exley, 358 Pa. 98, 56 A.2d 210, 212. No estoppel can be raised against the Board by reason of its approval of similar extensions in other cases. Appeal of Valicenti, 298 Pa. 276, 148 A. 308; Note 119 A.L.R. 1509, 1517.

[5] Under the circumstances we think the action of the Board cannot be sustained.

Judgment reversed, with costs.



REINDOLLAR et al. v. KAISER et ux.

No. 161.

Court of Appeals of Maryland.

May 10, 1950.

Robert M. Reindollar and others, as Commissioners of the State Roads Commission of Maryland, instituted a condemnation suit for land necessary for road purposes against Frederick A. Kaiser and wife in the Circuit Court, Howard County, James Clark, J. The Roads Commission appealed from a judgment assessing damages in the amount of $12,500. The Court of Appeals, Collins, J., held that the trial judge did not err in charging the jury either by minimizing the weight of appellant's evidence or by assuming facts not in evidence.

Judgment affirmed.

1. Eminent domain ⇐124, 138

In condemnation proceedings, measure of loss is value of land taken at time taken; and when land is part of larger tract, diminution in value of larger tract caused by taking particular segment thereof must also be considered.

2. Eminent domain ⇐222(5)

In condemnation proceedings it was not error, in charging jury, for trial judge to use word "only" to show minimum appraisement when he went on to inform jury that they had exclusive prerogative and duty to determine amount of damages.

3. Trial ⇐185

Review of evidence by trial judge in charge to jury should be impartial.

CLELAND et al. v. MAYOR & CITY COUNCIL OF BALTIMORE et al.

No. 30.

Court of Appeals of Maryland.

Nov. 2, 1951.

Three practicing physicians and their wives, co-owners of certain property applied for a permit to establish a parking lot on their property to be used for parking automobiles belonging to physicians and members of their staff who were using the physicians' offices. The application was opposed by Joseph P. Cleland, trustee, and others. The building inspection engineer declined to grant the permit and an appeal was taken to the Board of Municipal and Zoning Appeals where the application was approved and the objectors appealed. The Mayor and City Council of Baltimore and others were named appellees. The Baltimore City Court, W. Conwell Smith, C. J., affirmed the action of the Board and the objectors appealed. The Court of Appeals, Marbury, C. J., held that exceptions to the Zoning Act are not a matter of right and as it appeared that nothing would be served by granting permit but convenience of physicians and their employees, Board was not justified in granting an exception.

Order reversed and case remanded.

1. Municipal Corporations ⇐601(15)

Baltimore ordinance giving mayor and city council authority to provide by ordinance, on conditions, for establishment of open areas in a residential use district for parking of automobiles, did not impliedly repeal provisions of zoning ordinance permitting board of municipal and zoning appeals to grant use of same classification, necessary or incidental to a nonconforming use existing in a residential use district, within 50 feet from such nonconforming use, and permitting board to grant within 100 feet of a boundary line between use districts any use permitted in that one of such use districts which has lower classification.

2. Municipal Corporations ⇐621.43

Where counsel for applicant for permit to establish parking lot for physicians and their employees on property where physicians' offices were located made unsworn statement of situation to board of municipal and zoning appeals, and two physicians were then called, who adopted counsel's statement, physicians were subject to cross-examination on any statements made by counsel, and method of procedure was not to be commended as a general proposition.

3. Municipal Corporations ⇐621.17

Special exceptions to a zoning ordinance will never be granted to gratify mere convenience, there must be a necessity, and that necessity must be so urgent and the facts so extraordinary as to require withdrawal of that particular case from application of accepted rule.

4. Municipal Corporations ⇐601(23)

The spirit of the Baltimore zoning ordinance is against extension of nonconforming uses.

5. Municipal Corporations ⇐621.17

Rule that special exception to city zoning ordinance will never be granted to gratify convenience, and not only must necessity be urgent but facts in given case so extraordinary as to require withdrawal of case from application of accepted rule, applies to provision of Baltimore zoning ordinance authorizing board of municipal and zoning appeals to grant within 100 feet of a boundary line between two use districts any use permitted in that one of such use districts which has lower classification.

6. Municipal Corporations ⇐621.30

Convenience of physicians and their employees did not warrant granting of exception to zoning ordinance by Baltimore board of municipal and zoning appeals of property owner's application for permit to establish on property where physicians' offices were located in residential use area of parking lot for automobiles of physicians and their employees, although there was a pre-existing nonconforming use of that portion of property permitting its use for physicians' offices.

Norman C. Melvin, Jr., and Douglas H. Gordon, both of Baltimore, for appellants.

J. Cookman Boyd, Jr., Baltimore (F. Murray Benson, Baltimore, on the brief), for appellees Bennett, Johnson & Eaton and others.

Francis J. Valle, Asst. City Sol., Baltimore (Thomas N. Biddison, City Sol., Baltimore, on the brief), for appellees Mayor & City Council of Baltimore.

Before MARBURY, C. J., and DELAPLAINE, COLLINS, and HENDERSON, JJ.

MARBURY, Chief Judge.

Three practising physicians and their wives, co-owners of 4-6 East Madison Street, applied for a permit to establish a parking lot on their property to be used for parking cars belonging to the doctors and members of their staff who were using the doctors' offices at 4 East Madison Street. 4-6 East Madison Street is practically one lot, although it has two numbers. It is located in a residence zone, although there is a pre-existing non-conforming use of 4 East Madison Street, which has been used as doctors' offices since 1919. There is no building on that part of the lot known as 6 East Madison Street, except a garage which holds three automobiles. The building inspection engineer necessarily declined to grant the permit, and an appeal was taken to the Board of Municipal and Zoning Appeals, where the application was approved. An appeal was taken to the Baltimore City Court by the appellants, residents and taxpayers of the city, and owners of real estate near the property. The Baltimore City Court affirmed the action of the Board, and from its order the appeal comes here.

The order appealed from not only authorizes the use of the rear of 6 East Madison Street as a parking lot for the doctors and their employees, but also authorizes an entrance and exit to and from the rear of said property by a roadway on or over the sidewalk and front portion of the lot which is on East Madison Street. The property to the south adjoining the lot of the applicants is zoned first commercial, with the exception of the University Club property which is at the corner of Madison and Charles Streets, and is zoned residential.

[1] The Board of Municipal and Zoning Appeals attempted to act under the provisions of Paragraphs 12(b) and (c) of the zoning ordinance. (b) permits the Board to grant a use of the same classification, necessary or incidental to a non-conforming use now existing in a residential use district, within 50 feet from such non-conforming use. (c) permits the Board to grant within 100 feet of a boundary line between two use districts, any use permitted in that one of such use districts which has a lower classification. Appellants contend that the right to act under these provisions is taken away by the passage of Ordinance 1312, approved July 5, 1950. This ordinance adds Paragraph 14(a) to the zoning ordinance, and gives the Mayor and City Council authority to provide by ordinance, upon conditions for the establishment, maintenance and regulation of open areas in a residential use district, for the parking thereon of automobiles. We are unable to agree with appellant's contention in this respect, as we do not think this ordinance impliedly repeals Paragraphs 12(b) and 12(c).

[2] In their attack upon the action of the Board, the appellants contend that there was no admissible evidence before the Board. The basis for this is that counsel for the applicants made an unsworn statement of the situation, and then two of the doctors were called, who adopted counsel's statement. The doctors were, however, subject to cross-examination under these circumstances on any statements made by counsel, and, while this method of procedure is not to be commended as a general proposition, it was probably allowed in this case as a means of saving time, and we cannot say that there was not evidence of the facts before the Board when it acted. Assuming, therefore, that the statement of counsel became evidence after its adoption by the doctors, we find that the basis for the application is that these physicians are active orthopedic surgeons, and the pressure of parking space has become intolerable because they have to get to their place of business and get away when needed, are frequently called on emergencies, and, if they do not have access to their own cars, delay ensues. The entrance to the garage is through adjacent property and through an alley which, however, has of late years become blocked by trucks of commercial enterprises which border on it. The space in the garage is such that if three cars are there, and the first one in wants to get out, a difficult and awkward situation ensues. The proposal was to breach the wall along Madison Street, put in an ornamental iron gate and a ten-foot driveway which would lead to the back of the lot and the rear of the building on lot No. 4. Sometimes the applicants would want an ambulance to run in, but they primarily want the use of the parking space for the cars of nurses and other employees who work in the building on No. 4.

[3-5] Under Paragraph 12(b), the use to be granted must be necessary or incidental to a non-conforming use already existing. The non-conforming use was that of maintaining doctors' offices. There is nothing to show that it is necessary or incidental to such offices to have parking areas adjacent to them. It would no doubt be a great convenience to the applicants to have their cars, and the cars of their employees, parked in the rear of their offices, but this is neither usual nor necessary. Many physicians have offices in office buildings in the downtown sections of the city, and it is not necessary for them to have parking facilities on the same lot on which they practice their profession. This court has consistently held that special exceptions will never be granted to gratify mere convenience, that there must be a necessity, and that necessity must be so urgent, and the facts so extraordinary as to require the withdrawal of that particular case from the application of the accepted rule. That accepted rule is the division made in the zoning ordinance for various classes of use districts. It is part of a general plan which is not intended to be changed except in cases of urgent necessity. "It is evident that the spirit of the Baltimore City Zoning Ordinance is against the extension of non-conforming uses. It is generally accepted that a few non-conforming buildings and uses, allowed to continue as exceptions to the regulations in order to avoid injustice, will not be a substantial injury to the community if they are not allowed to multiply where they are harmful or improper; but non-conforming uses should not be perpetuated any longer than necessary, and the Zoning Board should make constant efforts to move them into the use districts where they properly belong." Colati v. Jirout, 186 Md. 652, 657, 47 A.2d 613, 615. See also Mayor and City Council of Baltimore v. Byrd, 191 Md. 632, 638, 62 A.2d 588; Heath v. Mayor and City Council of Baltimore, 190 Md. 478, 483-484, 58 A.2d 896. The same general rule applies to the exception to be permitted under Paragraph 12(c) within 100 feet of a boundary line between two use districts. We had such a situation in the recent case of Gleason v. Keswick Improvement Association, Md., 78 A.2d 164, where we ruled against the exception. Cf. Hoffman v. Mayor & City Council, Md., 79 A.2d 367.

The trial court relied upon the case of Akers v. Mayor and City Council of Baltimore, 179 Md. 448, 20 A.2d 181, for the statement that occupants of certain houses are not prohibited from parking cars in their yards. That, however, is quite different from the present application. What is desired here is not to permit the doctors to park their cars in the rear of their residences where they also maintain offices. It is to provide a general parking space for not only their cars in the rear of their offices, but also the cars of all their employees who work in the building. We are unable to find any case in which this court has held that that is a permissible use.

[6] In the instant case, we find no such compelling necessity as to justify the Board of Municipal and Zoning Appeals in granting an extension of the non-conforming use, or in utilizing the provisions of Section 12(c). It was not intended by the zoning act that whenever it was convenient or desirable for an individual owner to have a special exception, he should be allowed it by the Board. Exceptions are not a matter of right, and where it appears, as it does in this case, that nothing will be served but the convenience of the doctors and their employees, we do not think such a case, based upon convenience alone, would justify the Board in granting an exception.

Such action, if based upon insufficient reasons, is arbitrary and is in violation of the zoning law, and it cannot stand.

For these reasons, the action of the trial court will be reversed and the case remanded in order that that court may pass an order reversing the action of the Board of Municipal and Zoning Appeals and directing the dismissal of the petition.

Order reversed with costs and case remanded.



WILLIAMS v. McCARDELL et al.

No. 4.

Court of Appeals of Maryland.

Oct. 31, 1951.

Proceeding by Charles A. Williams, against J. Neil McCardell, and others, wherein it was sought to compel the Board of Trustees of the Employees' Retirement System of Baltimore City, to approve petitioner's application for accidental disability benefits. The Court of Common Pleas of Baltimore City, John T. Tucker, J., dismissed the petition, and the petitioner appealed. The Court of Appeals, Markell, J., held that the evidence sustained the finding that the petitioner's disability was not due to any accident or a series of accidents occurring in course of petitioner's employment as a fireman by the Baltimore City Fire Department.

Order affirmed.

1. Municipal Corporations ⇐200(9)

In proceeding by city fireman for accidental disability benefits for coronary thrombosis, evidence sustained finding that fireman's disability was not due to any single accident or series of accidents occurring in course of fireman's employment by city.

2. Administrative Law and Procedure ⇐763

Action of administrative board may be arbitrary or unlawful because facts found are unsupported by evidence or conclusions drawn are contrary to law or facts.

3. Administrative Law and Procedure ⇐741, 760, 791

Generally, courts are concerned with results rather than methods of administrative boards and review the action not the opinion of the board, and courts cannot set aside findings of facts supported by substantial evidence merely by calling findings arbitrary.

4. Mandamus ⇐187(9)

Where evidence in proceeding for mandamus commanding board of trustees of employee's retirement system to approve petitioner's application for accidental disability benefits presented no issue of fact to be submitted to jury, alleged error if any, in denying petitioner jury trial, on ground that he failed to pray therefor within time prescribed by rule of court, was not prejudicial.

O. Bowie Duckett, Baltimore (Samuel M. Campanaro Baltimore, on the brief), for appellant.

Thomas N. Biddison, City Solicitor and Daniel B. Leonard, Asst. City Solicitor, both of Baltimore, on the brief, for appellees.

Before MARBURY, C. J., and DELAPLAINE, COLLINS, GRASON, HENDERSON and MARKELL, JJ.

MARKELL, Judge.

This is an appeal from an order dismissing a petition for mandamus commanding respondents, the Board of Trustees of the Employees' Retirement System, to approve petitioner's application for accidental disability benefits from December 11, 1948.

In 1927 petitioner, then twenty-five years old, entered the Baltimore City Fire Department. In 1938 he was promoted to the rank of Lieutenant. On December 11, 1948 he was retired by the Department as totally and permanently unfit for duty. He is a member of the Employees' Retirement System.

Section 6 of the Employees' Retirement System ordinance (Ordinance No. 553, approved February 21, 1926; Baltimore

City Code, 1927 Edition, Article 30, section 6) provides: "* * * Accidental Disability Benefit (5) Upon application of a member, * * * any member who has been totally and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty *at some definite time and place*, without wilful negligence on his part, shall be retired by the Board of Trustees, provided that the medical board shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that such member shall be retired. Allowance on Accidental Disability Retirement (6) Upon retirement for accidental disability a member * * * shall receive an accidental disability retirement allowance which shall consist of [a specified annuity and pension]" [Italics supplied.]

Petitioner made application for accidental disability benefits. On June 21, 1949 and September 22, 1949 his application was heard by respondents, on testimony and other evidence and arguments of counsel. On October 19, 1949 the application was denied, with a written opinion, on the ground that "the Board does not find that the incapacity of the applicant is the natural and proximate result of an accident occurring in the actual performance of duty at some definite time and place. This conclusion is based on the testimony and evidence presented to the Board and upon a consideration of the applicable authorities." Petitioner alleges that respondents' action in denying his application "is unwarranted and contrary to the applicable facts and law", and that in denying the application respondents "acted capriciously, arbitrarily, illegally and unreasonably * * *". The application for mandamus was heard on the testimony and other evidence before the Board. The petition was dismissed on two grounds, stated in Judge Tucker's opinion, [1] "There was very substantial evidence before the Board of Trustees of the Retirement System to support their decision that the incapacity of the petitioner was not the natural and proximate result of an accident; and for that reason alone their decision may not be disturbed by the court." [2] "There is another reason, however, that the petitioner may not obtain the relief for which he has prayed. The contention of the petitioner, which, he claims is supported by the testimony of his witnesses, Doctors Skolnick and Serra, is that during his 21 years of services in the Fire Department he sustained various injuries, some of which were accidental, and was subjected to considerable responsibility in protecting property and the lives of people, and it was the combination of these events and conditions that caused his eventual incapacitation. But, even if this contention were supported by uncontradicted evidence it would not entitle the petitioner to the special benefits under the above provisions of the ordinance, because the incapacity would not be the result of "an accident occurring * * * at some definite time and place'. * * * There is no substantial evidence to show that the petitioner's incapacity resulted from 'an accident at some definite time and place'." Judge Tucker held that by the ordinance "the cause of incapacity is limited to one accident at a definite time and place".

Petitioner's disability is due to coronary thrombosis. Petitioner contends this was caused—or aggravated—by accident; respondents contend it was not, and could not be, caused by accident. The Board "does not find" that it "is the natural and proximate result of an accident occurring in the actual performance of duty at some definite time and place". Judge Tucker holds that [1] "There was very substantial evidence before the Board * * * to support their decision" that it was not the natural and proximate result of an accident and [2] "there is no substantial evidence" that it resulted from one "accident at some definite time and place".

Petitioner testified to four "accidents" in the performance of duty, on October 20, 1928, January 18, 1940, August 28, 1942, and December 6, 1948, and six occasions, on April 22, 1942, January 9, 1943, February 12, 1943, November 17, 1948, November 29, 1948, and December 11, 1948, when he was examined (and in five of these instances went off duty) on account of

evidence concerning the physical condition of the road, claiming that those conditions would have shown an additional hazard to safety by any increased use of the road. Confining our ruling to the facts of this case, we hold the chancellor was correct. The only question to be determined was whether the Moores had a legal right to use the road for the benefit of parcel X, and, as we have already decided that they did, this argument of the appellants cannot prevail.

Decree affirmed in part, and reversed in part, and cause remanded for further proceedings not inconsistent with this opinion, appellants to pay the costs.



215 Md. 206

Frank C. MARINO et al.
v.
CITY OF BALTIMORE et al.

No. 79.

Court of Appeals of Maryland.

Dec. 30, 1957.

Proceeding to review action of board of municipal and zoning appeals, denying permit to construct a store building and adjacent parking area on unimproved lot of land in area zoned for residential use only. The Baltimore City Court, E. Paul Mason, J., entered order affirming action of board and property owners appealed. The Court of Appeals, Horney, J., held that question of whether to grant or deny exception under evidence was fairly debatable so that order of trial court must be affirmed.

Affirmed.

1. Municipal Corporations ⇐601(15), 621.8

All zoning regulation, including rezoning, as well as an exception and a variance, which are intended to relieve harshness of zonal restriction in a particular instance, is a lawful exercise of police power by sovereign state.

2. Municipal Corporations ⇐600

Individual right to use privately owned property is subordinate to paramount right of public whenever such use tends to affect injuriously the health, comfort, safety and general welfare of all persons in a community, providing, that such zoning restriction is itself lawful and not such as to permanently deprive property owner of all reasonable use of property.

3. Municipal Corporations ⇐621.8, 621.17

Exceptions to zoning regulations are granted sparingly, under exceptional circumstances, but existence of an unnecessary hardship usually justifies granting of an exception.

4. Municipal Corporations ⇐621.17

Criterion for determining unnecessary hardship is whether applicable zoning restriction when applied to property in setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with basic right of private ownership.

5. Municipal Corporations ⇐621.46

Where property owners sought an exception to zoning ordinance to permit them to construct commercial building in area zoned for residential use, property owners had burden of proving that they were entitled to an exception under ordinance.

6. Municipal Corporations ⇐621.46

Where property owners sought exception to zoning ordinance under Baltimore City ordinance allowing granting of exception when land proposed to be used does present, because of topography, grade or accessibility, practical difficulties or unnecessary hardships, it was incumbent upon owners to prove that their property zoned for residence was peculiar, preventing a reasonable return from or any reasonable use of their property for residential purposes, and that the difficulties or hardships were not the result of owners' own actions. Code Supp.1957, art. 66B, § 7(g) (2, 3).

7. Municipal Corporations ⇐621.21

Mere financial hardship or an opportunity to get an increased return from property is not sufficient reason for granting exception to zoning ordinante but financial advantage, although not controlling, is not entirely irrelevant.

8. Municipal Corporations ⇐621.17

Plight of owner of real property seeking exception to zoning ordinance must be due to unique circumstances and not to general conditions in the neighborhood.

9. Municipal Corporations ⇐621.39

A prior exception to zoning ordinance granted by municipality does not control the granting of a subsequent exception.

10. Eminent Domain ⇐2(1)

A zoning ordinance which permanently so restricts use of property that it cannot be used for any reasonable purpose goes beyond permissible regulation, and must be regarded as taking of property without compensation.

11. Municipal Corporations ⇐621.55

In proceeding by property owners for review of action by municipality in denying exception to zoning ordinance so as to permit owners to construct commercial buildings and adjacent parking area on lots zoned for residential use only, evidence sustained finding that board did not abuse its discretion in denying application for exception. Code Supp.1957, art. 66B, § 7 (g) (2, 3).

12. Municipal Corporations ⇐621.14

Traffic congestion is an element which the board should consider in deciding whether or not to grant variance to zoning ordinance. Code 1957, art. 66B, § 3.

13. Municipal Corporations ⇐621.58

Where question of whether to grant or deny exception to zoning ordinance is, under evidence, fairly debatable, order of trial court approving action of board must be affirmed.

14. Administrative Law and Procedure ⇐763

Court may not substitute its judgment as to the wisdom or soundness of action taken by the administrative body unless it is clear that such action was illegal, arbitrary or discriminatory.

Donald N. Rothman and Robert Hammerman, Baltimore (Gordon, Feinblatt & Rothman and David P. Gordon, Baltimore, on the brief), for appellants.

Henry Vogt, Baltimore, for Wm. J. Huber, and others, Intervenors.

Shirley B. Jones, Asst. City Sol., Baltimore (Thomas N. Biddison, City Sol. and Hugo A. Ricciuti, Deputy City Sol., Baltimore, on the brief), for City of Baltimore.

Before BRUNE, C. J., and HENDERSON, HAMMOND, PRESCOTT, and HORNEY, JJ.

HORNEY, Judge.

This is an appeal from an order of the Baltimore City Court affirming the action of the Board of Municipal Zoning Appeals, (the Board), denying a permit to construct a one-story store building and adjacent parking area on the unimproved lot of land owned by Frank C. Marino and Bernardine Marino, his wife, and the Marimar Company, Inc., (the Marinos), on the north side of Belvedere Avenue near the intersection of said Avenue with York Road, generally known as 522 East Belvedere Avenue.

The property is situated in a residential use district and has been so classified since the passage of the initial zoning act in 1931. Only semi-detached or single dwellings are

permitted but none has been constructed by the Marinos or previous owners. The plat filed with the record shows a first commercial use district on both sides of York Road to the north and south of Belvedere Avenue, an area which has been zoned commercial since the original zoning ordinance in 1931. The area between the easternmost boundary of the commercial district and the property for which an exception is sought, also owned by the Marinos, is zoned for residential use, but is now used for commercial purposes under a prior permit approved by the Board. The area immediately to the north of the property in question, above a slope, variously estimated to be ten to thirty feet high, is zoned and used for residential purposes. The sylvan area to the east, owned by the City, is also zoned residential, although a part of it may be used in the future as a portion of the proposed Northern Parkway Extension. Directly across the avenue from the Marino property there is a large parking lot, formerly zoned residential, but now used commercially. A department store is situated on the southeast corner of York Road and Belvedere Avenue, but it is within the first commercial use district referred to. Other nonresidential uses have, by way of exceptions, invaded the residential use district. However, the major part of the originally zoned residential district still remains zoned and is used for residences.

On October 5, 1953, an ordinance was introduced in the City Council of Baltimore City to rezone the property in question from residential to first commercial. On October 30, 1953, the Board approved and recommended passage of the proposed ordinance stating that "it is not suitable for residential development". The Planning Commission of Baltimore City suggested an amendment of the proposed ordinance to the effect that the eastern portion of the property should be restricted to a parking area for the building proposed to be erected on the western portion. The suggestion was acceptable to the Marinos, but on June 1, 1954, the ordinance as amended was rejected by the City Council.

At the hearing before the Board evidence was produced to the effect that the property was unsuitable for residential use; that to use it for that purpose would be wasteful, imprudent, economically unsound, and impossible to finance; and that the property was best suited for commercial use. There was also testimony that the value of the property for commercial use was ten times that for residential use, and that such use would not affect the value of neighboring properties. On the contrary there was evidence, some of it on cross examination, to the effect that the property was suitable for residential purposes; that houses costing from $12,000 to $15,000, if built, could be readily sold; and a banker testified that his savings and loan association would "entertain" an application for a loan for residential development of the property. The protestants, who testified, objected to any further encroachment by commercial interests because it would tend to depreciate the value of their properties. One witness, a real estate appraiser and broker, attempted to testify that the present use of the property as a "dump" and a "parking lot" created a health as well as a safety problem, but his testimony had little probative value. Because vacant lots scared him, another real estate developer, who had seen the property used as a dump inhabited by mice and rats and perhaps a few snakes, and used as a playground for children, thought the residential restriction had created a health, safety and morals hazard, but he was not an expert in either field.

There was some testimony, pro and con, before the Board as to the effect of traffic congestion in the area. In court, the director of traffic, who had made several traffic surveys of the cross-streets area of York Road and Belvedere Avenue, testified that it was a difficult intersection; that it was "strategic", and was considered among the "heaviest traveled corners" in the City—a count on September 1, 1956, showed that 47,988 vehicles passed through the area in a twenty-four hour period, 18,782 of which were going "to the east of York Road". Over a period of four years there were fifty-seven accidents at the intersection. He further testified that the parking lot across the avenue had created traffic congestion and that another on the Marino property would make it "doubly worse", and that the congestion is already great and the street arrangements are not such as permit a present solution of the problem. The traffic director was also of the opinion that the development of a large department store and parking lot in the area was a serious error traffic-wise which ought not to be repeated.

The authority of the Board to make an exception under the Enabling Act, [Code, Cum.Sup. (1957), Art. 66B, sec. 7(g) (2), (3)], and Section 36(b) and (c), [formerly 33(b) and 33(c)], of the Baltimore City Zoning Ordinance, (the ordinance), is not disputed. Furthermore, the City and the intervenors admit that in this case the proper tribunal to hear and determine the appeal from the Board was the Baltimore City Court.

Section 7(g) (3), supra, provides that the Board shall have the power, among others:

> "To authorize upon appeal in specific cases such variance from the terms of the ordinance as is necessary to avoid arbitrariness and so that the spirit of the ordinance shall be observed and substantial justice done."

The ordinance provides that the Board shall have power: (i), by Section 35(g) 2, to "hear and decide special exceptions * * *"; and (ii), by Section 35(g) 3, the same identical power as that granted by Section 7(g) (3), supra, of the enabling act. Section 36(b) and (c), supra, of the ordinance, with which we are primarily concerned, provide, in part, authority to:

> "(b). Grant a permit where the use or change of use of land, * * proposed to be used is limited as to its location because of the * * * topography, grade or accessibility."

[and]

> "(c). Grant a permit where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of any of the provisions of the * * * [zoning ordinance]."

Section 36(b) and (c), supra, also provide that the Board shall act as a fact-finding body and, in arriving at a decision, shall give consideration to the rules, regulations, restrictions, guides and standards set forth elsewhere in the ordinance.

Ordinarily, there is a marked distinction in the law of zoning between a *variance* and an *exception*,[1] but there is none in Baltimore City since an *exception*, apparently, overlaps a *variance* inasmuch as both may be granted where there are "practical difficulties or unnecessary hardships". This is the reason why many cases which arise in Baltimore City, such as this one, discuss exceptions and variances without differentiation.

[1, 2] Basically, of course, all zoning regulation, including rezoning, as well as an exception and a variance, which are intended to relieve the harshness of a zonal restriction in a particular instance, is a lawful exercise of its police power by the sovereign state. It is axiomatic that the individual right to use privately owned property is subordinate to the paramount right of the public whenever such use tends to affect injuriously the health, comfort, safety and general welfare of all persons in a community, provided, however, that such zonal restriction is itself lawful and not such as to permanently deprive the property owner of all reasonable use of his property.

1. See Montgomery County v. Merlands Club, 1953, 202 Md. 279, 288, 96 A.2d 261; Reed v. Board, 1931, 255 N.Y. 126, 174 N.E. 301, 303; Application of Devereux Foundation, Inc., 1945, 351 Pa. 478, 41 A.2d 744.

See Grant v. Mayor and City Council of Baltimore, 1957, 212 Md. 301, 315, 129 A.2d 363; and Walker v. Board of County Com'rs of Talbot County, 1955, 208 Md. 72, 87, 116 A.2d 393, and the cases therein cited; and City of Baltimore v. Cohn, 1954, 204 Md. 523, 105 A.2d 482.

[3, 4] As a general rule exceptions are granted sparingly, and under exceptional circumstances. To do otherwise would decimate zonal restrictions and eventually destroy all zoning regulations, and thus detrimentally affect the marketability of property within zoned areas. On the other hand, the existence of an unnecessary hardship usually justifies the granting of an exception. The criterion for determining unnecessary hardship is whether the applicable zoning restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership. As was stated in Carney v. City of Baltimore, 1952, 201 Md. 130, 137, 93 A.2d 74, 76–77:

> "The need sufficient to justify an exception must be substantial and urgent and not merely for the convenience of the applicant, inasmuch as the aim of the ordinance is to prevent exceptions as far as possible, and a liberal construction allowing exceptions for reasons that are not substantial and urgent would have the tendency to cause discrimination and eventually destroy the usefulness of the ordinance. * * *
>
> "The expression 'practical difficulties or unnecessary hardships' means difficulties or hardships which are peculiar to the situation of the applicant for the permit and are not necessary to carry out the spirit of the ordinance and which are of such a degree of severity that their existence amounts to a substantial and unnecessary injustice to the applicant."

[5, 6] We think that the primary question we must decide on this appeal is whether the Marinos met the burden of proving that they were entitled to an *exception* under Section 36(b) and (c), *supra*, of the ordinance. See Easter v. Mayor and City Council of Baltimore, 1950, 195 Md. 395, 73 A.2d 491; Gleason v. Keswick Imp. Ass'n, 1951, 197 Md. 46, 78 A.2d 164; Serio v. Mayor and City Council of Baltimore, 1956, 208 Md. 545, 119 A.2d 387. Although the Marinos based their application for an exception in part under Section 36(b), supra, on the claim that their property was *peculiar* in that its topography as well as the grade between it and the adjacent land to the north rendered it impossible to construct dwellings thereon, the testimony as to such peculiarities was so meager that it was not unreasonable for the Board and the trial court to have concluded that the property was not unique and therefore was not such as to justify an exception for those reasons. With respect to meeting the required burden under Section 36(c), supra, it was incumbent upon the Marinos to have shown (i) that if they complied with the ordinance they would not be able to secure a reasonable return from, or to make any reasonable use of, their property, (ii) that the difficulties or hardships were peculiar to the property in question in contrast with those of other property owners in the same district, and (iii) that the hardship was not the result of the applicants' own actions.

[7] Mere financial hardship or an opportunity to get an increased return from the property is not sufficient reason for granting an exception. Easter v. Mayor and City Council, supra. However, financial advantage, although not controlling, is not entirely irrelevant. Serio v. Mayor and City Council of Baltimore, supra. Obviously, if unnecessary hardships referred only to economic disadvantage, an exception might always have to be granted as a matter of course. Ellicott v. Mayor and City Council of Baltimore, 1942, 180 Md. 176, 23 A.2d 649; Gleason v. Keswick Imp. Ass'n, supra; Kracke v. Weinberg, 1951, 197 Md. 339, 79 A.2d 387; Serio v. Mayor and City Council of Baltimore, supra. Thus, an analysis of zoning cases demonstrates that the differences between a situation in which the applicant complains that he could secure a greater return from his property if granted an exception and a situation in which the applicant contends that it is impossible to secure a reasonable return from or to make a reasonable use of such property is one of degree rather than kind. In the first instance, his application would invariably be refused. But, in the second instance, if other conditions were met, an exception would likely be allowed. On the whole, this Court, as well as those in other jurisdictions, applies the same rules, but the decisions inevitably depend on the facts of each case.[2]

[8] The plight of the owner must be due to unique circumstances and not to general conditions in the neighborhood. The rule was accurately and succinctly stated by Judge Henderson in Easter v. Mayor & City Council, supra, when he said in 195 Md. at page 400, 73 A.2d at page 492. "* * * it must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood." Thus, it is clear that the Board, in refusing to grant the Marinos an exception, applied the correct principle of law when it said:

> "It is the Board's understanding * * * that in order to make an exception to the use regulations, so as to permit a commercial use in the residential zone, evidence must be produced to show that the practical difficulties and unnecessary hardships involved in the use of the land in question or in the making of improvements on such land must be peculiar to the property in question and the difficulties or hardships must not be such as prevail generally with respect to the use of other similarly situated areas * * *."

[9] While it is true that the Marinos did not purchase the property in question with the thought in mind of applying for an exception—actually they purchased it some years before they petitioned for an exception—they knew, of course, that it was restricted to residential use when they purchased it. More to the point, however, it is a fact that a prior application by them, which was granted, for a commercial use of a part of the property, is without doubt one of the reasons why the remainder is less adaptable now for residential use purposes. Certainly a prior exception granted by the Board does not control the granting of a subsequent exception. Easter v. Mayor & City Council, supra, 195 Md. at page 400, 73 A.2d 491.

[10, 11] The Marinos contend that there is no legal principle which requires that

2. Some of the leading cases in other jurisdictions on this issue in which *variance* was granted include: Nagaven Realties v. Banzhaf, 1933, 149 Misc. 361, 267 N.Y.S. 729; People ex rel. St. Albans-Springfield Corp. v. Connell, 1931, 257 N.Y. 73, 177 N.E. 313; Schaible v. Board of Adjustment, 1946, 134 N.J.L. 473, 49 A.2d 50. Cases in which *variance* was refused include: Fleming v. Prospect Park Board of Adjustment, 1935, 318 Pa. 582, 178 A. 813; Stevens v. Clark, 1926, 216 App.Div. 351, 215 N.Y.S. 190; 4672 Broadway Corp. v. Board of Standards and Appeals, 1928, 225 App.Div. 97, 232 N.Y.S. 266, affirmed 1929, 250 N.Y. 571, 166 N.E. 328; Joyce v. Dobson, 1933, 255 App.Div. 348, 8 N.Y.S.2d 768; Hickox v. Griffin, 1949, 298 N.Y. 305, 83 N.E.2d 836; Otto v. Steinhilber, 1939, 282 N.Y. 71, 24 N.E. 2d 851; Colorado Springs v. Miller, 1934, 95 Colo. 337, 36 P.2d 161; Levy v. Board of Standards and Appeals, 1935, 267 N.Y. 347, 196 N.E. 284; Young Women's Hebrew Ass'n v. Board of Standards and Appeals, 1935, 266 N.Y. 270, 194 N.E. 751; Jenney Mfg. Co. v. Zoning Board of Review, 1939, 63 R.I. 477, 9 A.2d 705; Ricci v. Zoning Board of Review, 1946, 72 R.I. 58, 47 A.2d 923.

the difficulties and hardships referred to in Section 36(c), supra, must be peculiar to their property and not applicable to other property in the same zoning district, citing N. W. Merchants Terminal v. O'Rourke, 1948, 191 Md. 171, 60 A.2d 743; Hoffman v. Mayor and City Council of Baltimore, 1951, 197 Md. 294, 79 A.2d 367; and City of Baltimore v. Cohn, supra. They also insist that the Board abused its discretion in denying an exception on the assumption that the evidence showed that their property was wholly unsuitable for residential use, relying principally, on the Terminal, Hoffman and Cohn cases, supra, to support this contention. Obviously, their interpretation of the Board's finding was erroneous, and the Marinos' contention that it is impossible to use their property for the purposes to which it is restricted by the ordinance is a debatable question. In the Terminal case, in which we applied the presumption of reasonableness to the facts in that particular case, we declared that the rezoning ordinance was invalid because it was unreasonable, arbitrary and contrary to Section 3 of Article 66B of the Code (1951). Likewise in the Hoffman case we held that it was unnecessary to consider the "exceptions" as such because we could and did determine the ordinance to be *pro tanto* invalid on the facts of that case. And in the Cohn case, again on the particular facts there present, we held that a particular application of a zoning ordinance may be held invalid when it restricts property to uses for which the property was not adapted. We did not consider the question of the existence of practical difficulties or unnecessary hardships in any of those cases. Instead we reaffirmed the established constitutional doctrine "that a zoning ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes beyond permissible regulation, and must be regarded as taking of property without compensation." City of Baltimore v. Cohn, supra, 204 Md. at page 530, 105 A.2d at page 486. As previously indicated the facts in the Terminal, Hoffman and Cohn cases were vastly different from the facts here. In the case at bar, there are insufficient facts to show indisputably that the residential use ordinance so restricts the use of their property that it cannot be used for any reasonable purpose. Nor are we persuaded that the Board abused its discretion in denying the Marinos' application for an exception for the reason that their property was unsuitable for residential use. In fact, we believe it is fairly debatable under the testimony in this case whether the owners are able to secure a reasonable return from, or to make any reasonable use of their property, of which more presently. Furthermore we do not believe that it was necessary for the Board to make a specific finding that the Marino property was suitable for residential use. Instead we think that such a finding was implicit in their sole finding that there were no practical difficulties or unnecessary hardships peculiar to the property in question.

[12] There is yet another aspect of this case which is an important factor, although not necessarily controlling. We have recognized repeatedly that traffic congestion is an element which the Board should consider when deciding whether to grant a variance. Hardesty v. Board of Zoning Appeals, 1956, 211 Md. 172, 126 A.2d 621; Temmink v. Board of Zoning Appeals, 1957, 212 Md. 6, 128 A.2d 256; Price v. Cohen, 1957, 213 Md. 457, 132 A.2d 125. In fact, the enabling act [Code (1951), Art. 66B, sec. 3], specifically provides, *inter alia*, that zoning regulations shall be made in accordance with a comprehensive plan and "designed to lessen congestion in the streets". The testimony before the Board on the question of traffic congestion was not extensive, but the weight of what there was is to the effect that at certain hours it is next to impossible to get through the Belvedere Avenue-York Road intersection except at a very slow pace. The testimony of the traffic director in court was to the same effect in that he testified that this intersection was considered to be among the heaviest traveled corners in the city. His opinion was based on the result of several traffic surveys of the area. It was also his opinion that the proposed commercialization of the whole of the Marino property would not help the situation. The Board did not assign the traffic problem as a reason for declining the exception but the trial court did. Such consideration was proper. It is apparent from the testimony of the traffic director, the only traffic expert who testified, that the layout of the streets in the area is not such as would permit a solution of the problem. And there was no evidence that a relocation of the streets was contemplated in the near future. We think it is clear that to grant the exception sought would tend to increase congestion in the streets, not to lessen it, as the clear mandate of the enabling act contemplates. Hardesty v. Zoning Board, supra; Temmink v. Board of Zoning Appeals, supra.

[13, 14] We believe that the question whether to grant or deny an exception under the evidence in this case was fairly debatable. This being so, the order of the trial court must be affirmed. A court may not substitute its judgment as to the wisdom or soundness of the action taken by an administrative body unless it is clear that such action was illegal, arbitrary or discriminatory. Serio v. Mayor and City Council of Baltimore, supra.

Since the Board has broad discretionary powers which a court cannot set aside without sound legal reasons, we are not persuaded that either the Board or the trial court erred in refusing to grant the Marinos an exception to the residential use restriction to which their property is presently subject. If it is a fact that the character of the neighborhood is gradually changing as a result of additional commercial uses from time to time, then the City Council might well extend the adjacent first commercial district to include the whole of the Marino property, but that is a legislative, not a judicial function. See Miller v. Silver, 1951, 278 App. Div. 962, 105 N.Y.S.2d 474, 475, in which it was said:

> "* * * where a claimed hardship is *common* to other properties in the area and not one special and peculiar to the specific property, the remedy is by change in the *zoning ordinance* itself." (Italics supplied.)

There is one remaining objection which requires a brief comment. We think that the admission in evidence of the agreement between the Marinos and certain neighborhood interests concerning the use of the property in question was at the most no more than a harmless error. All that it shows is that the Marinos had a different concept in 1946 as to the use of the property than they had in 1956 when they applied for another exception. Clearly the agreement had no evidentiary value bearing on the finding made by the Board and the question the trial court decided, which we are about to affirm. There is nothing in the record to indicate that the agreement was prejudicial or in any way influenced either the action of the Board or the decision of the trial court.

Order affirmed, the appellants to pay the costs.



Clarence E. TYLER

v.

WARDEN, BALTIMORE CITY JAIL.

Application No. 51.

Court of Appeals of Maryland.

Dec. 24, 1957.

Habeas corpus proceeding to secure release of prisoner in city jail. The Court of Appeals, Prescott, J., held that where defendant, confined in city jail, made ap-

[1] Section 239 provides, *inter alia,* that if an administrator shall not render the first administration account as required by law or shall not within three months after the date of his letters exhibit to the court an inventory, a summons, returnable in not less than eight nor more than thirty days may, ex officio, be issued against such administrator to show cause "wherefore such inventory has not been exhibited," or such account has not been rendered. And upon the return of the summons "summoned," or upon two citations being returned "non est" by the sheriff of the county wherein the party resided at the time of obtaining his letters, if the administrator does not appear at the return of the summons, or appearing, fails to show satisfactory cause, the court may revoke his letters.[2] This Court has frequently stated that the right to administer is a valuable one, and an administrator will not be removed except for "legal and specific causes, and after citation and opportunity to be heard in opposition to the motion." Johnson v. Macaboy, 226 Md. 23, 30, 171 A.2d 474, 478.

The order revoking Lombard's letters was dated July 17, 1963, and, among other things, contains this recital, "Whereas—by authority of Article 93, Section 239 * * *, two summons have been issued to the said Earl J. Lombard *and two citations have [been] returned "non est" by the sheriff* * * *." (Italics supplied.) The Orphans' Court, apparently, was acting upon the assumption that the recital was correct, but, unfortunately, we have been unable to verify the italicized portion above, after a careful examination of appellant's brief and of the transcript.

These examinations reveal the following sequence of events. Lombard seems to have been extremely lax in attending to his duties as administrator, and, at least as early as the latter part of 1962, the court, by telephone calls and letters attempted to get him to settle the estate. He repeatedly requested additional time, and, apparently, took the position that he was entitled to the same as a matter of right, if he had other matters that allegedly needed his attention. Finally, the court, on June 18, 1963, notified him, by registered letter, to be in court on June 21, 1963, to show cause why he should not be removed. This letter was unclaimed. It was followed by another registered letter, dated June 21, 1963, directing him to be in court no later than June 26, 1963, for the same purpose. It, too, was unclaimed. On June 28, 1963, the court passed an order commanding the sheriff to "cite and summon" Lombard to appear before the court on July 12, 1963. The return to this order was "non est." On July 12, 1963, the court passed another order, similar to that described above, which directed the sheriff to "cite and summon" Lombard to be in court on July 23, 1963. The return to this order was "summoned," without the date of its service being noted thereon. This, conceivably, could be a very important part of the return. (The record does reveal, however, that this return was "received" by the court on July 19, 1963.)

At this point, certain inexplicable procedure followed, which is determinative of our decision. Although the sheriff had the court's order commanding him to summon Lombard to be in court on July 23, 1963, to show cause, etc., on July 17, 1963, it passed the order, referred to above, reciting that two citations [had] been returned "non est," and revoking his letters. Thereafter, on July 19, 1963, still another order was passed by the court commanding the sheriff to cite and summon Lombard "forthwith" to be and appear before the court. This order was served upon Lombard on July 21, 1963, some four days after his letters had been revoked.

[2] From the above, it is obvious that no return of "summoned" to a citation and summons for an appearance by Lombard on, or before, July 17, 1963, was existent at the time of the order, and two returns of "non est" had not been made on, or before, that date. Hence, the provisions of the statute were not complied with. We must, therefore, reverse the order, but we shall do so without prejudice to further proceedings relative to removal after proper notice, should the Orphans' Court deem such procedure desirable.

Order reversed, without prejudice to further proceedings relative to the removal of the administrator: Costs to be paid by appellant.

2. For some of the cases in this Court considering the sufficiency of causes for removal, see Johnson v. Macaboy, 226 Md. 23, 30, 171 A.2d 474; Smith v. Waller, 225 Md. 94, 169 A.2d 454; Wheatley v. Fleischmann, 216 Md. 157, 140 A.2d 152; Fulford v. Fulford, 153 Md. 81, 137 A. 487.

233 Md. 640

Jesse Phillip HAWKINS

v.

WARDEN OF the MARYLAND PENITENTIARY.

Post Conviction No. 100.

Court of Appeals of Maryland.

Jan. 29, 1964.

Application for leave to appeal.

Before HENDERSON, HAMMOND, PRESCOTT, HORNEY and MARBURY, JJ.

PER CURIAM:

For reasons stated in the opinion of Judge Prendergast below, the application for leave to appeal is hereby denied.

Application denied.

233 Md. 372

PEM CONSTRUCTION CO.

v.

CITY OF BALTIMORE.

No. 108.

Court of Appeals of Maryland.

Jan. 28, 1964.

Proceeding on appeals from a decision of the Baltimore City Court, Joseph L. Carter, J., affirming the denial of a variation or special exception for two adjoining parcels of land in residential zone. The Court of Appeals, Sybert, J., held that evidence that residential use of the property would not be feasible according to developer's original plans because they would be difficult to sell did not establish an urgent necessity rather than a mere convenience and would not support the grant of a variance.

Affirmed.

1. Zoning ⇐497

Variance or special exception will not be granted on the basis of practical difficulties or unnecessary hardships if such are the result of the applicant's own action.

2. Zoning ⇐497

Contention that zoning restrictions cause peculiar hardships entitling landowner to a variance is not available to one who purchases realty with the intention of applying for a variance.

3. Zoning ⇐495

When an applicant seeks a zoning variance on the basis of practical difficulties or unnecessary hardships, he has the burden of establishing a substantial and urgent need which would justify the exception.

4. Zoning ⇐502

Evidence that residential use of property in residential zone would not be fea-

sible according to developer's original plan because houses constructed thereon would be difficult to sell did not establish an urgent necessity rather than a mere convenience and would not support the grant of a variance.

Sol C. Berenholtz, Baltimore, for appellant.

John A. Dewicki, Asst. City Sol. (Joseph Allen, City Sol. and George W. Baker, Jr., Deputy City Sol., on the brief) all of Baltimore, for appellee.

Before BRUNE, C. J., and HAMMOND, PRESCOTT, HORNEY and SYBERT, JJ.

SYBERT, Judge.

A developer appeals from a decision of the Baltimore City Court which affirmed a resolution of the Board of Municipal and Zoning appeals denying a variation or special exception so that two adjoining parcels of land located in a D–40 residential area could be used as parking lots for a nearby shopping center.

The appellant, Pem Construction Company, is the owner of both parcels, one known as 5451 Tippett Avenue (referred to on a plot plan as Parcel No. 2), and the other as 5401–43 Tippett Avenue (referred to on the plot plan as Parcel No. 3). Tippett Avenue, 50 feet wide, runs in an east-west direction.[1] Parcel No. 2 has a frontage on the north side of Tippett Avenue of about 233 feet, and is about 100 feet in depth. Parcel No. 3, to the east of Parcel No. 2 (the two tracts being separated by a 15 foot right of way), fronts approximately 192 feet on the north side of Tippett Avenue and has a depth of 85 feet. Reisterstown Road, an arterial highway, is one block south of Tippett Avenue and runs parallel thereto. One block north, and parallel to Tippett Avenue, is Price Avenue. Rogers Avenue is west of the area in dispute, and Lewiston Avenue is to the east; both of these streets run in a north-south direction. Fronting on the north side of Reisterstown Road (in the 5400 block) and on the east side of Rogers Avenue, there is a shopping center known as the Hilltop Shopping Center. The back of the shopping center is on the south side of Tippett Avenue, across from Parcel No. 2. Parcel No. 3 faces an existing commercial parking lot and various buildings across Tippett Avenue. The subject parcels are abutted by two-story masonry dwellings on Rogers Avenue to the west and on Price Avenue to the north. On the east, a 90 foot lot with an existing dwelling separates the tracts from Lewiston Avenue, on the east side of which there are two-story dwellings.

In 1946 the appellant owned a tract embracing what are now Parcel No. 2, the Hilltop Shopping Center area, and the land to the west and north of Parcel No. 2 (on which two-story masonry dwellings have been erected). At that time, as well as now, the shopping center area was zoned commercial and Parcel No. 2 and the land west and north thereof were zoned residential. The appellant proceeded to develop the residential areas first; the dwellings were built in 1946 and the shopping center in 1947. Houses were constructed west of Parcel No. 2, facing west on Rogers Avenue, and north thereof facing north on Price Avenue. Nothing was built on Parcel No. 2. Parcel No. 3 was not acquired by the appellant until 1960; the appellant has never owned the land opposite Parcel No. 3 across Tippett Avenue, nor the houses on Price Avenue which are north of Parcel No. 3.

The appellant seeks a variation or exception from the residential area restrictions so that Parcels Nos. 2 and 3 may be used for the parking of motor vehicles in conjunction with the Hilltop Shopping Center. The applications for the two lots were heard together by the Board of Municipal and Zoning Appeals (Board) and by the lower court on appeal, and thus both cases are in one record and are treated as one here.

1. Actually the streets run in a northeast-southwest or northwest-southeast direction, but for purposes of simplicity, the streets involved will be treated as running east-west or north-south.

Originally the applications were rejected by the Building Inspection Engineer of Baltimore City (the Zoning Commissioner), and an appeal to the Board ensued. The requests for special exception or variance were made pursuant to Sec. 36 of the Baltimore City Zoning Ordinance which provides in part that the Board may:

> "(b) Grant a permit where the use or change of use of land, buildings or structures proposed to be used is limited as to its location because of the size of buildings, size of yards, irregularity of shape of land or buildings, topography, grade or accessibility * * *.
>
> "(c) Grant a permit where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of any of the provisions of this Article * * *."

The Board denied the applications on the basis that, *inter alia*, "any hardship that has been created for the appellant is self-induced and therefore does not warrant the Board in making any exception". The appellant then appealed to the Baltimore City Court, which affirmed the decision of the Board on the basis that, "the record clearly shows that whatever hardship the appellant has incurred has been the result of his own mistakes and wrongdoings," and that "the appellant knew at all times that Parcels 2 and 3 were zoned D–40 Residential, and the law is clear that one cannot purchase land in expectation of being granted a variance or special exception."

At the hearing before the Board several qualified experts appeared for the appellant. One testified that although it would be possible to build homes on the parcels in question, they could not be sold profitably, and that the best use of the land would be for parking. Another testified that it would not be feasible to build homes on the parcels and that it would be difficult to sell such homes if they were built because they would have to face the back of the shopping center, or the back of the houses on Price Avenue. Both experts felt that a parking lot would not impair the value of the adjoining properties. An officer of the appellant corporation, a qualified architect, testified that it would not be feasible to build homes on the two parcels. On cross-examination, he stated that originally tract No. 2 was to be used for residential purposes, but that through the years such use was determined to be impracticable. When asked who had made the mistake in the original decision to use the parcels for residential purposes, he stated that the mistake had been "in our own judgment".

Several protestants also testified at the hearing before the Board. Owners of houses on Price Avenue testified that when they bought their homes, a representative of the appellant corporation had expressly stated that homes would be built on Parcel No. 2, and one said she had received a letter to that effect. Other protestants opposed the granting of permits on the basis that it would depreciate the value of their homes and would create a traffic hazard.

[1–4] Even though this Court has held that a variance or special exception will not be granted on the basis of practical difficulties or unnecessary hardships if such were the result of the applicant's own action, Marino v. City of Baltimore, 215 Md. 206, 137 A.2d 198 (1957), and that where a person purchases realty with the intention of applying for a variance, he cannot contend that the zoning restrictions cause him such peculiar hardships as to entitle him to the variance, Gleason v. Keswick Improvement Ass'n., 197 Md. 46, 78 A.2d

164 (1951), there is another, more compelling reason why the applications were properly denied in this case. When an applicant seeks a variance on the basis of "practical difficulties or unnecessary hardships" (Sec. 36(c), supra), he has the burden of showing a substantial and urgent need which would justify the exception. As was stated in Cleland v. City of Baltimore, 198 Md. 440, 444, 84 A.2d 49, 51 (1951):

> "* * * This court has consistently held that special exceptions will never be granted to gratify mere convenience, that there must be a necessity, and that necessity must be so urgent, and the facts so extraordinary as to require the withdrawal of that particular case from the application of the accepted rule. That accepted rule is the division made in the zoning ordinance for various classes of use districts. It is part of a general plan which is not intended to be changed except in cases of urgent necessity. * * *"

In the present case the testimony produced by the appellant did not rule out the possibility of residential use of the parcels by utilizing a different plot plan, or of other uses permitted in residential districts. The evidence only showed that it would not be "feasible" to build houses according to the plan originally intended by the appellants because they would be difficult to sell. We believe that this testimony was insufficient to establish an urgent necessity, rather than mere convenience, and thus could not support the granting of a variance. Our most recent consideration of this problem was in City of Baltimore v. Polakoff, 233 Md. 1, 194 A.2d 819 (1963), in which we adhered to the rule stated in Cleland, supra. Cf. Carney v. City of Baltimore, 201 Md. 130, 93 A.2d 74 (1952); Heath v. Mayor and City Council of Baltimore, 190 Md. 478, 58 A.2d 896 (1948). The appellant here is in the same situation as were the appellants in Marino, where it was said (at p. 221 of 215 Md., at p. 204 of 137 A.2d): "* * * there are insufficient facts to show indisputably that the residential use ordinance so restricts the use of their property that it cannot be used for any reasonable purpose. * * *" Cf. City of Baltimore v. Cohn, 204 Md. 523, 105 A.2d 482 (1954). The facts before us fall substantially short of establishing a taking in a constitutional sense. Cf. Frankel v. City of Baltimore, 223 Md. 97, 101, 162 A.2d 447 (1960).

Although the appellant also asked for a variance under Sec. 36(b), supra, our examination of the record reveals no evidence of any limitation on the use of the land by "size of buildings, size of yards, irregularity of shape of land or buildings, topography, grade or accessibility" as would justify an exception. The premises in question do not appear to come within the purview of this section. Cf. Marino (at p. 217 of 215 Md., at p. 202 of 137 A.2d).

Judgment affirmed; appellant to pay the costs.

233 Md. 637

Monroe BANKS

v.

WARDEN OF the MARYLAND PENITENTIARY.

Post Conviction No. 89.

Court of Appeals of Maryland.

Jan. 28, 1964.

Application for leave to appeal.

Before HENDERSON, HAMMOND, PRESCOTT, HORNEY and MARBURY, JJ.

PER CURIAM:

For the reasons assigned by Judge Harlan in the court below, the application for leave to appeal will be denied.

Application denied.

233 Md. 344

Kathryn W. LEATHERBURY

v.

William E. LEATHERBURY.

No. 166.

Court of Appeals of Maryland.

Jan. 24, 1964.

Proceeding by second wife for divorce on ground that Alabama divorce obtained by husband in order to marry her was void. The Circuit Court, Montgomery County, Walter H. Moorman, J., dismissed the bill, and the wife appealed. The Court of Appeals, Hammond, J., held that second wife could not collaterally attack validity of Alabama decree obtained by husband in proceeding wherein both husband and first wife appeared and participated.

Order affirmed.

1. Divorce ⇐172

If one spouse did not participate in divorce proceeding, he or she or state may show that court granting divorce had no jurisdiction over that spouse.

2. Divorce ⇐168

If original defendant spouse in divorce proceeding seemingly then participated but in actuality did not, inattentive deluded or defrauded one may later collaterally attack divorce.

3. Evidence ⇐35

Where second wife who had burden of persuading Maryland court that Alabama would permit collateral attack by subsequent spouse on divorce decree granted by one of its courts did not give notice of her intention to rely on Alabama law under Uniform Judicial Notice of Foreign Law Act and there was no waiver of such requirement, neither Maryland circuit court nor Court of Appeals was required to notice judicially Alabama law other than to presume it was like that of Maryland. Code 1957, art. 35, §§ 47–53; Maryland Rules, Rule 885.

4. Divorce ⇐168

Under Alabama law, where both parties participate, divorce decree regular on its face but actually fraudulent is not void but voidable and neither party alone can collaterally attack it if he or she participated in its procurement.

5. Divorce ⇐354

Second wife who sought divorce in Maryland circuit court on ground that Alabama divorce obtained by husband in order to marry her was void could not collaterally attack validity of Alabama decree obtained by husband in proceeding wherein both husband and first wife appeared and participated.

George L. Quinn, Jr., Silver Spring, and John D. Connelly, Rockville, for appellant.

Edward L. Foster, Silver Spring, for appellee.

Before HENDERSON, HAMMOND, HORNEY, MARBURY and SYBERT, JJ.

HAMMOND, Judge.

A second wife appeals from the dismissal of her bill seeking a divorce on the claim that the Alabama divorce her husband obtained in order to marry her was void. The appellant and her present husband had dis-

ham, filed a bill of complaint for the sale in lieu of partition of real property. The said two infants, together with Mary Anna Graham and the defendant below, Michael J. Rybikowsky (why his name is Rybikowsky and not Ciuffreda is undisclosed by the record) are the four surviving children, heirs at law and next of kin of Alfred Michael Ciuffreda, who died intestate on September 8, 1960, while seized of the real estate here involved. The defendants below were Michael J. Rybikowsky, Theresa A. Nolan, the Emigrant Industrial Savings Bank, and the appellants Joseph B. Pino and his wife, Mary T. Pino. Theresa A. Nolan was the assignee of Rybikowsky's one-fourth interest in his father's estate under an assignment dated August 16, 1962. She in turn had assigned the one-fourth interest to appellants Pino under an assignment dated September 21, 1964. The validity of these assignments was established by the lower court, and is not questioned on this appeal. The Emigrant Industrial Savings Bank was the holder of a note secured by a deed of trust on the subject property.

On October 27, 1960, the administrator of Alfred Ciuffreda's estate erroneously contracted with the appellants to sell the property to them for a total purchase price of $15,000.00, including the balance owing on the trust note. In connection with this purported agreement the Pinos paid to a real estate broker the amount of $500.00 as a deposit and an additional $4,315.43 to the administrator. Pursuant to the agreement the appellants have occupied the subject property, making improvements, paying taxes and insurance, and making payments on the note secured by the deed of trust on the premises. As earlier pointed out, they subsequently acquired a one-fourth interest of one of the decedent's heirs.

The real property was sold on May 31, 1967, at public sale to Joseph B. Pino, one of the appellants, for the sum of $11,600.00, subject to a balance of $3,554.21 due the Emigrant Industrial Savings Bank on its trust note. By order of the Circuit Court for Prince George's County dated November 18, 1966, the appellants and any other party were allowed to file claims for any allowances they felt they had "with respect to any part of the net proceeds resulting from said sale * * *." After such claims had been made by the appellants and the appellees had filed their opposition, the court referred the matter to the court auditor. The auditor filed reports granting certain of the claimed allowances and denying others. In addition to other claims allowed the Pinos, he allowed the aggregate amount of the monthly payments made by the Pinos on the trust note toward principal and interest. However, he disallowed their claim in the amount of $3,823.98, representing the curtailments they had made against the principal balance of said trust note. In their brief, appellants stated that these curtailments were made by them on January 5, 1962, in the amount of $911.99, and on February 2, 1962, in the amount of $2,911.99, totaling $3,823.98. Thus the auditor allowed the aggregate of the individual monthly payments, but disallowed both large lump sum payments.

On October 3, 1967, the lower court issued an order ratifying the auditor's report. The appellants filed a motion for reconsideration of the court's order, and the auditor filed a supplementary memorandum in opposition. On October 27, 1967, the lower court denied the motion for reconsideration relying upon the authorities stated in the auditor's memorandum, and the Pinos have appealed to this Court.

[1] The issue presented is whether the lower court erred in ratifying the auditor's report which disallowed appellants' claim for contribution from the other co-tenants for lump sum curtailment payments made on the trust note which was secured by the subject property. We do not find the authorities relied upon by the lower court as determinative of this issue. The general rule in Maryland is that when one tenant pays a mortgage or other encumbrance upon the common property, he is entitled to contribution from his co-tenants to the extent to which he has paid their share, and is entitled to an equitable lien for the amount due him. Meyers v. East End Loan & Sav. Assn., 139 Md. 607, 116 A. 453; Hogan v. McMahon, 115 Md. 195, 80 A. 695. See Withers v. Douglas, 206 Md. 141, 110 A.2d 513.

[2] The auditor allowed the Pinos a credit for the aggregate amount of the individual monthly payments, but disallowed their claim for the curtailment payments on the ground that these payments were for the exclusive benefit of their estate. We cannot agree that the other co-tenants received no benefit. The equity of the non-contributing co-tenants was increased by these payments just as it was increased by the monthly sums paid by the Pinos. The final result of both the curtailment payments and the monthly payments was to increase the co-tenants' *aliquot* share in the property. Equity will not allow the unjust enrichment of the appellees at the appellants' expense. The Restatement of Restitution, Section 105 (1937) provides:

"Protection of Things Owned by Payor and Another.

(1) Where two persons are tenants in common or joint tenants and one of them has taken reasonably necessary action for the preservation of the subject matter or of their common interests, he is entitled to indemnity or contribution, enforced by means of a lien upon the interest of the other

(a) if he made a request to the other to join in such preservation, or

(b) without such request, if action was immediately necessary and the other was not available.

(2) A person who through legal proceedings procures or preserves property in which he and another have on [sic] interest may be entitled to reasonable compensation for his services and restitution of his expenses in obtaining or preserving the property."

Comment b to this section states that "the rule applies to the payment of encumbrances against the common property * *."

For the above mentioned reasons the lower court's order of October 3, 1967, ratifying the auditor's report and account, is reversed in part to allow the appellants' contribution from the proportionate shares of the co-tenants for their curtailment payments.

Order affirmed in part and reversed in part and case remanded for modification of the Auditor's report in accordance with this opinion. Costs of this appeal to be charged against the interests of the appellees.

251 Md. 554

Andrew J. BURNS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE et al.

No. 405.

Court of Appeals of Maryland.

Dec. 4, 1968.

Appeal from ruling of the Baltimore City Court, J. Harold Grady, J., affirming resolution of zoning board approving application for variance. The Court of Appeals, Finan, J., held that factors upon which applicant's financial crisis depended, namely, current occupancy demands, general economic conditions and management, were factors which presented problems to other rental properties in the neighborhood and were not sufficiently peculiar to applicant's premises as to justify relaxation of zoning ordinance on basis of financial hardship, assuming, arguendo, that hardship may be the subject of valid consideration.

Judgment reversed.

1. Zoning ⇐536

Burden of showing facts to justify an exception or variance rests on applicant, and it must be shown that hardship affects particular premises and is not common to other property in neighborhood.

2. Zoning ⇐496

Factors upon which variance applicant's financial crisis depended, namely, current occupancy demands, general economic conditions and management, were factors which presented problems to other rental properties in neighborhood and were not sufficiently peculiar to applicant's premises as to justify relaxation of zoning ordinance on basis of financial hardship, assuming, arguendo, that hardship may be the subject of valid consideration.

J. Francis Ford, Baltimore (J. Joseph Curran, Jr., Baltimore, on the brief) for appellant.

Paul L. Betz, Baltimore (Charles Mindel and Buckmaster, White, Mindel & Clarke, Baltimore, on the brief) for Leroy Kappelman, and another part of appellees.

Simon Schonfield, Asst. City Solicitor (George L. Russell, Jr., City Solicitor, Baltimore on the brief) for Mayor and City Council of Baltimore, other appellee.

Before HAMMOND, C. J., and BARNES, McWILLIAMS, FINAN and SMITH, JJ.

FINAN, Judge.

This is an appeal from a ruling of the Baltimore City Court which affirmed the resolution of the Board of Municipal and Zoning Appeals (Board) approving the application of Leroy F. Kappelman, Ralph Lubrow and Marian Kappelman, a partnership (appellee), to add two single bedroom units in space already existing, in each of two apartment buildings owned by the appellee designated as Nos. 6103–05 and 6107–09 Bellona Avenue. Appellant is the owner of residential property in which he resides in Baltimore and his home is in close proximity to 6103–05 and 6107–09 Bellona Avenue.

The property designated as 6103–05 is located in an E–40 height and area district and the lot contains 25,918.64 square feet. Under sections 28 and 29 of the Zoning Ordinance (Baltimore City Code (1950 ed., as amended) Art. 40) this lot is sufficient to accomodate ten families. The property designated as 6107–09 contains a total of 31,830.49 square feet, of which 23,609.72 square feet is located in an E–40 height and area district which is sufficient to accommodate nine families and 8,220.77 square feet is located in an F–40 height and area district which is sufficient to accommodate one family. In 1965 each of the lots now designated as Nos. 6103–05 and 6107–09, were improved by a two-story, brick apartment building, 30 feet by 156 feet, housing ten families; the terrace level, two families and the first and second floors, four families each, all in double bedroom units. There was space provided for two additional single bedroom apartments in each of the buildings but they were not completed because under the restrictions of the Zoning Ordinance only ten family occupancy was permitted; consequently, the extra space was used for storage. Construction was completed on these buildings in January, 1965, and the first tenants took possession in April of that same year. In May, 1965, after the apartment units had been in operation for only one month, the appellee made a request for four additional single units, which request was denied because the Board felt that the apartments had not been operated for a sufficient length of time to show hardship. Two years later, in 1967, the appellee filed two applications, one for each property, requesting two additional single bedroom units in each building. The effect of its requests would be to increase the density so that twelve families would be allowed in each of the apartment houses instead of ten, as set out in sections 28 and 29 of the Zoning Ordinance. Again the appellee

based its requests primarily on the basis of hardship. Both of appellee's requests were originally turned down by the Zoning Commissioner and appeals were taken to the Board. The Board, after combining the appeals and holding a hearing on them, found that the appellee had shown sufficient hardship under section 40(c) of the Zoning Ordinance (hardship provision) to justify the granting of a special exception and approved the applications.

The resolution of the Board was appealed to the Circuit Court for Baltimore City and there it was affirmed. It is from that ruling that this appeal is taken.

The main thrust of the appellee's hardship argument is that it has sustained a financial loss. In 1966 the loss was $21,-363.66, including $21,200.00 depreciation and the projected loss for 1967 was $4,200.-00, without taking into consideration depreciation.

This hardship argument was underpinned with evidence that in the general area of the apartments the demand for single bedroom units was seven (7) times that for double bedroom apartments; that if the apartments did not generate additional revenue, service for the tenants and the quality of maintenance would deteriorate with an accompanying detrimental effect on the appearance of the buildings; that appellee intended to provide the additional parking space which the increased occupancy would require; that since the construction of the apartments, Bellona Avenue had been widened by eight feet, thus minimizing any potential traffic congestion; and that the increase in density would not adversely affect the health, safety or welfare of the neighborhood.

Against these contentions the appellant points out that at the time the partnership purchased the property and erected the buildings, it knew full well that only ten (10) families could lawfully be housed on each of the areas in question.

The appellant also argues that the fact, that at the time the buildings were constructed, provision was made for additional space, readily convertible into four (4) extra apartments, raises the suspicion that this may have been by deliberate design in the hope that at some future time the zoning authorities could be persuaded to relax the regulations and allow the construction of the additional units, such as was approved by the Board and affirmed by the lower court.

The lower court in its oral opinion emphasized that the exception granted by the Board was of a "minimal nature." However, this in itself would not justify arbitrary and capricious action on the part of the Board in granting the exception to the Code, as contended by the appellant.

We think the Board did act arbitrarily in granting the exception and that the lower court erred in not reversing the Board's action as constituting an abuse of its discretion.

In City of Baltimore v. Polakoff, 233 Md. 1, 194 A.2d 819 (1963), a case wherein the owner-developer requested a special exception to allow him to construct a four story, 32 family, luxury apartment house, allegedly in demand, on a lot restricted by zoning to a density of 18 families, Judge Hammond (now Chief Judge) speaking for the Court said: "Mr. Polakoff did not meet the burden he bore as an applicant, showing no more than that the granting of the exception would do no harm and be a profitable convenience to him. Under the cases this is not enough. * * *." Id. 9, 194 A.2d 824. In Easter v. Mayor and City Council of Baltimore, 195 Md. 395, 73 A.2d 491 (1950), in reversing the lower court and the zoning board, both of which on the basis of hardship had granted a special exception to front yard requirements to permit an owner to extend a store front on a combination store and dwelling, we said: "* * * The mere fact that the variance would make the property more profitable is not a sufficient ground to justify a relaxation of setback requirements. * * *." Id. 400, 73 A.2d 492.

Assuming; *arguendo,* that straitened financial circumstances could be considered a hardship which would justify a relaxation of the ordinance, the appellee has actually presented a very thin case. In Board of County Commissioners v. Luria, 249 Md. 1, 238 A.2d 108 (1968), in reversing the circuit court which had in turn reversed the action of the Board of County Commissioners for Prince George's County, sitting as the District Council, which had denied a special exception for a gasoline filling station, we stated:

"* * * It is our view that such findings must be based on testimony, and that the applicant assumes the burden of adducing such testimony, even in a prima facie case. * * *." Id. at 3, 238 A.2d at 109.

See also Board of County Commissioners for Prince George's County v. Lightman, 251 Md. 86, 246 A.2d 261.

In the instant case the record reveals that during the year 1966, after allowing $22,100.00 for depreciation, the operation broke about even. The figures for 1967 were projected and presented an estimated $4,200.00 loss after taking depreciation. The testimony on occupancy was vague to the point that it did not close the door on the possibility of obtaining better income from the existing facilities.

[1,2] Also, as we stated in *Easter,* supra:

"The burden of showing facts to justify an exception or variance rests upon the applicant, and it must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood. * * *." Id. at 400, 73 A.2d at 492.

Certainly, in the instant case, factors which contribute to the financial crisis complained of by the appellee depend on current occupancy demands, general economic conditions and management; all factors which may quickly vary. These are also factors which present problems common to other rental properties in the neighborhood and are not sufficiently peculiar to the appellee's premises as to justify the relaxation of the ordinance on the basis of financial hardship, assuming, for the sake of argument, that hardship may be the subject of valid consideration.

We are of the opinion that the lower court erred in affirming the action of the Board.

Judgment reversed, appellees to pay costs.



251 Md. 428

George M. FINLEY et ux.

v.

TEETER STONE, INC.

No. 355.

Court of Appeals of Maryland.

Nov. 19, 1968.

Owners of farm brought action against quarrying company for damage to farm as result of the pumping of percolating water from quarry by quarrying company. The Circuit Court for Carroll County, James Macgill, C. J., rendered a judgment for the quarrying company, and the owners of the farm appealed. The Court of Appeals, Barnes, J., held that where quarrying company, in operation of quarry, was required to pump water from quarry, drawing percolating water from adjoining farm and withdrawal of percolating water caused sink holes on farm and damaged farm, but there was no negligence by quarry company in its excavation of its quarry or any waste, malice, or sale of percolating waters, or other unreasonable use, quarrying company was not liable to owners of farm for damages resulting

pumping percolating waters from ...ry.

Judgment affirmed.

Waters and Water Courses ⇐99

"Subterranean waters" are generally ...idered to be underground streams or ...olating waters.

See publication Words and Phrases ...or other judicial constructions and ...finitions.

Waters and Water Courses ⇐99

To be classified as "underground ...m" water must flow in a definite and ... channel whose existence and location ...ther known or may be ascertained ... indications on surface of land or by ... means without subsurface excava... to determine such existence and loca...

See publication Words and Phrases ...or other judicial constructions and ...finitions.

Waters and Water Courses ⇐99

"Percolating waters" are those which ... seep or filter through soil beneath ...ace, without a defined channel, or in a ... that is unknown and not discover... from surface indications without excava... for that purpose, and fact that they ... in their underground course, at places ... together so as to form veins or rivu... does not destroy their character as ...olating waters".

See publication Words and Phrases ...or other judicial constructions and ...finitions.

Waters and Water Courses ⇐107(3)

Unless it can be shown that underground water flows in a defined and ... channel, it will be presumed to be ...ating water.

Waters and Water Courses ⇐100, 101

While normally the use of underground streams is governed by same law as applies to those waters flowing in defined and fixed channels above the surface, a separate and distinct body of law has developed governing the use of percolating waters.

6. Waters and Water Courses ⇐106

The pumping of large quantities of water, incident to mining or quarrying operations is both reasonable and necessary.

7. Mines and Minerals ⇐121

Generally, landowner engaged in ordinary and usual mining operations is not responsible for damages resulting from diversion or destruction of flow of percolating waters.

8. Mines and Minerals ⇐122

Where quarrying company, in operation of quarry, was required to pump water from quarry, drawing percolating water from adjoining farm, and withdrawal of percolating water caused sink holes on farm and damaged farm, but there was no negligence by quarry company or any waste, malice, or sale of percolating waters, or other unreasonable use, quarrying company was not liable to owners of farm for damages resulting from pumping percolating waters from quarry.

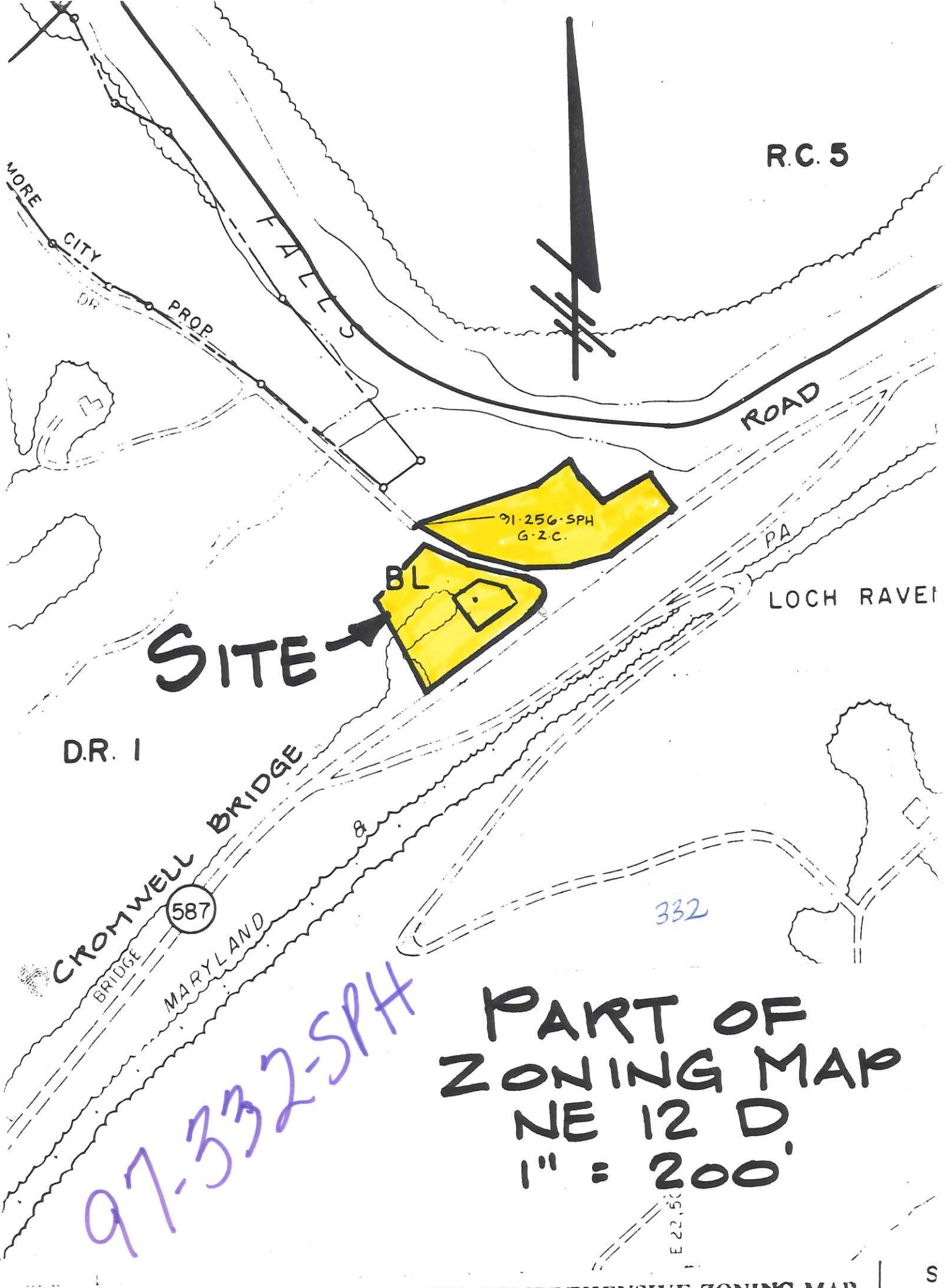
9. Waters and Water Courses ⇐100, 101

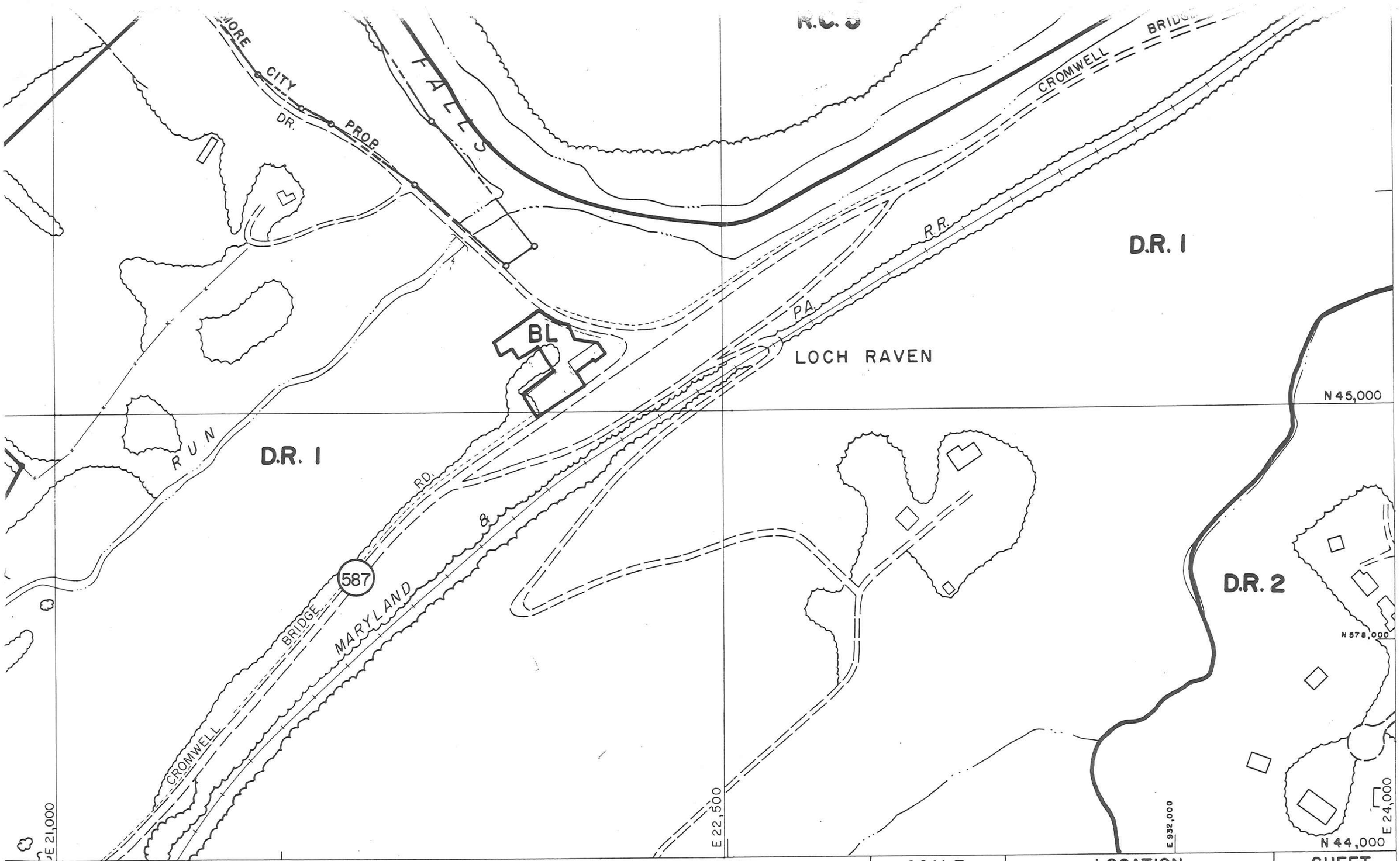
Interference with support provided by water is not subject to same rules of absolute liability that are imposed on a landowner who deprives his neighbor of natural support provided by soils and other more solid materials.

Carl H. Lehmann, Jr., Baltimore, for appellants.

Richard A. Reid, Towson (Royston, Mueller, Thomas & McLean, Towson, and Charles O. Fisher and Walsh & Fisher, Westminster, on the brief), for appellee.

Before HAMMOND, C. J., and BARNES, McWILLIAMS, SINGLEY and SMITH, JJ.

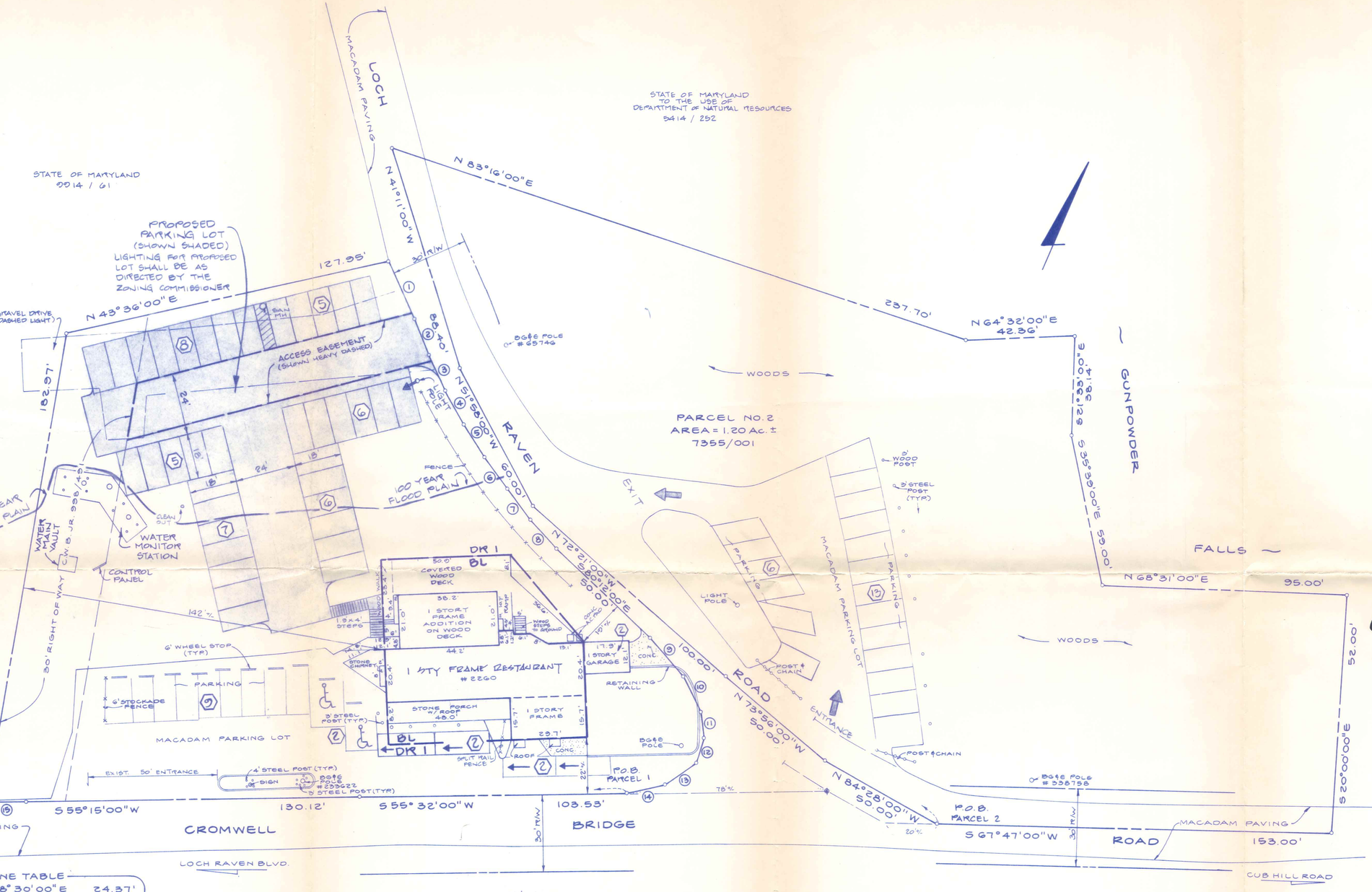

R.C. 5
MORE
CITY
DR
PROP
FALLS
ROAD
91-256-SPH
G.Z.C.
B L
SITE
PA
LOCH RAVEN
D.R. 1
CROMWELL BRIDGE
587
BRIDGE
MARYLAND
&
332
97-332-SPH
PART OF
ZONING MAP
NE 12 D
1" = 200'
E 22,5
1992 COMPREHENSIVE ZONING MAP
S



SHEET N.E.-11-D)

ORE COUNTY
ANNING AND ZONING

SCALE	LOCATION	SHEET
1" = 200' ±	LOCH RAVEN RESERVOIR AREA	N.E.
DATE OF	CROMWELL	12-D

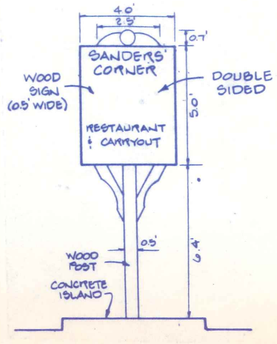


LINE TABLE		
1	S 58°30'00" E	24.37'
2	S 56°08'00" E	15.00'
3	S 58°35'00" E	15.00'
4	S 62°30'00" E	15.00'
5	S 66°50'00" E	15.00'
6	S 69°17'00" E	15.00'
7	S 72°30'00" E	15.00'
8	S 76°01'00" E	15.00'
9	S 75°29'00" E	20.00'
10	S 59°59'00" E	15.00'
11	S 40°19'00" E	10.00'
12	S 18°21'00" E	10.00'
13	S 21°07'00" W	15.00'
14	S 44°24'00" W	15.00'
15	S 55°15'00" W	15.25'

ZONING HISTORY

REFER TO CASE # 91-256-SPH PETITION FOR SPECIAL HEARING GRANTED MARCH 20, 1991 FOR THE NONCONFORMING USE OF COMMERCIAL PARKING IN A RESIDENTIAL ZONE.

REFER TO ISSUE No. 6-087 FOR ZONING RECLASSIFICATION APPROVAL FROM DR.1 TO BL ON THE 1988 COMPREHENSIVE ZONING MAPS

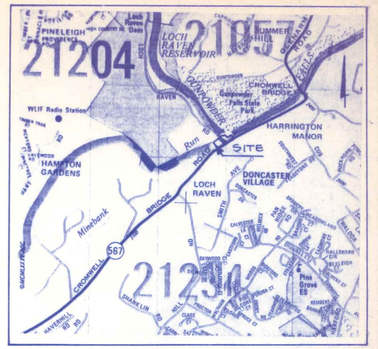


SIGN DETAIL
SCALE: 1"=3'

ZONING SPECIAL HEARING REQUEST

1. TO ALLOW COMMERCIAL PARKING IN A RESIDENTIAL ZONE PURSUANT TO BCZR SECTION 409.8.B
2. TO AMEND A PREVIOUS SITE PLAN DATED OCT. 23, 1990. REFER TO CASE No. 91-256-SPH.
3. TO CONFIRM AN EXISTING NON-CONFORMING USE AS SHOWN HEREON.
4. TO APPROVE A MODIFIED PARKING PLAN PURSUANT TO BCZR SECTION 409.12.

ORIGINAL PLAN FROM CASE No. 96-168 SPHA



VICINITY MAP
SCALE: 1" = 2000'

SITE DATA

SITE AREA	2.113 Acs
ELECTION DISTRICT	9
COUNCILMANIC DISTRICT	6
EXISTING ZONING	BL : DR-1
DEED REFERENCE	7355 / 1
TAX MAP / GRID / PARCEL	62/20/211
TAX ACCOUNT NUMBERS	0919001950 0919001951
EXISTING USE	RESTAURANT
PROPOSED USE	RESTAURANT
FLOOR AREA	*4,548 Sq.Ft
FA.R. *4,548 SF / 2.113 Acs	= 0.040
*(INCLUDES PORCH ENCLOSURE)	

PARKING TABULATION
REQUIRED SPACES
1 SPS PER 1,000 SF
or 16 x 4.548 = 73 SPS

PARKING PROVIDED = 73 SPS
* FLOOR AREA INCLUDES PROPOSED FRONT PORCH ENCLOSURE

97-332-SPH

OWNER
RONALD H. SANDERS
2260 CROMWELL BRIDGE ROAD
BALTIMORE COUNTY, MARYLAND

REVISIONS		
NO.	DATE	DESCRIPTION
1	10/12/05	REV PER ATTORNEY'S COMMENTS
2	11/15/05	REV. PER ATTORNEY'S COMMENTS
3	2/5/06	REV. PER ZONING ORDER
4	8/16/06	ADD 100 YEAR FLOOD PLAIN

SPELLMAN, LARSON & ASSOCIATES, INC.
CIVIL ENGINEERS AND LAND SURVEYORS
SUITE 109, JEFFERSON BLDG., TOWSON, MD., 21204
PHONE 823-3535

PLAT TO ACCOMPANY ZONING PETITION FOR SPECIAL HEARING

"SANDERS' CORNER"

#332

2260 CROMWELL BRIDGE ROAD

9TH ELECTION DISTRICT BALTO. CO., MD

SCALE: 1" = 20'	DES. BY: N/A	SHT. 1 OF 1
DATE: 10-10-05	DRN. BY: W.O.G.	

94008