

8/1/01
IN THE MATTER OF
THE APPLICATION OF
WILLIAM R DUVAL, JR. AND
THERESA A. DUVAL -PETITIONERS
FOR ZONING VARIANCE ON PROPERTY

12TH ELECTION DISTRICT
7TH COUNCILMANIC DISTRICT

* BEFORE THE
* COUNTY BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. 00-241-A

* * * * *

RULING ON MOTION FOR RECONSIDERATION
AND JOINT MOTION TO REVISE ORDER

A final Opinion and Order was issued by the Board on June 6, 2001, along with a Concurring /Dissenting Opinion. The Petitioner filed a "Motion for Reconsideration" on July 5, 2001, with the accompanying "Joint Motion to Revise Order" being filed on July 17, 2001.

The basis for the Reconsideration was as follows:

1. That William R. Duval, Jr., and Theresa A. Duval have sold the property known as 403 Bayside Drive, Baltimore County, Maryland 21222 to Howard C. Becker and Melanie I. Becker, new owners.
2. That Howard C. Becker and Melanie I. Becker have come to an agreement with Michael Mioduszewski and Susan Hagerty, regarding the pier.
3. That the parties have agreed that the boatlift shall be removed and that all of the pier, except for a pier extending 29' from the bulkhead with a 5' wide deck shall be allowed to remain on the property.
4. That the boat lift, the pilings and the pier decking, except as set forth above, have been removed from the property as shown on the photographs submitted to the Board as an attachment to said Motion.

The Petitioners had requested that:

- a) The County Board of Appeals vacate the Opinion and Order of this Board dated June 6, 2001 and adopt the proposed Order set forth as Exhibit "1" of the Motion as the Final Order in this case;
- b) For such other and further relief as the nature of this cause may require.

The Joint Motion was signed by the former owners of the subject property, the new purchasers, Susan Hagerty and Michael Mioduszewski, original Protestants, and counsel for the Petitioners and new owners and counsel for the Protestants.

Request was being made to have the Board reverse its Order to grant the Petitioners' request for variance from §§ 417.3B and 417.4 of the *Baltimore County Zoning Regulations* (BCZR) to grant in part only to allow a pier 29 feet in length from the bulkhead with a 5-foot wide pier deck and that the balance of the Petitioners' request for variance be denied.

The Board held a public deliberation on July 26, 2001 at 11:00 a.m. Only two members of the original panel were still on the Board: Charles L. Marks and Margaret Worrall. Donna M. Felling resigned her position as of June 30, 2001.

The Board agreed to reconsider the matter, and the remaining members revisited their notes, the transcript, previous evidence submitted, and new photographs with the Motion recently filed.

The Board considering having a third member of the Board reconsider the matter to determine the questions of uniqueness and division line location. However, in a recent decision the Circuit Court appeared to frown on the interpretation by a new panel member where questions of credibility and demeanor of witnesses are concerned. [*In the Matter of Country Ridge Shopping Center*, Circuit Court File No. 3-C-01-0307, CBA Case No. 96-226-X] While the original Board agreed with the divisional line question in that they found "the testimony of the Protestants' witnesses to be far more credible on this issue," the questions of uniqueness and practical difficulty were the subject of disagreement. Ms. Worrall and Ms. Felling found no uniqueness existed and any "practical difficulty or unreasonable hardship" was self-created. Mr. Marks disagreed and filed the Concurring /Dissenting Opinion.

During the public deliberation of the Motions filed, it became obvious, because of the sale of the property to the new owners, Howard C. Becker and Melanie Becker, along with the modifications made since the Board's Order of June 6, 2001, and the withdrawal of objections by the Protestants, that different circumstances now existed that might call for a new variance application being filed with the Department of Permits & Development Management whereby

the new variance request, with modifications, might cause a review by the Zoning Commissioner of the uniqueness issue and consideration of the location of the divisional line.

The Board, in light of its final Order, did not consider it appropriate to change or modify its Order in light of the existing Code violation, and the fact that there might be neighbors in opposition to the granting of the variance. Because of the issuance of the final Order, it would be inappropriate for the Board to revise its Order without proper notification. However, a request to the Department of Permits & Development Management for a variance with the modifications already in place could resolve these issues.

Therefore, the Motion for Reconsideration was granted and reconsideration given to the Joint Motion to Revise Order. However, the request to vacate the Board's original Order and adopt the proposed Order as submitted is denied.

THEREFORE, IT IS THIS 7th day of August, 2001 by the
County Board of Appeals of Baltimore County

ORDERED that, having granted Petitioners' request to reconsider this matter, the Joint Motion to Revise Order filed herein be and the same is **DENIED**; and it is further

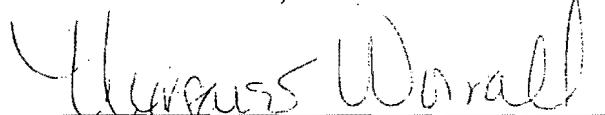
ORDERED that the Opinion and Order issued by this Board on June 6, 2001 remains the final Order in Case No. 00-241-A.

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*.

**COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY**



Charles L. Marks, Panel Chairman



Margaret Worrall

STILL DENIED

CD / p12



County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
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August 7, 2001

Alfred L. Brennan, Jr., Esquire
825 Eastern Boulevard
Baltimore, MD 21221

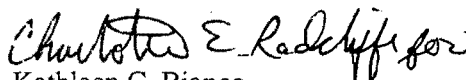
RE: *In the Matter of: William R. Duval, Jr., and Theresa A. Duval*
-Legal Owners / Case No. 00-241-A

Dear Mr. Brennan:

Enclosed please find a copy of the Board's Ruling on Motion for Reconsideration and Joint Motion to Revise 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*, 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
Administrator

Enclosure

c: Alfred L. Brennan, Jr., Esquire
Mr. & Mrs. William Duval
Edward Covahey, Esquire
Susan Hagerty
Michael Mioduszewski
J. Scott Dallas
Theresa Duval
Chesapeake Bay Critical Areas Commission
People's Counsel for Baltimore County
Pat Keller, Planning Director
Lawrence E. Schmidt, Zoning Commissioner
R. Bruce Seeley /DEPRM
James Thompson, Code Enforcement /PDM
Arnold Jablon, Director /PDM

8/7/01
IN THE MATTER OF
THE APPLICATION OF
WILLIAM R DUVAL, JR. AND
THERESA A. DUVAL -PETITIONERS
FOR ZONING VARIANCE ON PROPERTY

12TH ELECTION DISTRICT
7TH COUNCILMANIC DISTRICT

* BEFORE THE
* COUNTY BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. 00-241-A

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RULING ON MOTION FOR RECONSIDERATION
AND JOINT MOTION TO REVISE ORDER

A final Opinion and Order was issued by the Board on June 6, 2001, along with a Concurring /Dissenting Opinion. The Petitioner filed a "Motion for Reconsideration" on July 5, 2001, with the accompanying "Joint Motion to Revise Order" being filed on July 17, 2001.

The basis for the Reconsideration was as follows:

1. That William R. Duval, Jr., and Theresa A. Duval have sold the property known as 403 Bayside Drive, Baltimore County, Maryland 21222 to Howard C. Becker and Melanie I. Becker, new owners.
2. That Howard C. Becker and Melanie I. Becker have come to an agreement with Michael Mioduszewski and Susan Hagerty, regarding the pier.
3. That the parties have agreed that the boatlift shall be removed and that all of the pier, except for a pier extending 29' from the bulkhead with a 5' wide deck shall be allowed to remain on the property.
4. That the boat lift, the pilings and the pier decking, except as set forth above, have been removed from the property as shown on the photographs submitted to the Board as an attachment to said Motion.

The Petitioners had requested that:

- a) The County Board of Appeals vacate the Opinion and Order of this Board dated June 6, 2001 and adopt the proposed Order set forth as Exhibit "1" of the Motion as the Final Order in this case;
- b) For such other and further relief as the nature of this cause may require.

The Joint Motion was signed by the former owners of the subject property, the new purchasers, Susan Hagerty and Michael Mioduszewski, original Protestants, and counsel for the Petitioners and new owners and counsel for the Protestants.

6/16/01
IN THE MATTER OF
THE APPLICATION OF
WILLIAM R. DUVAL, JR., AND
THERESA A. DUVAL -LEGAL OWNERS
FOR VARIANCE ON PROPERTY
LOCATED ON THE S/S BAYSIDE DRIVE,
67' W OF CENTERLINE OF MIDWAY
DRIVE (403 BAYSIDE DRIVE)
12TH ELECTION DISTRICT
7TH COUNCILMANIC DISTRICT

* BEFORE THE
* COUNTY BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO. 00-241-A

* * * * *

OPINION

This case comes before the Baltimore County Board of Appeals on a timely appeal brought by the Protestant, Susan Hagerty, resulting from a decision by the Zoning Commissioner to grant with conditions a Petition for Variance seeking relief from §§ 417.3.B and 417.4 of the *Baltimore County Zoning Regulations* (BCZR) to permit a Divisional Line setback of 0 feet in lieu of the required 10 feet, and access strips as close as 2 feet apart in lieu of the required 20 feet, for an existing pier and boat lift in accordance with Petitioner's Exhibit No. 1. The Zoning Commissioner's Findings of Fact and Conclusions of Law is dated April 19, 2000.

The Appellant /Protestant, Susan Hagerty, whose property, 405 Bayside Drive, is adjacent to the subject site, was represented by Edward C. Covahey, Jr., Esquire.

The Petitioners, William R. Duval, Jr., and Theresa A. Duval, owners of the subject site at 403 Bayside Drive, 12th Election District, 7th Councilmanic District, were represented by Alfred L. Brennan, Esquire.

Both properties border what was once called Bear Creek and is now known as Chink Creek.

Counsel for the Petitioners called Jonathan Scott Dallas as the first witness. Mr. Dallas testified that he is a licensed property line surveyor, and in that capacity he prepared

the metes and bounds on the site plan presented below and here (Petitioner's Exhibit ZC 1 and Petitioner's Exhibit CBA No. 7) to accompany the Petition for Variance as a result of the Duvals' receipt of a zoning violation notice pursuant to § 417.3.B. Mr. Dallas inspected and walked the property to determine the divisional line where construction would be permitted under the BCZR. He also defined the bulkhead as a base line.

It was Mr. Dallas' observation before the Board that many neighboring lots have piers and boat lifts similar to what the Petitioners wish to enjoy. As evidence he submitted a photograph of the Duval pier and posts (Petitioner's Exhibit No. 9A-9B). He noted that, of the 13 properties he looked at nearby, 11 had piers in place plus mooring posts. He stated that no other properties except the subject property are "pinched or squeezed" the same way by divisional lines. In his opinion, there is almost no place for a pier to be placed at this property without a variance. Mr. Dallas also pointed out that the angle of the Duval bulkhead differed from neighboring lots.

On cross-examination, Mr. Covahey asked Mr. Dallas if other similarly shaped properties in the neighborhood would also require a variance such as the Petitioners requested. Mr. Dallas agreed that such was possible. He also testified that the Petitioners had built their pier without the permit that is required by Baltimore County.

On examination of the 1986 aerial photograph (Petitioner's Exhibit No. 4), Mr. Dallas noted that no pier could be observed on the Duval property, but he opined that the poles from an old pier might be submerged and therefore not visible. The current pier is

visible in the 1995 aerial photograph (Petitioner's Exhibit No. 5). Mr. Dallas said that the Petitioners applied for the pier and mooring post permit as of December 4, 2000.

William Duval, owner of the subject property, testified that he had purchased 403 Bayside Drive in 1994. At that time, there was evidence of old poles in the water, reminiscent of a pier that the seller had suggested to him existed years ago (Petitioner's Exhibit No. 10).

Mr. Duval testified that he removed the old poles and had a new pier put in. He stated that he consulted with his neighbors on both sides and neither had an objection to the construction. He only learned that there was a problem in December 1999 after the property at 405 Bayside Drive was sold and the new owner (Appellant /Protestant Susan Hagerty) moved in.

Mr. Duval opined that insufficient depth of water at his bulkhead impedes his ability to dock a boat at his property without the 70-foot subject pier (Petitioners' Exhibit No. 11A-H). He added that he believes that under the current conditions there is sufficient space for both his boats and the Hagerty boats to be docked at their respective piers without creating a safety hazard.

On cross-examination, Mr. Duval admitted that he had not applied for permission from Baltimore County or the Army Corps of Engineers to construct the pier or the boat lift, to extend electricity and water to the pier, or to do work on the bulkhead.

At the conclusion of the Petitioners' case, Mr. Covahey, on behalf of the Appellant

/Protestant, moved that the case be dismissed under the rationale of *Cromwell v. Ward*, 102 Md.App. 891 (1995) in that Petitioners' own evidence established that their property was not unique, and, therefore, the first step of the variance process as enunciated in *Cromwell* was not satisfied. The Board, however, reserved ruling on this motion until the completion of the testimony and evidence before us.

Appearing in opposition to the granting of the requested variance, Billye Kessler, Susan Hagerty's predecessor in title, testified that there was never a pier in front of the subject property, nor did she ever see any evidence of a former pier at that location. Ms. Kessler had lived at 405 Bayside Drive from 1965 until she sold the property to Ms. Hagerty in 1999.

Ms. Kessler also questioned the credibility of the testimony of the Petitioner, Mr. Duval, when he said that he did not extend and fill the bulkhead when he worked on it. Ms. Kessler testified that she personally observed the extension and fill work at 403 Bayside Drive.

She further indicated that the boat lift constructed by the Petitioners in 1998 blocked the Kesslers' property (Protestant's Exhibit No. 9A-B), but she and her husband did not complain at the time because they had the property up for sale, and they didn't realize that they could do anything legally to remedy the situation.

Also appearing for the Protestant, Debra Kimble, who now resides at 315 Bayside Drive, testified that she and her husband looked at the subject property before purchasing

their house nearby. She stated that there was no pier located on the property at 403 at the time, and that they would have purchased the property instead of 315 if they could have legally constructed the 70-foot pier that the Petitioners have since installed.

Ms. Kimble further noted that she and her husband, in accordance with the BCZR and all other governmental requirements, have constructed at their property the maximum permitted pier which extends only 25 feet into Chink Creek. Ms. Kimble is opposed to a variance which grants special privileges denied to others in similar circumstances.

The Appellant /Protestant, Susan Hagerty, testified in opposition to the variance request. She attested that the boat lift and the pier as constructed at 403 Bayside Drive obstructs not only the view from her lot but precludes her from constructing an additional boat lift because the Petitioners have denied her the 20-foot access strip mandated by the BCZR § 417.4, which states:

No construction, beyond mean low tide, including mooring piles, will be permitted within 10 feet of divisional lines as established. The effect of this requirement will be to maintain a 20 foot open access strip between the facilities of adjoining property owners.

Ms. Hagerty's son, Michael Mioduszewski, also appeared in opposition. Employed by the Coast Guard at Curtis Bay for ten years as an engineer /technician, Mr. Mioduszewski developed an overlay of the Petitioners' site plan (Petitioners' Exhibit No. 7) and opined that in comparison to the location survey at the time Mr. Duval purchased the property in 1994, the bulkhead has been extended, contrary to Mr. Duval's testimony before

the Board. Mr. Mioduszewski further testified that numerous other pie-shaped lots in the neighborhood suffered from constraints similar to those at 403. His concern is that his mother's property is being landlocked, that the Petitioner has broken the zoning laws, and that this construction has avoided review by the Army Corps of Engineers.

The Protestant's attorney also called Edwin Howe, who was accepted as an expert before the Board as a registered professional engineer. Mr. Howe testified that the Petitioners' surveyor, Mr. Dallas, did not determine the mean low water line, which is that water depth that is one-half way between the highest low tide and the lowest low tide as determined by the National Oceanic and Atmospheric Administration (NOAA). He noted that Mr. Dallas had testified that he based his computation of the divisional lines on his own calculations without recourse to the measurement of the tide or consulting recorded tidal history in the area, and without contacting NOAA.

Further, Mr. Howe corroborated the overlay as prepared by Mr. Mioduszewski (Protestant's Exhibit No. 12) which, when compared with the Petitioners' location survey, shows that the bulkhead was extended subsequent to their purchase of the property.

Mr. Howe noted as well that numerous properties along the shoreline would have problems similar to that of the Petitioners because of the irregular shape and the concavity of the curving shore.

Attorney for the Petitioners, Mr. Brennan, recalled Scott Dallas, surveyor, and Petitioner William Duval to refute the testimony that the location of the bulkhead was

extended and filled. They stood by their original testimony that the bulkhead had not been extended or filled.

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

The burden to establish special circumstances or conditions was clarified by the Court of Special Appeals in *North v. St. Mary's County*, 99 Md.App. 502 (1994), when Judge Cathell stated:

An applicant for variance bears the burden of overcoming the assumption that the proposed use is unsuited. That is done, if at all, by satisfying fully the dictates of the statute authorizing the variance.

Under the Court of Special Appeals decision in *Cromwell v. Ward*, *ibid*, which sets forth the legal benchmark 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 be properly considered.

After a thorough review of the evidence and testimony before us, the majority of this Board finds as a matter of fact that the Petitioner has not met the burden as required for a variance under BCZR § 307.1 and the standards of *Cromwell v. Ward*.

The first prong requires that the land itself which is the subject of the variance request must be unique from others in the neighborhood to qualify for a variance. The testimony and evidence are substantial that 403 Bayside Drive is not different from many other lots in that neighborhood which border Chink Creek.

All of the plats and photographs introduced into evidence establish that neighboring properties are all bounded by an irregular shoreline. Indeed, by the testimony of the Petitioners' own surveyor, Mr. Dallas, the property immediately to the east of the subject site would also require a variance to construct a 70-foot pier and boat lift. Even the Protestant would need a variance to build a similar structure to the east of 405 Bayside Drive.

Assuming *arguendo* that this prong of uniqueness had been met (which, in the opinion of the majority of this Board, it has not), the request for variance would fail equally under the second prong as to practical difficulty and unreasonable hardship. Evidence before us, as testified by both the Protestant and the Petitioner, supports the fact that the pier, the boatlift, the electrical and plumbing hook-up, and the bulkhead restoration were all created without the requisite permits. It is clear that the Petitioners constructed the improvements and then sought a variance when they were cited in violation. Any practical difficulty or unreasonable hardship is self-created.

As to the third prong of spirit and intent, the Petitioners' request would also fail here in that the illegal construction as built and the requested variance clearly contradict the

Court's dictate in *Cromwell* that: "The general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances."

Further the granting of this particular variance request would adversely impact the Protestant, Susan Hagerty, by depriving her of her legal and unimpeded right to access Chink Creek.

Finally, on the question of whether the divisional line was correctly calculated by the Petitioners' surveyor, Mr. Dallas, the Board is unanimous. We find the testimony of the Protestant's witnesses to be far more credible on this issue. Mr. Dallas' computation fails scrutiny.

Therefore, it is the decision of the majority of this Board to deny the request for variance from §§417.3.B and 417.4 of the *Baltimore County Zoning Regulations* (BCZR) to permit a Divisional Line setback of 0 feet in lieu of the required 10 feet, and access strips as close as 2 feet apart in lieu of the required 20 feet.

ORDER

THEREFORE, IT IS THIS 6th day of June, 2001 by the
County Board of Appeals of Baltimore County

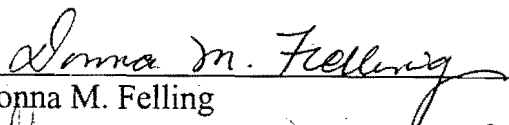
ORDERED that the Petitioner's request for variance from §§417.3.B and 417.4 of the *Baltimore County Zoning Regulations* (BCZR) to permit a Divisional Line setback of 0 feet in lieu of the required 10 feet, and access strips as close as 2 feet apart in lieu of the required 20 feet, for an existing pier and boat lift be and the same is hereby **DENIED**; and it

is further

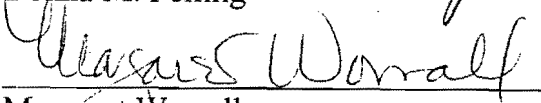
ORDERED that the Petitioner has forty-five (45) days from the date of this Order to bring the subject property into compliance with all applicable zoning laws and regulations of Baltimore County.

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*.

**COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY**



Donna M. Felling



Margaret Worrall

6/6/01
IN THE MATTER OF
THE APPLICATION OF
WILLIAM R. DUVAL, JR., AND
THERESA A. DUVAL -LEGAL OWNERS
FOR VARIANCE ON PROPERTY
LOCATED ON THE S/S BAYSIDE DRIVE,
67' W OF CENTERLINE OF MIDWAY
DRIVE (403 BAYSIDE DRIVE)
12TH ELECTION DISTRICT
7TH COUNCILMANIC DISTRICT

* BEFORE THE
* COUNTY BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO. 00-241-A

* * * * *

CONCURRING /DISSENTING OPINION

This writer is in agreement with the majority decision that the Board is required to deny the request for variance from § 417.3.B and § 417.4 of the *Baltimore County Zoning Regulations* to permit a Divisional Line setback of 0 feet in lieu of the required 10 feet, and access strips as close as 2 feet apart in lieu of the required 20 feet. The writer adopts the Majority Opinion with exception to two elements which, in and of themselves, do not affect the final decision.

The writer believes that, based on the testimony and evidence, uniqueness does exist that satisfies the first requirement of *Cromwell v. Ward*.

In the analysis of *Cromwell*, uniqueness relates to the physical characteristics of the property under scrutiny. What constitutes "uniqueness" is judgmental. Many people view the scene in a different perspective. In reviewing the exhibits submitted at the hearing, I believe that the subject site does pass muster as formulated by *Cromwell, supra*, 102 Md.App. at 710, 651 A.2d at 434 as follows:

"Uniqueness" of a property for zoning purposes requires that the subject 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. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

Reference is made to Petitioners' Exhibits 2, 3, 4, 5, 8, and 12A & B.

Additionally, the writer has carefully examined and reviewed Protestants' Exhibits 2, 3, 11,

and 15. It is my observation that the subject property is unlike other properties in the immediate area. The unusual shape and configuration of the shoreline results in a crowded condition for the residents along the shoreline. However, it is particularly severe when it impacts the property of the Petitioner that drives the need for variance. As one reviews the various exhibits and reviews the testimony of the witnesses, it is difficult, in my opinion, to determine that there is any other property in the area that has a bulkhead angle like the subject property.

I agree with the observations made by the Petitioners' witness, Mr. Dallas, that the property was "unique" within the *Cromwell* standard and zoning regulations because of the physical constraints placed upon the property by reason of its location on Chink Creek.

The writer also agrees with the Petitioners that "practical difficulty" is present in the instant case. Strict enforcement of the required 10-foot area from division lines would allow the Petitioners to build a pier the size of which would be roughly 10 feet long, with a permissible width ranging from 2 feet to 0 feet. This writer concurs with Mr. Dallas that it would be an unusable area for any type of pier. Granting the variance would permit the Petitioners to reasonably enjoy and utilize their waterfront lot without unreasonable denial of Protestants' use of her access to Chink Creek.



Charles L. Marks

DATE: June 6, 2001



County Board of Appeals of Baltimore County

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June 6, 2001

Edward C. Covahey, Jr., Esquire
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614 Bosley Avenue
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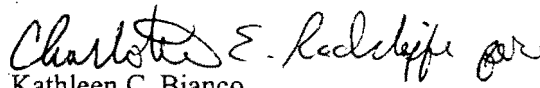
RE: *In the Matter of: William R. Duval, Jr., and Theresa A. Duval*
-Legal Owners / Case No. 00-241-A

Dear Mr. Covahey:

Enclosed please find a copy of the Majority Opinion and Order issued this date by the County Board of Appeals of Baltimore County in the subject matter. Also enclosed is a copy of Mr. Marks' Dissenting Opinion.

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*, 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
Administrator

Enclosure

c: Susan Hagerty
Alfred L. Brennan, Jr., Esquire
Mr. & Mrs. William Duval
J. Scott Dallas
Theresa Duval
Michael Mioduszewski
Chesapeake Bay Critical Areas Commission
People's Counsel for Baltimore County
Pat Keller, Planning Director
Lawrence E. Schmidt, Zoning Commissioner
R. Bruce Seeley /DEPRM
James Thompson, Code Enforcement /PDM
Arnold Jablon, Director /PDM



4/19/00
IN RE: PETITION FOR VARIANCE
S/S Bayside Drive, 67' W of the c/l
Midway Drive
(403 Bayside Drive)
12th Election District
7th Councilmanic District

William R. Duval, Jr., et ux
Petitioners

* BEFORE THE
* ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* Case No. 00-241-A
*

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of a Petition for Variance filed by the owners of the subject property, William R. Duval, Jr., and his wife, Theresa A. Duval, through their attorney, Alfred L. Brennan, Jr., Esquire. The Petitioners seek variance relief from Sections 417.3.B and 417.4 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit a Divisional Line setback of 0 feet in lieu of the required 10 feet, and access strips as close as 2 feet apart in lieu of the required 20 feet. The subject property and relief sought are more particularly shown on the site plan submitted into evidence and marked as Petitioner's Exhibit 1.

It is to be noted that the Petition was filed in response to a zoning violation notice the Petitioners received relative to a pier and boatlift which were constructed at the subject location without benefit of a permit. The Petitioners were advised to file the instant Petition to legitimize existing conditions on the property.

Appearing at the requisite public hearing in support of the request were Theresa Duval, property owner, J. Scott Dallas, the Surveyor who prepared the site plan for this property, and Alfred L. Brennan, Jr., Esquire, attorney for the Petitioners. Appearing as Protestants in the matter were Susan Hagerty, adjacent property owner of 405 Bayside Drive, and her son, Michael Mioduszewski. The subject property was previously owned by Thomas E. and Billye R. J. Kessler, but was subsequently acquired by Ms. Hagerty in December, 1999.

Testimony and evidence offered revealed that the subject property is a waterfront lot located on Chink Creek, near its confluence with Bear Creek, in the vicinity of Wise Avenue in Dundalk. The property consists of two lots, known as Lots 62 and 63 of Inverness, and contains a gross area of 0.126 acres, more or less, zoned D.R.5.5. The property is improved with a two-story dwelling, to which an 18' x 16' addition has been added, along with a wood deck, which is connected by stairs to a concrete patio. Other improvements on the property include a shed, an above-ground swimming pool, and a pier with an attached boat lift, which is the subject of the instant request. The pier is approximately 70 feet in length and extends from the bulkhead at the rear of the property into Chink Creek.

Apparently a pier has existed on the property for many years. Mrs. Duval testified that she and her husband purchased the subject property from the Williams family in April 1994 and replaced the pier that existed at that time in May or June of that year. Approximately two years ago, the Duvals installed a boat lift at the pier to provide out-of-water storage for their boat. Testimony indicated that the lift was necessary due to shallow conditions at the pier at low tide.

Variance relief is requested as noted above. Clearly, the variances are necessitated due to the unusual configuration of the subject property, most notably at the water line. The frontage of the subject property and adjacent lots is curved in a crescent configuration along the shoreline. Thus, under the zoning regulations which regulate pier and waterfront construction, insufficient setbacks exist for the pier and lift which have been installed.

As noted above, Ms. Hagerty recently purchased the adjacent property from the former owners, Mr. & Mrs. Thomas Kessler. Apparently, the Kesslers had no objections at the time the pier and lift were installed on the subject property and only recently filed their complaint on behalf of Ms. Hagerty. Ms. Hagerty indicated at the hearing she had no objections to the pier itself, but believes that the boat lift crowds and reduces her access to the water.

Following the hearing, I visited the site and inspected the subject property and vicinity. That site inspection revealed that nearly every waterfront property in this area features a pier leading into Bear Creek. Additionally, a number of property owners have also constructed boat

lifts, including the Kennell family which owns the property on the other (east) side. The existing construction by the Petitioners and others in the area, as well as the unusual configuration of the shoreline as described above, results in a crowded condition. Mr. & Mrs. Duval constructed their boat lift on the west side of their pier, as did the Kennells. Should Ms. Hagerty wish to construct a boat lift at her pier, she would no doubt be forced to locate that lift on the west side of her pier, in view of the location of the existing lifts on the immediately adjacent properties.

The grant of variances in Baltimore County is governed by Section 307 of the B.C.Z.R. as same has been construed by Cromwell v. Ward, 102 Md. App. 691 (1995). In Cromwell, the Appellate Court imposed a three-part test in order for variance relief to be granted. First, it must be determined that the subject property is unique, thereby driving the need for a variance. Second, variance relief can be granted only if a practical difficulty would result upon the property owner if the regulations were strictly enforced. Third, relief can be granted only if there would be no detrimental impact to adjacent properties.

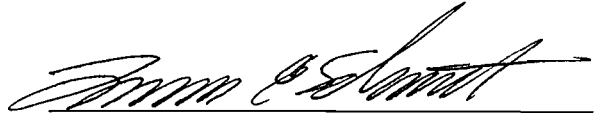
The uniqueness of the subject property is caused by the unusual configuration of the shoreline. This crescent shape crowds all of the property owners, not just the Petitioners. However, it is particularly egregious here. In my judgment, this condition does drive the need for the variance. Moreover, I am persuaded that the Petitioners would suffer a practical difficulty if relief were denied in that they would be unable to reasonably utilize and enjoy their waterfront access of this lot. Thus, I find that the second part of the test is met.

The third portion of the test is more difficult. No doubt, the construction of the pier and particularly the boat lift, does limit the possibility of construction of a similar boat lift on the Hagerty property. Although that impact exists, it is common to all of these property owners. Indeed, a sufficient basis appears to exist for variance relief for those property owners in the event they wish to install a boat lift at their pier. That is, the configuration of the shoreline in this area limits all of these property owners. Thus, although I find there is a negative impact occasioned by the Petitioners' boat lift, I do not find that it exists to such a degree as to warrant a denial of the variance. Thus, the Petition for Variance shall be granted.

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

THEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County this 19th day of April, 2000 that the Petition for Variance seeking relief from Sections 417.3.B and 417.4 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit a Divisional Line setback of 0 feet in lieu of the required 10 feet, and access strips as close as 2 feet apart in lieu of the required 20 feet, for an existing pier and boat lift in accordance with Petitioner's Exhibit 1, be and is hereby GRANTED, subject to the following restriction:

- 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 the 30-day appeal period from the date of this Order has expired. If an appeal is filed and this Order is reversed, the relief granted herein shall be rescinded.


LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs



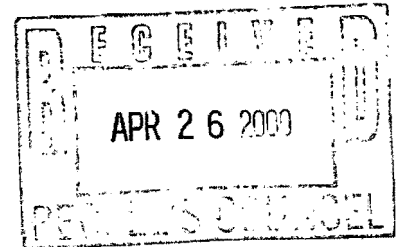
Baltimore County
Zoning Commissioner

April 19, 2000

Suite 405, County Courts Bldg.
401 Bosley Avenue
Towson, Maryland 21204
410-887-4386
Fax: 410-887-3468

Alfred L. Brennan, Jr., Esquire
825 Eastern Boulevard
Baltimore, Maryland 21221

RE: PETITION FOR VARIANCE
S/S Bayside Drive, 67' W of the c/l Midway Drive
(403 Bayside Drive)
12th Election District - 7th Councilmanic District
William R. Duval, Jr., et ux - Petitioners
Case No. 00-241-A



Dear Mr. Brennan:

Enclosed please find a copy of the decision rendered in the above-captioned matter. The Petition for Variance 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. & Mrs. William Duval
403 Bayside Drive, Baltimore, Md. 21222
Ms. Susan Hagerty
405 Bayside Drive, Baltimore, Md. 21222
Chesapeake Bay Critical Areas Commission
45 Calvert Street, 2nd Floor, Annapolis, Md. 21401
DEPRM; Code Enforcement Division, PDM; People's Counsel; Case File





Petition for Variance

to the Zoning Commissioner of Baltimore County

for the property located at 403 Bayside Drive

which is presently zoned D/R S. S

This Petition shall be filed with the Department of Permits and 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 Variance from Section(s)

417.3B and 417.4 to allow a setback of zero feet (0') in lieu of the required ten feet (10') from Divisional Lines and in effect, a 2' wide access strip in lieu of the required twenty feet (20') AS SHOWN ON PROVIDED SITE PLAN AS CLOSE AS 2 FT. WIDE Q7B4.

of the Zoning Regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons: (indicate hardship or practical difficulty)

To be determined at hearing.

Property is to be posted and advertised as prescribed by the zoning regulations.

I, or we, agree to pay expenses of above Variance, advertising, posting, etc. and further agree to and are to be bounded 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/Lessee:

Name - Type or Print

Signature

Address

Telephone No.

City

State

Zip Code

Attorney For Petitioner:

ALFRED L. BRENNAN, JR.

Name - Type or Print

Signature

BRENNAN AND BRENNAN, ATTORNEYS AT LAW, P.A.
Company

825 Eastern Boulevard

(410) 687-3434

Address

Telephone No.

Baltimore, Maryland 21221

City

State

Zip Code

Legal Owner(s):

WILLIAM R. DUVAL, JR.

Name - Type or Print

Signature

THERESA A. DUVAL

Name - Type or Print

Signature

403 Bayside Drive

410-282-6725

Address

Telephone No.

Baltimore, Maryland

21222

City

State

Zip Code

Representative to be Contacted:

Name

Address

Telephone No.

City

State

Zip Code

OFFICE USE ONLY

ESTIMATED LENGTH OF HEARING

1/2 HR

UNAVAILABLE FOR HEARING

Reviewed By VL

Date

12/10/99

Case No. 00-241-A

RE: PETITION FOR VARIANCE
403 Bayside Drive, S/S Bayside Dr,
67' W of c/l Midway Dr
12th Election District, 7th Councilmanic

Legal Owner: William R. & Theresa A. Duval, Jr.
Petitioner(s)

* BEFORE THE
* ZONING COMMISSIONER
* FOR
* BALTIMORE COUNTY
* Case No. 00-241-A

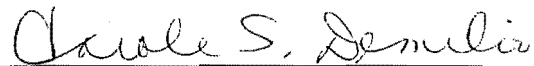
* * * * *

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
People's Counsel for Baltimore County



CAROLE S. DEMILIO
Deputy People's Counsel
Old Courthouse, Room 47
400 Washington Avenue
Towson, MD 21204
(410) 887-2188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of December, 1999 a copy of the foregoing Entry of Appearance was mailed to Alfred L. Brennan, Jr., Esq., Brennan and Brennan, 8225 Eastern Boulevard, Baltimore, MD 21221, attorney for Petitioners.



PETER MAX ZIMMERMAN

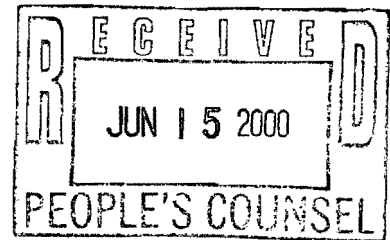


Baltimore County
Department of Permits and
Development Management

col
Development Processing
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
pdmlandacq@co.ba.md.us

June 14, 2000

Alfred L. Brennan, Jr., Esquire
825 Eastern Boulevard
Baltimore, Maryland 21221



Dear Mr. Brennan:

RE: Petition for Variance, Case #00-241-A, 12th Election District
*WM. + THERESA DUVAL, 403 Bayside Dr
7th Councilmanic*

Please be advised that an appeal of the above referenced case was filed in this office on May 15, 2000 by Ms. Susan Hagerty. All materials relative to the case have been forwarded to the Baltimore County Board of Appeals.

If you have any questions concerning this matter, please do not hesitate to call the County Board of Appeals at 410-887-3180.

Sincerely,

Arnold Jablon
Director

AJ:kew

cc: People's Counsel
Mr. & Mrs. William Duval, 403 Bayside Drive, Balto., Md. 21222
Ms. Susan Hagerty, 405 Bayside Dr., Balto., Md. 21222
Chesapeake Bay Critical Areas Commission, 45 Calvert St., 2nd Fl., Annapolis, Maryland, 21401
DEPRM, Code Enforcement Division, PDM, People's Counsel, Case File
J. Scott Dallas, P.O. Box 26 Baldwin, Md. 21013
Theresa Duval, 403 Bayside Dr., Balto., Md. 21222
Michael Mioduszewski, 1926 Sun Berry Rd., Balto., Md. 21222



Census 2000



For You, For Baltimore County



Census 2000



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on Recycled Paper

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