

~~Monday, August 14, 2006 @ 11:00 a.m. Rm 407~~
~~Friday, September 15, 2006 @ 11:00 a.m. Rm 407~~
Tuesday, September 26, 2006 @ 11:00 a.m. Rm 407

APPEAL

06-651-651

SPHA

CERTIFICATE OF POSTING

1) Posted 9/11 Hearing Date _____
2) Posted 9/12 Hearing Date _____

ADS

1) Paper/Date 9/27/06 Enc _____
Paper/Date 7/28/06 Enc _____

2) Paper/Date _____ Enc _____
Paper/Date _____ Enc _____

Per ADS

1) _____
2) _____

COMMENTS

Planning ☒ Fire ☒ Traffic ☒
Cultural Area ☒ EPA ☒
Health ☒

Associate _____

Zoning Violation # _____

Prior Hearing(s) _____

CBCA
Flood zone "A"

20060651 "A"
Supplemental
06-651-SPHA

10/8/09

IN THE PETITION OF <u>HOWARD & MELANIE</u>	*	IN THE
<u>BECKER</u> FOR JUDICIAL REVIEW OF THE	*	
DECISION OF THE COUNTY BOARD OF APPEALS	*	
OF BALTIMORE COUNTY	*	CIRCUIT COURT
IN THE CASE OF <u>HOWARD & MELANIE BECKER,</u>	*	
LEGAL OWNERS/PETITIONERS		
FOR VARIANCE ON PROPERTY LOCATED ON THE		
S/S BAYSIDE DRIVE, 75' E C/LINE WINONA AVENUE*		FOR
(403 BAYSIDE DRIVE)	*	
12 th Election District, 7 th Councilmanic District	*	BALTIMORE COUNTY
Case Nos. 06-651-SPHA & 03-C-08-004351	*	Case No.: 03-C-09-008390
Before the County Board of Appeals		
* * * * *		* * * * *

MEMORANDUM OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY
TABLE OF CONTENTS

After the remand; déjà vu all over again; back to the future.....	1
On the waterfront.....	3
The present petitions	3
Questions Presented	4
Relevant Baltimore County Zoning Regulations	4
Statement of Facts	4
The property	4
History: the 2008 CBA's description of the 2001 case.	5
The 2006 site plan; concave shorelines; divisional boundaries; minimum setbacks	6
The <i>de novo</i> trial hearing.....	7
The Beckers' Case: July 26 and November 7, 2007	7
The Opposition's Case: November 7-8, 2007	9
Argument.....	11

Scope of judicial review of agency decisions "Respecting the administrative function: factual inferences, judgment, and legal interpretation"	11
I. The <i>res judicata</i> doctrine precludes the present petitions, which are substantially similar to the petition denied by the CBA in 2001, both with respect to variance and divisional line relief requested; even if petitioners present new legal theories or arguments, these do not provide an escape from this doctrine, which applies to all claims made or which might have been made in the earlier case.....	14
II. Petitioners were not entitled to try to redraw the divisional lines based on an <i>ex parte</i> meeting with zoning staff in between hearing days	23
III. Drawn either way, the proposed waterfront construction does not satisfy the BCZR § 417.4 10-foot minimum setbacks from divisional lines; therefore, the property owners must satisfy the BCZR § 307.1 test for variances anyway.	25
IV. The evidence is legally insufficient to support the variance.	27
A. In the context of BCZR § 417, the site is not unique because it is one of many existing small lots on concave shorelines along the Baltimore County waterfront; with properties such as this, because of their size and location, there is simply not enough room for a pier and boatlift of the length and size available to larger properties on straight or convex shorelines; this is thus a problem typical of small lots on concave shorelines, which property owners must accept.	27
B. There is no practical difficulty. Petitioners were aware of the limitations of the property when they bought it; they have available to them the use of their home, and other waterfront amenities such as recreation, fishing, and small boat launching; it would undermine the intent of the law to allow a long pier and remarkably large boatlift without the legally required divisional line access setbacks.	29
V. There is a failure to meet the BCZR § 500.14 statutory requirement for findings by the Department of Environmental Protection and Resource Management (DEPRM) with respect to minimization of adverse environmental impacts; conservation of fish, wildlife, and plant habitat; and consistency with Chesapeake Bay Critical Area (CBCA) land use policies. The DEPRM comment submitted in evidence does not satisfy these criteria.	31
Conclusion.....	32

APPENDIX

Baltimore County Zoning Regulations § 307.....	Apx. 1
Baltimore County Zoning Regulations § 417.....	Apx. 3
Baltimore County Zoning Regulations § 500.7.....	Apx. 6
Baltimore County Zoning Commissioner Policy Manual Section 417.3	Apx. 8
Circuit Court Judge Thomas Bollinger's Memorandum Opinion and Amended Order in Case. No. 03-C-08-4351	Apx. 10
Baltimore County Board of Appeals Opinion and Order in Case No. 06-651-SPHA	Apx. 18
Baltimore County Board of Appeals Order of the Board on Remand from the Circuit County for Baltimore County in Case 06-651-SPHA	Apx. 36

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FOR

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BALTIMORE COUNTY

Case Nos. 06-651-SPHA & 03-C-08-004351

*

Case No.: 03-C-09-008390

Before the County Board of Appeals

* * * * *

MEMORANDUM OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY

After the remand; déjà vu all over again; back to the future

Howard and Melanie Becker ("the Beckers") have petitioned for judicial review of the June 17, 2009 County Board of Appeals (CBA) decision. This decision responded to Judge Thomas J. Bollinger's January 6, 2009 Memorandum Opinion and Order and February 4, 2009 amended remand order in Case No. 03-C-08-4351. These are attached.

When we were last in Circuit Court, the Beckers had petitioned for judicial review of the attached CBA March 8, 2008 opinion and order. The CBA had denied the Beckers' requests for "special hearing" and division line setback variance relief to construct a pier and boat lift at 403 Bayside Drive on Chink Creek.

The present zoning case began in 2006. In an earlier case, the CBA on June 6, 2001 had denied the previous owners', the Duvalls', variance petition for a pier 70 feet in length and boatlift. The Beckers, then contract purchasers, joined the Duvalls in a motion for reconsideration. The CBA confirmed that denial in its final order of August 7, 2001.

In the present case, we naturally raised the issue of *res judicata*, but the CBA initially declined to address it. When the Beckers sought judicial review, we asserted not only that the CBA's denial must be sustained on the merits, but also that the CBA should have barred the petitions because of the *res judicata* impact of the 2001 final decision.

Judge Bollinger recognized, at page 6 of his January 6, 2009 opinion,

"... that the issue of *res judicata* is a threshold issue that precludes discussion of the questions presented for review, as framed by the Petitioners. In its opinion, the Board stated that it was "not totally rejecting the concept of *res judicata* with respect to Board decisions." (Board Opinion, pg. 6). The Board went on to note that a Petition for a Special Hearing could have been filed in the earlier case (Case No. 00-241), but was not filed. The Board then stated that it would "not abide by the strict rule of *res judicata*" and instead would "rule on the issues presented in the present case." (Board opinion, pg. 6-7). However, *res judicata* applies to both the matters which were previously litigated and to those matters which should have been litigated. *Kim v. Council of Unit Owners for Collington Center III Condominium*, 180 Md. App. 606, 616. The Board did not offer any explanation as to why it declined to apply the doctrine of *res judicata* in this case, and therefore the Board did not find whether the issues presented in the instant case were or were not barred by *res judicata*."

As no appeal was taken to the Court of Special Appeals, the matter returned to the CBA on remand. In its public deliberation and Order of the Board on Remand dated June 17, 2009, the CBA addressed *res judicata* in detail, and found that application of the doctrine does indeed bar the present petitions as a threshold matter. The CBA also reiterated its opinion and order that the Beckers' petitions must be denied on the merits.

The Beckers have again filed a petition for judicial review, and the case is ripe for consideration of all issues. The Circuit Court case, however, has a new file number: 03-C-09-8390. We trust that the entire record is available to the Court.

In this complicated procedural setting, we have tried to organize this memorandum to assist the Court. We will address the threshold *res judicata* issue again, with an appropriate discussion of the CBA decision on remand. We will then return to our arguments on the merits, and respond to the Beckers' latest memorandum. We will include, *inter alia*, the observations in our previous memorandum reviewed by Judge Bollinger in Case No 03-C-08-4351.

On the waterfront

This case is about waterfront construction. Baltimore County Zoning Regulation (BCZR) 417 governs waterway boundaries ("divisional lines"), locations and setbacks, access, visual impact, and compatibility. BCZR § 417.3 sets ground rules for "divisional lines" extending from land boundaries into the water. BCZR § 417.4 works in tandem to set a minimum distance for waterfront construction of ten feet from each divisional line. This protects the access rights and view of nearby property owners. It also serves the public interest to minimize waterway congestion.

The BCZR Appendix and Zoning Policy Manual contain drawings on different shoreline configurations. Contentious issues tend to occur where the shoreline is irregular and concave. The divisional lines of properties on such shorelines converge toward each other. Therefore, the space available for waterfront construction is more limited than on straight or convex shorelines. That is the situation here, where the Beckers's proposed pier extension and boatlift both deviate extremely from the basic rules.

To repeat, this is the second time around for a zoning petition for waterfront construction at this property. In light of the CBA's 2001 denial the of previous petition, the questions presented involve not only the implementation of waterfront construction law and variance standards, but also the threshold legal issue of *res judicata*.

The present petitions

On June 16, 2006, the Beckers filed a "special hearing" petition under BCZR § 500.7 to determine their right under BCZR § 417.3 to extend an existing 29-foot pier to 70 feet in length and to construct a boatlift 210 square feet (14' x 15') in size. This is like a petition for declaratory judgment. Antwerpen v. Baltimore County 165 Md. App. 194, 209 (2005). The Beckers also filed a BCZR § 307.1 petition for variance from BCZR § 417.4,

"To allow a pier and boatlift within 0 feet of the divisional line instead of the required 10 foot setback of the divisional line as established pursuant to Section 417.4 of the BCZR."

On October 12, 2006, the Zoning Commissioner granted the special hearing and dismissed the variance as moot.

Upon appeal by adjacent property owner Susan Hagerty, the CBA held a *de novo* trial hearing in 2007 and reviewed trial memoranda. People's Counsel participated in the proceedings. Following public deliberation on February 21, 2008, the CBA issued the March 8, 2008 opinion, which Judge Bollinger addressed in his January, 2009 remand.

Questions Presented

1. Are the present petitions barred by the *res judicata* doctrine?
2. Are the petitioners entitled to redraw the divisional lines under BCZR § 417.3;
3. In any event, must waterfront construction still comply with the BCZR § 417.4 divisional line setback standards for whichever lines are drawn or redrawn?
4. Does the petition for variances meet the BCZR § 307.1 tests of uniqueness and resulting practical difficulty?
5. Is there compliance with the BCZR § 500.14 zoning requirements for petitions in the Chesapeake Bay Critical Area?

Relevant Baltimore County Zoning Regulations

There are in the appendix: BCZR § 307.1, Variances; BCZR § 417, Waterfront Construction; Zoning Commissioner's Policy Manual, BCZR § 417.3; BCZR § 500.7, Special Hearings; and BCZR § 500.14, Within the Chesapeake Bay Critical Area.

Statement of Facts

The property

The waterfront property at 403 Bayside Drive is in the Dundalk area of southeastern Baltimore County. It is a typical residential property, .13 acres in size, with frontage on Chink Creek of 24 feet. There is an existing pier 29 feet in length. There is no boatlift at present. As the CBA stated, on page 2 of its March 8, 2008 opinion (hereinafter "2008"),

"The property in question is a triangular-shaped waterfront parcel located on the south side of Bayside Drive, just east of Winona Avenue, with frontage on Chink Creek and near its confluence with Bear Creek in Dundalk. The property consists of two lots

known as Lot 62 and Lot 63 of Inverness and contains a gross area of 0.13 acre +/- and is zoned D.R. 5.5. The property is presently improved with a two-story framed dwelling, an above-ground swimming pool and a detached accessory shed."

As already noted, the shoreline is concave.

History: the 2008 CBA's description of the 2001 case.

The CBA provided this description of the zoning history, at pages 2-4 (2008),

"The property was the subject of a prior zoning case #00-241-A in which the previous owners, William R. Duvall, Jr., and his wife, Teresa A. Duvall, filed a Petition for Variance as set forth above. No request for special hearing was presented to the Zoning Commissioner at that time.

That case came before prior Zoning Commissioner Lawrence E. Schmidt, the attorney in the instant case, and the Protestants who appeared in that matter are the same Protestants in the matter before this Board. As noted in the prior Order issued by Commissioner Schmidt, the Duvalls had purchased the property from the Williams family in 1994 and replaced the pier that existed at that time in May or June of that year. Approximately 2 years later, the Duvalls installed a boatlift at the pier to provide out of water storage for their boat. At that time, the then-adjacent property owners, Mr. and Mrs. Thomas Kessler, had no objections to the pier and boatlift because they were in the process of selling their property. However, they filed a complaint on behalf of the subsequent property owner, Ms. Hagerty, and a violation notice was issued to the Duvalls, who were advised to file for variance relief. At the hearing in that matter, Ms. Hagerty stated that she had no objections to the pier itself but felt that the boatlift interfered with her access to the water. Then-Commissioner Schmidt granted the request to allow the existing pier and boat lift to remain by order dated April 19, 2000. He noted the unique configuration of the subject and adjacent lots, which tapered to a curved, crescent configuration along the shoreline, thereby limiting the area for pier development without variance relief. Protestants subsequently filed a timely appeal to the County Board of Appeals, and following public deliberation of the matter, the Board denied the variance and issued a final Opinion and Order along with a concurring /dissenting Opinion on June 6, 2001.

The Duvalls then filed a Motion for Reconsideration on July 5, 2001 and an accompanying Motion to Revise Order on July 17, 2001. The joint motion had been signed by the Duvalls, the Beckers, and their counsel, as well as Ms. Hagerty and her son, Mr. Mioduszeewski and their counsel. Within the joint motion, counsel for the Petitioners /Protestants noted that an agreement had been reached between the parties and a request was made that the Board reverse its Order in accordance with that agreement. The parties specifically agreed that the boatlift should be removed and that all of the pier, except for a pier extending 29 feet from the bulkhead with a 5-foot wide deck, would be permitted to remain on the property. The boatlift and pilings and the pier decking, except that agreed to above, had been removed. The Board considered the Motion at a public deliberation

on July 26, 2001. Two members of the original panel were still on the Board, Charles L. Marks, the concurring /dissenting member, and Margaret Worrall, a member of the Majority opinion. Donna Felling had 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. As stated in the decision on the Motion for Reconsideration:

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 and 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 a proposed Order as submitted is denied."

The new owners, Mr. and Mrs. Becker, now seek relief set forth above to remove a portion of the existing pier, approximately 20 feet, and run a short stretch of pier to the west and ultimately build a pier, which would stretch 58.4 feet along the western divisional line of the subject property adjacent to the Hagerty property. In addition, they propose to construct a boat lift, which would project at least 7 feet over the divisional line into Mrs. Kennell's property on the east side of the Petitioners' (Beckers) property. At the hearing, the Petitioner presented an affidavit from Mrs. Kennell that stated that she had no objections to the requested relief and supported Petitioners' proposed construction. The affidavit from Mrs. Kennell stated that she was 83 years old. She did not appear at the hearing to testify. The Board accepted the affidavit of Mrs. Kennell, as it usually does, and gave it the weight that it felt the affidavit deserved."

The CBA's August 7, 2001 final order denied the Duvall/Becker motion. We shall quote it below in our discussion of *res judicata* on page 20.

The 2006 site plan; concave shorelines; divisional boundaries; minimum setbacks

Surveyor Kenneth Wells prepared the Beckers' 2006 site plan. It shows the concave shoreline and converging divisional boundaries drawn according to the BCZR § 417.3.B formula for irregular shorelines. The proposed extension of the pier length to 70-feet runs right along the western divisional line, and the boatlift spanning 210 square feet crosses over the east side divisional line by seven feet. The actual setback, therefore, is as

low as zero (0) feet on the west side and minus seven (-- 7) feet on the east side. Clearly, they do not satisfy the BCZR § 417.4 minimum setback of ten (10) feet.

The *de novo* trial hearing

The Beckers' Case: July 26 and November 7, 2007

On July 26, 2007, Wells was the Beckers' main witness. T. I, 53-202. He is a high school graduate, with a community college course in surveying technology. The CBA allowed him to testify on zoning issues because he had gone into the business of processing zoning petitions. He sought to justify the zoning variances and also belatedly attempted to redraw divisional boundaries. He claimed that this would exempt the proposal from the setback requirements. T. I, 53-91.

Wells produced not only the current site plan, but also a copy of the site plan filed in the 2001 Duvall case. He confirmed on cross-examination that the two plans showed the same 403 Bayside Drive property. T. I, 121-25. It came to light that the Beckers' proposed boatlift actually extended seven feet across the Kennell divisional boundary, that the entire boatlift would encroach into the restricted area within ten feet of the Kennell divisional line, and that the proposed pier extension would straddle the Hagerty line.. T. I, 98-110. Wells confirmed the area of the boatlift as 210 square feet (15' x 14') but could not describe its height or capacity. T. I, 159-66. He admitted that the proposed boatlift would be much larger than the Hagertys' boatlift (85 square feet) and Kennell's boatlift (132 square feet). T. I, 167-68. It became apparent that the proposed location of the pier and boatlift would seriously impinge on and restrict the respective access and construction rights of the Hagertys and Kennell. T. I, 159-70.

Wells admitted that small waterfront lots on concave shorelines are by their nature relatively restricted in area available for piers. T. I, 115-117. The subject property has a frontage of 24 feet. There are about 100 residential properties along Chink Creek. Wells had not surveyed them, but admitted that some have concave shorelines. T. I, 126-27.

Nevertheless, Wells opined again that a redrawing of divisional lines under BCZR § 417.3 should exempt the property owner from the BCZR § 417.4 setback requirements.

T. I, 127-41. He cited the unwritten "latitude" of the zoning office. Yet, he could cite no language or legislative history to support his opinion. He also conceded there was no exemption from any other subsection of BCZR § 417, such as the requirements for permits, for documents to be filed, and even for the maximum length of piers. The thrust of his selective opinion is that the Beckers should be able to avoid the crucial setback subsection. The CBA ultimately rejected Wells' opinion.

On November 7, 2007, the Beckers called John Lewis, a member of the county zoning office staff. T. II, 5-88. One day earlier, November 6, he had met with Wells and the Becker's attorney. He had informally reviewed Wells' *ex parte* proposal to redraw the divisional boundaries in zigzag fashion and legitimize the pier extension. T. II, 34-48. Despite objections to the irregularity of the limited *ex parte* review and alteration of the lines drawn on the filed site plan, the CBA allowed Lewis to testify to a tentative or limited concurrence with Wells' new marked-up drawing. T. II, 21-34. Lewis had not reviewed the original petition and site plan, had not been to the property, and had not followed the BCZR § 417.3.C legislative procedures prerequisite to revision of divisional boundaries. Ironically, with the redrawn boundaries, it turned out that the pier and boatlift still encroached well into the minimum setbacks, running from zero to 1.5 feet for the most part. T. II, 48-54. Lewis also suggested that by redrawing the divisional lines, a petitioner could override the minimum setback requirement; but he was unable to identify any statutory language to justify his virtual repeal of BCZR § 417.4. T. II, 54-69.

(The *ex parte* recruitment of Lewis to buttress or salvage Wells' unsupported opinions was outrageous. The CBA's 2008 opinion ultimately rejected the attempts both to redraw the boundaries and to claim an exemption from BCZR § 417.4 setback standards.)

Melanie Becker took the stand to explain why she wanted the extended pier and boatlift. T. II, 89-114. She intended to purchase a 30 to 35-foot boat, but provided no details about its type, height, or width, or about the expected use of the boatlift. T. II, 109-110. She was aware of the Duvall case when she negotiated and contracted to buy the

property. She was aware of the CBA's June 6, 2001 denial of the Duvall petition before she settled on July 9, 2001. She signed the July 17, 2001 joint motion to reconsider, which agreed to removal of the Duvalls' illegally constructed boatlift and the shortening of the pier to 29 feet in length. T. II, 133-49. She also admitted she received the CBA's August 7, 2001 order denying the motion for reconsideration, and that she did not appeal it. T. II, 149-51. Attorney Al Brennan represented her at the time of the motion, but he no longer represented her when she received the decision. As she put it, at T. 151,

“We had the attorney for when we filed for the reconsideration, and then we did not keep him on.”

The only other witness for the Beckers was Matthew Turbutt, who lives in Bel Air, but owns and rents out a property located two properties away from the Becker property (not adjacent, but one property removed). He supported the Beckers. T. I, 38-52.

The Opposition's Case: November 7-8, 2007

Kevin Anderson, a professional engineer, showed how the proposed construction would conflict with the minimum setbacks and cross the divisional lines T. II, 170-79. Anderson visited the area by boat. He found that nearby properties at 315 and 317 Bayside Drive have similar concave shorelines, so there is nothing unique about the Becker property. T. II, 180-82. He also challenged the validity of Mr. Wells' attempt to revise and jog the lines of division. T. II, 183-85. In addition, he saw no reason to avoid or “negate” the minimum setback standard of BCZR § 417.4. He explained the importance of the setbacks for waterfront access, and then showed graphically that the Becker proposal would obstruct access to adjoining properties. T. II, 187-90.

More generally, Anderson said there are many concave shoreline areas along the rivers and creeks of southeastern Baltimore County. T. II, 190-91. As he said, “... there's nothing unusual about finding a concave shoreline as part of the waterfront” Ibid. He also underlined that divisional boundaries should follow the rules set in BCZR § 417.3.B and that relief might be available only if there is “some hardship and uniqueness.” T. II,

192. He confirmed "...that the proposed boatlift is bigger than any other boatlift shown on Mr. Wells' plat." T. II, 197.

The Beckers' counsel asked Mr. Anderson to agree that the proposed pier and boatlift would "conflict with existing construction," so as to justify alteration of divisional lines; but Mr. Anderson said the question ignored an important part of BCZR § 417.3,

"The paragraph needs to be looked at in its entirety. It says the rules as set forth herein to cause the least interference with existing and/or possible future construction. You totally ignore the future construction." T. II, 207-08.

Mr. Anderson reiterated that no matter where the divisional boundary is drawn, there still must be the ten-foot access strip on each side. T. II, 219-22. He also explained again that the Becker property is not unique because neighboring properties have the same condition and problem relating to concave shoreline geography. T. II, 222-23.

Michael Mieduszewski, a mechanical engineer technician and draftsman for the U.S. Coast Guard, is the son of protestant, Susan Hagerty. T. II, 22-23. He produced photographs to depict the immediate waterfront area. T. III, 24-33. The photos showed the proposed Becker pier would be directly in front of the Hagerty property and obstruct the view. T. III, 33-34. He also explained that the proposed construction would effectively landlock his mother's property. T. III, 43-44, 55-58.

He confirmed from experience that there are many residential waterfront properties with concave shorelines on Chink Creek and other area waterways. T. III, 41-43. He added that when the Beckers were considering whether to purchase the property, he had provided them information about the case then pending, and that they had stated their intent to buy the property even if there could be no pier. T. III, 38-39, 44-45.

Susan Hagerty, having resided at 405 Bayside Drive since 1999, explained that the proposed pier would effectively landlock her property. It would come within one or two feet of any potential boatlift or moored boat on the east side of her pier. It would directly obstruct the view in front of her property. T. III, 67-70. If the Beckers were then to moor

a boat with eight-foot beams to the west side of their proposed pier, her access would be totally blocked. Ibid. The Beckers' proposal would devalue her property. T. III, 71-72.

JoAnn Burkhardt, of 311 Bayside Drive, observed that approval here would set a negative precedent along this waterway. In particular, it would allow her neighbor at 315 Bayside Drive to extend his pier T. II, 156-70. Like the Becker property, its shoreline is concave, so that extension of the pier would infringe on Ms. Burkhardt's area.

On November 8, 2007, Howard Becker testified as an adverse witness. Upon inquiry about the scope of residential use at 403 Bayside Drive and the size, configuration, and location of any boat, the Beckers' attorney successfully objected. The CBA panel chairman similarly refused to allow questions regarding the specific use of the boatlift, and reasons for requesting such a large facility. T. III, 8-16. Mr. Becker eventually admitted that he hadn't even looked at a boat. He provided no information regarding his planned use of the boatlift, except that it would be "for a boat." T. III, 14.

Argument

Scope of judicial review of agency decisions "Respecting the administrative function: factual inferences, judgment, and legal interpretation"

Judge Bollinger recognized the narrow scope of judicial review on page 2 of his January 6th opinion. This matter is so important that we shall restate here the heart of the discussion provided in our earlier memorandum.

The legislature has delegated broad authority to the CBA to conduct *de novo* trial hearings. Charter § 603; Boehm v. Anne Arundel County 54 Md. App. 497, 506-11 (1983); Hill v. Baltimore County 86 Md. App. 642 (1991); Pollard's Towing v. Berman's Body Frame & Mechanical 137 Md. App. 277, 288 (2001). This includes fact-finding, legal interpretation, and application of law to facts. Where the agency is acting rationally within the scope of its authority, the scope of judicial review is narrow and deferential. The courts respect the agency's function to hear, view, and assess evidence and also to employ specialized expertise to interpret its assigned field of law. Otherwise stated, the Court should reverse or remand only for clear errors of law.

In Snowden v. Mayor and City Council of Baltimore, 224 Md. 443, 447-48 (1961) the Court of Appeals explained the “substantial evidence” test,

“The substantial evidence test ‘means that the reviewing court’s inquiry is whether on the record the agency could reasonably make the finding’ . . . Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ . . . (Citation omitted).

The Court elaborated in Eger v. Stone, 253 Md. 533, 542 (1969):

“We have made it quite clear that if the issue before the administrative body is “fairly debatable,” that is, that its determination involved testimony from which a reasonable man could come to different conclusions, the courts will not substitute their judgment for that of the administrative body, in the absence of an unconstitutional taking of property for public use without the payment of just compensation.” [Citations omitted]

“This rule will be adhered to even if we were of the opinion that the administrative body came to a conclusion we probably would not have reached on the evidence. (Internal citations omitted).”

Judge Charles Moylan discussed the “substantial evidence” standard in Futoryan v. Mayor and City Council of Baltimore, 150 Md. App. 157, 177 (2003):

As to the quality of “substantial evidence,” Judge Harrell had earlier described that quality in Friends of the Ridge v. Baltimore Gas and Electric Co., 120 Md. App. 444, 446, (1998), vacated in part, 352 Md. 645 (1999):

The substantial evidence standard applicable to the Board’s findings of fact and resolution of mixed questions of law and fact, sometimes referred to as the “fairly debatable” test, is implicated by our assessment of whether the record before the Board contained at least “a little more than a scintilla of evidence” to support the Board’s scrutinized action. If such substantial evidence exists, even if we would not have reached the same conclusions as the Board based on all the evidence, we must affirm. Stated another way, substantial evidence pushes the Board’s decision into the unassailable realm of a judgment call, one for which we may not substitute our own exercise of discretion. (Emphasis supplied).”

Judge Moylan also discussed the related “fairly debatable” standard,

“If there is some evidence pointing in each direction, the issue is, by definition, “fairly debatable,” and the decision of the administrative agency, whichever way it goes, may not be reversed on judicial review as having been arbitrary or capricious.” 150 Md. App. at 172.

In Snowden, at 448, Judge Hall Hammond also focused on factual inferences:

"The heart of the fact finding process is often the drawing of inferences from the facts. The administrative agency is the one to whom is committed the drawing of whatever inferences reasonably are to be drawn from the factual evidence. 'The Court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported.' The test is reasonableness not rightness."

Judge Cathell echoed Snowden in Marzullo v. Kahl, 366 Md. 158, 172 (2001),

"... A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. ... A reviewing court "must review the agency's decision in the light most favorable to it; ... the agency's decision is *prima facie* correct and presumed valid, and ... it is the agency's province to resolve conflicting evidence" and to draw inferences from that evidence.' ... A reviewing court "must review the agency's decision in the light most favorable to it; ... the agency's decision is *prima facie* correct and presumed valid, and ... it is the agency's province to resolve conflicting evidence" and to draw inferences from that evidence.' ... (Citations omitted).

It is Petitioners' duty both to produce evidence and persuade the decision-maker of the facts and law. Pollard's v. Bermans, 137 Md. App. 277, 289 (2001) instructed that it is virtually impossible to reverse an agency where the agency is simply not persuaded,

"In this case, all that was required was that the Board be not persuaded that there was a need for additional towing service. To the extent its finding was weightier than that, the incremental weight was surplusage. Far less is required to support a merely negative instance of non-persuasion than is required to support an affirmative instance of actually being persuaded of something."

"[I]t is far easier to sustain as not clearly erroneous the decisional phenomenon of not being persuaded than it is to sustain the very different decisional phenomenon of being persuaded ... Mere non-persuasions ... require nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard." Id. 290 (citing Stark v. Stark, 134 Md. App. 663 (2000)) (Italics in original).

The deference extends to legal interpretations within the scope of the agency's delegated field. Judge Eldridge wrote in Board of Physician Quality Assurance v. Banks, 354 Md. 59, 67 (1999),

"... Despite some unfortunate language that has crept into a few of our opinions, a court's task on review is *not* to "substitute its judgment for the expertise of those persons who constitute the administrative agency," ... Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative

agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts . . . *McCullough v. Wittner*, 314 Md. 602, 612 (1989) ("The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight"). Furthermore, the expertise of the agency in its own field should be respected." (citations omitted).

Judge Cathell cited Banks with approval in Marzullo v. Kahl, *supra* 366 Md. at 171. In Fosler v. Panoramic Design, Ltd., 376 Md. 118 (2003), Judge Eldrige cited Marzullo, *supra*, and other cases. He wrote:

"(When construing a statute intended to be administered by an administrative agency, courts normally give significant weight to an agency's interpretation of the statute.)" 376 Md. 118, at 136.

The deference due to the agency relates here to the County Board of Appeals. The CBA is the quasi-judicial agency entrusted *de novo* with the interpretation of zoning law. It is not bound to agree with bureaucrats, especially when they make up rules.

I. The *res judicata* doctrine precludes the present petitions, which are substantially similar to the petition denied by the CBA in 2001, both with respect to variance and divisional line relief requested; even if petitioners present new legal theories or arguments, these do not provide an escape from this doctrine, which applies to all claims made or which might have been made in the earlier case.

Res judicata controls here because this matter was litigated to a conclusion and decided. The interest in finality precludes further litigation. The CBA's Duvall decision bars the present petitions. Case No. 00-241-A, June 6, 2001.. PC Exh. 3. The CBA's August 7, 2001 order denying the motion for reconsideration finalized its June 6 Order denying the zoning petition.. PC Exh. 4

The 2001 Duvall case involved a petition for variance for waterfront construction at 403 Bayside Avenue, including a setback variance of 0 feet instead of 10 feet. The key CBA finding is that the property failed to meet the threshold criterion of BCZR § 307.1 "special circumstances or conditions exist that are peculiar to the land or structure" ("uniqueness" in shorthand). Cromwell v. Ward 102 Md. App. 691 (1995). The CBA also

found there was no practical difficulty and that the divisional lines should be drawn based on the standard method for irregular shorelines.

Res judicata applies to administrative proceedings. Batson v. Shiflett 325 Md. 684, 701-05 (1992). Judge Robert Karwacki wrote, approvingly,

“The Court of Special Appeals used the following test for determining whether the NLRB decision is entitled to preclusive effect:

“Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: ‘(1) whether the [agency] was acting in a judicial capacity; (2) whether the issue presented to the district court was actually litigated before the [agency]; and (3) whether its resolution was necessary to the [agency's] decision.’”

Batson, 86 Md. App. at 356, 586 A.2d at 799 (quoting West Coast Truck Lines v. American Industries, 893 F.2d 229, 234-35 (9th Cir.1990)). This test was first enunciated in Exxon Corp. v. Fischer, 807 F.2d 842, 845-46 (9th Cir.1987), and its three prongs are supported by the Supreme Court caselaw on issue preclusion.

In United States v. Utah Constr. Co., 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), the Court spoke particularly to the preclusive effect of administrative law rulings, stating that:

“When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.” [citations omitted].

Id. at 422, 86 S.Ct. at 1560, 16 L.Ed.2d at 661. Thus, agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court.”

Just a year before Batson, the Supreme Court quoted the above language from Utah Construction Co. in Astoria Federal Savings & Loan Assoc. v. Solimino 501 U.S. 104, 107 (1991). Mr. Justice Souter added,

“Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. ... The principle holds true when a court has resolved an

issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal”

Res judicata applies to parties or their privies. Batson, supra. A successor owner is a privy. This plainly applies in zoning cases, where the issue revolves around property use rather than the owner’s identity. City of Baltimore v. Poe 224 Md. 428 (1961). Here, in any event, the Beckers participated in the 2001 proceedings.

In zoning cases, the law allows for consideration of substantial change in the character of the neighborhood if it materially affects the zoning issue.. Whittle v. Board of Zoning Appeals of Baltimore County 211 Md. 36 (1956); Mayor & City Council of Balto. v. Linthicum 170 Md. 245 (1936); Bensel v. Mayor & City of Balto. 203 Md. 506 (1954); Woodlawn Area Citizens Assoc. v. Board of Co. Comm’rs 241 Md. 187 (1966).

As Chief Judge Brune wrote in Whittle, 211 Md. at 45,

“The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions. * * * This rule seems to rest not strictly on the doctrine of *res judicata*, but upon the proposition that it would be arbitrary for the board to arrive at the opposite conclusions on substantially the same state of facts and the same law.” Emphasis supplied.

Res judicata bars litigation of the same matter with respect not only to the legal claims or issues decided in the case finally adjudicated, but also “as to all matters which with propriety could have been litigated in the first suit.” Alvey v. Alvey 225 Md. 386, 390 (1961); MPC, Inc. v. Kenny 279 Md. 29, 32 (1977); DeLeon v. Slear 328 Md. 569, 580 (1992); Kim v. Council of Unit Owners of Collington Center II Condominium 180 Md. App. 606, 616 (2008). A litigant must bring forward the entire case, including all relevant facts and legal issues. Otherwise, there would be a potentially infinite series of litigation based on different facts and legal theories to achieve the same objective.

The present case deals with the same property, shoreline, and D.R. (Density Residential) Zone addressed in Duval. There is no material change in the character of the neighborhood, or any other new fact that would justify revival of the case. The

Beckers acquired the property from the Duvalls and, as a matter of law, are their privies. They acquired it before the Duvall litigation ended and became parties then. The situation would be no different legally if they had acquired the property later.

The proposed waterfront construction presents similar or more extreme requests with respect to location and size. There is still a request for zero (0) feet deviation from the BCZR § 417.4 required minimum setback of ten (10) feet from the divisional line. The site plan, Pet. Exh. 2, shows the Beckers' proposed pier to be large as the Duvalls' pier depicted in the 2001 Dallas site plan, Prot. Exh. 1. The new pier would be up against the divisional line boundary with the Hagerty area. Moreover, the Beckers' boatlift (15' x 14') would be twice the size of the Duvalls' boatlift.

Significantly, The CBA had decided in Duvall that the property lacked the requisite "uniqueness" to meet the BCZR § 307.1 standard for variances. The CBA majority wrote, at page 8 (6/2001),

"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 the 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 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."

Again, there is no material change in the area to justify a different conclusion now. The Duvall CBA had also found that there was no practical difficulty, at page 8, (6/2001),

"Any practical difficulty or unreasonable hardship is self-created."

The Duvall CBA had also addressed the issue of divisional lines, drawn according to the BCZR § 417.3.B method for irregular shorelines (see Prot. Exh. 1). The only dispute related to the location of mean low water line. There was no attempt to specify alternative divisional lines. The CBA wrote, at page 9 (6/2001),

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

As we have said, the *res judicata* doctrine also bars new litigation based on facts or legal argument which might have been presented in the earlier litigation. So, even were the Beckers' request to establish alternative divisional lines under BCZR § 417.3 described as a new claim or legal theory, *res judicata* would still bar its assertion now. But the June 6, 2001 CBA decision did address the divisional lines and held that they were properly drawn in conformance with the BCZR § 417.3.B method for irregular shorelines.

* * *

From time to time, unsuccessful zoning petitioners or their successors fabricate new factual or legal twists to try to avoid the consequences of the earlier denial. The Court of Appeals has rejected these ploys on several occasions.

In Woodlawn Citizens, 241 Md., at 156, a rezoning case, Judge Hammond wrote, at 241 Md. 156, quoting Whittle, 211 Md. at 49-50.

"Neither neighborhood sentiment nor the slight distinction created by the additional restrictions were deemed to amount to a substantial change in circumstances. In conclusion we held:

"Because essentially the same facts appeared in the second case as appeared or as could have been shown in the first case, the appellees are barred by *res judicata*, and their petition should have been denied."

The Court revisited the issue in two other rezoning cases. In Chatham Corp. v. Beltram 243 Md. 138 (1966), the applicants tried to circumvent an earlier denial by reducing the requested density and invoking new arguments. Judge Hammond wrote that the proposal did not differ significantly in kind or degree. Therefore the first decision controlled. 243 Md. 150-52. In Alvey v. Hedin 243 Md. 334 (1966), the Court rejected another effort to overcome a previous denial of a claim of mistake. Judge Marbury wrote, 243 Md. at 340,

"The above holding in the first case is an absolute bar to the present attempt by the Alveys to again raise the question of mistake in original zoning of the same tract of

land, because any of the testimony relied upon in the instant case as to this question could and should have been presented in the first case, and the applicability of the doctrine of *res judicata* as to this mistake question is not affected by the fact that they are here attempting to get a different type of commercial classification than in the first case."

* * *

With Judge Bollinger's instructive remand opinion in hand, the CBA refocused on the *res judicata* issue. The CBA elucidated its analysis on pages 5-7 (2009). After quoting DeLeon v. Slear 328 Md. 569 (1992), the CBA opined, at 6-7,

" The property in case number 00-241-A, herein referred to as the Duvall case, was the identical property at issue in the present case. The Duvall case involved a Petition for Variance for waterfront construction at the property including a set back variance of zero (0) feet in lieu of ten (10) feet. The Board, in that case, found that the property failed to satisfy the "special circumstances or conditions exist that are peculiar to the land or "structure" test or "uniqueness" test as set forth in § 307.1 of the BCZR. See *Cromwell v. Ward*, 102 Md. App. 691 (1995). The Board also found that there was no practical difficulty and that the divisional lines should be drawn based on the standard method for irregular shore-lines.

In the present case before the Board, the only difference was the shape of the pier being requested by the Beckers, the subsequent purchasers of the property. A variance of zero (0) feet in lieu of ten (10) feet was also requested. The Beckers, were involved in the previous matter when they signed the Motion for Reconsideration, which was granted in part by the previous Board in Case Number 00-241-A. It is well established that *res judicata* applies to parties and to their privies. *Baltimore v. Poe* 224 Md. 428 (1961). A successor/owner is a privy and in this case the Beckers were actually involved in the previous case. As stated in DeLeon supra, *res judicata* bars litigation of the same matter with respect not only to the legal claims or issues decided in the case finally adjudicated, but also "as to all matters which with propriety could have been litigated in the first suit." The fact that the Petitioners requested a Special Hearing in the instant case, does not change the issue with respect to *res judicata*. A Special Hearing could have been requested in Case Number 00-241-A, but was not.

The present case deals with the same property, shoreline, and density and DR zone addressed in the Duvall case. There is no material change in the character of the neighborhood, or any other new fact that would justify revival of the case. The previous Board in Case Number 00-241-A found that the property was not unique within the meaning of *Cromwell v. Ward*. A review of the decision of this Board in the present case on page 15, shows that this Board stated:

"Therefore, the Board adopts the finding of the Board in Case No. 00-241-A as to failure to meet the uniqueness standard."

In effect, this Board has adopted the decision of the previous Board and should have found the doctrine of *res judicata* applied from the very beginning. The Board also finds that the issue with respect to the divisional lines drawn in accordance with § 417.3.b of the BCZR, set forth in Case Number 00-241-A was also adopted by the Board in the instant case and there should be no attempt to specify alternative divisional lines."

Spurred on by Judge Bollinger, the CBA issued a spot-on, accurate opinion. It shows an understanding of the path of this litigation.. Under these circumstances, the analysis is correct, and at least reasonable. The CBA's understanding and interpretation of the relationship of the 2001 and 2008 decisions are entitled to deference.

The Beckers persist that the August 7, 2001 CBA decision on reconsideration left the door open for future zoning petitions. We disagree. First of all, the CBA comment in this regard alluded to a July 17, 2001 joint motion in which the Duvalls and Beckers proposed the removal of the Duvalls' pier, 70 feet in length, and boatlift, about 100 square feet in area in return for Hagerty's consent to a pier 29 feet in length and any modest variance associated with that. The CBA never suggested that it might be proper for the Beckers to come back with a pier of the length just denied, or any boatlift, not to mention a boatlift twice the size of the boatlift removed. The CBA never intended to provide leverage for re-litigation of a similar request, much less one more extreme.

Secondly, the CBA's allusion to a potential future variance request was a "side remark" and manifest *dictum*. It has no legal force. See Bryan v. State Roads Comm'n 115 Md. App. 707, 712-13 (1997) *aff'd* 356 Md. 4 (1999). It did not alter the holding that the property lacked uniqueness, that there was no legal difficulty, and that the divisional lines should follow the standard method for irregular shorelines. The CBA denied the Motion. Here is what the CBA wrote in its final binding Order of August 7, 2001,

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

ORDERED that, having granted Petitioner's request to reconsider this matter, the Joint Motion to Review 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."

There was no appeal of this final order. It became final for the purpose of *res judicata*.

In this connection, the Beckers cite Klein v. Colonial Pipeline Co. 55 Md. App. 324 (1983) and suggest that the CBA's 2001 decision was affected by "*mistake or inadvertence*," and that the CBA truly sought "to allow future litigation of all zoning issues." This argument is delusive and mythical. The attentive 2009 CBA on remand understood very well that the 2001 CBA had conclusively denied the request for a 70-foot pier, and that the ruling on reconsideration never intended to give *carte blanche* to a renew the same request, much less one of greater magnitude.

The Beckers also manufacture an argument from Jack v. Foster B. Homeowners Assoc. 53 Md. App. 325 (1982). We disagree. Their invocation of the "same evidence" test disregards the key principle in the line of Court of Appeals decisions. These hold that, in the absence of a change in the neighborhood, *res judicata* applies (or it would be arbitrary and capricious to differ) where a petitioner could have presented a different legal basis, theory or evidence in the initial case. When a petitioner comes up with a new legal or factual ground omitted in the initial case, some different evidence, opinion, or theory will frequently bear on the new approach. The petitioner will then assert that the new theory engenders different facts. The "new facts" are really intertwined with their new theory, which could have been asserted in the initial case. To the extent that the Beckers' cite Jack to rationalize a different theory of the case as involving "different evidence," they ignore the conceptual framework of Whittle and its progeny.

Furthermore, Jack is distinguishable on its facts. There, the petitioner filed its renewed application for parking space modification, reduction, or waiver under an entirely different section of the law (Ordinance § 16.025) from the initial variance application (under § 20.47). Furthermore, in the absence of a transcript of the earlier proceeding, there was no proof that the zoning board had made any adverse findings which were relevant to the later petition. That is not the case for the proposed waterfront construction here.

In the present case, both the earlier and later petitions were framed within BCZR § 417 on waterfront construction. While the Beckers try to differentiate the current petition by reference to BCZR § 500.7, this latter section merely allows the Zoning Commissioner to make a legal determination. Here, the requested legal determination pertains to BCZR § 417.3, pertinent to alteration of divisional lines, an issue which came up in 2001.

Significantly, the CBA's June 6, 2001 opinion determined the divisional lines and declined a requested alteration. We quoted this specific finding on page 17, above:

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

The essence of the new theory and evidence currently proposed by the Beckers has to do with the alteration of the divisional lines. But this was resolved in 2001. Furthermore, as shown below in Section III, even with different divisional lines, the Beckers would still need a variance, and the CBA's 2001 finding (quoted on page 17, above) that the property was not unique precludes a different result now.

Another distinction in Jack is that there was never any finding, either in the earlier or later cases, that the requested parking modification would have an adverse impact on the neighborhood. This may have made the appellate court mores sympathetic there. Here, on the other hand, there was a palpable adverse impact on the use of the Hagerty property.

Finally, the Beckers cite Attmann/Glazer P.B. Co. v. Mayor & Alderman of Annapolis 314 Md.. 675 (1989). Suffice it to say that this case is entirely inapposite. It has nothing to do with *res judicata*. Its discussion of a municipality's ability to propose a compromise agreement is not apt here. The Beckers' reiteration that the CBA decision was "a blatant contradiction of their intentions" is ridiculous.

* * *

In sum, the CBA on remand was correct to hold that the *res judicata* doctrine bars the present petitions. The decision serves the public interest in the prevention of repetitive and successive zoning petitions on the same subject.

For the sake of completeness, we well also address the issues on the merits. Here also, the CBA's decision to deny the petitions should be affirmed as a matter of law, or at least as deserving of deference and fairly debatable.

II. Petitioners were not entitled to try to redraw the divisional lines based on an *ex parte* meeting with zoning staff in between hearing days

The Petition for Variance requests a setback of zero (0) feet instead of the minimum ten (10) feet from the divisional line. Although the petition purports to request an alteration of the divisional line, the site plan shows only the divisional line drawn according to the rule of BCZR §417.3.B. There is no alternate divisional line in the site plan. The public notice tracks the language in the petition.

As noted, the proposed boatlift actually crossed 7 feet over the divisional line, so that the actual variance should have been measured at minus 7 (-7) rather than zero (0). There were more aggravating notice problems relating to the testimony of John Lewis. He tentatively supported a proposal to draw alternative divisional boundaries presented to him in the *ex parte* meeting with Wells and counsel. There was no notice of this proposal to anyone else. If a petitioner requests an alteration of a divisional line, then it is necessary to show the proposed alteration on the site plan, and not leave it up in the air until the hearing. This is especially true because BCZR § 417.3.C places the responsibility, at least in the first instance, on the Office of Planning and Zoning (OPZ). Here, there was no notice of any specific proposed alteration, no notice of any OPZ review, and no written comment from either the Zoning Supervisor or the Planning Director. On top of that, the entire procedure and timing involving Lewis was so one-sided, superficial and unfair as to violate procedural due process of law.

The CBA agreed with our position that the Beckers had failed to follow the proper procedures for submission of proposed alternative divisional boundaries. The CBA discussed this subject at pages 7-12 of its opinion, and wrote, at pages 11-12 (2008),

“Section 417.3.C is clear with respect to the duty of the Office of Planning and Zoning. If that office has been abolished or revised, there should be some procedure for the application of § 417.3.C. The Board contends that the Director of the Office of

Planning should perform the duties set forth in § 417.3.C and specify the limits of construction to "conform as closely as possible to the rules as set forth herein so as to cause the least interference with existing and/or possible future construction." The Office of Planning should review the Petitions and plans submitted in support thereof to determine whether or not appropriate divisional lines have been drawn and to revise those divisional lines if necessary to cause the least interference with existing or possible future construction. Notice of the proposed construction should then be given by DEPRM [*sic*, PDM] to adjoining property owners affected. This was not done in this case. No notice was given to either property owner until the Petition was filed. In any event, the property owners had no notice of the revised divisional lines approved by the Office of Planning on November 6 until the next day at the hearing on November 7, 2007. Thus, the Petitioner has filed [failed] to comply with § 417.3.C of the BCZR."

Plainly, a property owner cannot bypass the procedures which begin with the Planning Director. The CBA properly added,

"As set forth above, the Board finds that § 417.3 applies in this matter and that the Petitioner has failed to flow the requirements of § 417.3.C. The divisional lines as proposed by Petitioner will not be approved by this Board."

The Beckers make the self-serving argument that the Department of Permits and Development Management, not the Planning Office, is entrusted with the authority to redraw divisional lines, so that their *ex parte* meeting with John Lewis of that department is controlling. Their argument fails for several reasons.

The Baltimore County Charter § 522 description of the Office of Planning and Zoning lists begins with a "Director of Planning and Zoning who shall administer the office. ..." BCZR § 417.3.C itself differentiates the "Office of Planning and Zoning," which may specify the limits of construction, from the "Department of Permits and Development Management," which has the separate duty to provide notice to adjoining property owners. In this context, it was correct, and at least reasonable, for the CBA to conclude that BCZR § 417.3.C assigns to the Planning Director, not the zoning staff, the responsibility to consider requests to alter divisional lines.

The Beckers suggest that the Planning Director's function is limited to the Master Plan and community plans, and cite for the first time Bill 69-95. Suffice it to say that the Planning Director's function is not so limited. There are myriad provisions of the county code and zoning regulations which assign the Planning Director important functions in zoning matters.

In any event, in the present case, the *ex parte* meeting with Mr. Lewis did not conform to procedural due process of law. Furthermore, as discussed in the next section, the CBA was not

bound to credit Mr. Lewis' incomplete and distorted perspective gleaned from the informal one-sided meeting with the Beckers' advocates.

III. Drawn either way, the proposed waterfront construction does not satisfy the BCZR § 417.4 10-foot minimum setbacks from divisional lines; therefore, the property owners must satisfy the BCZR § 307.1 test for variances anyway.

The CBA also correctly concluded, on page 12 (2008),

“Even if it were found that the divisional lines met the requirements of § 417.3.C, the Petitioner, in the opinion of this Board, must still meet the variance requirements in order to obtain a variance from § 417.4 of the BCZR. This requires a 10-foot setback from the divisional lines.”

The Beckers had asserted that satisfaction of BCZR § 417.3 negates the requirement to satisfy the BCZR § 417.4 minimum setback from the divisional line. Kenneth Wells opined that BCZR 417.3 provides “latitude.” He said essentially that BCZR § 417.4 doesn’t count if a proposal passes under BCZR §. 417.3. John Lewis echoed Wells’ sentiment when he expressed a preference for the newly manufactured divisional lines shown to him first on November 6 and then again on November 7 at the hearing. He believed that the redrawing of divisional lines eliminated the need to satisfy the minimum setback standard. This would excuse Petitioners from compliance with BCZR § 417.4 if the divisional lines drawn by Wells and “preferred” by Lewis were selected.

But the opinions of Wells and Lewis conflict with the palpable legislative purpose. It is basic that “... the language of a statute must be viewed as a whole, with reference to the surrounding provisions of a statute.” Department of Human Resources v. Howard 397 Md. 353, 362 (2007). It is important to “... construe the statute as a whole so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory.” The goal also is to avoid any “unreasonable, illogical or inconsistent interpretation” Mayor & Town Council of Oakland v. Mayor & Town Council of Mountain Park 392 Md. 301, 316 (2006); Department of Health v. Kelly 397 Md. 399, 420 (2007).

BCZR § 417, entitled "Waterfront Construction," is included as PC Exh. 1. It begins with the statement in BCZR § 417.1,

"All waterfront construction, such as piers, wharves, docks, bulkheads, or other work extended into navigable waters beyond mean low tide as prescribed in Baltimore County Design Manual shall be governed by these regulations as well as by Sec. 33-2-801 of the Baltimore County Code, except that nothing in these regulations shall apply to the M.H. Zone and to the extension of industrial waterfront facilities to the limit of Corps of Engineers' established pierhead or bulkhead lines."

There then follow BCZR §§ 417.2 to 417.8. They all apply, without exception, other than to the M.H. Zone and industrial waterfront facilities. To understand the law of waterfront construction, it is necessary to review the entire section.

BCZR § 417.2 requires that applications for waterfront construction be accompanied by a plot diagram showing outlines of the property in question and adjoining property, existing and proposed waterfront construction and, where required by the Buildings Engineer, a plan prepared by a professional engineer or surveyor. BCZR § 417.3A-C sets forth the rules for "defining boundaries within which waterfront construction shall take place;" and states, "divisional lines shall be established in accordance with the following rules: BCZR § 417.3A for "straight shore lines," BCZR § 417.3B for "irregular shorelines," and BCZR § 417.3C for "Conflict with existing construction." BCZR § 417.4 sets the crucial requirement that,

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

BCZR § 417.5 begins,

"Any structure built beyond mean low tide must be contained within construction offsets as prescribed. In addition to meeting these requirements, the structure must not extend beyond any of the following limits:

- A. Three hundred feet beyond mean low tide.
- B. In the absence of a definable channel, not more than 1/3 the width of waterway.
- C. Not beyond the near boundary of a definable channel.

BCZR § 417.6 requires waterfront construction to satisfy regulations and requirements of the Department of Health. BCZR §. 417.7 sets standards for out-of-water storage facilities. BCZR §. 417.8 requires all waterfront construction to comply with County Code provisions governing water-dependent facilities, water-dependent structures, non-water-dependent structures and shore erosion protection works, as well as BCZR § 103.5.

The bottom line is that BCZR § 417.4 applies to whichever "divisional lines" are "established." Here, the proposed pier and boatlift conflict with the setback requirements for either set of suggested divisional lines. Lewis confirmed that the proposed pier and boatlift virtually straddle any of the divisional lines drawn by Mr. Wells.

Petitioners' site plan, Pet. Exh. 2, shows the concave irregular shoreline and divisional lines drawn by the method prescribed by BCZR § 417.3B for irregular shorelines, as in Diagram #3 in the Zoning Commissioner's Policy Manual. Page 4-82.1. Wells drew his alternative lines in magic marker on Pet. Exh. 5. Either way, the proposed waterfront construction clearly conflicts with the BCZR § 417.4 setback standards.

For the purpose of future guidance, in our view, there is no real conflict with existing construction, i.e. predating BCZR § 417, which would warrant any alteration in the drawing of the divisional lines. Therefore, BCZR § 417.3C does not apply in this case. There is no need to depart from the rule established for the placement of divisional lines relating to the irregular shoreline. As a matter of law, the divisional lines shown on the original site plan should not be altered here.

Even were there a reason to consider alteration, it is perspicuous that Wells tried, after the fact, to gerrymander the divisional lines and bootstrap disproportionate waterfront construction into a severely constrained waterfront area.

IV. The evidence is legally insufficient to support the variance.

A. In the context of BCZR § 417, the site is not unique because it is one of many existing small lots on concave shorelines along the Baltimore County waterfront; with properties such as this, because of their size and location, there is simply not enough room for a pier and boatlift of the length and size available to

larger properties on straight or convex shorelines; this is thus a problem typical of small lots on concave shorelines, which property owners must accept.

Once again, the Beckers' proposed pier straddles the divisional line bordering the Hagerty area. Their proposed boatlift crosses over the divisional line bordering the Kennell area. It also fails to meet the setbacks for their proposed alternative divisional lines. This construction thus deviates severely from the BCZR § 417.4 divisional setback and access standards on both sides. To qualify for setback variances, an applicant must satisfy BCZR § 307.1 standards. This requires proof of a property's "uniqueness" and resulting practical difficulty. Trinity Assembly of God v. People's Counsel for Baltimore County 407 Md. 53, 79-85 (2008). The evidence here plainly fails to satisfy this standard.

A concave shoreline is not unusual. BCZR §. 417.3 reflects that shorelines fall into two basic categories: straight and irregular. Irregular shorelines are either convex or concave. The diagrams in the Policy Manual illustrate the alternatives. Diagram 3, the concave shoreline, illustrates the situation in the present case.

Mr. Wells, limited his view to the subject property and two adjoining properties. He did not survey other properties along Chink Creek or Bear Creek. He admitted that there are straight, convex and concave shorelines generally along the waterfront. The aerial photos and the ADC highway map excerpt reflect the frequent occurrence of concave shorelines along area rivers and creeks.

There is just nothing unique about the Beckers' irregular shoreline. Inevitably, a concave shoreline on a small or moderate size lot has a relatively constrained area for waterfront construction. Where there is a concave shoreline, the divisional lines typically extend across the waterway in an inward direction. This naturally limits the potential area in comparison with straight or convex shorelines. The essential point is that environmental constraints in waterfront areas, which restrict many properties, are not unique and do not justify the approval of a variance. Chester Haven Beach Partnership. v. Board of Appeals for Queen Anne's County 103 Md. App. 324 (1995).

Petitioners suggested that because their property is not exactly like any of the other properties in the area, that it is "one of a kind," and therefore unique. This is Orwellian doubletalk. To the extent that there are slight differences in shape and size between otherwise similarly situated properties, it might be said that every property is "unique." This is often said with regard to purchase and sale of properties. From the point of view of zoning, however, the uniqueness must be significant and must result in practical difficulty peculiar to that property. In this context, there is nothing unusual about an irregular, concave shoreline. Indeed, BCZR § 417 explicitly categorizes and regulates these areas. One of the principal functions of the law is to preserve divisional line setbacks and to control waterfront construction in such areas.

The CBA discussed the issue of uniqueness at pages 12-15 of its opinion (2008). The CBA found that the property is not unique. It confirmed the finding made previously in its 2001 opinion. The CBA understood that the "uniqueness" standard, for zoning purposes, does not focus on every trivial characteristic of a property which may be different from that of other properties. The CBA thus rejected the Beckers' "one of a kind" argument as a kind of lawyer's play on words. The CBA explained, on Page 15,

"The Board finds that Mr. Anderson's testimony with respect to uniqueness supports a finding that the property of the Petitioners' is not unique within the meaning of *Cromwell v. Ward*, 102 Md.App. 691 (1995). It is an accepted fact that there may be some different characteristic in each piece of property that, when magnified, could determine the property to be "unique." However, under the requirements of *Cromwell v. Ward*, this property is not any more unique than other properties in the area, even in addition to 317 and 315 Bayside Drive. Many of the properties are on a concave shoreline. The difference between the allowance of the construction of a 12-foot pier, a 13-foot pier, and a 20-foot pier without having to request a variance is miniscule when comparing the uniqueness of properties. Therefore, the Board adopts the finding of the Board in Case No. 00-241-A as to failure to meet the uniqueness standard."

B. There is no practical difficulty. Petitioners were aware of the limitations of the property when they bought it; they have available to them the use of their home, and other waterfront amenities such as recreation, fishing, and small boat launching; it would undermine the intent of the law to allow a long pier and remarkably large boatlift without the legally required divisional line access setbacks.

Having found a failure to prove uniqueness, the CBA deemed it unnecessary to discuss in depth the subject of practical difficulty. The CBA observed, however,

“... [the Beckers] were well aware of the limitations of the property when they bought it. In fact, they made an agreement with Protestants Hagerty to reduce the size of the pier constructed by the Duvalls to a pier that is 29 feet long.” Page 15.

There is no evidence of resulting practical difficulty, based on the criteria in McLean v. Soley 270 Md. 208, 213-14 (1973) repeated in Trinity Assembly, 407 Md. at 83-84. Where waterfront property has a concave shoreline, a property owner is on notice of the inevitable waterway constraints. There is no reasonable expectation that the property will accommodate a long pier and a large boatlift close to the neighboring area. This is particularly true here, where the Beckers had the property under contract at the time the CBA denied the Duvall request in 2001. Indeed, the concave shoreline is a factor that may reasonably be taken into account in the negotiation of the purchase price.

To deny a pier extension and boatlift of such scale and magnitude does not unreasonably deny a permitted use where both proposed uses conflict in a major way with statutory setback and access requirements. The Beckers’ request for a disproportionately large pier and boatlift in a confined area does not do justice to area property owners, regardless of Ms. Kennell’s alleged consent.

Allowance of such substantial encroachments would also set a harmful precedent for congestion and visual impacts on Chink Creek and other Chesapeake Bay waterways. The combination of a zero (0) foot setback, and (effectively) a minus seven (-7) foot setback is so extreme as to be unacceptable on its face. The proposed boatlift size, at least about twice the size of any other area boatlift, is likewise extreme.

It is telling that the Beckers agreed in writing at the conclusion of the 2001 case to remove the then existing 70-foot pier and smaller boatlift and to restrict construction to a pier 29 feet long, which in fact remains. This further negates their claim of practical difficulty. If the Beckers had stuck to their agreement, there would not be this litigation.

Instead, they have done an about face and come back with this disingenuous and incongruous request.

V. There is a failure to meet the BCZR § 500.14 statutory requirement for findings by the Department of Environmental Protection and Resource Management (DEPRM) with respect to minimization of adverse environmental impacts; conservation of fish, wildlife, and plant habitat; and consistency with Chesapeake Bay Critical Area (CBCA) land use policies. The DEPRM comment submitted in evidence does not satisfy these criteria.

There is a failure to comply with BCZR § 500.14, which requires specific written DEPRM findings to be sent to the Zoning Commissioner for zoning petitions within the Chesapeake Bay Critical Area (CBCA). The September 21, 2006 DEPRM comment on file shows that this property is in the CBCA. But it does not include the required findings. PC Exh. 6. The Beckers argued they were excused from BCZR § 500.14 when the case was appealed to the CBA, and so no longer before the "Zoning Commissioner." That is a false premise. If that were true, the CBA could not address special hearings, special exceptions and variances, which BCZR §§ 500.7, 502.1 and 307.1 assign to the Zoning Commissioner. The CBA necessarily applies all zoning laws addressed to the Commissioner as part of its *de novo* appellate review function.

The CBA had already upheld this requirement in Shaneybrook/Basso, No. 00-139-X, dated July 16, 2001. Circuit Court Judge Lawrence Daniels affirmed in Case No. 3-C-01-8460, February 18, 2002. Both decisions were attached to our CBA memorandum.

There is no genuine dispute that the aforementioned DEPRM comment is insufficient. The CBA correctly analyzed the issue at pages 16-17 of its 2008 opinion,

"The Board finds that DEPRM did not meet its obligations under § 500.14. While it is true that the Petitioner cannot force DEPRM to make any findings under § 500.14, the Petitioner could certainly have requested DEPRM to make such findings in order to comply with the law as written. The County Council has passed § 500.14 of the BCZR and the Board will enforce that section until such time as the Council repeals it. If a Petitioner has requested the review by DEPRM under § 500.14 and DEPRM refuses to make a recommendation, then the Board will deal with that situation when it arises. Until that point, the Board will require the recommendations of DEPRM under § 500.14. The Board rejects the argument that § 500.14 only applies to decisions before the Zoning Commissioner. The Board adopts the contention of People's Counsel on this issue."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of October, 2009, a copy of the foregoing Memorandum of People's Counsel for Baltimore County was mailed to Edward C. Covahey, Jr, Esquire, Covahey, Boozer, Devan & Dore, P.A., 614 Bosley Avenue, Towson, MD 21204 attorney for Susan Hagerty, and Lawrence E. Schmidt, Esquire, Gildea & Schmidt LLC, 600 Washington Avenue, Suite 200, Towson, MD 21204, Attorney for Petitioners.

Peter Max Zimmerman
PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

IN THE MATTER OF	*	BEFORE THE
THE APPLICATION OF		
<u>HOWARD AND MELANIE BECKER</u> –LEGAL	*	COUNTY BOARD OF APPEALS
OWNERS /PETITIONERS		
FOR SPECIAL HEARING AND VARIANCE	*	OF
ON PROPERTY LOCATED AT 403 BAYSIDE		
DRIVE 12 TH ELECTION DISTRICT	*	BALTIMORE COUNTY
7 TH COUNCILMANIC DISTRICT		
	*	Case No. 06-651-SPHA

* * * * *

**ORDER OF THE BOARD ON REMAND
FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY**

This matter comes before the Board on remand by Order of Judge Thomas J. Bollinger, Circuit Court for Baltimore County, filed January 23, 2009, and Amended Order, filed February 5, 2009 in which Judge Bollinger remanded this matter to the County Board of Appeals to determine the issue of whether or not *res judicata* applies to the decision in this case, based upon the Board's decision in a previous case involving the same property.

Statement of Facts

The Circuit Court succinctly set forth the facts of this case. The property in question is a triangular-shaped waterfront parcel located on the south side of Bayside Drive, just east of Winona Avenue, with frontage on Chink Creek and near its confluence with Bear Creek in Dundalk. The property consists of two lots known as Lot 62 and Lot 63 of Inverness and contains a gross area of 0.13 acre +/- and is zoned D.R. 5.5. The property is presently improved with a two-story framed dwelling, an above-ground swimming pool and a detached accessory shed.

The property was the subject of a prior zoning case #00-241-A in which the previous owners, William R. Duvall, Jr., and his wife, Teresa A. Duvall, filed a Petition for Variance for

waterfront construction of a pier, including a set back variance of zero (0) feet in lieu of ten (10) feet. No request for special hearing was presented to the Zoning Commissioner at that time.

That case came before prior Zoning Commissioner Lawrence E. Schmidt, the attorney in the instant case, and the Protestants who appeared in that matter are the same Protestants in the matter before this Board in the instant case.

As noted in the prior Order issued by Commissioner Schmidt, the Duvalls had purchased the property from the Williams family in 1994 and replaced the pier that existed at that time in May or June of that year. Approximately 2 years later, the Duvalls installed a boatlift at the pier to provide out of water storage for their boat. At that time, the then-adjacent property owners, Mr. and Mrs. Thomas Kessler, had no objections to the pier and boatlift because they were in the process of selling their property. However, they filed a complaint on behalf of the subsequent property owner, Mrs. Susan Hagerty, a Protestant in the instant case, and a violation notice was issued to the Duvalls, who were advised to file for variance relief. At the hearing in that matter, Ms. Hagerty stated that she had no objections to the pier itself but felt that the boatlift interfered with her access to the water. Then-Commissioner Schmidt granted the request to allow the existing pier and boat lift to remain, by Order dated April 19, 2000. He noted the unique configuration of the subject and adjacent lots, which tapered to a curved, crescent configuration along the shoreline, thereby limiting the area for pier development without variance relief. Protestants subsequently filed a timely appeal to the County Board of Appeals, and following a hearing, the Board denied the variance and issued a final Opinion and Order along with a concurring /dissenting Opinion on June 6, 2001.

The Duvalls then filed a Motion for Reconsideration on July 5, 2001 and an accompanying Motion to Revise Order on July 17, 2001. The joint motion had been signed by

the Duvalls, the Beckers (who had purchased the property from the Duvalls), and their counsel, as well as Ms. Hagerty and her son, Mr. Mioduszewski, and their counsel.

Within the joint motion, counsel for the Petitioners/Protestants noted that an Agreement had been reached between the parties and a request was made that the Board reverse its Order in accordance with that Agreement. The parties specifically agreed that the boatlift should be removed and that all of the pier, except for a pier extending 29 feet from the bulkhead with a 5-foot wide deck, would be permitted to remain on the property. The boatlift and pilings and the pier decking, except that agreed to above, had been removed. The Board considered the Motion at a Public Deliberation on July 26, 2001. The Board agreed to reconsider the matter and the two remaining members of the original panel revisited their notes, the transcript, previous evidence submitted, and new photographs with the Motion. As stated in the decision on the Motion for Reconsideration:

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 and 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 a proposed Order as submitted is denied."

The new owners, the Beckers (Petitioners), then sought relief in the instant case, before the Zoning Commissioner to remove a portion of the existing pier, approximately 20 feet, and run a short stretch of pier to the west and ultimately build a pier, which would stretch 58.4 feet along the

western divisional line of the subject property adjacent to the Hagerty property. In addition, they propose to construct a boat lift, which would project at least 7 feet over the divisional line into Mrs. Kennell's property on the east side of the Petitioners' (Beckers) property. At the hearing before the Zoning Commissioner, the Petitioners presented an affidavit from Mrs. Kennell that stated that she had no objections to the requested relief and supported Petitioners' proposed construction. The affidavit from Mrs. Kennell stated that she was 83 years old. She did not appear at the hearing before the Board of Appeals to testify. The Board accepted the affidavit of Mrs. Kennell, and gave it the weight that it felt the affidavit deserved.

In a decision dated October 12, 2006, the Zoning Commissioner granted a Special Hearing to construct an extension of an existing pier and the proposed boat lift, finding that the proposed construction complied with § 417.3.C of the *Baltimore County Zoning Regulations* (BCZR), and further ordering that the Petition for Variance seeking relief from § 417.4 of the BCZR to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 feet was dismissed as moot.

In its Opinion dated March 18, 2008, the Board DENIED the Petition for Special Hearing for the waterfront construction of an extension to an existing pier and proposed boatlift under § 417.3.C of the BCZR and DENIED the Petition for Variance seeking relief from § 417.4 of the BCZR to allow the pier and boatlift within 0' of the divisional line in lieu of the required 10 feet.

Although the Board recognized that the doctrine of *res judicata* could apply to the Board's decision, it declined to apply the doctrine in this particular case.

The Court found that there were six (6) issues which should be decided with respect to this case, but the threshold issue to be decided was whether or not *res judicata* applied to this case and would preclude the discussion of the questions presented for review as framed by the Petitioners.

The Court returned the case to the Board stating:

“Therefore this case must be returned to the Board of Appeals in order for the Board to articulate factual findings and to make specific rulings as to whether the issues presented in the instant petitions are barred by the doctrine of *res judicata*.”

Decision

The Board has reviewed it's decision and the facts of this case and finds that it erred in not finding that the doctrine of *res judicata* applies to the facts and circumstances of this particular case.

In DeLeon v. Slear, 328 Md. 569 at page 580, the Court of Appeals stated:

“The doctrine of *res judicata* is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters with propriety could have been litigated in the first suit....”

The Court continued further stating:

“The traditional principal of *res judicata* has three elements: (1) the parties in the present litigation should be the same or in privity with the parties to the earlier case; (2)

the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction."

The property in case number 00-241-A, herein referred to as the Duvall case, was the identical property at issue in the present case. The Duvall case involved a Petition for Variance for waterfront construction at the property including a set back variance of zero (0) feet in lieu of ten (10) feet. The Board, in that case, found that the property failed to satisfy the "special circumstances or conditions exist that are peculiar to the land or "structure" test or "uniqueness" test as set forth in § 307.1 of the BCZR. See *Cromwell v. Ward*, 102 Md. App. 691 (1995). The Board also found that there was no practical difficulty and that the divisional lines should be drawn based on the standard method for irregular shore-lines.

In the present case before the Board, the only difference was the shape of the pier being requested by the Beckers, the subsequent purchasers of the property. A variance of zero (0) feet in lieu of ten (10) feet was also requested. The Beckers, were involved in the previous matter when they signed the Motion for Reconsideration, which was granted in part by the previous Board in Case Number 00-241-A. It is well established that *res judicata* applies to parties and to their privies. *Baltimore v. Poe* 224 Md. 428 (1961) A successor/owner is a privy and in this case the Beckers were actually involved in the previous case. As stated in *DeLeon supra*, *res judicata* bars litigation of the same matter with respect not only to the legal claims or issues decided in the case finally adjudicated, but also "as to all matters which with propriety could have been litigated in the first suit." The fact that the Petitioners requested a Special Hearing in the instant case, does not change the issue with respect

to *res judicata*. A Special Hearing could have been requested in Case Number 00-241-A, but was not.

The present case deals with the same property, shoreline, and density and DR zone addressed in the Duvall case. There is no material change in the character of the neighborhood, or any other new fact that would justify revival of the case. The previous Board in Case Number 00-241-A found that the property was not unique within the meaning of *Cromwell v. Ward*. A

review of the decision of this Board in the present case on page 15, shows that this Board stated:

"Therefore, the Board adopts the finding of the Board in Case No. 00-241-A as to failure to meet the uniqueness standard."

In effect, this Board has adopted the decision of the previous Board and should have found the doctrine of *res judicata* applied from the very beginning. The Board also finds that the issue with respect to the divisional lines drawn in accordance with § 417.3.b of the BCZR, set forth in Case Number 00-241-A was also adopted by the Board in the instant case and there should be no attempt to specify alternative divisional lines.

ORDER

IT IS THEREFORE this 17th day of June, 2009, by the County Board of Appeals of Baltimore County

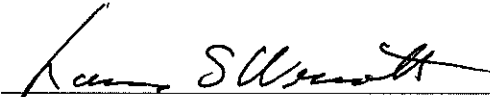
ORDERED that, in accordance with the Ruling and Remand Order of the Honorable Thomas J. Bollinger, Judge, Circuit Court for Baltimore County, filed February 5, 2009, for further proceedings consistent with the opinion, it is

ORDERED that Petition for Special Hearing for the waterfront construction of an extension to an existing pier and proposed boatlift under § 417.3.C of the Baltimore County Zoning Regulations be and is hereby **DENIED**; and it is further

ORDERED that the Petition for Variance seeking relief from § 417.4 of the BCZR to allow the pier and boatlift within 0' of the divisional line in lieu of the required 10' be and is hereby **DENIED**; on the basis of *res judicata*, as having already been applied in Case Number 00-241-A, by this Board in the decisions of June 6 and August 7, 2001, respectively.

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*.

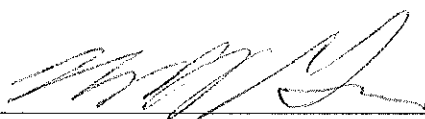
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Lawrence S. Wescott, Panel Chair



Lawrence M. Stahl



Wendell H. Grier

PETITION OF
HOWARD AND MELANIE BECKER

FOR JUDICIAL REVIEW
OF THE BOARD OF APPEALS
OF BALTIMORE COUNTY

IN THE CASE OF THE APPLICATION
OF HOWARD AND MELANIE BECKER-
LEGAL OWNERS/PETITIONERS FOR
SPECIAL HEARING AND VARIANCE
ON PROPERTY LOCATED AT
403 BAYSIDE DRIVE
12TH ELECTION DISTRICT
7TH COUNCILMANIC DISTRICT

BOARD OF APPEALS
CASE NO.: 06-651-SPHA

IN THE

CIRCUIT COURT

FOR

BALTIMORE COUNTY

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BALTIMORE COUNTY
BOARD OF APPEALS

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Case No.: 03-~~C-07-1895~~

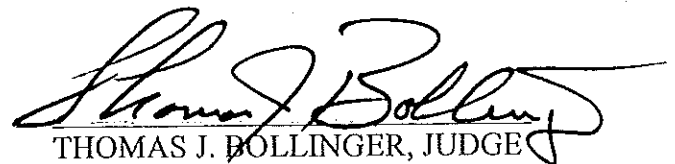
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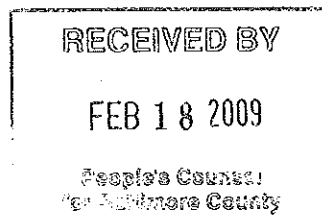
AMENDED ORDER

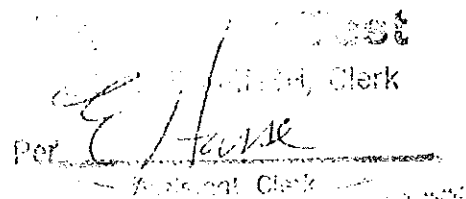
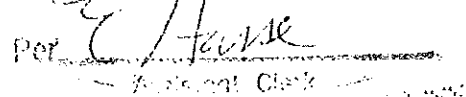
The Conclusion to the Memorandum Opinion and Order in the above-captioned case is hereby stricken and should read as follows:

This matter is hereby **REMANDED** to the County Board of Appeals for further proceedings consistent with this opinion.

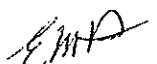
2/4/09
DATE


THOMAS J. BOLLINGER, JUDGE




Clerk
Per 
Clerk

FILED FEB 18 2009



PETITION OF
HOWARD AND MELANIE BECKER

*

IN THE

*

CIRCUIT COURT

FOR JUDICIAL REVIEW
OF THE BOARD OF APPEALS
OF BALTIMORE COUNTY

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FOR

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BALTIMORE COUNTY

IN THE CASE OF THE APPLICATION
OF HOWARD AND MELANIE BECKER-
LEGAL OWNERS/PETITIONERS FOR
SPECIAL HEARING AND VARIANCE
ON PROPERTY LOCATED AT
403 BAYSIDE DRIVE
12TH ELECTION DISTRICT
7TH COUNCILMANIC DISTRICT

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Case No.: 03-C-07-1895-
08-4351

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BOARD OF APPEALS
CASE NO.: 06-651-SPHA

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MEMORANDUM OPINION AND ORDER

This matter comes before the Court as a Petition for Judicial Review of the decision of the Board of Appeals of Baltimore County dated March 18, 2008, denying Howard and Melanie Becker's Petition for Special Hearing for an extension to existing pier and proposed boatlift under § 417.3.C of the Baltimore County Zoning Regulations (BCZR) and denial of a Petition for Variance seeking relief from § 417.4 of the BCZR to allow a pier and boatlift within zero feet of the divisional line in lieu of the required ten feet. A hearing was held before this Court on December 16, 2008. The Court has carefully considered the oral arguments heard, the legal memoranda presented, the decision of the Board of Appeals, and the applicable statutory and case law in reaching its decision in this matter.

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BALTIMORE COUNTY
BOARD OF APPEALS

SCOPE OF REVIEW

In reviewing a decision of the Board of Appeals, the Circuit Court is limited to whether that decision is “in accordance with the law.” Maryland Code Annotated, Article 25A § 5(U) (1957, 1994 Repl. Vol.). The Circuit Court may correct any abuse of discretion by an administrative agency. The Court may also reverse or modify the Board’s actions when they are unsupported by facts, arbitrary, illegal, capricious, or unreasonable. *Heaps v. Cobb*, 185 Md. 372 (1945); *Art Woods Enterprises v. Wiseburg Community Assoc.*, 88 Md. App. 723, 727 (1991). However, the scope of judicial review of decisions by administrative agencies is narrow, recognizing that the Board members have expertise in a particular area and, ultimately, should be free to exercise their discretion as such. *Finney v. Halle*, 241 Md. 224 (1966).

Thus a reviewing court will not substitute its judgment for that of an administrative board where the issue is freely debatable and the record contains substantial evidence supporting the administrative decision. *Montgomery County v. Woodward and Lothrop, Inc.*, 280 Md. 686 (1977). Accordingly, the Circuit Court’s role is limited to determining whether or not there is substantial evidence in the record as a whole to support the agency’s finding and conclusions, and to determine whether or not the agency’s decision is premised upon a proper construction of the law. *United Parcel Service, Inc. v. People’s Counsel for Baltimore County*, 336 Md. 569, 577 (1994).

STATEMENT OF FACTS

In its opinion the Board of Appeals stated the following facts, as set forth in the decision of the Zoning Commissioner. The property in question is a triangular-shaped waterfront parcel located on the south side of Bayside Drive, just east of Winona Avenue, with frontage on Chink Creek and near its confluence with Bear Creek in Dundalk. The property consists of two lots

known as Lot 62 and Lot 63 of Inverness and contains a gross area of 0.13 acre +/- and is zoned D.R. 5.5. The property is presently improved with a two-story framed dwelling, an above-ground swimming pool and a detached accessory shed.

The property was the subject of a prior zoning case, #00-241-A in which the previous owners, William R. Duvall, Jr., and his wife, Teresa A. Duvall, filed a Petition for Variance as set forth above. No request for special hearing was presented to the Zoning Commissioner at that time.

That case came before prior Zoning Commissioner Lawrence E. Schmidt, the attorney in the instant case, and the Protestants who appeared in that matter are the same Protestants who appeared before the Board on the instant case. As noted in the prior Order issued by Commissioner Schmidt, the Duvalls had purchased the property from the Williams family in 1994 and replaced the pier that existed at that time in May or June of that year. Approximately two years later, the Duvalls installed a boatlift at the pier to provide out-of-water storage for their boat. At that time, the then-adjacent property owners, Mr. and Mrs. Thomas Kessler, had no objections to the pier and boatlift because they were in the process of selling their property. However, they filed a complaint on behalf of the subsequent property owner, Ms. Susan Hagerty, a Protestant in the instant case, and a violation notice was issued to the Duvalls, who were advised to file for variance relief. At the hearing in that matter, Ms. Hagerty stated that she had no objections to the pier itself but felt that the boatlift interfered with her access to the water. Then-Commissioner Schmidt granted the request to allow the existing pier and boatlift to remain by Order dated April 19, 2000. He noted the unique configuration of the subject and adjacent lots, which tapered to a curved, crescent configuration along the shoreline, thereby limiting the area for pier development without variance relief. Protestants subsequently filed a timely appeal

to the County Board of Appeals, and following a hearing, the Board denied the variance and issued a final Opinion and Order along with a concurring/dissenting Opinion on June 6, 2001.

The Duvalls then filed a Motion for Reconsideration on July 5, 2001 and an accompanying Motion to Revise Order on July 17, 2001. The joint motion had been signed by the Duvalls, the Beckers, and their counsel, as well as Ms. Hagerty and her son, Mr. Mioduszewski and their counsel. Within the joint motion, counsel for the Petitioners/Protestants noted that an agreement had been reached between the parties and a request was made that the Board reverse its Order in accordance with that agreement. The parties specifically agreed that the boatlift should be removed and that all of the pier, except for a pier extending 29 feet from the bulkhead with a 5-foot wide deck, would be permitted to remain on the property. The boatlift and pilings and the pier decking, except that to which was agreed above, had been removed. The Board considered the Motion at a hearing on July 26, 2001. The Board agreed to reconsider the matter, and the two remaining members of the original panel revisited their notes, the transcript, previous evidence submitted and new photographs with the Motion. As stated in the decision on the Motion for Reconsideration:

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 and 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 a proposed Order as submitted is denied.

The new owners, the Beckers (Petitioners), then sought relief before the Zoning Commissioner to remove a portion of the existing pier, approximately 20 feet, and run a short stretch of pier to the west and ultimately build a pier, which would stretch 58.4 feet along the western divisional line of the subject property adjacent to the Hagerty property. In addition, they propose to construct a boatlift, which would project at least 7 feet over the divisional line into Mrs. Kennell's property on the east side of the Petitioners' (Beckers) property. At the hearing before the Zoning Commissioner, the Petitioners presented an affidavit from Mrs. Kennell that stated that she had no objections to the requested relief and supported Petitioners' proposed construction. The affidavit from Mrs. Kennell stated that she was 83 years old. She did not appear at the hearing to testify. The Board accepted the affidavit of Mrs. Kennell and gave it the weight that it felt the affidavit deserved.

In a decision dated October 12, 2006, the Zoning Commissioner granted a special hearing to construct an extension of the existing pier and the proposed boatlift, finding that the proposed construction complied with § 417.3.C of the BCZR and further ordering that the Petition for Variance seeking relief from § 417.4 of the BCZR to allow a pier and boatlift within 0 feet of the divisional line in lieu of the required 10 feet was dismissed as moot. In its Opinion dated March 18, 2008, the Board denied the Petition for Special Hearing for the waterfront construction of the extension to the existing pier and proposed boatlift under § 417.3.C of the BCZR and denied the Petition for Variance seeking relief from § 417.4 of the BCZR to allow the pier and boatlift within zero feet of the divisional line in lieu of the required 10 feet. The Board declined to apply the doctrine of res judicata in evaluating Petitioners' requests.

ANALYSIS

The Petitioners raise five questions for judicial review:

1. Did the Board err when it found Appellants failed to comply with § 417.3.C of the BCZR?
2. Did the Board err when it found that Appellants needed a variance for setbacks when utilizing § 417.3.C of the BCZR?
3. Did the Board err when it found that the property was not unique within the meaning of § 307.1 of the BCZR and therefore denied the variance?
4. Did the Board err when it found that the Department of Environmental Protection and Resource Management (DEPRM) failed to comply with 500.14?
5. Assuming DEPRM failed to comply with 500.14, did the Board apply the proper remedy?
6. Did the Petitioners follow the correct procedures in bringing § 417.3.C before the Zoning Commissioner?

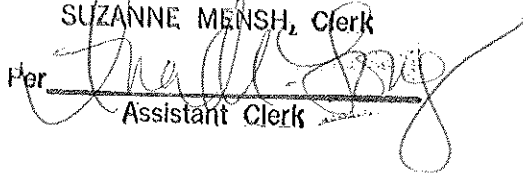
This Court declines to address these questions at this time, as the Court finds that the issue of res judicata is a threshold issue that precludes discussion of the questions presented for review, as framed by the Petitioners. In its opinion, the Board stated that it was “not totally rejecting the concept of res judicata with respect to Board decisions.” (Board opinion, pg. 6). The Board went on to note that a Petition for a Special Hearing could have been filed in the earlier case (Case No. 00-241-A), but was not filed. The Board then stated that it would “not abide by the strict rule of res judicata” and instead would “rule on the issues presented in the present case.” (Board opinion, pg. 6-7). However, res judicata applies to both the matters which were previously litigated and to those matters which should have been litigated. *Kim v. Council of Unit Owners for Collington Center III Condominium*, 180 Md. App. 606, 616. The Board did not offer any explanation as to why it declined to apply the doctrine of res judicata in this case, and therefore the Board did not find whether the issues presented in the instant case were or were not barred by res judicata.

Therefore, this case must return to the Board of Appeals in order for the Board to articulate factual findings and to make specific rulings as to whether the issues presented in the instant petitions are barred by the doctrine of res judicata.

CONCLUSION

Accordingly, on this 6th day of January, 2009, by the Circuit Court of Baltimore County, this matter is hereby **REMANDED** to the Office of Administrative Hearings for further proceedings consistent with this opinion.


THOMAS J. BOLLINGER, JUDGE

True Copy Test
SUZANNE MENSCH, Clerk
Per 
Assistant Clerk

8/21/08

IN THE PETITION OF HOWARD & MELANIE BECKER FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY

* IN THE
*
*
* CIRCUIT COURT

IN THE CASE OF HOWARD & MELANIE BECKER,
LEGAL OWNERS/PETITIONERS
FOR VARIANCE ON PROPERTY LOCATED ON THE
S/S BAYSIDE DRIVE, 75' E C/LINE WINONA AVENUE*
(403 BAYSIDE DRIVE)

FOR

12th Election District, 7th Councilmanic District

* BALTIMORE COUNTY

Case No. 06-651-SPHA
Before the County Board of Appeals

* Case No.: 03-C-08-004351

* * * * *

MEMORANDUM OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY

Introduction

This zoning case is about waterfront construction. The Baltimore County Zoning Regulations (BCZR) address waterfront construction to define and control boundaries, location, access, visual impact, and compatibility. BCZR § 417.3 sets ground rules for divisional boundaries extending from land boundaries into the water. BCZR § 417.4 works in tandem to set a minimum setback for waterfront construction of ten feet from each divisional line. This protects the access rights and view of nearby property owners. It also serves the public interest to minimize waterway congestion.

The BCZR Appendix and Zoning Policy Manual contain drawings on different shoreline configurations. Contentious issues tend to occur where the shoreline is irregular and concave. The divisional lines of properties on such shorelines converge toward each other. As a result, the space available for piers and boatlifts is more limited than on straight or convex shorelines. That is the situation in the present case, as the property owners seek permission for a pier extension and boatlift, which avoid or deviate from the basic rules.

This is the second time around for a zoning petition on this property. The history includes a previous petition denied in 2001. The questions presented involve, therefore, not just the implementation of waterfront construction law, BCZR § 417, and the application of variance standards, but also the threshold legal issue of *res judicata*.

Statement of the Case

On June 16, 2006, Petitioners Howard and Melanie Becker filed a BCZR § 500.7 “special hearing” petition to determine their right under BCZR § 417.3 to extend an existing 29-foot pier to 70 feet in length and to construct a boatlift 210 square feet (14’ x 15’) in size. The Beckers also filed a petition for a variance under BCZR § 417.4,

“To allow a pier and boatlift within 0 feet of the divisional line instead of the required 10 foot setback of the divisional line as established pursuant to Section 417.4 of the BCZR.”

On October 12, 2006, the Zoning Commissioner granted the special hearing and dismissed the variance as moot.

Upon a *de novo* appeal by Susan Hagerty, a neighboring property owner, the County Board of Appeals (CBA) conducted a *de novo* trial hearing in 2007 and reviewed post-trial memoranda. People’s Counsel participated in the proceedings. On February 21, 2008, the CBA convened for public deliberation to address five questions presented by the parties..

The CBA decided the petitions were not barred by *res judicata* and that there was sufficient public notice to confer jurisdiction. The CBA decided, however, that the petitions failed because there was no legal basis to alter the statutory waterfront divisional lines or boundaries; the evidence did not support the variances; and there was a failure to comply with specific BCZR § 500.14 statutory requirements for review by the Department of Environmental Protection of Chesapeake Bay Critical Area law standards. The CBA thereupon issued a March 8, 2008 written opinion and order denying the special hearing and variances. Petitioners thereupon filed a timely petition for judicial review.

Questions Presented

1. Are the petitions barred by the *res judicata* doctrine?
2. Is the content of the public notice legally sufficient?

3. Are the petitioners entitled to redraw the divisional lines under BCZR § 417.3; in any event, must waterfront construction still comply with the BCZR § 417.4 divisional line setback standards for whichever lines are drawn or redrawn?

4. Does the petition for variances meet the BCZR § 307.1 tests of uniqueness and resulting practical difficulty?

5. Is there compliance with the BCZR § 500.14 zoning requirements for petitions in the Chesapeake Bay Critical Area?

We pause to underline that upon a petition for judicial review, the respondent who is the prevailing party may address all issues, and “may argue as a ground for affirmance a matter that was resolved against it at trial,” Paolino v. McCormick & Co. 314 Md. 575, 579 (1989); Montrose Christian School v. Walsh 363 Md. 565, 578 n. 3 (2001); Harford County v. Saks Fifth Avenue 399 Md. 73, 89 n. 15 (2007). Here, these include the *res judicata* and public notice issues. The CBA could have and should have cited these as additional reasons to deny the petitions.

Relevant Baltimore County Zoning Regulations

There are included in the appendix: BCZR § 307.1, Variances; BCZR § 417, Waterfront Construction; Zoning Commissioner’s Policy Manual, BCZR § 417.3; BCZR § 500.7, Special Hearings; and BCZR § 500.14, Within the Chesapeake Bay Critical Area.

Statement of Facts

The Property

The waterfront property at 403 Bayside Drive is in the Dundalk area of southeastern Baltimore County. It is a typical residential waterfront lot, .13 acres in size, with frontage on Chink Creek of 24 feet. There is an existing pier 29 feet in length. There is no boatlift at present. As the CBA described it, on page 2 of its opinion,

“The property in question is a triangular-shaped waterfront parcel located on the south side of Bayside Drive, just east of Winona Avenue, with frontage on Chink Creek and near its confluence with Bear Creek in Dundalk. The property consists of two lots known as Lot 62 and Lot 63 of Inverness and contains a gross area of 0.13 acre +/- and is zoned D.R. 5.5. The property is presently improved with a two-story framed dwelling, an above-ground swimming pool and a detached accessory shed.”

As already noted, the shoreline is concave. With this geography, the frontage of the lot is so configured that the law restricts the area available for a pier and boatlift.

The Zoning History

The CBA provided this description of the zoning history, at pages 2-4,

"The property was the subject of a prior zoning case #00-241-A in which the previous owners, William R. Duvall, Jr., and his wife, Teresa A. Duvall, filed a Petition for Variance as set forth above. No request for special hearing was presented to the Zoning Commissioner at that time.

That case came before prior Zoning Commissioner Lawrence E. Schmidt, the attorney in the instant case, and the Protestants who appeared in that matter are the same Protestants in the matter before this Board. As noted in the prior Order issued by Commissioner Schmidt, the Duvalls had purchased the property from the Williams family in 1994 and replaced the pier that existed at that time in May or June of that year. Approximately 2 years later, the Duvalls installed a boatlift at the pier to provide out of water storage for their boat. At that time, the then-adjacent property owners, Mr. and Mrs. Thomas Kessler, had no objections to the pier and boatlift because they were in the process of selling their property. However, they filed a complaint on behalf of the subsequent property owner, Ms. Hagerty, and a violation notice was issued to the Duvalls, who were advised to file for variance relief. At the hearing in that matter, Ms. Hagerty stated that she had no objections to the pier itself but felt that the boatlift interfered with her access to the water. Then-Commissioner Schmidt granted the request to allow the existing pier and boat lift to remain by order dated April 19, 2000. He noted the unique configuration of the subject and adjacent lots, which tapered to a curved, crescent configuration along the shoreline, thereby limiting the area for pier development without variance relief. Protestants subsequently filed a timely appeal to the County Board of Appeals, and following public deliberation of the matter, the Board denied the variance and issued a final Opinion and Order along with a concurring /dissenting Opinion on June 6, 2001.

The Duvalls then filed a Motion for Reconsideration on July 5, 2001 and an accompanying Motion to Revise Order on July 17, 2001. The joint motion had been signed by the Duvalls, the Beckers, and their counsel, as well as Ms. Hagerty and her son, Mr. Mioduszeewski and their counsel. Within the joint motion, counsel for the Petitioners /Protestants noted that an agreement had been reached between the parties and a request was made that the Board reverse its Order in accordance with that agreement. The parties specifically agreed that the boatlift should be removed and that all of the pier, except for a pier extending 29 feet from the bulkhead with a 5-foot wide deck, would be permitted to remain on the property. The boatlift and pilings and the pier decking, except that agreed to above, had been removed. The Board considered the Motion at a public deliberation on July 26, 2001. Two members of the original panel were still on the Board, Charles L. Marks, the concurring /dissenting member, and Margaret Worrall, a member of the

Majority opinion. Donna Felling had 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. As stated in the decision on the Motion for Reconsideration:

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 and 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 a proposed Order as submitted is denied."

The new owners, Mr. and Mrs. Becker, now seek relief set forth above to remove a portion of the existing pier, approximately 20 feet, and run a short stretch of pier to the west and ultimately build a pier, which would stretch 58.4 feet along the western divisional line of the subject property adjacent to the Hagerty property. In addition, they propose to construct a boat lift, which would project at least 7 feet over the divisional line into Mrs. Kennell's property on the east side of the Petitioners' (Beckers) property. At the hearing, the Petitioner presented an affidavit from Mrs. Kennell that stated that she had no objections to the requested relief and supported Petitioners' proposed construction. The affidavit from Mrs. Kennell stated that she was 83 years old. She did not appear at the hearing to testify. The Board accepted the affidavit of Mrs. Kennell, as it usually does, and gave it the weight that it felt the affidavit deserved."

The Beckers' Site Plan; concave shorelines; divisional boundaries; minimum setbacks

~~Every zoning petitioner must file a site plan to accompany the petition. This is~~
essential to public notice. Kenneth Wells, a property surveyor, prepared the Beckers' site plan. It shows the concave shoreline at this location and the converging divisional boundaries drawn according to the BCZR § 417.3.B formula for irregular shorelines. The minimum 10-foot setback limits the area available for waterfront construction. Here, the proposed extension of the pier length to 70-feet runs right along the western divisional line, and the boatlift spanning 210 square feet crosses over the east side divisional line by seven feet. The actual setback, therefore, is as low as zero (0) feet on the west side and minus seven (-- 7) feet on the east side, instead of the minimum ten (10) feet.

The Hearing

The Beckers' Case: July 6 and November 7, 2007

On the first day, July 26, 2007, Wells was the Beckers' main witness. 53-202. He is a high school graduate, with a community college course in surveying technology. Despite his limited background, the CBA allowed him to testify on zoning issues because he had gone into the business of processing zoning petitions. His main effort was directed to justification of the zoning variances and a belated attempt to redraw divisional boundaries and to argue that this would preempt or negate the setback requirements. T. 53-91.

Wells produced not only the current site plan, but also a copy of the site plan filed in the 2001 Duvall case. He confirmed on cross-examination that the two plans showed the same 403 Bayside Drive property. T. I, 121-25. It came to light that the proposed boatlift actually extended seven feet across the Kennell divisional boundary, that the entire boatlift would encroach into the restricted area within ten feet of the Kennell divisional line, and that the proposed pier extension would straddle the Hagerty line.. T. I, 98-110. He confirmed the area of the boatlift as 210 square feet (15' x 14') but could not describe its height or capacity. T. I, 159-66. He admitted that the proposed boatlift would be much larger than the Hagertys' boatlift (85 square feet) and Kennell's boatlift (132 square feet). T. I, 167-68. It became apparent that the proposed location of the pier and boatlift would seriously impinge on and restrict the respective access and construction rights of the Hagertys and Kennell. T. I, 159-70.

Wells admitted that small waterfront lots on concave shorelines are necessarily restricted as area available for piers. T. I, 115-117. The subject property has a frontage of 24 feet. There are about 100 residential properties along Chink Creek. Wells had not surveyed them, but admitted that some have concave shorelines. T. I, 126-27.

Nevertheless, Mr. Wells opined again that a redrawing of divisional lines under BCZR § 417.3 should exempt the property owner from the BCZR § 417.4 setback requirements. T. I, 127-41. He cited the unwritten "latitude" of the zoning office. Yet, he could cite no language or legislative history to support his opinion. He also conceded there

was no exemption from any other subsection of BCZR § 417, such as the requirements for permits, for documents to be filed, and even for the maximum length of piers. The thrust of his selective opinion is that the Beckers should be able to avoid the crucial setback subsection.. The CBA ultimately rejected Mr. Wells' opinion.

On November 7, 2007, the Beckers called John Lewis, a planner in the county zoning office. T. II, 5-88. One day earlier, November 6, he had met with Wells and the Becker's attorney. He had informally reviewed Wells' *ex parte* proposal to redraw the divisional boundaries in zigzag fashion and legitimize the pier extension. T. II, 34-48 Over objections as to the irregularity of the limited *ex parte* review and modification of lines shown on the filed site plan, the CBA allowed Mr. Lewis to testify to a tentative or limited concurrence with Mr. Wells' new marked-up drawing. T. II, 21-34. Lewis had not reviewed the original petition and site plan, had not been to the property, and had not followed the BCZR § 417.3.C legislative procedures prerequisite to revision of divisional boundaries. Ironically, with the redrawn boundaries, it turned out that the pier and boatlift still encroached well into the minimum setbacks, running from zero to 1.5 feet for the most part.. T. II, 48-54. Lewis also suggested that by redrawing the divisional lines, a petitioner could override the minimum setback requirement; but he was unable to identify any statutory language to justify the virtual repeal of BCZR § 417.4. T. II, 54-69.

The *ex parte* recruitment of Lewis to buttress or salvage Mr. Wells' unsupported opinions turned out to be a smokescreen and tangled web procedurally, substantively, and factually. The CBA ultimately rejected the irregular attempts both to redraw the boundaries and to claim an exemption from BCZR § 417.4 setback standards.

Melanie Becker took the stand to explain why she wanted the extended pier and boatlift. T. II, 89-114. She said she intended to purchase a 30 to 35-foot boat, but provided no details about its type, height, or width, or about the expected use of the boatlift.. T.II, 109-10. She admitted that she was aware of the earlier Duval case when she negotiated and contracted to buy the property; that she was aware of the CBA's June 6, 2001 denial of the petition before she settled on July 9; and that she signed the July, 2001

joint motion to reconsider, which agreed to removal of the Duvals' illegally constructed boatlift and the shortening of the pier to 29 feet in length. T. II, 133-49. She admitted she received the CBA's August 7, 2001 order denying the motion for reconsideration, and that she did not appeal it/ T. II, 149-51. She stated that attorney Al Brennan represented her at the time of the motion, but that he no longer represented her when she received the decision shortly thereafter. As she put it, at T. 151,

"We had the attorney for when we filed for the reconsideration, and then we did not keep him on."

The only other witness for the Beckers was Matthew Turbutt, who lives in Bel Air, but owns and rents out a property located two properties away from the Becker property (not adjacent, but one property removed). He supported the Beckers. T. I, 38-52.

The Opposition's Case: November 7-8, 2007

Kevin Anderson, a professional engineer, showed how the proposed construction would conflict with the minimum setbacks and cross the divisional lines T. II, 170-79. Anderson visited the area by boat. He found that nearby properties at 315 and 317 Bayside Drive have similar concave shorelines, so there is nothing unique about the Becker property. T. II, 180-82. He also challenged the validity of Mr. Wells' attempt to revise and jog the lines of division. T. II, 183-85. In addition, he saw no reason to avoid or "negate" the minimum setback standard of BCZR § 417.4. He explained the importance of the setbacks for waterfront access, and then showed graphically that the Becker proposal would obstruct access to adjoining properties. T. II, 187-90.

More generally, Anderson confirmed that there are many concave shoreline areas along the rivers and creeks of southeastern Baltimore County. T. II, 190-91. As he said, "... there's nothing unusual about finding a concave shoreline as part of the waterfront" Ibid. He also underlined that divisional boundaries should follow the rules set in BCZR § 417.3.B and that relief might be available only if there is "some hardship and uniqueness." T. II, 192. He also observed "...that the proposed boatlift is bigger than any other boatlift shown on Mr. Wells' plat." T. II, 197.

On cross-examination, counsel tried to get Mr. Anderson to agree that the proposed pier and boatlift would "conflict with existing construction," so as to justify an alteration of the divisional lines; but Mr. Anderson replied that the question ignored an important part of BCZR § 417.3,

"The paragraph needs to be looked at in its entirety. It says the rules as set forth herein to cause the least interference with existing and/or possible future construction. You totally ignore the future construction." T. II, 207-08.

Mr. Anderson reiterated that no matter which divisional boundary is set, there would still must be the ten-foot access strip on each side. T. II, 219-22. He also explained again that the Becker is not unique because neighboring properties have the same condition and problem relating to concave shoreline geography. T. II, 222-23.

Michael Mieduszewski, a mechanical engineer technician and draftsman for the U.S. Coast Guard, is the son of protestant, Susan Hagerty. T. II, 22-23. He produced photographs to depict the immediate waterfront area. T. III, 24-33. The photos showed the proposed Becker pier would be directly in front of the Hagerty property and obstruct the view. T. III, 33-34. He also explained that the proposed construction would effectively landlock his mother's property. T. III, 43-44, 55-58.

He confirmed from experience that there are many residential waterfront properties with concave shorelines on Chink Creek and other area waterways. T. III, 41-43. He added that when the Beckers were considering whether to purchase the property, he had provided them information about the case then pending, and that they had stated their intent to buy the property even if there could be no pier. T. III, 38-39, 44-45.

Susan Hagerty, having resided at 405 Bayside Drive since 1999, explained that the proposed pier would effectively landlock her property, come within one or two feet of any potential boatlift or moored boat on the east side of her pier, and directly obstruct the view in front of her property. T. III, 67-70. If the Beckers were then to moor a boat with eight-foot beams to the west side of their proposed pier, her access would be totally blocked. Ibid. She added that the Beckers' proposal would devalue her property. T. III, 71-72.

JoAnn Burkhardt, of 311 Bayside Drive, stated her concern that approval here would set a precedent along this waterway, and would in particular allow her neighbor at 315 Bayside Drive to extend his pier T. II, 156-70. Like the Becker property, its shoreline is concave, so that extension of the pier would infringe on Ms. Burkhardt's area.

On November 8, 2007, Howard Becker testified as an adverse witness. Upon inquiry as to the scope of residential use at 403 Bayside Drive and as to the size, configuration, and location of any potential boat, the Beckers' attorney successfully objected. The CBA panel chairman similarly refused to allow questions regarding the specific use of the boatlift and the reasons for requesting such a large facility. T. III, 8-16. Mr. Becker eventually admitted that he hadn't even looked at a boat. He provided no information regarding his planned use of the boatlift, other than that it would be "for a boat." T. III, 14.

Argument

Scope of judicial review of agency decisions "Respecting the administrative function: factual inferences, judgment, and legal interpretation"

The County Charter assigns to the County Board of Appeals the responsibility to review *de novo* the DZC decision. This law treats the CBA hearing as the first hearing, as if the DZC decision were nonexistent. Boehm v. Anne Arundel County 54 Md. App. 497, 506-11 (1983); Hill v. Baltimore County 86 Md. App. 642 (1991); Pollard's Towing v. Berman's Body Frame & Mechanical 137 Md. App. 277, 288 (2001). Therefore, the Circuit Court must focus on the CBA decision, not the DZC decision.

The legislature has delegated broad authority to the CBA. This includes fact-finding, legal interpretation, and application of law to facts. Where the agency is acting rationally within the scope of its authority, the scope of judicial review is narrow and deferential. The courts respect the agency's function to hear, view, and assess evidence and also to employ specialized expertise to interpret its assigned field of law. Otherwise stated, the Court should reverse or remand only where there are clear errors of law.

For the review of factual findings, Judge Charles Moylan wrote in Riffin v. People's Counsel for Baltimore County, 137 Md. App. 90, 93-94 (2001),

"With regard to the standard of review to be applied in a case such as this, we explained in Stover v. Prince George's County, 132 Md. App. 373, 380-381 (2000), that:

"[w]hen reviewing a decision of the administrative agency, this Court's role is 'precisely the same as that of the circuit court.' 'Judicial review of administrative agency action is narrow. The court's task on review is *not* to substitute its judgment for the expertise of those persons who constitute the administrative agency.'"

"Rather, '[t]o the extent the issues on appeal turn on the correctness of an agency's findings of fact, such findings must be reviewed on the substantial evidence test.' The reviewing court's task is to determine 'whether there was substantial evidence before the administrative agency on the record as a whole to support its conclusions.' *The court cannot substitute its judgment for that of the agency, but instead must exercise a 'restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions.'* (Citations omitted; emphasis supplied)."

In Snowden v. Mayor and City Council of Baltimore, 224 Md. 443, 447-48 (1961) the Court of Appeals long ago explained the "substantial evidence" test,

"The substantial evidence test 'means that the reviewing court's inquiry is whether on the record the agency could reasonably make the finding' . . . Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . (Citation omitted).

The Court elaborated in Eger v. Stone, 253 Md. 533, 542 (1969):

"We have made it quite clear that if the issue before the administrative body is 'fairly debatable,' that is, that its determination involved testimony from which a reasonable man could come to different conclusions, the courts will not substitute their judgment for that of the administrative body, in the absence of an unconstitutional taking of property for public use without the payment of just compensation." [Citations omitted]

"This rule will be adhered to even if we were of the opinion that the administrative body came to a conclusion we probably would not have reached on the evidence. (Internal citations omitted)."

Judge Moylan again discussed the "substantial evidence" standard in Futoryan v. Mayor and City Council of Baltimore, 150 Md. App. 157, 177 (2003):

As to the quality of "substantial evidence," Judge Harrell had earlier described that quality in Friends of the Ridge v. Baltimore Gas and Electric Co., 120 Md. App. 444, 446, (1998), vacated in part, 352 Md. 645 (1999):

The substantial evidence standard applicable to the Board's findings of fact and resolution of mixed questions of law and fact, sometimes referred to as the "fairly

debatable" test, is implicated by our assessment of whether the record before the Board contained at least "a little more than a scintilla of evidence" to support the Board's scrutinized action. *If such substantial evidence exists*, even if we would not have reached the same conclusions as the Board based on all the evidence, *we must affirm*. Stated another way, *substantial evidence pushes the Board's decision into the unassailable realm of a judgment call, one for which we may not substitute our own exercise of discretion*. (Emphasis supplied)."

Judge Moylan also discussed the related "fairly debatable" standard,

"If there is some evidence pointing in each direction, the issue is, by definition, 'fairly debatable,' and the decision of the administrative agency, whichever way it goes, may not be reversed on judicial review as having been arbitrary or capricious." 150 Md. App. at 172.

In Snowden, *supra* at 448, Judge Hall Hammond, later Chief Judge, focused on the importance of factual inferences:

"The heart of the fact finding process is often the drawing of inferences from the facts. The administrative agency is the one to whom is committed the drawing of whatever inferences reasonably are to be drawn from the factual evidence. 'The Court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported.' The test is reasonableness not rightness."

Judge Cathell echoed Snowden in Marzullo v. Kahl, 366 Md. 158, 172 (2001), in reinstating the finding of the Board of Appeals,

"... A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. ... A reviewing court '"must review the agency's decision in the light most favorable to it; ... the agency's decision is *prima facie* correct and presumed valid, and ... it is the agency's province to resolve conflicting evidence" and to draw inferences from that evidence.' ... A reviewing court '"must review the agency's decision in the light most favorable to it; ... the agency's decision is *prima facie* correct and presumed valid, and ... it is the agency's province to resolve conflicting evidence" and to draw inferences from that evidence.' ... (Citations omitted).

It is Petitioners' duty both to produce evidence and persuade the decision-maker of the facts and law. Pollard's v. Bermans, 137 Md. App. 277, 289 (2001) instructed that it is virtually impossible to reverse an agency where the agency is simply not persuaded,

"In this case, all that was required was that the Board be not persuaded that there was a need for additional towing service. To the extent its finding was weightier than that, the incremental weight was surplusage. Far less is required to support a merely negative

instance of non-persuasion than is required to support an affirmative instance of actually being persuaded of something.”

“[I]t is far easier to sustain as not clearly erroneous the decisional phenomenon of not being persuaded than it is to sustain the very different decisional phenomenon of being persuaded . . . Mere non-persuasions . . . require nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard.” *Id.* 290 (citing Stark v. Stark, 134 Md. App. 663 (2000)) (*Italics in original*).

The deference due to agency determinations extends to legal interpretations and application of the law within the scope of the agency’s delegated field. Judge Eldridge clarified in Board of Physician Quality Assurance v. Banks, 354 Md. 59, 67 (1999),

“ . . . Despite some unfortunate language that has crept into a few of our opinions, a court’s task on review is *not* to “substitute its judgment for the expertise of those persons who constitute the administrative agency,” . . . Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency’s interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts . . . McCullough v. Wittner, 314 Md. 602, 612 (1989) (“The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight”). Furthermore, the expertise of the agency in its own field should be respected.” (citations omitted).

Judge Cathell cited Banks with approval in Marzullo v. Kahl, *supra* 366 Md. at 171. In Fosler v. Panoramic Design, Ltd., 376 Md. 118 (2003), Judge Eldridge cited Marzullo, *supra*, and other cases. He wrote:

“(When construing a statute intended to be administered by an administrative agency, courts normally give significant weight to an agency’s interpretation of the statute.)” 376-Md:118, at 136.

The deference accorded the agency relates here to the County Board of Appeals. The CBA is the agency entrusted ultimately with the interpretation of the zoning law. It is not bound to agree with or defer to zoning bureaucrats, especially when they make up the rules as they go along.

I. The *res judicata* doctrine precludes the present petitions, which are substantially similar to the petition denied by the CBA in 2001, both with respect to variance and divisional line relief requested; even if petitioners present new legal theories or arguments, these do not provide an escape from this doctrine, which applies to all claims made or which might have been made in the earlier case.

The case is barred by *res judicata*, the doctrine of preclusion, because this matter has been litigated to a conclusion and decided. The interest in finality precludes further litigation. The CBA's Duval decision bars the present petitions. Case No. 00-241-A, June 6, 2001.. PC Exh. 3. In denying the motion for reconsideration, the CBA made the June 6 Order the final order in the case. PC Exh. 4

The Duval case involved a petition for variance for waterfront construction at 403 Bayside Avenue, including a setback variance of 0 feet instead of 10 feet. The key CBA finding is that the property failed to satisfy the familiar BCZR § 307.1 "special circumstances or conditions exist that are peculiar to the land or structure" test ("uniqueness" in shorthand). Cromwell v. Ward 102 Md. App. 691 (1995). The CBA also found there was no practical difficulty and that the divisional lines should be drawn based on the standard method for irregular shorelines.

It is settled that *res judicata* applies to administrative proceedings. Batson v. Shiflett 325 Md. 684, 701-05 (1992). In zoning cases, the law does allow for consideration of a substantial change in the character of the neighborhood if it materially affects the relevant zoning issue.. Whittle v. Board of Zoning Appeals of Baltimore County 211 Md. 36 (1956); Mayor & City Council of Baltimore v. Linthicum 170 Md. 245 (1936); Bensel v. Mayor & City of Baltimore 203 Md. 506 (1954); Woodlawn Area Citizens Assoc. v. Board of County Comm'rs 241 Md. 187 (1966).

Res judicata applies to parties or their privies. Batson, supra. A successor owner is a privy. This applies in zoning cases, where the issue revolves around property use rather than the owner's identity. City of Baltimore v. Poe 224 Md. 428 (1961).

Res judicata bars litigation of the same matter with respect not only to the legal claims or issues decided in the case finally adjudicated, but also "as to all matters which

with propriety could have been litigated in the first suit.” Alvey v. Alvey 225 Md. 386, 390 (1961); MPC, Inc. v. Kenny 279 Md. 29, 32 (1977); DeLeon v. Slear 328 Md. 569, 580 (1992); Kim v. Council of Unit Owners of Collington Center II Condominium ___ Md. App. ___ (2008). A litigant must bring forward the entire case, including all relevant facts and legal issues. Otherwise, there would be a potentially infinite series of litigation based on different facts and legal theories to achieve the same objective.

The present case deals with the same property, shoreline, and D.R. (Density Residential) Zone addressed in Duvall. There is no material change in the character of the neighborhood, or any other new fact that would justify revival of the case.

The Beckers acquired the property from the Duvals and, as a matter of law, are their privies. They acquired it before the Duval litigation ended and became parties then. The situation would be no different legally if they had acquired the property later.

The proposed waterfront construction presents materially similar or more extreme requests with respect to location and size. There is still a request for zero (0) feet deviation from the BCZR § 417.4 required minimum setback of ten (10) feet from the divisional line. The site plan, Pet. Exh. 2, shows the Beckers’ proposed pier to be large as the Duvalls’ pier depicted in the 2001 Dallas site plan, Prot. Exh. 1. The new pier would be up against the divisional line boundary with the Hagerty area. Moreover, the Beckers’ boatlift (15’ x 14’) would be twice the size of the Duvals’ boatlift.

The CBA had determined in the Duval case that the property lacked the requisite “uniqueness” for the purpose of BCZR § 307.1. The CBA majority wrote, at page 8,

“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 the 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 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.”

There is no material change in the area here which would justify a different conclusion. The Duval CBA found also that there was no practical difficulty, concluding at page 8,

“Any practical difficulty or unreasonable hardship is self-created.”

The Duval CBA had addressed, in addition, the issue of divisional lines, drawn according to the BCZR § 417.3.B method for irregular shorelines (see Prot. Exh. 1). The only dispute related to the location of mean low water line. There was no attempt to specify alternative divisional lines. The CBA wrote, at page 9,

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

Significantly, the *res judicata* doctrine also bars new litigation based on facts or legal argument which might have been presented in the earlier litigation. So, even if the Beckers’ request to establish alternative divisional lines under BCZR § 417.3 is characterized as a new claim or legal theory, *res judicata* would still bar its assertion now. It should be repeated, however, that the June 6, 2001 CBA decision did address the divisional lines and held them to be properly established in accordance with the BCZR § 417.3.B method for irregular shorelines.

The present CBA declined, however, to apply *res judicata*. It wrote at pages 6-7,

“~~the Duval~~ Board in its Ruling on Motion for Reconsideration... ‘leaves the door open’ for further requests for a new variance application when it stated: ‘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 modification’s already in place could resolve these issues.’

“The Board recognizes that a Petition for Special Hearing could have been filed in Case No. 00-241-A; however, it was not. Therefore the Board will not abide by the strict rule of *res judicata* in this matter but will rule on the issue presented in the present case. That is not to say that the Board does not recognize the decision in Case No. 00-241A, that the property is not unique within the meaning of § 307.1 of the BCZR.”

There are several errors in the present CBA's ruling here. First of all, the comment which appears to "leave the door open" was made in reference to a July 17, 2001 joint motion in which the Duvalls and Beckers both proposed the removal of the Duvals' pier, 70 feet in length, and boatlift, about 100 square feet in area in return for Hagerty's consent to a pier 29 feet in length and any modest variance associated with that. The CBA never suggested that it might be proper for the Beckers to come back with a pier of the length just denied, or any boatlift, not to mention a boatlift twice the size of the boatlift removed. Its comment is not leverage for an open-ended relitigation of the case.

Secondly, the CBA's suggestion of a potential future variance request was a "side remark" and manifest *dictum*. It has no legal force. See Bryan v. State Roads Comm'n 115 Md. App. 707, 712-13 (1997) *aff'd* 356 Md. 4 (1999). It did not alter the holding that the property lacked uniqueness, that there was no legal difficulty, and that the divisional lines should follow the standard method for irregular shorelines. The CBA denied the Motion. Here is what the CBA wrote in its final binding Order of August 7, 2001,

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

ORDERED that, having granted Petitioner's request to reconsider this matter, the Joint Motion to Review 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."

There was no appeal of this final order. It became final for the purpose of *res judicata*.

The present CBA's further comment that a petition for special hearing could have been filed in the earlier case is also misses the point. As we have seen, the *res judicata* doctrine applies not only to matters which were litigated, but also to those which could with propriety have been litigated.

For all these reasons, the present CBA erred insofar as it declined to decide that the *res judicata* doctrine precludes the present case. It should end right here.

II. The CBA lacked jurisdiction over the present petitions because the public notice was insufficient; there was no notice that the proposed boatlift crosses 7 feet over the divisional line; there was also no notice of a specific alternative proposed divisional line or any proposed determination by the Office of Planning and Zoning; the way in which the zoning office staff member expressed a preference for an alternative divisional line was fundamentally unfair and conflicted with procedural due process of law; as a result, the CBA lacked jurisdiction.

The Petition for Variance describes the variance request as involving a setback of zero (0) feet instead of the minimum ten (10) feet from the divisional line. Although the petition also requests an alteration of the divisional line, the site plan shows only the divisional line drawn according to the rule of BCZR §417.3.B. There is no alternate divisional line in the site plan. The public notice tracks the language in the petition.

Yet, on the first hearing day, July 26, 2007, as we have seen, Mr. Wells confirmed the proposed boatlift crosses over the BCZR § 417.3.B divisional line bounding the waterway to the east, encroaching seven (7) feet across into the neighboring area.

Beckers' counsel argued that zero (0) feet is the most one can say to describe the requested setback variance, and that this is the zoning office's practice. We disagree with this view. The divisional lines are functionally equivalent to extension of land boundaries. As with any boundary, there can occur an encroachment across the divisional line. This brings into play the mathematics of negative numbers. The correct way to describe the requested variance is for a setback of minus seven (--7) feet instead of ten (10) feet and/or that the request crosses the division line boundary and extends seven (7) feet into the adjacent area. The Becker petition failed to provide an accurate description.

The notice is thus defective. To illustrate, a petitioner could not petition for a setback of eight (8) feet instead of ten (10) feet and yet submit a site plan showing an actual setback of one (1) foot. There would be a major discrepancy of seven (7) feet. The situation is fundamentally similar here, but with the involvement of negative numbers.

There are additional notice problems relating to the testimony of John Lewis. He tentatively supported a proposal to draw alternative divisional boundaries presented to him in the *ex parte* meeting with Mr. Wells and counsel. There was no notice of this proposal to

anyone else. If a petitioner requests an alteration of a divisional line, then it is necessary to show the proposed alteration on the site plan, and not leave it up in the air until the hearing. This is especially true because BCZR § 417.3.C places the responsibility, at least in the first instance, on the Office of Planning and Zoning (OPZ). Here, there was no notice of any specific proposed alteration, no notice of any OPZ review, and no written comment from either the Zoning Supervisor or the Planning Director. On top of that, the entire procedure and timing involving Mr. Lewis was so one-sided, superficial and unfair as to violate procedural due process of law.

The CBA lacks jurisdiction if notice is defective. *Cassidy v. County Board of Appeals of Baltimore County* 218 Md. 418 (1958). Anderson's American Law of Zoning 4th (1997), Sec. 22.21 provide some helpful observations about the adequacy of notice,

"A notice is not adequate if it does not reasonably apprise the public of the premises which are involved in the matter to be heard. Thus, a notice which refers to an application for a variance relating to lot 52 will not support a decision granting a variance in the use of lots 52 and 165. Similarly, a notice which specifies only one lot, although the building for which a variance is sought is located on two lots, is ineffective. A notice is adequate where it refers to the assessor's lots, and effectively names and locates each lot involved."

Moreover, the appearance of neighbors in person or by affidavit does not cure a defect in public notice. So, neither the challenge by Susan Hagerty, nor the conclusory affidavit of Margaret Kennell are substitutes. The main thing is that proper notice is required for the public in general. Other community associations and property owners along the waterfront at Chink Creek, as well as citizens along other county bay and river area waterfronts, may be concerned and alarmed at the broader implications of a request to cross a waterway divisional line and to move divisional lines around without a specific description but rather the stroke of informal acquiescence by the zoning staff.

The CBA accepted the zoning office's supposed practice to stop at zero and not make any provision to describe the crossing of the divisional line. The opinion concluded,

"The Board finds that the notification was sufficient in compliance with the BCZR." Page 7.

We submit nevertheless that the zoning office practice and CBA's acceptance of it are insufficient as a matter of law.

At the same time, the CBA agreed with our position that the Beckers had failed to follow the proper procedures for submission of proposed alternative divisional boundaries. The CBA discussed this subject at pages 7-12 of its opinion, and wrote at pages 11-12,

"Section 417.3.C is clear with respect to the duty of the Office of Planning and Zoning. If that office has been abolished or revised, there should be some procedure for the application of § 417.3.C. The Board contends that the Director of the Office of Planning should perform the duties set forth in § 417.3.C and specify the limits of construction to "conform as closely as possible to the rules as set forth herein so as to cause the least interference with existing and/or possible future construction." The Office of Planning should review the Petitions and plans submitted in support thereof to determine whether or not appropriate divisional lines have been drawn and to revise those divisional lines if necessary to cause the least interference with existing or possible future construction. Notice of the proposed construction should then be given by DEPRM to adjoining property owners affected. This was not done in this case. No notice was given to either property owner until the Petition was filed. In any event, the property owners had no notice of the revised divisional lines approved by the Office of Planning on November 6 until the next day at the hearing on November 7, 2007. Thus, the Petitioner has filed [failed] to comply with § 417.3.C of the BCZR."

Plainly, a property owner cannot bypass the procedures which begin with the Planning Director. The CBA properly added,

"As set forth above, the Board finds that § 417.3 applies in this matter and that the Petitioner has failed to flow the requirements of § 417.3.C. The divisional lines as proposed by Petitioner will not be approved by this Board."

III. Because the proposed waterfront construction does not satisfy the BCZR § 417.4 10-foot minimum setbacks from divisional lines, drawn either way, the property owners must satisfy the BCZR § 307.1 test for variances.

The CBA further correctly concluded, on page 12,

"Even if it were found that the divisional lines met the requirements of § 417.3.C, the Petitioner, in the opinion of this Board, must still meet the variance requirements in order to obtain a variance from § 417.4 of the BCZR. This requires a 10-foot setback from the divisional lines."

The Beckers asserted that satisfaction of BCZR § 417.3 negates the requirement to satisfy the BCZR § 417.4 minimum setback from the divisional line. Kenneth Wells opined that BCZR 417.3 provides "latitude." He said essentially that BCZR § 417.4 doesn't count if a proposal passes under BCZR §. 417.3. John Lewis echoed Mr. Wells' sentiment when he expressed a preference for the newly manufactured divisional lines shown to him first on November 6 and then again on November 7 at the hearing. He believed that the redrawing of divisional lines eliminated the need to satisfy the minimum setback standard. This would excuse Petitioners from compliance with BCZR § 417.4 if the divisional lines drawn by Mr. Wells and "preferred" by Mr. Lewis were selected.

But the opinions of Mr. Wells and Mr. Lewis conflict with the plain language and purpose of the law. It is basic that "... the language of a statute must be viewed as a whole, with reference to the surrounding provisions of a statute." Department of Human Resources v. Howard 397 Md. 353, 362 (2007). It is important to "... construe the statute as a whole so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory." The goal also is to avoid any "unreasonable, illogical or inconsistent interpretation" 392 Md. 301, Mayor & Town Council of Oakland v. Mayor & Town Council of Mountain Park 316 (2006); Department of Health v. Kelly 397 Md. 399, 420 (2007).

BCZR § 417, entitled "Waterfront Construction," is included as PC Exh. 1. It begins with the statement in BCZR § 417.1,

"All waterfront construction, such as piers, wharves, docks, bulkheads, or other work extended into navigable waters beyond mean low tide as prescribed in Baltimore County Design Manual shall be governed by these regulations as well as by Sec. 33-2-801 of the Baltimore County Code, except that nothing in these regulations shall apply to the M.H. Zone and to the extension of industrial waterfront facilities to the limit of Corps of Engineers' established pierhead or bulkhead lines."

There then follow BCZR §§ 417.2 to 417.8. They all apply, without exception, other than to the M.H. Zone and industrial waterfront facilities. To understand the law of waterfront construction, it is necessary to review the entire section.

BCZR § 417.2 requires that applications for waterfront construction be accompanied by a plot diagram showing outlines of the property in question and adjoining property, existing and proposed waterfront construction and, where required by the Buildings Engineer, a plan prepared by a professional engineer or surveyor. BCZR § 417.3A-C sets forth the rules for “defining boundaries within which waterfront construction shall take place;” and states, “divisional lines shall be established in accordance with the following rules: BCZR § 417.3A for “straight shore lines,” BCZR § 417.3B for “irregular shorelines,” and BCZR § 417.3C for “Conflict with existing construction.” BCZR § 417.4 sets the crucial requirement that,

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

BCZR § 417.5 begins,

“Any structure built beyond mean low tide must be contained within construction offsets as prescribed. In addition to meeting these requirements, the structure must not extend beyond any of the following limits:

- A. Three hundred feet beyond mean low tide.
- B. In the absence of a definable channel, not more than 1/3 the width of waterway.
- C. Not beyond the near boundary of a definable channel.

BCZR § 417.6 requires waterfront construction to satisfy regulations and requirements of the Department of Health. BCZR §. 417.7 sets standards for out-of-water storage facilities. BCZR §. 417.8 requires that all waterfront construction to comply with County Code provisions governing water-dependent facilities, water-dependent structures, non-water-dependent structures and shore erosion protection works, as well as BCZR § 103.5.

The bottom line is that BCZR § 417.4 applies to whichever “divisional lines” are “established.” Here, the proposed pier and boatlift conflict with the setback requirements with respect to either of the suggested divisional lines. Mr. Lewis confirmed that the proposed pier and boatlift virtually straddle any of the divisional lines drawn by Mr. Wells.

Petitioners' site plan, Pet. Exh. 2, shows the concave irregular shoreline and divisional lines drawn by the method prescribed by BCZR § 417.3B for irregular shorelines, as in Diagram #3 in the Zoning Commissioner's Policy Manual. Page 4-82.1. Mr. Wells drew his alternative lines in magic marker on Pet. Exh. 5. Either way, the proposed waterfront construction clearly conflicts with the setback standards.

For the purpose of future guidance, in our view, there is no real conflict with existing construction, i.e. predating BCZR § 417, which would warrant any alteration in the drawing of the divisional lines. Therefore, BCZR § 417.3C does not apply in this case. There is no need to depart from the rule established for the placement of divisional lines relating to the irregular shoreline. As a matter of law, the divisional lines shown on the original site plan should not be altered here.

Even were there a reason to consider alteration, it is apparent that Mr. Wells produced gerrymandered divisional lines solely to squeeze disproportionate waterfront construction into a severely constrained waterfront area.

IV. The evidence is legally insufficient to support the variance.

A. In the context of BCZR § 417, the site is not unique because it is one of many existing small lots on concave shorelines along the Baltimore County waterfront; with properties such as this, because of their size and location, there is simply not enough room for a pier and boatlift of the length and size available to larger properties on straight or convex shorelines; this is thus a problem typical of small lots on concave shorelines, which property owners must accept.

Once again, the Beckers' proposed pier straddles the divisional line bordering the Hagerty area. Their proposed boatlift crosses over the divisional line bordering the Kennell area. It also fails to meet the setbacks for their proposed alternative divisional lines. This construction thus deviates severely from the BCZR § 417.4 divisional setback and access standards on both sides. To qualify for setback variances, an applicant must satisfy BCZR § 307.1 standards. This requires proof of a property's "uniqueness" and resulting practical difficulty. The evidence here plainly fails to satisfy this standard.

A concave shoreline is not unusual. BCZR §. 417.3 reflects that shorelines fall into two basic categories: straight and irregular. Irregular shorelines are either convex or concave. The diagrams in the Policy Manual illustrate the alternatives. Diagram 3, the concave shoreline, illustrates the situation in the present case.

Mr. Wells, limited his examination to the subject property and two adjoining properties. He did not survey other properties along Chink Creek or Bear Creek. He admitted that there are straight, convex and concave shorelines generally along the waterfront. The aerial photos and the ADC highway map excerpt reflect the frequent occurrence of concave shorelines along area rivers and creeks.

So, based on the law and the facts, there is nothing unique about the Beckers' irregular shoreline. To be sure, a concave shoreline on a small or moderate size lot has a more constrained area for waterfront construction. Where there is a concave shoreline, the divisional lines typically extend across the waterway in an inward direction. This naturally limits the potential area in comparison with straight or convex shorelines. The essential point is that environmental constraints in waterfront areas, which restrict many properties, are not unique and do not justify the approval of a variance. Chester Haven Beach Partnership. v. Board of Appeals for Queen Anne's County 103 Md. App. 324 (1995).

Petitioners suggested that because their property is not exactly like any of the other properties in the area, that it is "one of a kind," and therefore unique. This is Orwellian doubletalk. To the extent that there are slight differences in shape and size between otherwise similarly situated properties, it might be said that every property is "unique." This is often said with regard to purchase and sale of properties. From the point of view of zoning, however, the uniqueness must be significant and must result in practical difficulty peculiar to that property. In this context, there is nothing unusual about an irregular, concave shoreline. Indeed, BCZR § 417 explicitly categorizes and controls such areas. One of the principal functions of the law is to preserve divisional line setbacks and to set limits to waterfront construction in such areas.

The CBA discussed the issue of uniqueness at pages 12-15 of its opinion. The CBA found that the property is not unique. It confirmed the finding made previously in its 2001 opinion. The CBA understood that the "uniqueness" standard, for zoning purposes, does not focus on every trivial characteristic of a property which may be different from that of other properties. The CBA thus rejected the Beckers' "one of a kind" argument as a kind of lawyer's play on words. The CBA explained, on Page 15,

"The Board finds that Mr. Anderson's testimony with respect to uniqueness supports a finding that the property of the Petitioners' is not unique within the meaning of *Cromwell v. Ward*, 102 Md.App. 691 (1995). It is an accepted fact that there may be some different characteristic in each piece of property that, when magnified, could determine the property to be "unique." However, under the requirements of *Cromwell v. Ward*, this property is not any more unique than other properties in the area, even in addition to 317 and 315 Bayside Drive. Many of the properties are on a concave shoreline. The difference between the allowance of the construction of a 12-foot pier, a 13-foot pier, and a 20-foot pier without having to request a variance is miniscule when comparing the uniqueness of properties. Therefore, the Board adopts the finding of the Board in Case No. 00-241-A as to failure to meet the uniqueness standard."

B. There is no practical difficulty. Petitioners were aware of the limitations of the property when they bought it; they have available to them the use of their home, and other waterfront amenities such as recreation, fishing, and small boat launching; it would undermine the intent of the law to allow a long pier and remarkably large boatlift without the legally required divisional line access setbacks.

Having found a failure to prove uniqueness, the CBA found it unnecessary to discuss in depth the subject of practical difficulty. The CBA observed, however,

"... [the Beckers] were well aware of the limitations of the property when they bought it. In fact, they made an agreement with Protestants Hagerty to reduce the size of the pier constructed by the Duvalls to a pier that is 29 feet long." Page 15.

There is simply no evidence of practical difficulty, based on the criteria enumerated in McLean v. Soley 270 Md. 208, 213-14 (1973). Where a waterfront property has a concave shoreline, a property owner is on notice of the inevitable waterway constraints. There is no reasonable expectation that the property will accommodate a long pier and a large boatlift close to the neighboring area. This is particularly true here, where the Beckers had the property under contract at the time the CBA denied the Duval request in

2001. Indeed, the concave shoreline is a factor that may reasonably be taken into account in the negotiation of the purchase price.

Under these circumstances, disallowance of a pier extension and boatlift is not an unreasonable denial of a permitted use where both proposed uses conflict in a major way with the statutory setback and access requirements. The Beckers' request for a disproportionately large pier and boatlift in a confined area does not do justice to area property owners, regardless of the claim of lack of opposition from Ms. Kennell. The approval would set a precedent not only for allowance of substantial encroachments, but also the proliferation of larger boats with major adverse congestion and visual impacts.

The proposal also subverts the legislative intent in an unprecedented way. The combination of a zero (0) foot setback, and (effectively) a minus seven (-7) foot setback is so extreme as to be unacceptable on its face. The proposed size of the boatlift, about twice the size (or more) of any other area boatlift, is also extreme. Again, It sets an unacceptable precedent for Chink Creek and other waterways.

It is telling that the Beckers agreed in writing at the conclusion of the 2001 case to remove the then existing 70-foot pier and smaller boatlift and to restrict construction to a pier 29 feet long, which in fact remains. This further negates their claim of practical difficulty. If the Beckers had stuck to their agreement, there would not be this litigation. Instead, they have done an about face and come back with this incongruous request.

V. There is a failure to meet the BCZR § 500.14 statutory requirement for findings by the Department of Environmental Protection and Resource Management (DEPRM) with respect to minimization of adverse environmental impacts; conservation of fish, wildlife, and plant habitat; and consistency with Chesapeake Bay Critical Area (CBCA) land use policies. The DEPRM comment submitted in evidence does not satisfy these criteria.

There is a failure to comply with BCZR § 500.14, which requires specific written DEPRM findings to be sent to the Zoning Commissioner for zoning petitions within the Chesapeake Bay Critical Area (CBCA). The September 21, 2006 DEPRM comment on file shows that this property is in the CBCA. But it does not include the required findings. PC

Exh. 6. The Beckers argued they were excused from BCZR § 500.14 when the case was appealed to the CBA, and so no longer before the "Zoning Commissioner." That is a false premise. If that were true, the CBA could not address special hearings, special exceptions and variances, which BCZR §§ 500.7, 502.1 and 307.1 assign to the Zoning Commissioner. The CBA necessarily applies all zoning laws addressed to the Commissioner as part of its *de novo* appellate review function.

The CBA had already upheld this requirement in Shaneybrook/Basso, No. 00-139-X, dated July 16, 2001. Circuit Court Judge Lawrence Daniels affirmed in Case No. 3-C-01-8460, February 18, 2002. Both decisions were attached to our CBA memorandum.

There is no genuine dispute that the aforementioned DEPRM comment is insufficient. The CBA correctly analyzed the issue at pages 16-17 of its opinion,

"The Board finds that DEPRM did not meet its obligations under § 500.14. While it is true that the Petitioner cannot force DEPRM to make any findings under § 500.14, the Petitioner could certainly have requested DEPRM to make such findings in order to comply with the law as written. The County Council has passed § 500.14 of the BCZR and the Board will enforce that section until such time as the Council repeals it. If a Petitioner has requested the review by DEPRM under § 500.14 and DEPRM refuses to make a recommendation, then the Board will deal with that situation when it arises. Until that point, the Board will require the recommendations of DEPRM under § 500.14. The Board rejects the argument that § 500.14 only applies to decisions before the Zoning Commissioner. The Board adopts the contention of People's Counsel on this issue."

Conclusion

For the above reasons, the Circuit Court should affirm the County Board of Appeals' March 8, 2008 Order denying the petitions for special hearing and variances.

Peter Max Zimmerman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of August, 2008, a copy of the foregoing Memorandum of People's Counsel for Baltimore County was mailed to Edward C. Covahey, Jr, Esquire, Covahey, Boozer, Devan & Dore, P.A., 614 Bosley Avenue, Towson, MD 21204 attorney for Susan Hagerty, and Lawrence E. Schmidt, Esquire, Gildea & Schmidt LLC, 600 Washington Avenue, Suite 200, Towson, MD 21204, Attorney for Petitioners.

Peter Max Zimmerman

PETER MAX ZIMMERMAN

People's Counsel for Baltimore County

IN THE MATTER OF	*	BEFORE THE
THE APPLICATION OF	*	COUNTY BOARD OF APPEALS
<u>HOWARD AND MELANIE BECKER</u> –LEGAL	*	OF
OWNERS /PETITIONERS	*	BALTIMORE COUNTY
FOR SPECIAL HEARING AND VARIANCE	*	Case No. 06-651-SPHA
ON PROPERTY LOCATED AT 403 BAYSIDE		
DRIVE 12 TH ELECTION DISTRICT		
7 TH COUNCILMANIC DISTRICT		

* * * * *

OPINION

This matter is before the Board on an appeal from the decision of the Zoning Commissioner dated October 12, 2006 in which the Zoning Commissioner granted a special hearing to construct an extension of an existing pier and a proposed boat lift, finding that it complied with § 417.3.C of the *Baltimore County Zoning Regulations* (BCZR), and further ordering that the Petition for Variance seeking relief from § 417.4 of the BCZR to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 feet was dismissed as moot.

A hearing was held before the Board on July 26, 2007, and November 7 and 8, 2007. Petitioners Howard and Melanie Becker were represented by Lawrence E. Schmidt, Esquire. Protestant, Susan Hagerty, was represented by Edward C. Covahey, Jr., Esquire. Peter Max Zimmerman, People's Counsel for Baltimore County, also participated in the matter. The parties submitted post-hearing memoranda on January 31, 2008. A public deliberation was held on February 21, 2008.

Background

The facts with respect to the background of this matter were succinctly set forth in the decision of the Zoning Commissioner.

The property in question is a triangular-shaped waterfront parcel located on the south side of Bayside Drive, just east of Winona Avenue, with frontage on Chink Creek and near its confluence with Bear Creek in Dundalk. The property consists of two lots known as Lot 62 and Lot 63 of Inverness and contains a gross area of 0.13 acre +/- and is zoned D.R. 5.5. The property is presently improved with a two-story framed dwelling, an above-ground swimming pool and a detached accessory shed.

The property was the subject of a prior zoning case #00-241-A in which the previous owners, William R. Duvall, Jr., and his wife, Teresa A. Duvall, filed a Petition for Variance as set forth above. No request for special hearing was presented to the Zoning Commissioner at that time.

That case came before prior Zoning Commissioner Lawrence E. Schmidt, the attorney in the instant case, and the Protestants who appeared in that matter are the same Protestants in the matter before this Board. As noted in the prior Order issued by Commissioner Schmidt, the Duvalls had purchased the property from the Williams family in 1994 and replaced the pier that existed at that time in May or June of that year. Approximately 2 years later, the Duvalls installed a boatlift at the pier to provide out of water storage for their boat. At that time, the then-adjacent property owners, Mr. and Mrs. Thomas Kessler, had no objections to the pier and boatlift because they were in the process of selling their property. However, they filed a complaint on behalf of the subsequent property owner, Ms. Hagerty, and a violation notice was issued to the Duvalls, who were advised to file for variance relief. At the hearing in that matter, Ms. Hagerty stated that she had no objections to the pier itself but felt that the boatlift interfered with her access to the water. Then-Commissioner Schmidt granted the request to allow the existing pier and boat lift to remain by order dated April 19, 2000. He noted the unique

configuration of the subject and adjacent lots, which tapered to a curved, crescent configuration along the shoreline, thereby limiting the area for pier development without variance relief.

Protestants subsequently filed a timely appeal to the County Board of Appeals, and following public deliberation of the matter, the Board denied the variance and issued a final Opinion and Order along with a concurring /dissenting Opinion on June 6, 2001.

The Duvalls then filed a Motion for Reconsideration on July 5, 2001 and an accompanying Motion to Revise Order on July 17, 2001. The joint motion had been signed by the Duvalls, the Beckers, and their counsel, as well as Ms. Hagerty and her son, Mr. Mioduszewski and their counsel. Within the joint motion, counsel for the Petitioners /Protestants noted that an agreement had been reached between the parties and a request was made that the Board reverse its Order in accordance with that agreement. The parties specifically agreed that the boatlift should be removed and that all of the pier, except for a pier extending 29 feet from the bulkhead with a 5-foot wide deck, would be permitted to remain on the property. The boatlift and pilings and the pier decking, except that agreed to above, had been removed. The Board considered the Motion at a public deliberation on July 26, 2001. Two members of the original panel were still on the Board, Charles L. Marks, the concurring /dissenting member, and Margaret Worrall, a member of the Majority opinion. Donna Felling had 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. As stated in the decision on the Motion for Reconsideration:

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 and 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 a proposed Order as submitted is denied."

The new owners, Mr. and Mrs. Becker, now seek relief set forth above to remove a portion of the existing pier, approximately 20 feet, and run a short stretch of pier to the west and ultimately build a pier, which would stretch 58.4 feet along the western divisional line of the subject property adjacent to the Hagerty property. In addition, they propose to construct a boat lift, which would project at least 7 feet over the divisional line into Mrs. Kennell's property on the east side of the Petitioners' (Beckers) property. At the hearing, the Petitioner presented an affidavit from Mrs. Kennell that stated that she had no objections to the requested relief and supported Petitioners' proposed construction. The affidavit from Mrs. Kennell stated that she was 83 years old. She did not appear at the hearing to testify. The Board accepted the affidavit of Mrs. Kennell, as it usually does, and gave it the weight that it felt the affidavit deserved.

Issues

People's Counsel in its memorandum has set forth the issues considered by the Board.

They are as follows:

- I. The *res judicata* doctrine precludes the present petitions which are substantially similar to the petition denied by the CBA in 2001, both respect to variance and divisional line relief requested; even if Petitioners present new legal theories or arguments, these do not provide an escape from this doctrine, which applies to all claims or which might have been made in the earlier case.

- II. A. The CBA lacks jurisdiction over the present petitions because the public notice was insufficient; there was no notice that the proposed boatlift crosses 7 feet over the divisional line.

B. There was also no notice of a specific alternative proposed divisional line or any proposed determination by the Office of Planning and Zoning; the way in which the Zoning Office staff member expressed a preference for an alternative divisional line was fundamentally unfair and conflicted with procedural due process of law; as a result, the CBA lacks jurisdiction.
- III. Determination of divisional lines under BCZR § 417.3.B or 417.3.C; however drawn, the proposed waterfront construction does not satisfy BCZR § 417.4, minimum setback from the divisional lines.
 - A. BCZR § 417.3.B rules for divisional lines for irregular shorelines control this case; BCZR § 417.3.C does not apply here; in either case, whether or not BCZR 417.3.B or BCZR 417.3.C may apply to determine divisional lines, the BCZR § 417.4, divisional line setback and access standards, still govern proposed waterfront construction.
 - B. Because the proposed waterfront construction does not satisfy the BCZR 417.4 minimum setbacks from divisional lines, drawn either way, the property owners must meet the BCZR § 307.1 test for variances.
- IV. The evidence is legally insufficient to support the variance.
 - A. In the context of BCZR § 417, the property is not unique because it is one of many existing small lots on concave shorelines along the Baltimore County waterfront;

B. The effect of such properties, because of their size and location, that there is simply not enough room for a pier and boatlift of the length and size available to larger properties on straight or convex shorelines. Nor is there practical difficulty.

V. There is a failure to meet BCZR § 500.14 statutory requirement for findings by the Department of Environmental Protection and Resource Management (DEPRM) with respect to minimization of adverse environmental impacts; conservation of fish, wildlife and plant habitat; and consistency with the Chesapeake Bay Critical Area (CBCA) land use policies in the construction of the proposed pier.

Decision

Rather than review all of the testimony and evidence and apply that to the above issues, the Board will review each issue and set forth its reasons based upon the testimony and evidence which were presented during the hearings.

1. The issue of *res judicata*.

While the Board is not totally rejecting the concept of *res judicata* with respect to Board decisions, the Board feels that each case must be evaluated on its own merits. In Case No. 00-241-A, the Board in its Ruling on Motion for Reconsideration and Joint Motion to Revise Its Order “leaves the door open” for further requests for a new variance application when it stated: “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.”

The Board recognizes that a Petition for Special Hearing could have been filed in Case No. 00-241-A; however, it was not. Therefore, the Board will not abide by the strict rule of *res*

judicata in this matter but will rule on the issues presented in the present case. That is not to say that the Board does not recognize the decision in Case No. 00-241-A, that the property is not unique within the meaning of § 307.1 of the BCZR.

Issue No. 2. A. The Board lacks jurisdiction over the present Petitions because the public notice was insufficient because there was no notice that the proposed boatlift crosses 7 feet over the divisional line.

B. The Board lacks jurisdiction because there was no notice of a specific alternative proposed divisional line or any proposed determination by the Office of Planning and Zoning given to the adjoining property owners as required by § 417.3.C.

A. In its plan submitted with its Petition, Petitioners proposed a 0' setback on the east side of where the proposed boatlift for the Petitioners pier was to be constructed. In fact, the proposed boatlift would extend 7 feet past the divisional line into the property line of next-door neighbor Kennell. Petitioners applied for a 0' setback rather than a negative -7' setback. The argument made by Petitioner through its surveyor, Kenneth Wells, and through Mr. John Lewis, a Planner II in the Baltimore County zoning review section was that they have never seen a Petition with a negative setback set forth. The only setback that can be shown is a 0' setback from the divisional line, even in the event of an extension of the property into a neighbor's property line. This procedure was also verified by the Protestants' engineer, Kevin Anderson, who stated that he had never seen a negative setback set forth in a Petition but always had seen in his experience that it was set forth as a 0' setback. (See transcript, November 7, 2007, pp 198 through 200.) The Board finds that the notification was sufficient in compliance with the BCZR.

B. Petitioners failed to comply with § 417.3.C of the BCZR. All parties argued with respect to the application of § 417 of the BCZR. Therefore, it behooves us to set forth the pertinent sections of § 417 which will pertain to this matter.

417.1 All waterfront construction, such as piers, wharves, docks, bulkheads or other work extended into navigable waters beyond mean low tide as prescribed in Baltimore County design manual, shall be governed by these regulations as well as by § 33-2-801 of the Baltimore County Code, except that nothing in these regulations shall apply to the M.H. zone and to the extension of industrial waterfront facilities to the limit of Corps of Engineers established pier or bulkhead lines.

* * * * *

417.3 For the purpose of defining boundaries within which waterfront construction may take place, divisional lines shall be established in accordance with the following rules:

* * * * *

B. With irregular shorelines. Where the shoreline is not straight, draw a base line between the two corners of each lot at mean low water line. Then draw a line from the corner of each proprietor's property into the water at right angles with the base line. If by reason of the curvature of the shore, the lines, when projected into the water, diverge from each other, the area excluded by both lines shall be equally divided between the two adjoining properties. If by reason of the curvature of the shore, the lines, when projected into the water, converge with each other, the area included by both lines shall be equally divided between the two adjoining proprietors.

C. Conflict with existing construction. Where proposed construction will conflict with existing facilities, it will be the duty of the Office of Planning and Zoning to specify the limits of construction to conform as closely as possible to the rules as set forth herein so as to cause the least interference with existing and/or possible future construction. Notice of the proposed construction shall be given by the Department of Permits & Development Management to adjoining property owners affected.

417.4 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.

On the second day of the hearing, November 7, 2007, Petitioners presented John Lewis, a Planner II with the Baltimore County zoning review section, which is part of the Permits & Development Management office. Petitioners also presented a revised site plan (Petitioners' Exhibit #5) which showed a revised divisional line marked in brown on the Plan which originally had been submitted as Petitioner's Exhibit #2. Mr. Lewis was questioned with respect

to the brown divisional lines and stated that he had been shown this plat on the previous day in his office when Petitioners' counsel and a surveyor met with himself and his supervisor, Carl Richards. Mr. Lewis's testimony was that he and Mr. Richards reviewed the proposal on Petitioner's Exhibit #5 and approved of the new divisional lines set forth in brown. This was questioned by People's Counsel with respect to § 417.3.C as follows:

Q. With reference to § 417.3.C, there is mention in that section about the duty of the Office of Planning and Zoning?

A. Yes sir.

Q. Is there any written policy that states who the Office of Planning and Zoning is under that section?

A. Written policy?

Q. Anything in writing?

A. No sir. I believe there was some higher level contacts and decisions made when Mr. Jablon was the Director. What was decided and how that was decided I was in that. [Sic. This should probably be: "I was not in on that.")

Q. Nothing in writing?

A. Not to my knowledge.

Q. As far as you know, the Planning Director has not looked at the question of where to put the divisional lines?

A. I assume his representative may have looked at the plan with something like that in mind, because there are zoning advisory plans set out for review with the Petition copies.

Q. Have you looked at the Planning comments in this case, the Office of Planning?

A. No sir, I have not.

Q. Do you know whether that office has altered the normal divisional lines for an irregular shoreline?

A. No, sir, I do not.

Q. Do you know whether or not there are any written comments from anyone in the zoning office suggesting a different divisional line?

A. I can only say, not having seen the case file, that normally, our review, by acceptance of the Plan, constitutes our comment, which was acceptable to go to hearing.

We are not looking when we review a plan for compliance with the law, other than the relief that's being sought for compliance with the law.

Q. In waterfront cases, you are not looking to see whether the site plan shows a proposal for a specific divisional line?

A. A site plan and the hearing are mutually supportive, where in the request for relief for special hearing, whether variance or special hearing, seems to be accurate or doesn't seem to be any gross errors on the part of the filing of the information. We accept it with the expectation that it's the zoning commissioner's decision to resolve whether or not what he is reviewing meets the law and can be, you know, basically acted upon.

Q. You don't require the Petitioner who wants a divisional line to show the line that the Petitioner wants?

A. If he asks for something specific, we would expect it to be shown.

Q. Don't you agree that if public notice is to be meaningful, then the public ought to see what other divisional line is proposed other than what's shown on the site plan?

A. That could go on infinitum. Certainly, the public hearing where the zoning commissioner has a plan available for public review and also to file in our office pending the outcome, or actually be the hearing before the commissioner, and even after the hearing, always remains public record.

Q. Now you understood the Office of Planning and Zoning to consist of the Planning Office and the Zoning Office, or what is your understanding?

A. Well, the understanding I've had since Mr. Jablon's holding of the office both at one time as the commissioner and the director of the department was that...

Q. What department?

A. Well at one time it was Planning and Zoning. Then it became Zoning and Development Management.

Q. Was Mr. Jablon ever the Director of Planning?

A. No sir, but again you're asking me for the interpretation of the office. And as directed by Mr. Jablon, where his (sic) said the Office of Planning and Zoning in the zoning regulations, it was his interpretation.

Q. Does Mr. Jablon make the law, or does the County Council make the law?

Mr. Schmidt: Objection.

A. When I was working for him, Mr. Jablon made our law.

Mr. Schmidt: Withdraw the objection.

* * * * *

Chairman: Is there anything in writing that says the department, I guess, draws the line, the divisional lines?

Q. Or even comments on it?

A. No. In the case of a hearing, again, we would think that presumptuous if it's going to the zoning commissioner.

[See Transcript, 11/7/2007, pp 38-42.)

Petitioner urges this Board to find that § 417.3.C does not specify that the Director of the Office of Planning and Zoning need specify the limits of construction. He contends that it is more appropriate for the Zoning Commissioner as a component of the Office of Planning and Zoning to specify the limits of construction. It is the responsibility of PDM, the zoning division, to monitor the application of the BCZR to all properties in the County. Petitioner contends Mr. Lewis is correct that PDM's application of the regulations, or deference to the decision of the Zoning Commissioner or Board upon the filing of a Petition for Special Hearing, is the proper mechanism to consider the application of § 417.3.C. of the BCZR.

The Board differs with this interpretation of the law. Section 417.3.C is clear with respect to the duty of the Office of Planning and Zoning. If that office has been abolished or revised, there should be some procedure for the application of § 417.3.C. The Board contends that the Director of the Office of Planning should perform the duties set forth in § 417.3.C and specify the limits of construction to "conform as closely as possible to the rules as set forth

herein so as to cause the least interference with existing and/or possible future construction.” The Office of Planning should review the Petitions and plans submitted in support thereof to determine whether or not appropriate divisional lines have been drawn and to revise those divisional lines if necessary to cause the least interference with existing or possible future construction. Notice of the proposed construction should then be given by DEPRM to adjoining property owners affected. This was not done in this case. No notice was given to either property owner until the Petition was filed. In any event, the property owners had no notice of the revised divisional lines approved by the Office of Planning on November 6 until the next day at the hearing on November 7, 2007. Thus, the Petitioner has failed to comply with § 417.3.C of the BCZR.

Issue No. 3. A. The determination of divisional lines under § 417.3.B or 417.3.C.

As set forth above, the Board finds that § 417.3.C applies in this matter and that the Petitioner has failed to follow the requirements of § 417.3.C. The divisional lines as proposed by Petitioner will not be approved by this Board.

B. Even if it were found that the divisional lines met the requirements of § 417.3.C, the Petitioner, in the opinion of this Board, must still meet the variance requirements in order to obtain a variance from § 417.4 of the BCZR. This requires a 10-foot setback on either side of the divisional lines.

Issue No. 4. Is there sufficient evidence to support a variance in this matter.

In analyzing the evidence to determine the question of uniqueness under § 307.1 of the BCZR, the Board refers to the case of *Cromwell v. Ward*, 102 Md.App. 691 at 710, 651 A.2d 424 at 434 in which the Court stated:

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.

Petitioner contends that its surveyor, Mr. Wells, and the County Planner, Mr. Lewis, found the property in question to be unique, citing its shape and size and particularly at the water line. As stated by Petitioner in its Brief, "as noted above, the property is pie-shaped with a significantly greater width at the street when compared to the bulkhead." Petitioner contends that the Protestants' expert, Kevin Anderson, agreed that the property in question was unique. Mr. Anderson testified that, in his opinion, the properties at 317 Bayside Drive and 315 Bayside Drive were similar to the Becker property at 403 Bayside Drive. Mr. Anderson testified as follows:

Q. Now I want you to look on here. Do you have any opinion as an expert witness within the requirements of property being unique as different from his neighbors, or peculiar with respect to getting a variance, do you have an opinion as to whether or not this property is unique when you compare it to the neighbors?

A. Yes, I do.

Q. What is that opinion?

A. My opinion is that these properties are located in this concave section of the shoreline, and that there are at least two other properties adjacent to the Becker's, not immediately adjacent, but one property removed, that have a very similar constructable area.

One is approximately at 317 Bayside Drive, approximately 13 feet; and at 315 Bayside Drive, approximately 20 feet.

Q. That would be the maximum pier that they could build without a variance or filing for zoning hearing, is that correct?

A. Correct.

[Transcript 11/7/2007, p 180.]

In support of their position, Protestants submitted an aerial view of Bayside Drive, showing the properties from 407 Bayside Drive, including the property in question, 403 Bayside

Drive, and the properties 317, 315, and 311 Bayside Drive. Mr. Anderson had drawn divisional lines on the aerial view for all of the properties showing where the piers could be constructed within the divisional lines without requesting a variance. The property at 403 Bayside Drive showed that approximately a 12-foot pier could be built without a variance; the property at 317 Bayside Drive could build a 13-foot pier without a variance; and the property at 315 Bayside Drive could build a 20-foot pier without obtaining a variance. All of the properties in question are pie-shaped with the wider area being on Bayside Drive and the narrower area of the property being on the creek side of the property. The Plan accompanying the Petition, which is in evidence as Petitioners' Exhibit #2, shows a blue triangle on the Plan at the property in question marked "B" on the Plan which measures approximately 12 feet on the basis of the scale, showing that the Petitioners could build a 12-foot pier without a variance.

On cross-examination, Petitioners' counsel asked Mr. Anderson about his comparison of the three properties. He stated:

Q. So there are many properties that share that characteristic. What does unique mean to you then, sir, as an expert witness?

A. To me, it means that it's unique in its soul and its character.

Q. It's one of a kind, right?

A. Yes, sir.

Q. Are there any other properties here that have the same size divisional line buildable area? You pointed out two other ones. But isn't the fact of the matter that they are both differently sized than this one?

A. Strict interpretation, yes.

Q. Well, doesn't the word unique mean one of a kind?

Mr. Zimmerman: Objection.

Chairman: Overruled.

A. Yes.

Q. Well is there any other one that's precisely like this?

A. No.

Q. Wouldn't this be unique since it's the only one with a divisional line that creates a buildable area like this?

A. Yes.

[Tr Nov 7 2007 p 203-204]

The Board finds that Mr. Anderson's testimony with respect to uniqueness supports a finding that the property of the Petitioners' is not unique within the meaning of *Cromwell v. Ward*, 102 Md.App. 691 (1995). It is an accepted fact that there may be some different characteristic in each piece of property that, when magnified, could determine the property to be "unique." However, under the requirements of *Cromwell v. Ward*, this property is not any more unique than other properties in the area, even in addition to 317 and 315 Bayside Drive. Many of the properties are on a concave shoreline. The difference between the allowance of the construction of a 12-foot pier, a 13-foot pier, and a 20-foot pier without having to request a variance is miniscule when comparing the uniqueness of properties. Therefore, the Board adopts the finding of the Board in Case No. 00-241-A as to failure to meet the uniqueness standard.

Having found that the property is not unique, the Board is not required to determine the question of practical difficulty with respect to the failure to grant the variance. Petitioners were well aware of the limitations of the property when they bought it. In fact, they made an agreement with Protestants Hagerty to reduce the size of the pier constructed by the Duvalls to a pier that is 29 feet long. Even this pier does not meet the variance requirements set forth in § 417 of the BCZR. The Hagertys have agreed to the size of that pier and there is no indication at this point to request that the pier be destroyed or removed.

Issue No. 5. Failure to meet § 500.14.

Section 500.14 of the BCZR states:

Within the Chesapeake Bay Critical Area.

No decision may be rendered by the zoning commissioner on any petition for special exception, variance, or special hearing unless the zoning commissioner has received from the director of the department of environmental protection and resource management, or his designated representative, written recommendations describing how the proposed request would:

- A. Minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have runoff from surrounding lands;
- B. Conserve fish, wildlife, and plant habitat; and
- C. Be consistent with established land use policies for development in the Chesapeake Bay Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement and activities of persons in that area can create adverse environmental impacts.

In support of its position that the Petitioners have not complied with § 500.14 of the BCZR, People's Counsel submitted a memo dated September 21, 2006 from Jeff Livingston, DEPRM – Development Coordination to Timothy M. Kotroco, Zoning Item No. 06-651-SPHA; Address: 403 Bayside Drive, Baltimore Maryland 21222, Zoning Advisory Committee Meeting of June 26, 2006. The memo is a form-type memo where an X is placed next to a statement stating, "The Department of Environmental Protection and Resource Management offers the following comments on the above-referenced zoning item." Next to the following statement, there is an X: "Development of this property must comply with the Chesapeake Bay Critical Area regulations (§ 30-2-101 through 33-2-1004 and other sections of the Baltimore County Code). This property is within the intensely developed area (IDA) and buffer management area (BMA) of the CBCA. Any proposed pier and accessory structure must be comply to the CBCA regulations. Reviewer: Kevin Prittingham. Date: 9/21/06."

Petitioner contends that the issue of § 500.14 is without merit. It states:

First, Zoning Advisory Committee comment was indeed submitted to the Zoning Commissioner from DEPRM. That comment generally provided that the subject property was subject to the Chesapeake Bay Critical Area regulations. Second, and more importantly, DEPRM's alleged failure to issue a comment cannot be laid at the feet of the Beckers. The Beckers cannot be charged with the responsibility to make a County agency do something that is required by law. If indeed the Board finds that DEPRM failed to submit the required recommendation, it should not penalize the Beckers. Third, and finally, it should be noted that § 500.14 specifically designates decisions rendered by the zoning commissioner only, cannot be issued without a comment from DEPRM. The section is silent as to any requirement as it relates to decisions by the Board, contrasted from other sections of the BCZR (e.g., 500.7) where authority delegated to both the zoning commissioner and the Board of Appeals upon appeal is specifically identified.

People's Counsel counters the final argument of Petitioners, stating:

Petitioners argue that they are excused from BCZR § 500.14 because the CBA now has the case. That is false. If that were true, the CBA could not address special hearings, special exceptions, and variances which BCZR § 500.7, § 502.1, and § 307.1 also assign to the Zoning Commissioner. Of course, the CBA on appeal applies all these laws.

The Board finds that DEPRM did not meet its obligations under § 500.14. While it is true that the Petitioner cannot force DEPRM to make any findings under § 500.14, the Petitioner could certainly have requested DEPRM to make such findings in order to comply with the law as written. The County Council has passed § 500.14 of the BCZR and the Board will enforce that section until such time as the Council repeals it. If a Petitioner has requested the review by DEPRM under § 500.14 and DEPRM refuses to make a recommendation, then the Board will deal with that situation when it arises. Until that point, the Board will require the recommendations of DEPRM under § 500.14. The Board rejects the argument that § 500.14 only applies to decisions before the Zoning Commissioner. The Board adopts the contention of People's Counsel on this issue.

ORDER

THEREFORE, IT IS THIS 18th day of March, 2008 by the
County Board of Appeals of Baltimore County

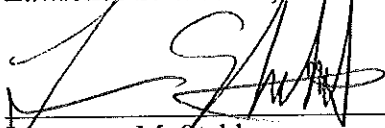
ORDERED that Petition for Special Hearing for the waterfront construction of an extension to an existing pier and proposed boatlift under § 417.3.C of the Baltimore County Zoning Regulations be and is hereby **DENIED**; and it is further

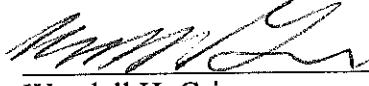
ORDERED that the Petition for Variance seeking relief from § 417.4 of the BCZR to allow the pier and boatlift within 0' of the divisional line in lieu of the required 10' be and is hereby **DENIED**.

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**


Lawrence S. Wescott, Panel Chair


Lawrence M. Stahl


Wendell H. Grier

APPEAL

Petition for Special Hearing and Variance
403 Bayside Drive
South side Bayside Drive, 75 feet east of the centerline Winona Avenue
12th Election District – 7th Councilmanic District
Legal Owner(s): Howard and Melanie Becker

Case No.: 06-651-SPHA

Petition for Special Hearing (June 16, 2006)
Petition for Variance (June 16, 2006)

Zoning Description of Property

Notice of Zoning Hearing (June 27, 2006)
New Notice of Zoning Hearing (August 10, 2006)
Corrected Notice of Zoning Hearing (August 14, 2006)

Certification of Publication (July 27, 2006, September 12, 2006)

Certificate of Posting (July 29, 2006 and September 11, 2006) by SSG Robert Black

Entry of Appearance by People's Counsel (June 27, 2006)

Petitioner(s) Sign-In Sheet – 1 Sheet

Protestant(s) Sign-In Sheet – None

Citizen(s) Sign-In Sheet – 1 Sheet

Zoning Advisory Committee Comments

Petitioners' Exhibit

1. Plan to accompany petition
2. Photographs (2A-2E)
3. Letter from neighbor
4. Overview photographs of neighborhood (4A-4B)
5. Real Estate property listing
6. Photograph – side yard view
7. Photograph – back angled view
8. Photographs – rear view, including pier

Protestants' Exhibits:

1. Site plan to accompany petition
2. Site plan that accompanied prior petition
3. Board of Appeals decision for prior case #00-241-A
4. Plat of neighborhood, Inverness
5. Joint motion to revise order #00-241-A
6. Photo denoting piers in 2000

Miscellaneous (Not Marked as Exhibit)

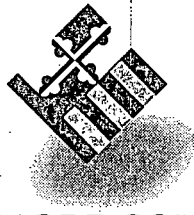
1. Findings of Fact and Conclusions of Law, Case #00-241-A
2. Waterfront construction guidelines
3. Request to postpone from Lawrence E. Schmidt, (8/4/06)
4. 200 Scale Zoning Map
5. Plan to accompany Petition

Zoning Commissioner's Order (Petition for Special Hearing granted – October 12, 2006)
(Petition for Variance dismissed – October 12, 2006)

Notice of Appeal received on November 3, 2006 from Edward C. Covahey, Jr.

c: People's Counsel of Baltimore County, MS #2010
Zoning Commissioner/Deputy Zoning Commissioner
Timothy Kotroco, Director of PDM
Howard Becker Melanie Becker 403 Bayside Drive Baltimore 21222
Kenneth J. Wells 7403 New Cut Road Kingsville 21087
Millicent Solomon 8 Kincaid Court Baldwin 21013
Michael Mioduszewski 1926 Sunberry Road Dundalk 21222
Susan Hagerty 405 Bayside Drive Dundalk 21222

date sent December 12, 2006, amf



BALTIMORE COUNTY

M A R Y L A N D

JAMES T. SMITH, JR.
County Executive

TIMOTHY M. KOTROCO, *Director*
Department of Permits and
Development Management

December 12, 2006

Lawrence E. Schmidt
Gildea & Schmidt LLC
300 East Lombard Street, Suite 1440
Baltimore, MD 21202

Dear Mr. Schmidt:

RE: Case: 06-651-SPHA, 403 Bayside Drive

Please be advised that an appeal of the above-referenced case was filed in this office on November 3, 2007 by Edward C. Covahey, Jr. All materials relative to the case have been forwarded to the Baltimore County Board of Appeals (Board).

If you are the person or party taking the appeal, you should notify other similarly interested parties or persons known to you of the appeal. If you are an attorney of record, it is your responsibility to notify your client.

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

Sincerely,

A handwritten signature in black ink that reads "Timothy Kotroco".

Timothy Kotroco
Director

TK:amf

c: William J. Wiseman III, Zoning Commissioner
Timothy Kotroco, Director of PDM
People's Counsel
Howard Becker Melanie Becker 403 Bayside Drive Baltimore 21222
Kenneth J. Wells 7403 New Cut Road Kingsville 21087
Millicent Solomon 8 Kincaid Court Baldwin 21013
Michael Mioduszewski 1926 Sunberry Road Dundalk 21222
Susan Hagerty 405 Bayside Drive Dundalk 21222

11/3/06

IN RE: PETITIONS FOR SPECIAL
HEARING AND VARIANCE -
S/S Bayside Drive,
75'E of the c/I Winona Avenue
(403 Bayside Drive)
12th Election District
7th Council District

Howard Becker, et ux
Petitioners

* BEFORE THE
* ZONING COMMISSIONER
* OF BALITMORE COUNTY
* CASE NO. 06-651-SPHA

* * * * *

NOTICE OF APPEAL

Susan Hagerty, by Edward C. Covahey, Jr. and Covahey, Boozer, Devan & Dore, P.A., her attorneys, hereby appeals the decision of the Zoning Commissioner rendered in the above-captioned case on October 12, 2006 to the Baltimore County Board of Appeals.



EDWARD C. COVAHEY, JR.
Covahey, Boozer, Devan & Dore, P.A.
614 Bosley Avenue
Towson, Maryland 21204
410-828-9441
Attorneys for Susan Hagerty

CERTIFICATE OF SERVICE

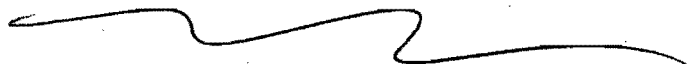
I HEREBY CERTIFY that on this 3 day of November 2006, a copy of the foregoing Notice of Appeal was mailed, first class, postage prepaid, to:

William J. Wiseman, III, Zoning Commissioner
for Baltimore County
401 Bosley Ave., Suite 405
Towson, Maryland 21204

Lawrence E. Schmidt, Esq.
Gildea & Schmidt, LLC
300 East Lombard Street, Suite 1440
Baltimore, Maryland 21202

and

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



EDWARD C. COVAHEY, JR.
Covahey, Boozer, Devan & Dore, P.A.
614 Bosley Avenue
Towson, Maryland 21204
410-828-9441
Attorneys for Susan Hagerty

ldr0611ldr02

COVAHEY, BOOZER, DEVAN & DORE, P. A.

ATTORNEYS AT LAW
614 BOSLEY AVENUE
TOWSON, MARYLAND 21204

EDWARD C. COVAHEY, JR.
F. VERNON BOOZER *
MARK S. DEVAN
THOMAS P. DORE
BRUCE EDWARD COVAHEY
JENNIFER MATTHEWS HERRING
FRANK V. BOOZER, JR.

410-828-9441

FAX 410-823-7530

ANNEX OFFICE
SUITE 302
606 BALTIMORE AVE.
TOWSON, MD 21204
410-828-5525
FAX 410-296-2131

*ALSO ADMITTED TO D.C. BAR

November 3, 2006

HAND-DELIVERED

Timothy M. Kotroco, Director
County Office Building
111 West Chesapeake Avenue, Suite 105
Towson, Maryland, 21204

Re: 403 Bayside Drive
Case No. 06-651-SPHA

Dear Mr. Kotroco:

Enclosed please find protestant Susan Hagerty's appeal from the Findings of Fact and Conclusions of Law of the Zoning Commissioner rendered on October 12, 2006, together with a check in the amount of \$400.00 representing the costs.

Very truly yours,

Edward C. Covahey, Jr.

ECC,Jr./ldr
Enclosures
1102ldr08

cc: William J. Wiseman, III, Zoning Commissioner
Lawrence E. Schmidt, Esq.
Peter Max Zimmerman, People's Counsel
Ms. Susan Hagerty

RECEIVED

NOV 03 2006

Per. 

10/12/06

IN RE: **PETITIONS FOR SPECIAL HEARING & VARIANCE** – S/S Bayside Drive,
75' E of the c/l Winona Avenue
(403 Bayside Drive)
12th Election District
7th Council District

Howard Becker, et ux
Petitioners

* BEFORE THE
* ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* Case No. 06-651-SPHA
*

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of Petitions for Special Hearing and Variance filed by the owners of the subject property, Howard Becker, and his wife, Melanie Becker, through their attorney, Lawrence E. Schmidt, Esquire. The Petitioners request a special hearing pursuant to Baltimore County Zoning Regulations (B.C.Z.R.) Section 417.3.C to confirm that the design of proposed waterfront construction of an extension to an existing pier and a proposed boat lift causes the least interference with existing and/or possible future construction and, in the alternative, variance relief from Section 417.4 of the B.C.Z.R. to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 feet. The subject property and requested relief are more particularly described on the site plan submitted, which was accepted into evidence and marked as Petitioner's Exhibit 1.

Appearing at the requisite public hearing in support of the request were Howard and Melanie Becker, property owners, Millicent Solomon, a family friend, Kenneth Wells, the Surveyor who prepared the site plan for this property, and Lawrence E. Schmidt, Esquire, attorney for the Petitioner. Appearing as interested citizens/Protestants were Susan Hagerty, adjacent property owner, and her son, Michael Mioduszewski. There were no other interested persons present.

Testimony and evidence offered disclosed that the subject property is a triangular shaped waterfront parcel located on the south side of Bayside Drive, just east of Winona Avenue,

UNDER RECEIVED FOR FILING
Date 10-12-06
By D. J. [Signature]

with frontage on Chink Creek near its confluence with Bear Creek in Dundalk. The property consists of two lots, known as Lots 62 and 63 of Inverness, and contains a gross area of 0.13 acres, more or less, zoned D.R.5.5. The property is presently improved with a two-story frame dwelling, an above ground swimming pool and detached accessory shed.

By way of background, this property was the subject of prior zoning Case No. 00-241-A in which the previous owners, William R. Duval, Jr. and his wife, Theresa A. Duval, filed a Petition for Variance seeking similar relief as set forth above. That case came before prior Zoning Commissioner Lawrence E. Schmidt, the attorney in the instant case, and the Protestants who appeared in that matter, are the same Protestants in the matter before me. As noted in the prior Order issued by then Commissioner Schmidt, the Duvals had purchased the property from the Williams family in 1994 and replaced the pier that existed at that time in May or June of that year. Approximately two years later, the Duvals installed a boat lift at the pier to provide out-of-water storage for their boat. At that time, the then adjacent property owners, Mr. & Mrs. Thomas Kessler, had no objections to the pier and boat lift because they were in the process of selling their property. However, they filed a complaint on behalf of the subsequent owner, Ms. Hagerty, and a violation notice was issued to the Duvals who were advised to file for variance relief. At the hearing in that matter, Ms. Hagerty stated that she had no objections to the pier itself, but felt that the boat lift interfered with her access to the water.

By his opinion and Order dated April 19, 2000, Commissioner Schmidt granted the request to allow the existing pier and boat lift to remain. He noted the unique configuration of the subject and adjacent lots, which taper to a curved, crescent configuration along the shoreline, and limit the area for pier development without variance relief. The Protestants subsequently filed a timely appeal to the County Board of Appeals and following public deliberation of the matter, the Board denied the variance and issued a final Opinion and Order along with a Concurring/Dissenting Opinion on June 6, 2001. The Duvals then filed a Motion for Reconsideration on July 5, 2001, and an accompanying Joint Motion to Revise Order on July 17, 2001. The Joint Motion had been signed by the Duvals, the Beckers and their counsel, as well as

Ms. Hagerty and Mr. Mioduszewski, and their counsel. Within the Joint Motion, Counsel for the Petitioners/Protestants noted that an agreement had been reached between the parties and a request was made that the Board reverse its Order in accordance with that agreement. Specifically, the parties agreed that the boatlift should be removed and that all of the pier, except for a pier extending 29 feet from the bulkhead with a 5-foot wide deck, would be permitted to remain on the property. That boat lift, the pilings and the pier decking, except as that agreed to above were removed. The Board considered the Motion at a public hearing held on July 26, 2001. Ultimately, because of the sale of the property to the Beckers along with the modifications made since the Board's original Order of June 6, 2001, and the withdrawal of certain objections by the Protestants, the Board determined that different circumstances existed that might warrant the filing of a new Petition for Variance and that it was inappropriate for it to revise its original Order without proper notification to the public. Thus, by Order dated August 7, 2001, the Board denied the Motion to Revise Order.

The new owners now come before me seeking relief as set forth above to remove a portion of the existing pier (20 feet) and construct a new 58.4-foot pier and boat lift, as shown on Petitioner's Exhibit 1. Testimony indicated that the new pier and boat lift have been designed to the extent possible in keeping with the requirements of Section 417.3.B. of the B.C.Z.R. and are within the divisional lines on the west side adjacent to the Hagerty property. However, a portion of the boat lift will slightly extend over the divisional line on the east side of the property, adjacent to the Kennell property. Ms. Kennell has no objections to the requested relief and supports the Petitioners' proposed construction as evidenced by her letter contained within the case file. As noted in the prior case, zoning relief is necessary owing to the unique configuration of the property, and the fact that the frontage of the subject property and adjacent lots is curved in a crescent configuration along the shoreline, insufficient setbacks exist for the proposed pier and boat lift. This configuration limits all of the property owners in this area of the Chink Creek, not just the Petitioners. Indeed, the Petitioner's and both of their neighbors on either side need divisional setback relief to have any reasonable access to the water. Moreover, the reduction of

the shoreline through accretion further aggravates the situation and is more pronounced at the Petitioner's property.

The Protestants argue that res judicata prevents the Petitioners from requesting relief in this case. They further argue that the Petitioners breached their prior agreement and that the remaining pier should be removed as it is illegal. However, this Zoning Commissioner believes that res judicata does not apply here, although the parties may have privity of contract between the Duvals and the Beckers. I believe that there are substantial differences between these cases. Significantly, the Board of Appeals contemplated that a new Petition for Variance would be filed in this matter. Moreover, the Petitioners seek relief through a Petition for Special Hearing, pursuant to Section 417.3.B of the B.C.Z.R. That Section allows relief where there is conflict with existing/proposed construction. No such request through a Petition for Special Hearing was filed in the prior request, thus the requested approval in this case was not considered in the prior matter. Finally, and perhaps most significantly, the proposed pier and boat lift in the instant case are differently configured than what was previously built (without a permit) and for which relief was requested in the prior case. Simply stated, the proposal under consideration at the present time is markedly distinguished (shorter and differently located and configured) than the previous request and has been designed to cause minimal impact to adjacent properties.

In the alternative, variance relief is requested from Section 417.4 of the B.C.Z.R. to allow a 0 foot setback from the divisional lines established between the subject property and neighboring properties. In this regard, it is to be noted that on either side of the subject property, there are existing piers and boat houses built on both the Hagerty and Kennell properties. As noted above, these improvements previously constructed by these neighbors also intrude within the required divisional line setbacks.

After due consideration of all of the testimony and evidence presented, I am persuaded that relief should be granted. Upon due consideration, I believe that a grant of relief through the Petition for Special Hearing is most appropriate. However, the facts and circumstances likewise justify variance relief. Specifically, I find that the Petitioners have met

ORDER RECEIVED FOR FILING
Date 9-0-10
By 10-3-10

the requirements of Section 307 of the B.C.Z.R. and that strict compliance with the regulations would prevent the Petitioners from reasonably utilizing and enjoying their waterfront access. I further find that the Petitioners would suffer a practical difficulty and unreasonable hardship if relief were denied. As noted above, the uniqueness of the subject property is caused by the unusual configuration of the shoreline and the location of adjacent improvements. In this regard, I am persuaded that the neighbors on both sides will have the ability to use their piers and boat lifts without any obstruction because their facilities are located further out into the water than the proposed pier and boat lift on the subject lot. This proposal is reasonable in that it permits access to the water by all of the adjacent property owners and limits impacts upon each property owner. There were no adverse comments submitted by any County reviewing agency and the neighbor who would be most affected by the proposed boat lift has no objections. Thus, I am persuaded that relief can be granted without detriment to adjacent properties. However, the proposed construction must comply with Chesapeake Bay Critical Areas requirements as set forth in the recommendations made by the Department of Environmental Protection and Resource Management, dated September 21, 2006, a copy of which is attached hereto and made a part hereof.

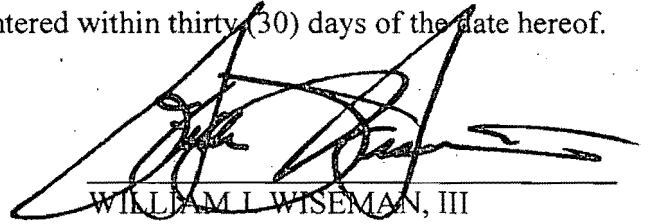
Pursuant to the advertisement, posting of the property, and public hearing on these Petitions held, and for the reasons set forth above, the relief requested shall be granted.

THEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County this 12th day of October 2006 that the proposed waterfront construction of an extension to an existing pier and proposed boat life complies with Section 417.3.C of the Baltimore County Zoning Regulations (B.C.Z.R.), and as such, the Petition for Special Hearing be and is hereby GRANTED; and,

IT IS FURTHER ORDERED that the Petition for Variance seeking relief from Section 417.4 of the B.C.Z.R. to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 feet, in accordance with Petitioner's Exhibit 1, be and is hereby DISMISSED, as moot, subject to the following restrictions:

- 1) The Petitioners may apply for their building permit and be granted same upon receipt of this Order; however, the 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.
- 2) Compliance with Chesapeake Bay Critical Areas regulations (Sections 33-6-101 through 33-6-122 of the Baltimore County Code), pursuant to the attached comments from the Department of Environmental Protection and Resource Management, dated September 21, 2006.
- 3) When applying for any permits, the site plan filed must reference this case and set forth and address the restrictions of this Order.

Any appeal of this decision shall be entered within thirty (30) days of the date hereof.



WILLIAM I. WISEMAN, III
Zoning Commissioner
for Baltimore County

WJW:bjs

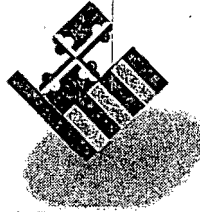
ORDER RECEIVED FOR FILING

Date

10-12-06

By

D. J. [Signature]



BALTIMORE COUNTY
M A R Y L A N D

JAMES T. SMITH, JR.
County Executive

October 12, 2006

WILLIAM J. WISEMAN III
Zoning Commissioner

Lawrence E. Schmidt, Esquire
Gildea & Schmidt, LLC
300 E. Lombard Street, Suite 1440
Baltimore, Maryland 21202

RE: **PETITIONS FOR SPECIAL HEARING and VARIANCE**
S/S Bayside Drive, 75' E of the c/l Winona Avenue
(403 Bayside Drive)
12th Election District – 7th Council District
Howard Becker, et ux - Petitioners
Case No. 06-651-SPHA

Dear Mr. Schmidt:

Enclosed please find a copy of the decision rendered in the above-captioned matter. The Petition for Special Hearing has been granted and the Petition for Variance has been dismissed as moot, 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 Department of Permits and Development Management office at 887-3391.

Very truly yours,

A handwritten signature in black ink, appearing to read "William J. Wiseman III", written over a horizontal line.

WILLIAM J. WISEMAN, III
Zoning Commissioner
for Baltimore County

WJW:bjs

cc: Mr. & Mrs. Howard Becker, 403 Bayside Drive, Baltimore, Md. 21222
Mr. Kenneth J. Wells, 7403 New Cut Road, Kingsville, Md. 21087
Ms. Susan Hagerty, 405 Bayside Drive, Baltimore, Md. 21222
Mr. Michael Mioduszewski, 1926 Sunberry Road, Dundalk, Md. 21222
Chesapeake Bay Critical Areas Commission
1804 West Street, Suite 100, Annapolis, Md. 21401
DEPRM; People's Counsel; Case File



Shood

Petition for Special Hearing

to the Zoning Commissioner of Baltimore County

for the property located at 403 Bayside Drive

which is presently zoned DR-5.5

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 Special Hearing under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

To confirm that the proposed waterfront construction of an extension to an existing pier and proposed boat lift complies with Section 417.3.C of the BCZR.

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

I, or we, agree to pay expenses of above Special Hearing, 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:

Lawrence E. Schmidt

Name - Type or Print

Signature Lawrence E. Schmidt

Gildea & Schmidt, LLC

Company

300 East Lombard Street, Suite 1440

410-234-0070

Address

Telephone No.

Baltimore

MD

21202

City

State

Zip Code

Legal Owner(s):

Howard Becker

Name - Type or Print

Signature Howard Becker

Melanie Becker

Name - Type or Print

Signature Melanie Becker

403 Bayside Drive

Address

Telephone No.

Baltimore

MD

21222

State

Zip Code

Representative to be Contacted:

Kenneth J. Wells

Name

7403 New Cut Road

(410) 592-8800

Address

Telephone No.

Kingsville

MD

21087

City

State

Zip Code

OFFICE USE ONLY

ESTIMATED LENGTH OF HEARING

UNAVAILABLE FOR HEARING

Reviewed By

JE

Date

6/16/00

ORDER RECEIVED FOR FILING

Date 10-12-00
By [Signature]

Case No. 06-651-SPHA

REV 15/98



Petition for Variance

to the Zoning Commissioner of Baltimore County

for the property located at: 403 Bayside Drive

which is presently zoned: DR-5.5

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):

To allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 foot setback of the divisional line as established pursuant to Section 417.4 of the BCZR

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 presented 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:

Lawrence E. Schmidt

Name - Type or Print

Signature Lawrence E. Schmidt

Gildea & Schmidt, LLC

Company

300 East Lombard Street, Suite 1440

410-234-0070

Address

Telephone No.

Baltimore

MD

21202

City

State

Zip Code

Legal Owner(s):

Howard Becker

Name - Type or Print

Signature Howard Becker

Melanie Becker

Name - Type or Print

Signature Melanie Becker

403 Bayside Drive

Address

Telephone No.

Baltimore

MD

21222

State

Zip Code

Representative to be Contacted:

Kenneth J. Wells

Name

7403 New Cut Road

(410) 592-8800

Address

Telephone No.

Kingsville

MD

21087

City

State

Zip Code

OFFICE USE ONLY

ESTIMATED LENGTH OF HEARING

UNAVAILABLE FOR HEARING

Reviewed By

JF

Date

4/16/02

Case No. OG-651-SPHA

REV 9/15/98

ORDER RECEIVED FOR FILING

Date 4-11-02

By [Signature]

kjWellsInc
Land Surveying and Site Planning

Telephone: (410) 592-8800
Fax: (410) 817-4055
Email: kwells@kjwellsinc.com

7403 New Cut Road
Kingsville, Md. 21087-1132

6/15/2006

**Zoning Description
For
403 Bayside Drive
Baltimore County
Maryland
12th Election District
7th Councilmanic District**

Beginning at a point on the south side of Bayside Drive which is 40 feet wide at a distance of 75 feet east of the centerline of the nearest improved intersecting street known as Winona Avenue which is 40 feet wide. Being Lots 62 and 63, Section H in the subdivision of "Inverness" as recorded in Baltimore County Plat Book 10 folio 128, containing 0.126 acres of land more or less.



651

DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT

ZONING REVIEW

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (BCZR) 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 the petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

For Newspaper Advertising:

Item Number or Case Number: 06-651-SPHA

Petitioner: HOWARD AND MELANIE BECKER

Address or Location: 403 BAYSIDE DRIVE

PLEASE FORWARD ADVERTISING BILL TO:

Name: JASON T. VETTORI

Address: 300 E. LOMBARD ST., SUITE 1440

BALTIMORE, MD 21202

Telephone Number: (410) 234-0070

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET & FINANCE
MISCELLANEOUS RECEIPT

No. 006

DATE 6-16-06 ACCOUNT 001-606-10150

AMOUNT \$130.00

RECEIVED FROM Gilman & Schmidt LLC

400 Bayview Dr.

FOR SP4A ITEM # 651

DISTRIBUTION
WHITE CASHIER

PINK AGENCY

YELLOW CUSTOMER

PAID RECEIPT

BUSINESS ACTION TIME 06/16/2006 09:14:46

OFFICE WORKING DAYS 2

RECEIPT # 347277 6/16/2006 OFFER

DATE 5/28/2006 VERIFICATION

AMOUNT \$130.00

PAID TO 007277

PAID BY 007277

PAID TO 007277

PAID BY 007277

CASHIER'S VALIDATION

NOTICE OF ZONING 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: #06-651-SPHA

403 Bayside Drive

Southside of Bayside Drive at a distance of 75 feet east of centerline of Winona Avenue

12th Election District - 7th Councilmanic District

Legal Owner(s): Howard & Melanie Becker

Variance: to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 foot setback of the divisional line as established. Special Hearing: to confirm that the proposed waterfront construction of an extension to an existing pier and proposed boatlift complies with Section 417.3.C of the Baltimore County Zoning Regulations.

Hearing: Monday, August 14, 2006 at 11:00 a.m. in Room 407, County Courts Building, 401 Bosley Avenue, Towson 21204.

WILLIAM J. WISEMAN, III

Zoning Commissioner for Baltimore County

NOTES: (1) Hearings are Handicapped Accessible for special accommodations. Please Contact the Zoning Commissioner's Office at (410) 887-3868.

(2) For information concerning the File and/or Hearing Contact the Zoning Review Office at (410) 887-3391.

7/27/06 July 27

103253

CERTIFICATE OF PUBLICATION

7/27/2006

THIS IS TO CERTIFY, that the annexed advertisement was published in the following weekly newspaper published in Baltimore County, Md., once in each of 1 successive weeks, the first publication appearing on 7/27/2006.

- ☒ The Jeffersonian
- ☐ Arbutus Times
- ☐ Catonsville Times
- ☐ Towson Times
- ☐ Owings Mills Times
- ☐ NE Booster/Reporter
- ☐ North County News

J. Wilkins

LEGAL ADVERTISING

NOTICE OF ZONING 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: #06-651-SPHA

403 Bayside Drive

Southside of Bayside Drive at a distance of 75 feet east of centerline of Winona Avenue

12th Election District - 7th Councilmanic District

Legal Owner(s): Howard & Melanie Becker

Variance: to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 foot setback of the divisional line as established. Special Hearing: to confirm that the proposed waterfront construction of an extension to an existing pier and proposed boatlift complies with Section 417.3(C) of the Baltimore County Zoning Regulations.

Hearing: Tuesday, September 26, 2006 at 11:00 a.m. in Room 407, County Courts Building, 401 Bosley Avenue, Towson 21204

WILLIAM J. WISEMAN, III

Zoning Commissioner for Baltimore County

NOTES: (1) Hearings are Handicapped Accessible; for special accommodations Please Contact the Zoning Commissioner's Office at (410) 887-3868.

(2) For information concerning the File and/or Hearing, Contact the Zoning Review Office at (410) 887-3391.

JT/9/649 Sept. 12 108972

CERTIFICATE OF PUBLICATION

9/14, 2006

THIS IS TO CERTIFY, that the annexed advertisement was published in the following weekly newspaper published in Baltimore County, Md., once in each of 1 successive weeks, the first publication appearing on 9/12, 2006.

- ☒ The Jeffersonian
- ☐ Arbutus Times
- ☐ Catonsville Times
- ☐ Towson Times
- ☐ Owings Mills Times
- ☐ NE Booster/Reporter
- ☐ North County News

J. Wilkinson

LEGAL ADVERTISING

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET & FINANCE
MISCELLANEOUS RECEIPT

No. 21793

DATE 11/9/06 ACCOUNT 001-006-650

AMOUNT \$ 700.00

RECEIVED FROM: Sivan Hagerty

FOR: Appeal

06-651-SPHA

DISTRIBUTION

WHITE - CASHIER

PINK - AGENCY

YELLOW - CUSTOMER

PAID RECEIPT

BUSINESS	ACTUAL	TIME	DRW
11/13/2006	11/09/2006	14:40:33	1
REG WSD1	WALKIN	JRIC JHR	
>>RECEIPT # 308521 11/09/2006			OFLN
Dept	5	528 ZONING VERIFICATION	
CR NO.	021793		

Recpt Tot \$400.00
\$400.00 CK \$.00 CA
Baltimore County, Maryland

CASHIER'S VALIDATION

CERTIFICATE OF POSTING

RE: Case No.: 06-651-SPHA

Petitioner/Developer: HOWARD L

MELANIE BECKER

Date of Hearing/Closing: AUG 14, 2006

**Baltimore County Department of
Permits and Development Management
County Office Building, Room 111
111 West Chesapeake Avenue
Towson, Maryland 21204**

ATTN: Kristen Matthews {(410) 887-3394}

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: _____

403 BAYSIDE DRIVE

The sign(s) were posted on

JULY 29, 2006
(Month, Day, Year)

Sincerely,

Robert Black 7-31-06
(Signature of Sign Poster) (Date)

SSG Robert Black

(Print Name)

1508 Leslie Road

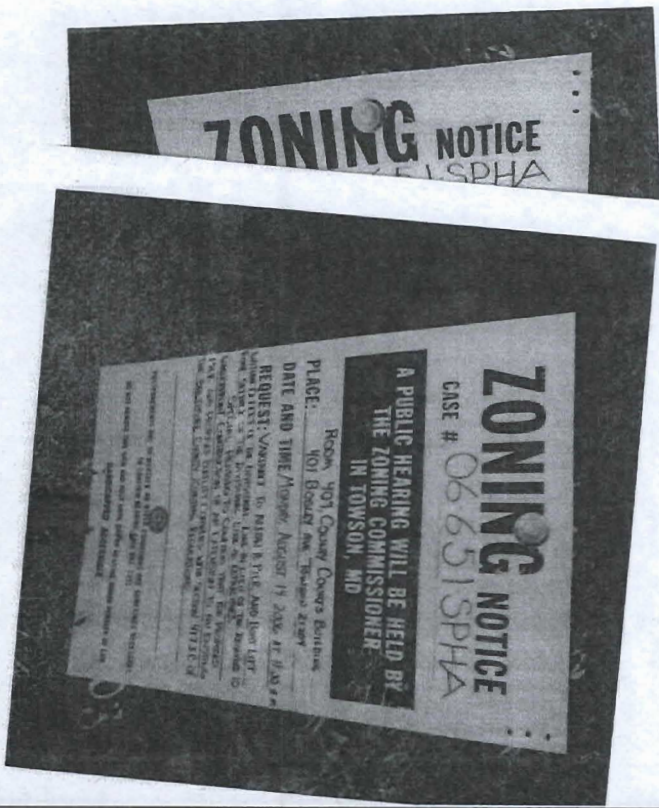
(Address)

Dundalk, Maryland 21222

(City, State, Zip Code)

(410) 282-7940

(Telephone Number)



CERTIFICATE OF POSTING

RE: Case No.: 06-651-SPHA

Petitioner/Developer: HOWARD +

MELANIE BECKER

Date of Hearing/Closing: 9-26-06

Baltimore County Department of
Permits and Development Management
County Office Building, Room 111
111 West Chesapeake Avenue
Towson, Maryland 21204

ATTN: Kristen Matthews {(410) 887-3394}

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: _____

403 BAYSIDE DRIVE

The sign(s) were posted on _____

9-11-06
(Month, Day, Year)

Sincerely,

Robert Black 9-14-06
(Signature of Sign Poster) (Date)

SSG Robert Black

(Print Name)

1508 Leslie Road

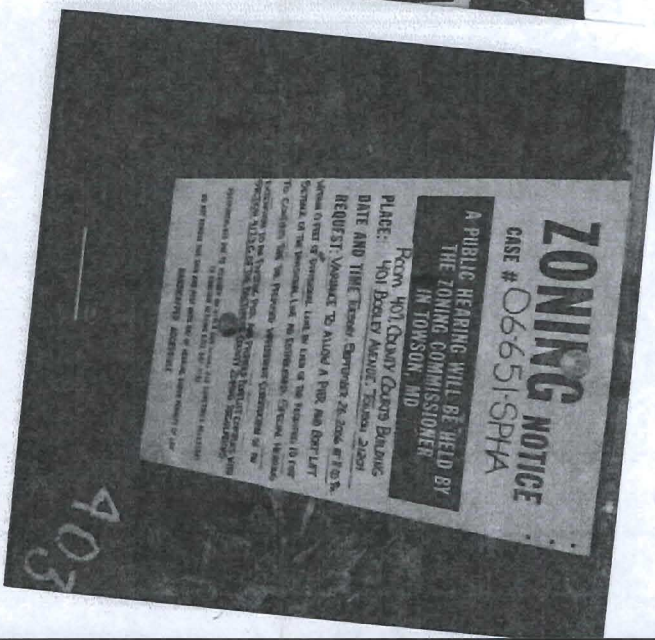
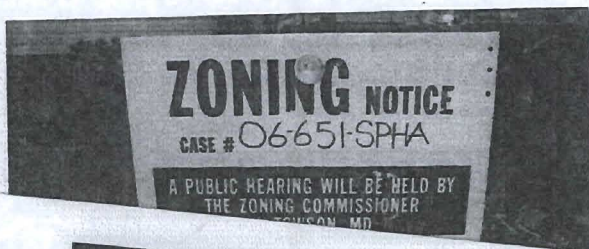
(Address)

Dundalk, Maryland 21222

(City, State, Zip Code)

(410) 282-7940

(Telephone Number)



TO: PATUXENT PUBLISHING COMPANY
Thursday, July 27, 2006 Issue - Jeffersonian

Please forward billing to:

Jason Vettori

410-234-0070

300 E. Lombard Street, Ste. 1440
Baltimore, MD 21202

NOTICE OF ZONING 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: 06-651-SPHA

403 Bayside Drive

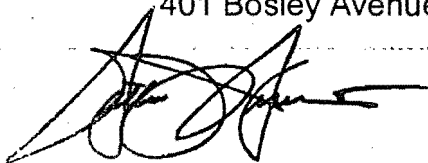
Southside of Bayside Drive at a distance of 75 feet east of centerline of Winona Avenue

12th Election District - 7th Councilmanic District

Legal Owners: Howard & Melanie Becker

Variance to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 foot setback of the divisional line as established. Special Hearing to confirm that the proposed waterfront construction of an extension to an existing pier and proposed boatlift complies with Section 417.3.C of the Baltimore County Zoning Regulations.

Hearing: Monday, August 14, 2006 at 11:00 a.m. in Room 407, County Courts Building,
401 Bosley Avenue, Towson 21204



WILLIAM J. WISEMAN III
ZONING COMMISSIONER FOR BALTIMORE COUNTY

- NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.
- (2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

**Department of Permits and
Development Management**

Director's Office
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204
Tel: 410-887-3353 • Fax: 410-887-5708



Baltimore County

James T. Smith, Jr., County Executive
Timothy M. Kotroco, Director

June 27, 2006

NOTICE OF ZONING 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: 06-651-SPHA

403 Bayside Drive
Southside of Bayside Drive at a distance of 75 feet east of centerline of Winona Avenue
12th Election District – 7th Councilmanic District
Legal Owners: Howard & Melanie Becker

Variance to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 foot setback of the divisional line as established. Special Hearing to confirm that the proposed waterfront construction of an extension to an existing pier and proposed boatlift complies with Section 417.3.C of the Baltimore County Zoning Regulations.

Hearing: Monday, August 14, 2006 at 11:00 a.m. in Room 407, County Courts Building,
401 Bosley Avenue, Towson 21204

A handwritten signature in black ink that reads "Timothy Kotroco".
Timothy Kotroco
Director

TK:klm

C: Lawrence Schmidt, 300 East Lombard Street, Ste. 1440, Baltimore 21202
Mr. & Mrs. Howard Becker, 403 Bayside Drive, Baltimore 21222
Kenneth Wells, 7403 New Cut Road, Kingsville 21087

- NOTES: (1) **THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY BY SATURDAY, JULY 29, 2006.**
- (2) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMMODATIONS PLEASE CALL THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.
- (3) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

JM
8-14

GILDEA & SCHMIDT, LLC

DAVID K. GILDEA
DAVIDGILDEA@GILDEALLC.COM

LAWRENCE E. SCHMIDT
LSCHMIDT@GILDEALLC.COM

SEBASTIAN A. CROSS
SCROSS@GILDEALLC.COM

JOSEPH R. WOOLMAN, III
JWOOLMAN@GILDEALLC.COM

D. DUSKY HOLMAN
DHOLMAN@GILDEALLC.COM

JASON T. VETTORI
JVETTORI@GILDEALLC.COM

300 EAST LOMBARD STREET

SUITE 1440

BALTIMORE, MARYLAND 21202

TELEPHONE 410-234-0070

FACSIMILE 410-234-0072

www.gildeallc.com

TOWSON, MD OFFICE

220 BOSLEY AVENUE

TOWSON, MARYLAND 21204

TELEPHONE 410-337-7057

August 4, 2006

RECEIVED

AUG 07 2006

ZONING COMMISSIONER

Ms. Kristin Matthews
Scheduler
Baltimore County Zoning
111 W. Chesapeake Avenue, Room 111
Towson, MD 21204

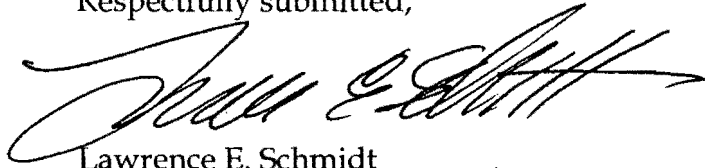
Re: Becker/403 Bayside Drive
Case No.: 06-651-SPHA

Dear Ms. Matthews:

I represent Mr. & Mrs. Howard Becker in the above referenced matter. On behalf of my clients, I respectfully request a postponement from the zoning hearing scheduled for Monday, August 14, 2006. The reason for this request is that I will be unavailable on this date. No party to this proceeding will be prejudiced by the postponement.

Please reschedule for the next available date.

Respectfully submitted,



Lawrence E. Schmidt

JTV: sf

CC: Timothy M. Kotroco, Director of Permits and Development Management
William J. Wiseman, Zoning Commissioner
Kenneth J. Wells, kj Wells Inc.
Howard & Melanie Becker
Jason T. Vettori, Esquire

TO: PATUXENT PUBLISHING COMPANY
Thursday, August 31, 2006 Issue - Jeffersonian

Please forward billing to:

Jason Vettori
300 E. Lombard Street, Ste. 1440
Baltimore, MD 21202

410-234-0070

NOTICE OF ZONING 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: 06-651-SPHA

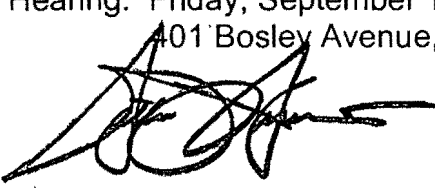
403 Bayside Drive

Southside of Bayside Drive at a distance of 75 feet east of centerline of Winona Avenue
12th Election District – 7th Councilmanic District

Legal Owners: Howard & Melanie Becker

Variance to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 foot setback of the divisional line as established. Special Hearing to confirm that the proposed waterfront construction of an extension to an existing pier and proposed boatlift complies with Section 417.3.C of the Baltimore County Zoning Regulations.

Hearing: Friday, September 15, 2006 at 11:00 a.m. in Room 407, County Courts Building,
401 Bosley Avenue, Towson 21204



WILLIAM J. WISEMAN III
ZONING COMMISSIONER FOR BALTIMORE COUNTY

- NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.
- (2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.



Director's Office
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

Tel: 410-887-3353 • Fax: 410-887-5708

*James T. Smith, Jr., County Executive
Timothy M. Kotroco, Director*

August 10, 2006

NEW NOTICE OF ZONING 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: 06-651-SPHA

403 Bayside Drive

Southside of Bayside Drive at a distance of 75 feet east of centerline of Winona Avenue

12th Election District – 7th Councilmanic District

Legal Owners: Howard & Melanie Becker

Variance to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 foot setback of the divisional line as established. Special Hearing to confirm that the proposed waterfront construction of an extension to an existing pier and proposed boatlift complies with Section 417.3.C of the Baltimore County Zoning Regulations.

Hearing: Friday, September 15, 2006 at 11:00 a.m. in Room 407, County Courts Building,
401 Bosley Avenue, Towson 21204

A handwritten signature in black ink that reads "Timothy Kotroco".

Timothy Kotroco
Director

TK:klm

C: Lawrence Schmidt, 300 East Lombard Street, Ste. 1440, Baltimore 21202
Mr. & Mrs. Howard Becker, 403 Bayside Drive, Baltimore 21222
Kenneth Wells, 7403 New Cut Road, Kingsville 21087

- NOTES: (1) THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY BY THURSDAY, AUGUST 31, 2006.**
- (2) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMMODATIONS PLEASE CALL THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.
- (3) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.



**Department of Permits and
Development Management**

Director's Office
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204
Tel: 410-887-3353 • Fax: 410-887-5708



Baltimore County

James T. Smith, Jr., County Executive
Timothy M. Kotroco, Director

August 14, 2006

CORRECTED NOTICE OF ZONING 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: 06-651-SPHA

403 Bayside Drive

Southside of Bayside Drive at a distance of 75 feet east of centerline of Winona Avenue

12th Election District – 7th Councilmanic District

Legal Owners: Howard & Melanie Becker

Variance to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 foot setback of the divisional line as established. Special Hearing to confirm that the proposed waterfront construction of an extension to an existing pier and proposed boatlift complies with Section 417.3.C of the Baltimore County Zoning Regulations.

Hearing: Tuesday, September 26, 2006 at 11:00 a.m. in Room 407, County Courts Building,
401 Bosley Avenue, Towson 21204

A handwritten signature in black ink, reading "Timothy Kotroco".

Timothy Kotroco
Director

TK:klm

C: Lawrence Schmidt, 300 East Lombard Street, Ste. 1440, Baltimore 21202
Mr. & Mrs. Howard Becker, 403 Bayside Drive, Baltimore 21222
Kenneth Wells, 7403 New Cut Road, Kingsville 21087

- NOTES: (1) **THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY BY MONDAY, SEPTEMBER 11, 2006.**
- (2) **HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMMODATIONS PLEASE CALL THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.**
- (3) **FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.**



TO: PATUXENT PUBLISHING COMPANY
Tuesday, September 12, 2006 Issue - Jeffersonian

Please forward billing to:

Jason Vettori
300 E. Lombard Street, Ste. 1440
Baltimore, MD 21202

410-234-0070

NOTICE OF ZONING 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: 06-651-SPHA

403 Bayside Drive

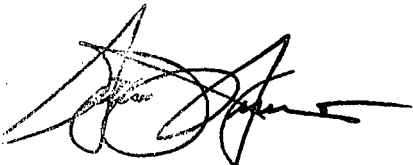
Southside of Bayside Drive at a distance of 75 feet east of centerline of Winona Avenue

12th Election District – 7th Councilmanic District

Legal Owners: Howard & Melanie Becker

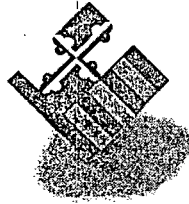
Variance to allow a pier and boat lift within 0 feet of the divisional line in lieu of the required 10 foot setback of the divisional line as established. Special Hearing to confirm that the proposed waterfront construction of an extension to an existing pier and proposed boatlift complies with Section 417.3.C of the Baltimore County Zoning Regulations.

Hearing: Tuesday, September 26, 2006 at 11:00 a.m. in Room 407, County Courts Building,
401 Bosley Avenue, Towson 21204



WILLIAM J. WISEMAN III
ZONING COMMISSIONER FOR BALTIMORE COUNTY

- NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.
- (2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.



BALTIMORE COUNTY
MARYLAND

JAMES T. SMITH, JR.
County Executive

TIMOTHY M. KOTROCO, *Director*
Department of Permits and
Development Management

September 18, 2006

Lawrence E. Schmidt
Gildea & Schmidt, LLC
300 East Lombard Street, Suite 1440
Baltimore, MD 21202

Dear Mr. Schmidt:

RE: Case Number: 06-651-SPHA, 403 Bayside Drive

The above referenced petition was accepted for processing by the Bureau of Zoning Review, Department of Permits and Development Management (PDM) on June 16, 2006.

The Zoning Advisory Committee (ZAC), which consists of representatives from several approval agencies, has reviewed the plans that were submitted with your petition. All comments submitted thus far from the members of the ZAC are attached. These comments are not intended to indicate the appropriateness of the zoning action requested, but to ensure 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. All comments will be placed in the permanent case file.

If you need further information or have any questions, please do not hesitate to contact the commenting agency.

Very truly yours,

A handwritten signature in black ink, reading "W. Carl Richards, Jr." with a stylized flourish at the end.

W. Carl Richards, Jr.
Supervisor, Zoning Review

WCR:amf

Enclosures

c: People's Counsel
Howard Becker Melanie Becker 403 Bayside Drive Baltimore 21222
Kenneth J. Wells 7403 New Cut Road Kingsville 21087



Robert L. Ehrlich, Jr., Governor
Michael S. Steele, Lt. Governor

Robert L. Flanagan, Secretary
Nell J. Pedersen, Administrator

Maryland Department of Transportation

Date: 6.27.06

Ms. Kristen Matthews
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County
Item No. 651 JRF

Dear Ms. Matthews:

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.

Should you have any questions regarding this matter, please contact Larry Gredlein at 410-545-5606 or by E-mail at (lgredlein@sha.state.md.us).

Very truly yours,

Steven D. Foster, Chief
Engineering Access Permits Division



Baltimore County
Fire Department

Office of the Fire Marshal
700 East Joppa Road
Towson, Maryland 21286-5500
410-887-4880

County Office Building, Room 111
Mail Stop #1105
111 West Chesapeake Avenue
Towson, Maryland 21204

June 29, 2006

ATTENTION: Zoning Review Planners

Distribution Meeting Of: June 26, 2006

651

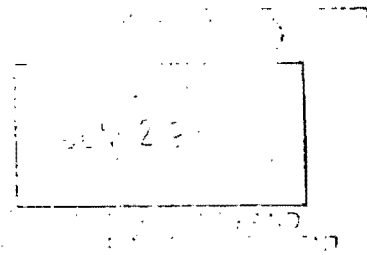
Item Number(s): 644 through 656

Pursuant to your request, the referenced plan(s) have been reviewed by this Bureau and the comments below are applicable and required to be corrected or incorporated into the final plans for the property.

1. The Fire Marshal's Office has no comments at this time.

Lieutenant Roland P Bosley Jr.
Fire Marshal's Office
410-887-4881, (C) 443-829-2946
MS-1102F

cc: File



BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Timothy M. Kotroco, Director
Department of Permits and
Development Management

DATE: July 7, 2006

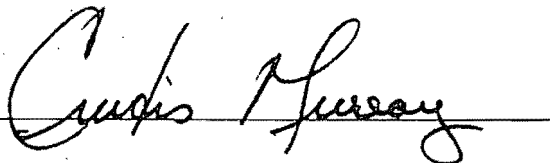
FROM: Arnold F. 'Pat' Keller, III
Director, Office of Planning

SUBJECT: Zoning Advisory Petition(s): Case(s) 6-651- Variance

The Office of Planning has reviewed the above referenced case(s) and has no comments to offer.

For further questions or additional information concerning the matters stated herein, please contact Laurie Hay in the Office of Planning at 410-887-3480.

Prepared By:



Division Chief:



CM/LL

BALTIMORE COUNTY, MARYLAND

INTEROFFICE CORRESPONDENCE

TO: Timothy M. Kotroco, Director
Department of Permits & Development
Management

DATE: June 28, 2006

FROM: Dennis A. Kennedy^{DAK}, Supervisor
Bureau of Development Plans Review

SUBJECT: Zoning Advisory Committee Meeting
For July 3, 2006
Item Nos. 647, 648, 649, 650, 651, 652,
653, 654, 655, and 656

The Bureau of Development Plans Review has reviewed the subject zoning items, and we have no comments.

DAK:CEN:clw

cc: File

ZAC-NO COMMENTS-06282006.doc

BALTIMORE COUNTY, MARYLAND

Inter-Office Correspondence



TO: Timothy M. Kotroco

FROM: Jeff Livingston, DEPRM - Development Coordination

DATE: 9/21/2006

SUBJECT: Zoning Item # 06-651-SPHA
Address 403 Bayside Drive
Baltimore, MD 21222

Zoning Advisory Committee Meeting of June 26, 2006

_____ The Department of Environmental Protection and Resource Management has no comments on the above-referenced zoning item.

X The Department of Environmental Protection and Resource Management offers the following comments on the above-referenced zoning item:

_____ Development of the property must comply with the Regulations for the Protection of Water Quality, Streams, Wetlands and Floodplains (Sections 33-3-101 through 33-3-120 of the Baltimore County Code).

_____ Development of this property must comply with the Forest Conservation Regulations (Sections 33-6-101 through 33-6-122 of the Baltimore County Code).

X Development of this property must comply with the Chesapeake Bay Critical Area Regulations (Sections 33-2-101 through 33-2-1004, and other Sections, of the Baltimore County Code).

Additional Comments:

This property is within the Intensely Developed Area (IDA) and Buffer Management Area (BMA) of the CBCA. Any proposed pier and accessory structure must comply to the CBCA regulations.

Reviewer: Kevin Brittingham

Date: 9/21/06

RE: PETITION FOR SPECIAL HEARING * BEFORE THE
AND VARIANCE *
403 Bayside Drive; S/S Bayside Drive, * ZONING COMMISSIONER
75' E c/line Winona Avenue *
12th Election & 7th Councilmanic Districts * FOR
Legal Owner(s): Howard & Melanie Becker *
Petitioner(s) * BALTIMORE COUNTY
* 06-651-SPHA

* * * * *

ENTRY OF APPEARANCE

Please enter the appearance of People's Counsel in the above-captioned matter. Notice should be sent of any hearing dates or other proceedings in this matter and the passage of any preliminary or final Order. All parties should copy People's Counsel on all correspondence sent/ documentation filed in the case.

Peter Max Zimmerman

PETER MAX ZIMMERMAN

People's Counsel for Baltimore County

Carole S. Demilio

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 27th day of June, 2006, a copy of the foregoing Entry of Appearance was mailed Kenneth Wells, 7403 New Cut Road, Kingsville, MD 21087, and Lawrence E. Schmidt, Esquire, Gildea & Schmidt LLC, 300 E. Lombard Street, Suite 1440, Baltimore, MD 21202, Attorney for Petitioner(s).

RECEIVED

JUN 27 2006

Per.....

Peter Max Zimmerman

PETER MAX ZIMMERMAN

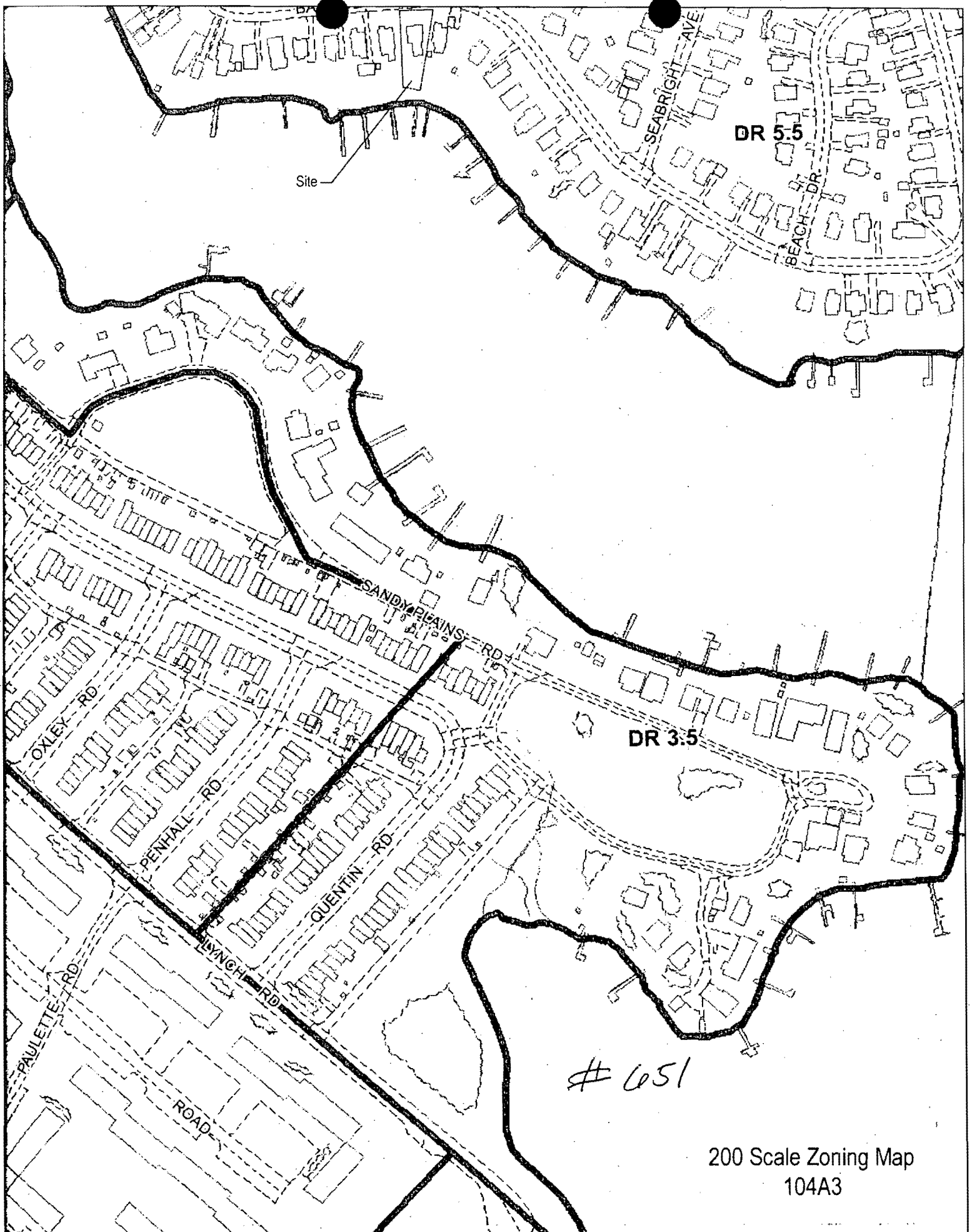
People's Counsel for Baltimore County

CASE NAME Berkov
CASE NUMBER 06-651-SHA
DATE 7/26/06

[illegible]

CASE NAME 06-651-SPH
CASE NUMBER Becker
DATE _____

[illegible]



200 Scale Zoning Map
104A3

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.

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 Mioduszezewski. The subject property was previously owned by Thomas E. and Billye R. J. Kessler, but was subsequently acquired by Ms. Hagerty in December, 1999.

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,

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

Case No.:

06-651-SPHA

Exhibit Sheet

Petitioner/Developer

Protestant

No. 1	SITE PLAN	J. Scott DALLIS SITE PLAN THAT ACCOMPANIED PRIOR Petition
No. 2	2A thru 2E Collectively Photographs	J. MARZENET and Company ADDITION TO PIER Permit
No. 3	Kennell Letter OF PERMISSION	BRD OF APPEALS DECISION 00-241-A ✓
No. 4	Aerial Photographs depicting Existing Conditions	PLAT OF INVERNESS 5-5-37
No. 5	Long + Foster LISTING AGREEMENT	JOINT MOTION TO REVISE ORDER - SETTING FORTH PRIOR ✓
No. 6	PHOTO'S OF PROTESTANTS PROPERTY - SUBMITTED TO. SHOW TREE BLOCKING WATER VIEW	PHOTO DENOTING PIERS IN "2000"
No. 7	PHOTO - SHOWS TREE BLOCKING VIEW	
No. 8	VIEW UP THE CREEK CHINK CREEK (AKA - BEAR CREEK)	
No. 9		
No. 10		
No. 11		
No. 12		

IFT WITHIN 0 FEET OF THE DIVISIONAL
10 FOOT SETBACK OF THE
ED PURSUANT TO SECTION 417.4 OF

SED WATERFRONT CONSTRUCTION OF
SED BOAT LIFT COMPLIES WITH

#651

NOTE:
THE PROPERTY LINES AND IMPROVEMENTS SHOWN
HEREON WERE BASED ON A BOUNDARY SURVEY PREPARED
BY S.J. MARTENET ON JANUARY 15, 2002.

PETITIONER'S

Plan to Accompany a Petition
for a Special Hearing and Zoning Variance

403 Bay Side Drive

LOTS 62 AND 63 SECTION 'H'
INVERNESS

BALTIMORE COUNTY
MARYLAND

DRAWN BY: KJW

CHECKED BY: KJW

DATE: 4/28/2006

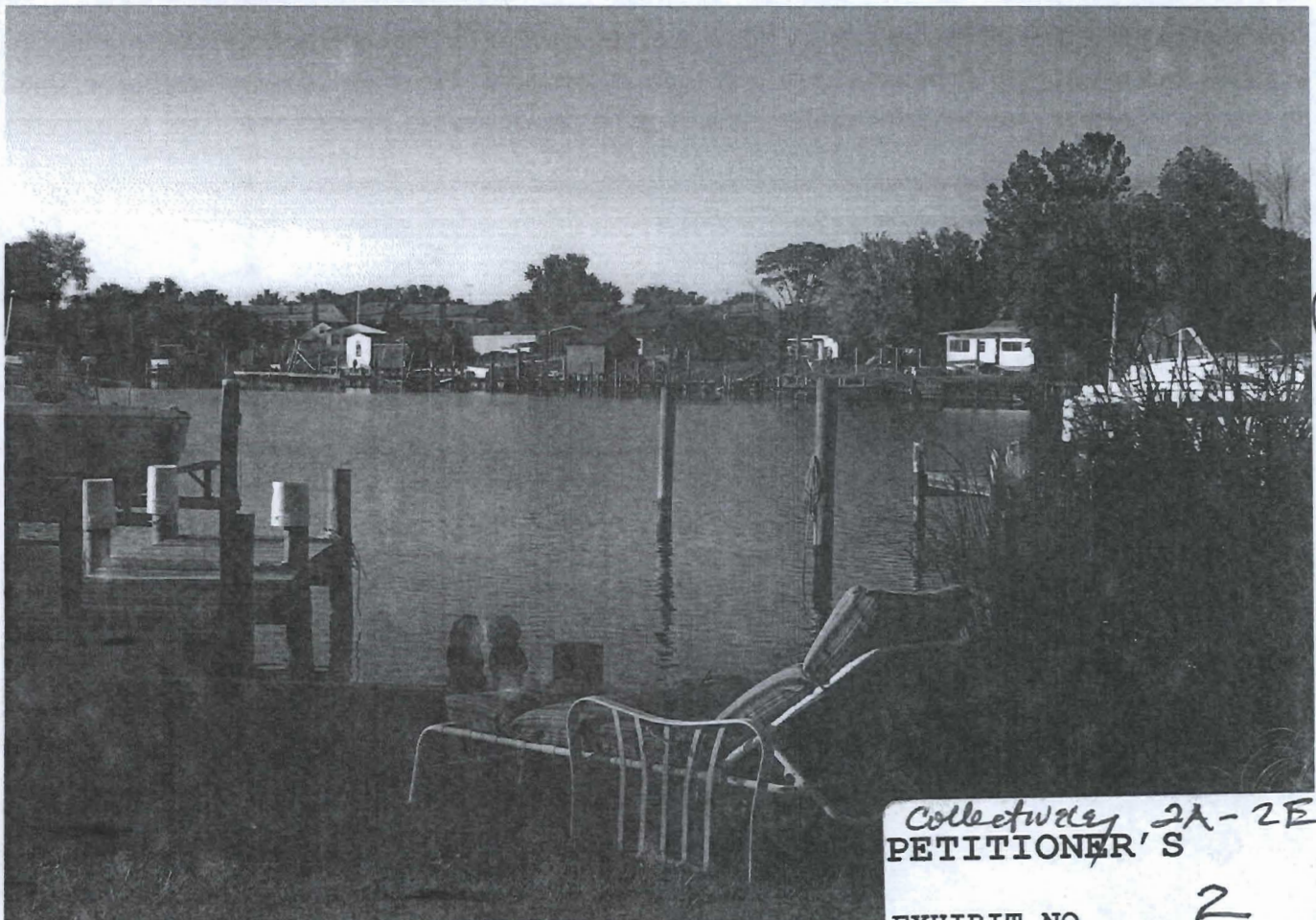
PROJECT NO.:

2006-011

SHEET 1 OF 1



Pet's
Prop.
(to water)

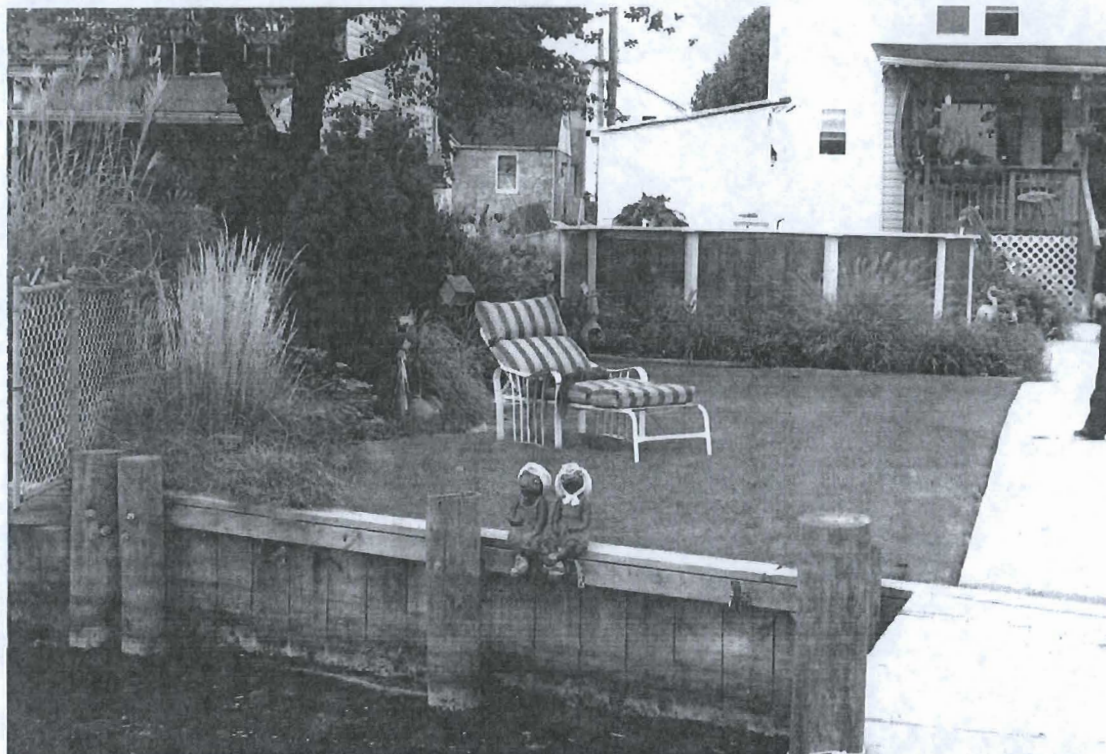


Pet's
Prop.
(to water)

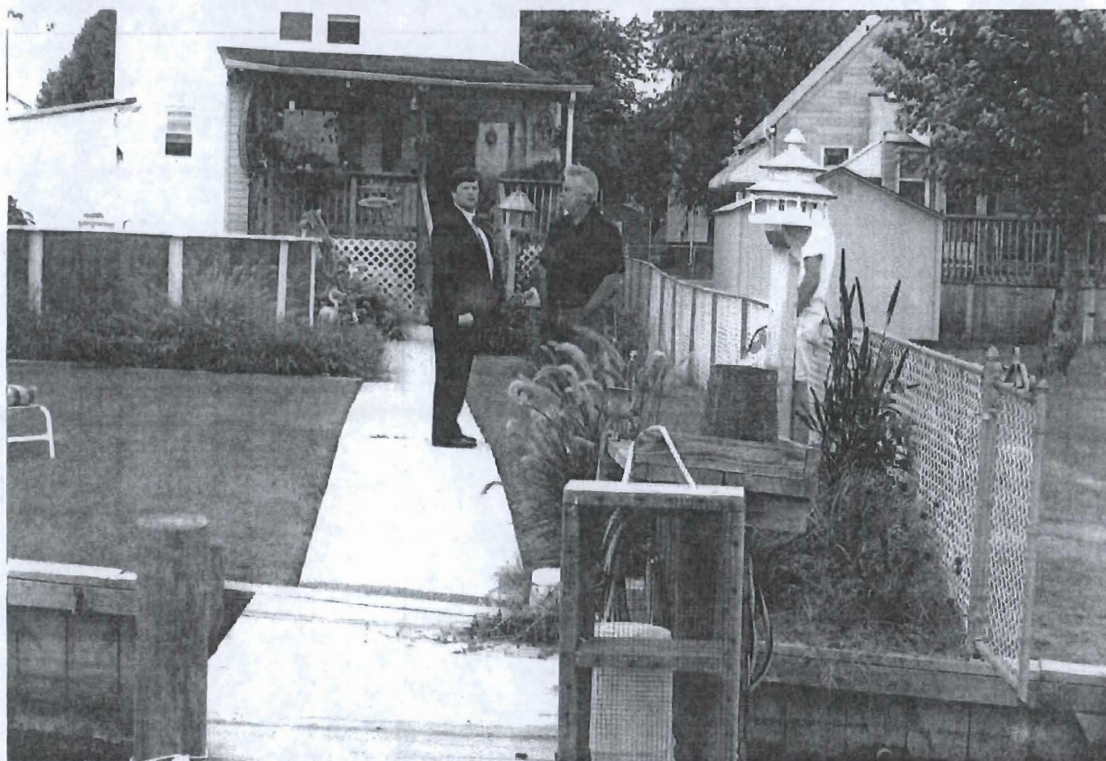
Collectway 2A-2E
PETITIONER'S

EXHIBIT NO. 2

Plot "7 A"



Pet's
prop
(towards
House)



Pet's prop
towards
House)

Pet '7-13"



Pet's
map
~~scribbles~~



Pet's
prop.

Dot "7 - 11"

Ret "2 D"





Ret '2 E''

To whom it may concern,

June 13, 2006

I, Margaret Kennell, resident and owner of property 401 Bayside Drive (Dundalk, Maryland 21222), have no objections to the granting of easement for the proposed pier and boat lift of property 403 Bayside Drive (Dundalk, Maryland 21222) owned by Howard and Melanie Becker.

Sincerely,

*Mrs. Margaret Kennell
401 Bayside Dr.
Dundalk, Md.
21222*

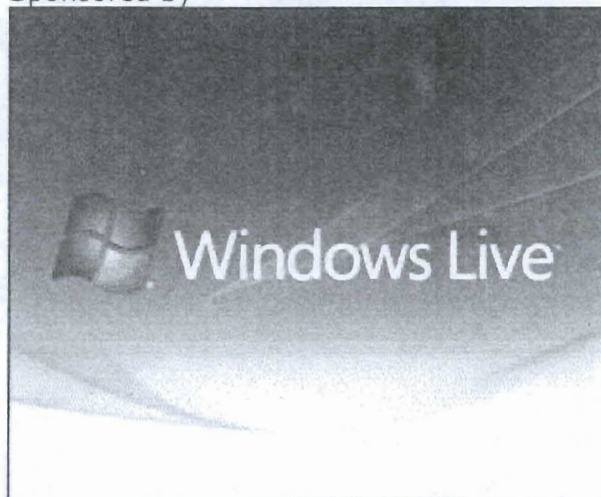
PETITIONER'S

EXHIBIT NO.

3



Sponsored by



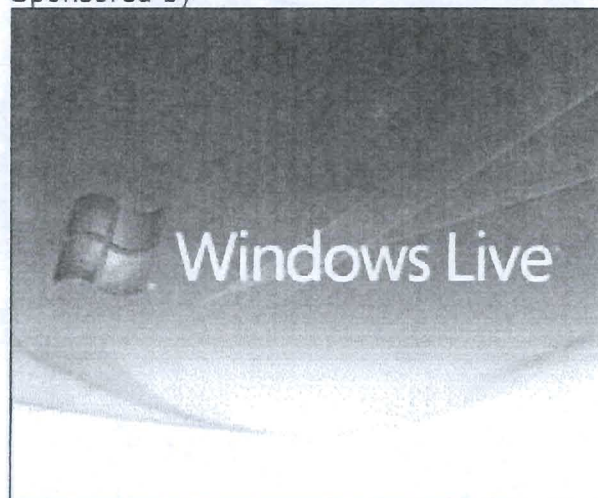
PETITIONER'S

EXHIBIT NO.

4A



Sponsored by



Pet 413

My Long & Foster

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Contact Us



www.longandfoster.com

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Mortgages

Real Estate Services

Real Estate Careers

Mid-Atlantic Region

About Long & Foster

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What is this ?

Property Details - Listing# BC6042984

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Ne

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[Printable Version](#)
[Email this Listing](#)


Schedule a Showing



Mortgage Pre-App



Map it!



Add To Route Planner



Search within 10 miles of this address

Sale Price \$650,000 - 405 BAYSIDE DR, DUNDALK MD 21222

\$4,078 per month. Can my payments be lower?

School Reports

Community Info

Cost of Living

Financial Calculator

Remarks:

Beautiful 2-story detached home waterfront property on Chink Creek off of Bear Creek. A 7,841 sq ft lot (0.17 ac) w/1900 sq ft home, 900 sq ft unfnsd bsemt. 4 BRs, 2 Full Bath Kitchen, Living Room and Dining Room. 70 ft. pier w/electric and water. 10K lbs boat lift (boat), w/shore tie, electric ski lift (2). Public water and sewer. Cable avail.

Property Information:

Listing #: BC6042984
Status: **ACTIVE**
Full Baths: 2
Subdivision: DUNDALK
Sale/Rental: Sale
Total Taxes: \$2,299
Style: Other

List Price: \$650,000
Bedrooms: 4
Half Baths: 0
Year Built: 1953
Property Type: Detached
County: BALTIMORE
Additional Info

Listing information:

Mickey Mezzanotte



Office Numbers

Agent Numbers

Local (410) 529-1900 Office (800) 514-7355

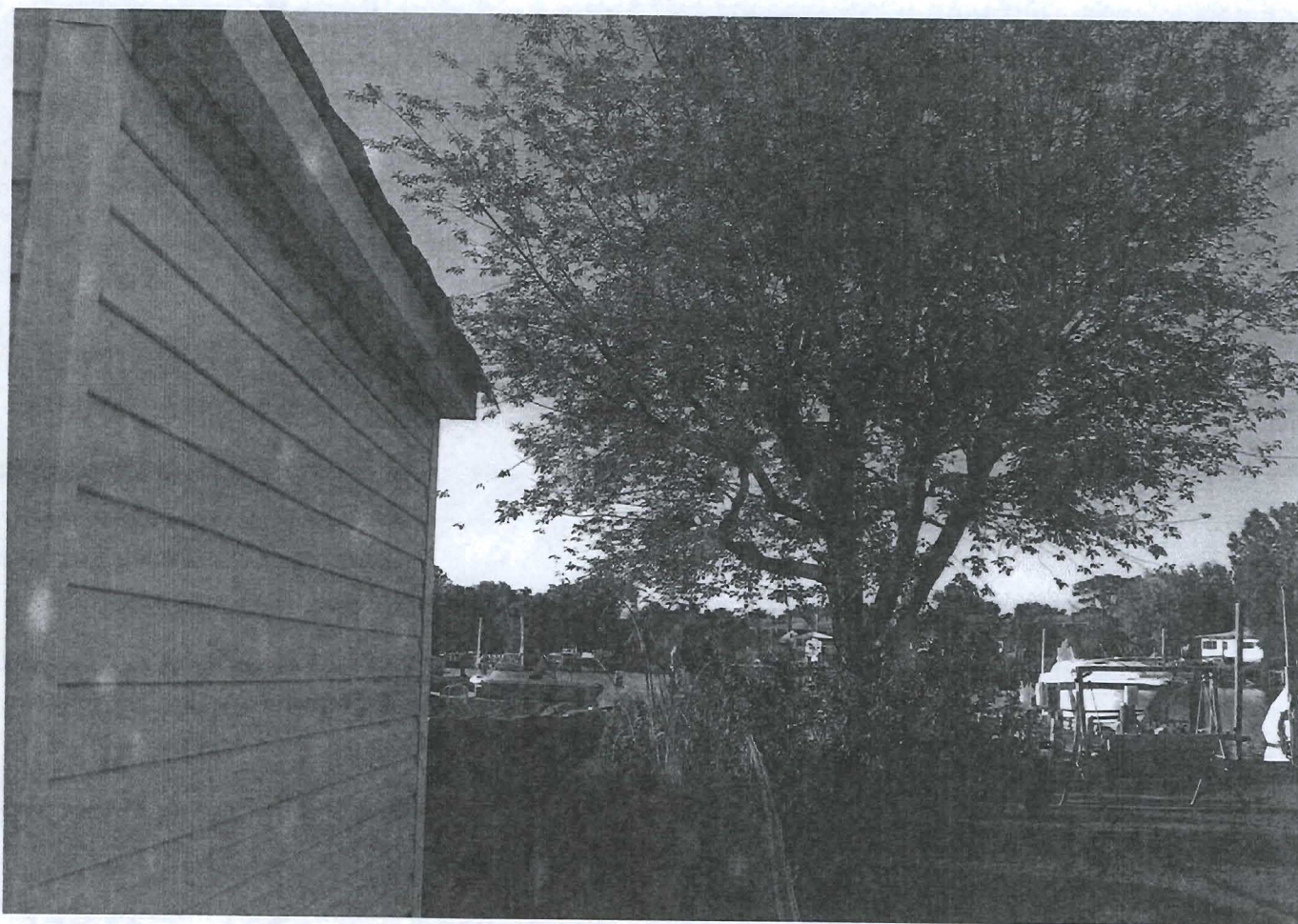
Fax (410) 529-5954 Fax (410) 529-5954

Toll Free (800) 514-7355 Mobile (443) 956-1427



Email

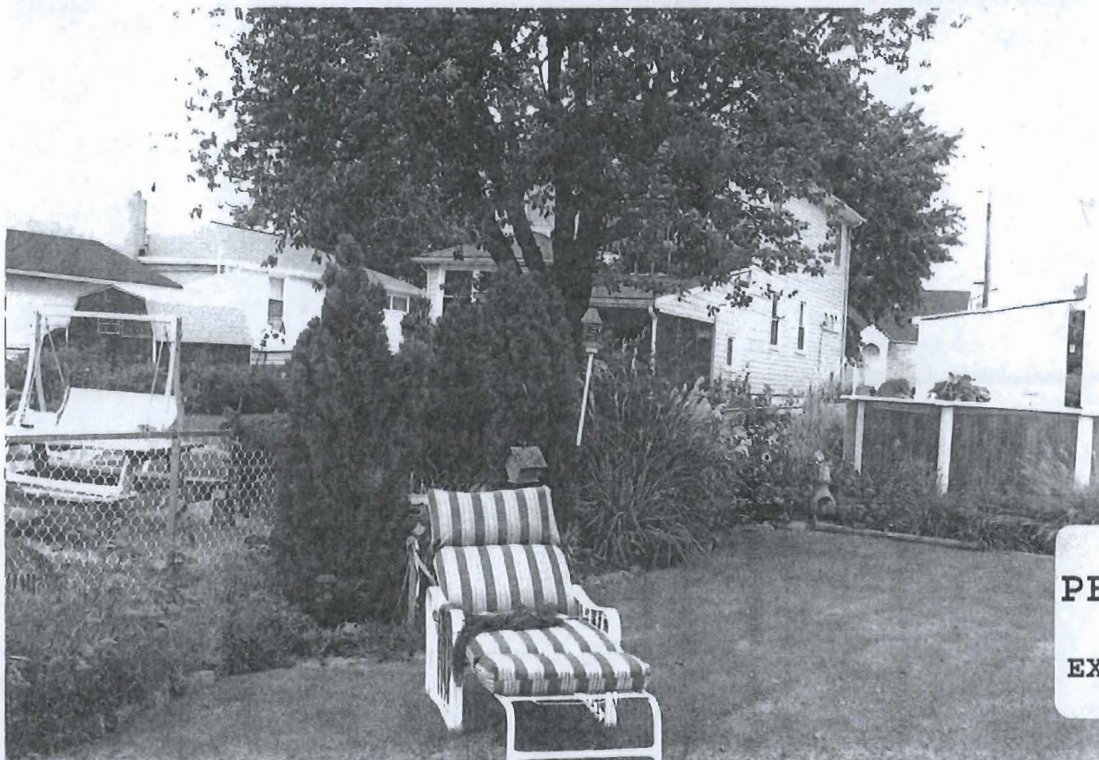
PETITIONER'S



PETITIONER'S

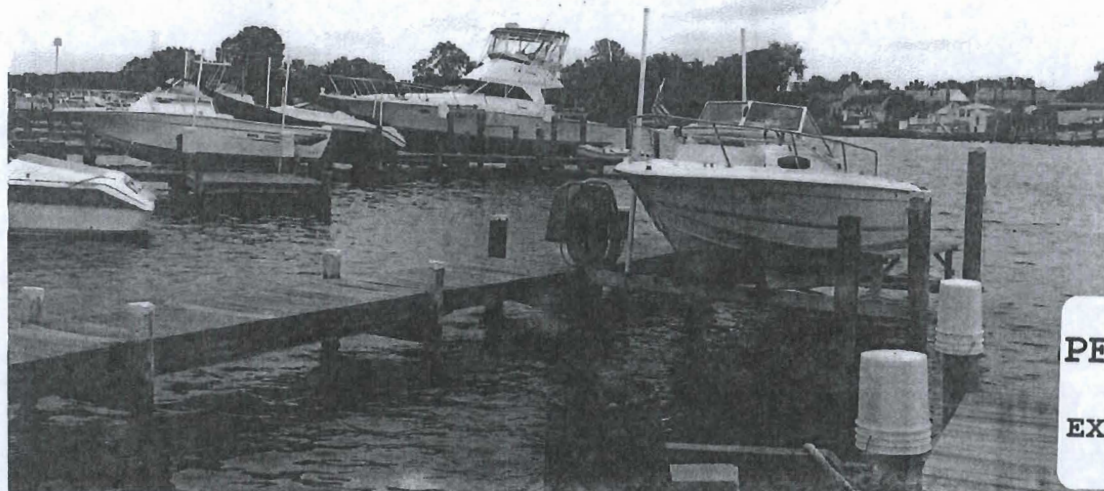
EXHIBIT NO. _____

6



PETITIONER'S

EXHIBIT NO. 7



PETITIONER'S

EXHIBIT NO.

8

Case No.:

06-651-SPHA

Exhibit Sheet

Petitioner/Developer

Protestant

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No. 2	2A thru 2E Collectively Photographs	J. MARTENET and Company ADDITION TO PIER Permit
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No. 6	PHOTO'S OF PROTESTANTS PROPERTY - SUBMITTED TO. SHOW TREE BLOCKING WATER VIEW	PHOTO DENOTING PIERS IN "2000"
No. 7	PHOTO - SHOWS TREE BLOCKING VIEW	
No. 8	VIEW UP THE CREEK CHINK CREEK (AKA - BEAR CREEK)	
No. 9		
No. 10		
No. 11		
No. 12		

00-241-A

241

PROTESTANT'S

EXHIBIT NO. 1

SITE PLAN TO ACCOMPANY PETITION FOR VARIANCE
403 BAYSIDE DRIVE

12TH ELEC. DIST. 7TH COUNC. DIST. BALTIMORE COUNTY, MD.
SCALE: 1" = 20' DECEMBER 8, 1999

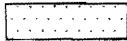
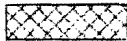
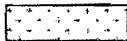
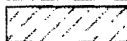
JO. #99-827

PARK 3

Areas:

Area of Original Lots	5,497 Sq. Ft. or 0.1262 Ac
Area of Fill	739 Sq. Ft. or 0.0170 Ac
Total	6,236 Sq. Ft. or 0.1432 Ac

Legend

Utility Pole	⊗
Chain Link Fence	— x —
Existing Piling	⊕
Proposed Piling	⊙
Existing Pier	
Proposed Pier	
Existing Boat Lift	
Proposed Boat Lift Area	
Allowable Pier Area	

CREEK

PROTESTANT' S

EXHIBIT NO. 2

10/4/2002
Property Line Surveyor No. 467

Date

Sci

BALTIMORE COUNTY ZOI

Section 417—WATERFRONT

Post-It® Fax Note 7871

Date	11/8	# of pages	3
To	MIKE SKI	From	Roy / Mr
Co./Dept.		Co.	
Phone #	410 636 3494	Phone #	887-3980
Fax #	410 636 4991	Fax #	

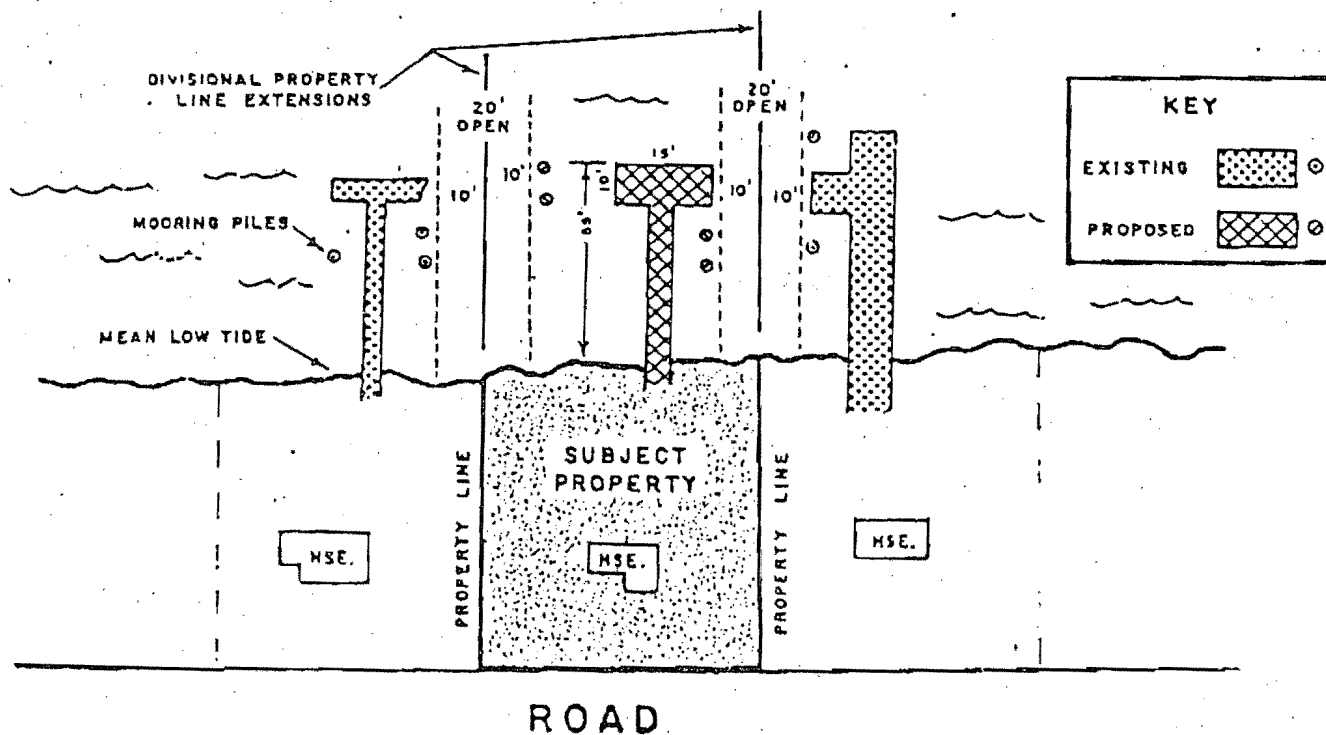
417.1—All waterfront construction, such as piers, wharves, docks, bulkheads, or other work extended into navigable waters beyond mean low tide as prescribed in Baltimore County Design Manual, 1955, shall be governed by these regulations as well as by the Baltimore County Code, 1962 Cumulative Supplement, Sec. 5-5.1, except that nothing in these regulations shall apply to the M. H. Zone and to the extension of industrial waterfront facilities to the limit of Corps of Engineers' established pierhead or bulkhead lines.

417.3—For the purpose of defining boundaries within which waterfront construction may take place, divisional lines shall be established in accordance with the following rules:

417.2—All applications for waterfront construction, when filed with the buildings engineer, shall be accompanied by a plot diagram suitable for filing permanently with the permit record, showing the outlines of the property in question and of adjoining properties, and showing any existing construction beyond mean low tide, as well as details of the proposed construction; whenever required by the buildings engineer, in his discretion, the application must be accompanied by a plan prepared by a professional engineer or land surveyor, showing to scale the outlines of the property in question, as well as the outlines of the adjoining properties, including any existing construction beyond mean low tide, and a plan and details of the proposed construction.

a. With straight shore lines:

If the shoreline is straight, the divisional lines are to be extended from the intersection of the property line and the shoreline into the water perpendicular to the shoreline, or where the property lines are parallel and it is practical to do so, the proper boundary line shall be extended in a straight line into the water.



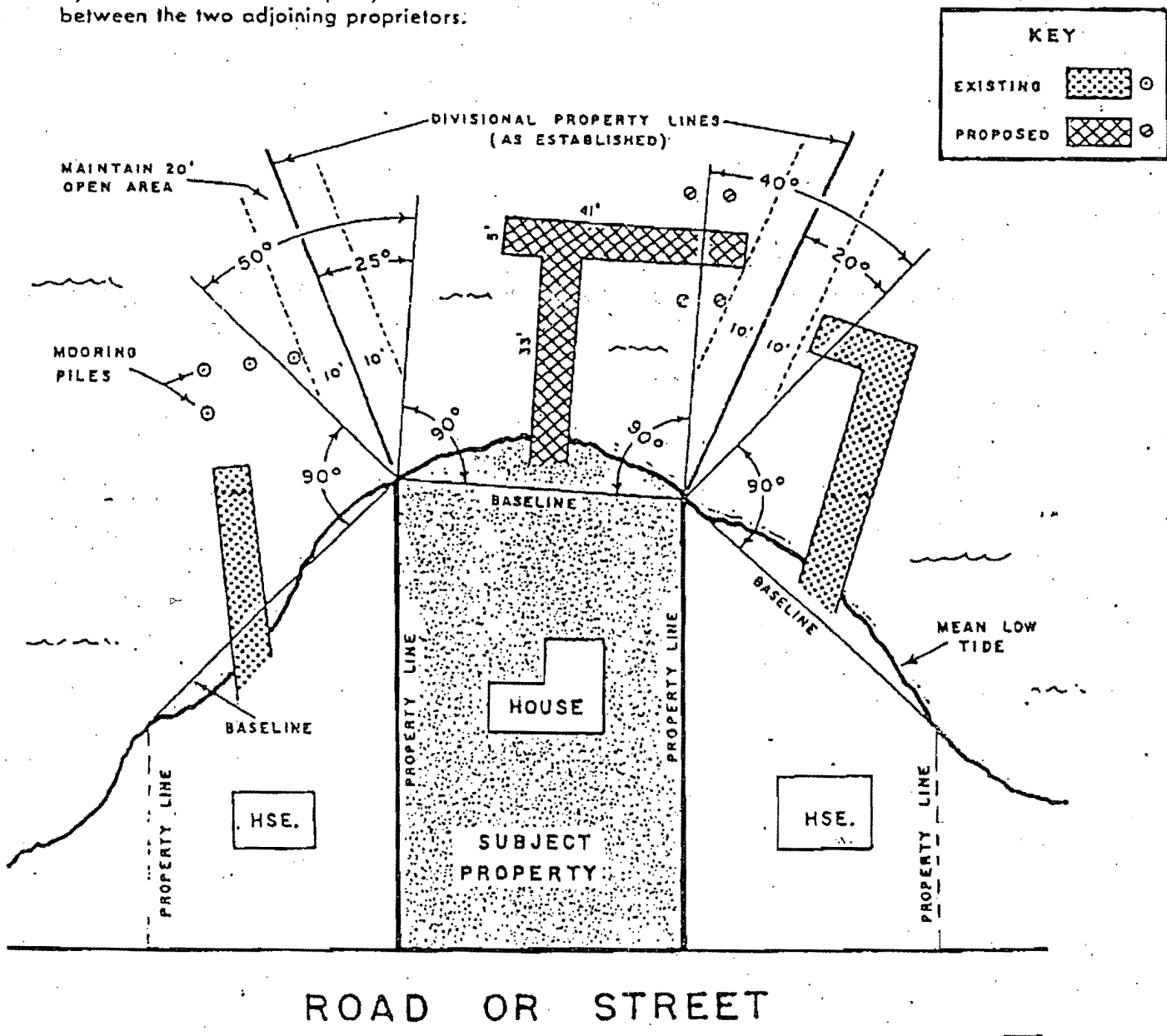
WATERFRONT CONSTRUCTION

b. With irregular shorelines:

Where the shoreline is not straight, draw a baseline between the two corners of each lot at mean low water line. Then draw a line from the corner of each proprietor's property into the water at right angles with the base line. If by reason of the curvature of the shore, the lines, when projected into the water, diverge from each other, the area excluded by both lines shall be equally divided between the two adjoining proprietors. If by reason of the curvature of the shore, the lines, when projected into the water, converge with each other, the area included by both lines shall be equally divided between the two adjoining proprietors.

c. Conflict with existing construction:

Where proposed construction will conflict with existing facilities, it will be the duty of the office of planning and zoning to specify the limits of construction to conform as closely as possible to the rules as set forth herein so as to cause the least interference with existing and/or possible future construction. Notice of the proposed construction shall be given by the department of permits and licenses to adjoining property owners affected.



WATERFRONT CONSTRUCTION

417.4—No construction, beyond mean low tide, including mooring piles, will be permitted within ten 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.

417.5—Any structure built beyond mean low tide must be contained within construction offsets as prescribed. In addition to meeting these requirements, the structure must not extend beyond any of the following limits:

- Three hundred feet beyond mean low tide
- In the absence of a definable channel, not more than $\frac{1}{3}$ the width of waterway *Army Corps* $\frac{1}{4}$
- Not beyond the near boundary of a definable channel

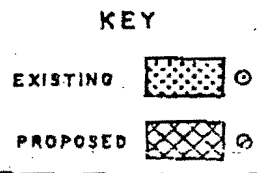
417.6—No new waterfront facilities, such as boat yards or marinas, or any service building or structure used in connection therewith, shall be established without the approval of and subject to the regulations and requirements of the Baltimore County department of health. Written approval shall be a required condition prior to issuance of a permit.

417.7—Marinas located on property consisting of five or more acres shall be permitted to establish out-of-water storage facilities for recreational marine craft provided that no such facilities thereon shall be located within 60 feet of any property line, and provided, further, that screening shall be provided and maintained of such types and at such locations as may be required by the Zoning Commissioner or County Board of Appeals, on appeal.

DIVISIONAL PROPERTY LINES
(AS ESTABLISHED)

MAINTAIN 20'
OPEN AREA

MOORING
PILES



MEAN LOW TIDE

BASELINE

BASELINE

B. LINE

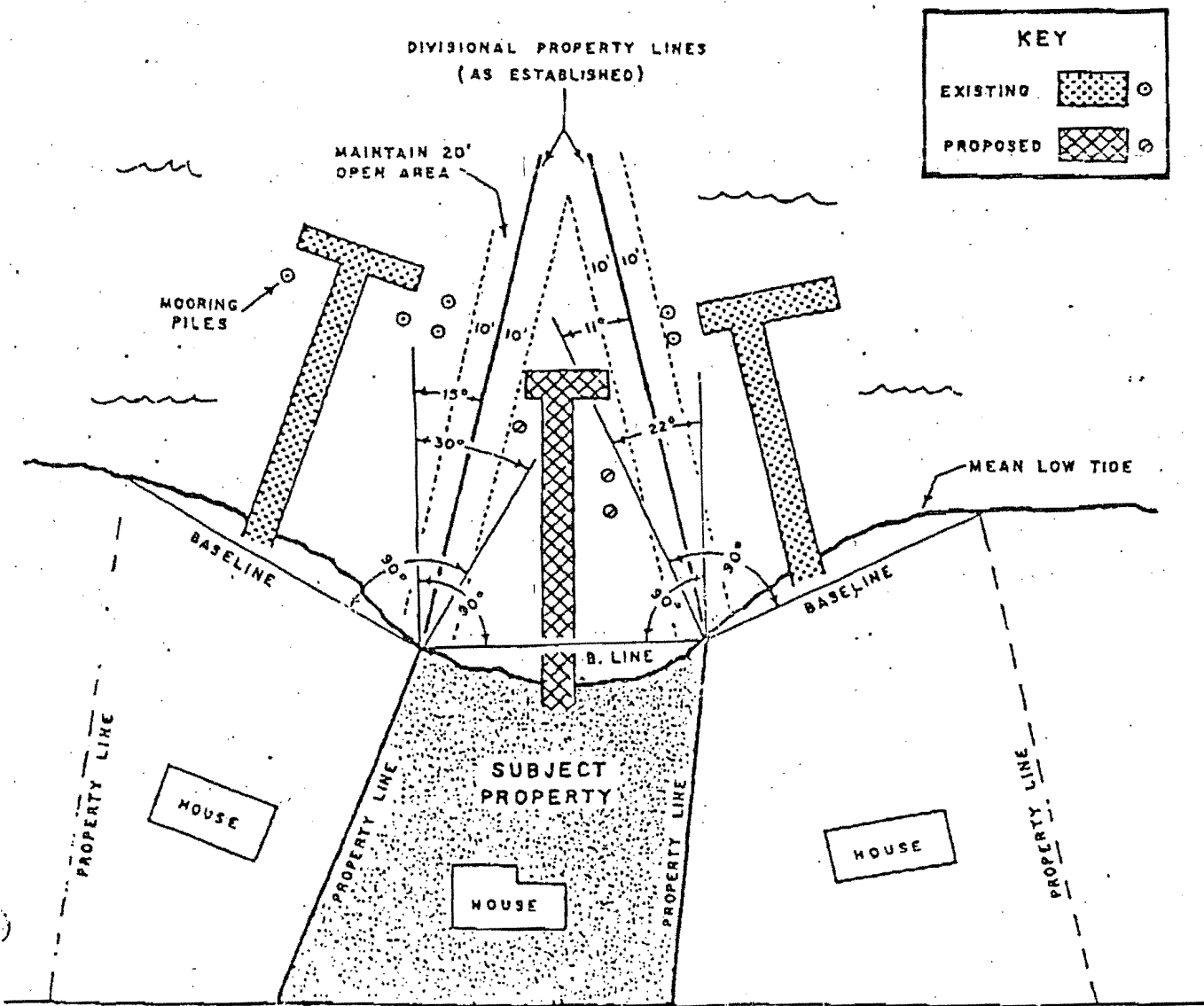
SUBJECT
PROPERTY

HOUSE

HOUSE

HOUSE

ROAD OR STREET





County Board of Appeals of Baltimore County

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

June 6, 2001

Edward C. Covahey, Jr., Esquire
COVAHEY & BOOZER, P.A.
614 Bosley Avenue
Towson, MD 21204

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,

Charlotte E. Redcliffe or
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

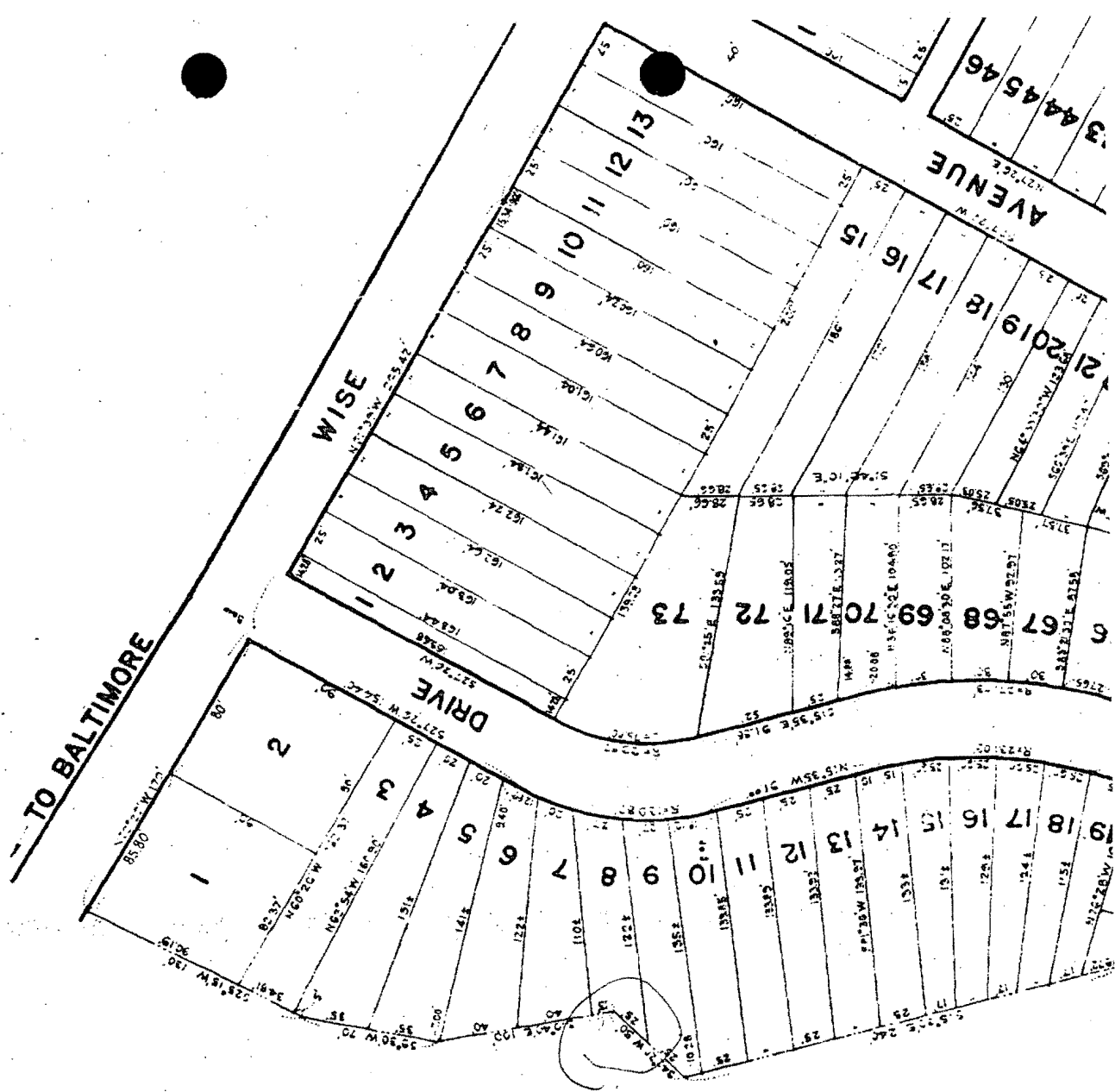
PROTESTANT' S

EXHIBIT NO. 3

PROTESTANT' S

EXHIBIT NO.

4



✱



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 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,

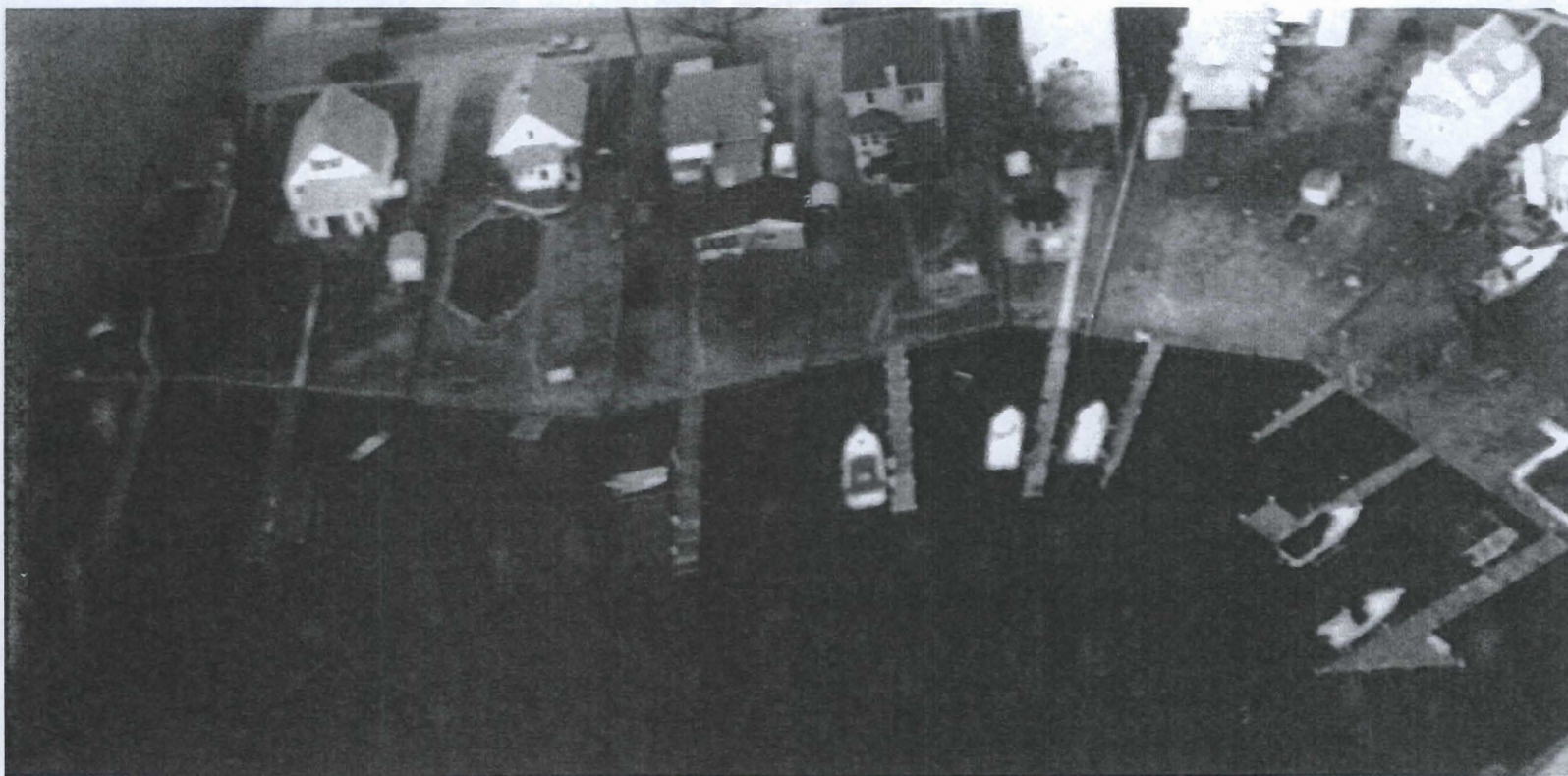
Kathleen C. Bianco
Kathleen C. Bianco
Administrator

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

PROTESTANT' S

EXHIBIT NO. 5



PROTESTANT' S

EXHIBIT NO. 6

TAKEN

A PROXIMATELY

12/00

denotes
Pmri Pmri at 403 BAYSIDE