IN THE MATTER OF LUCKY STAR, LLC – PETITIONER FOR VARIANCE ON THE PROPERTY LOCATED AT 11 LYNBROOK ROAD	* *	BEFORE THE BOARD OF APPEALS
15th ELECTION DISTRICT 7th COUNCILMANIC DISTRICT	* * *	OF BALTIMORE COUNTY CASE NO.: 21-109-A

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OPINION

This case comes to the Board of Appeals of Baltimore County (the "Board") as the result of a Petition submitted by Lucky Star, LLC ("Lucky Star") requesting approval for a detached residential garage of twenty feet in excess of the fifteen foot height requirement for an accessory structure in a residential zone. Lucky Star requested a finding that a variance was not necessary or, in the alternative, that a variance be ordered to permit such a structure. Lucky Star was represented by Dino C. La Fiandra, Esquire. Initially there was no opposition. In an opinion dated July 20, 2021, Administrative Law Judge Maureen E. Murphy dismissed the Petition as moot, holding that because the property was zoned BL, the zoning requirements for a business zone were applicable. Because the height restriction in a BL zone for the structure in question is forty feet, no variance was required.

People's Counsel, Peter Max Zimmerman, Esquire, filed a Motion for Reconsideration. The gist of its Motion was that because the BL zone was adjacent to a residential zone, any residential use in the BL zone was controlled by the requirements of the adjacent residential zone. This meant, according to People's Counsel, that Lucky Star did in fact require a variance, which People's Counsel did not oppose. Lucky Star took no position on the Motion. In an Opinion dated September 9, 2021, the Motion for Reconsideration was granted in part and denied in part, but to the extent relevant, the ALJ refused to alter the legal conclusion that a residential use in a BL zone was not controlled by the zoning restrictions in the adjoining residential zone.

People's Counsel filed an appeal to the Board. In its appeal, People's Counsel sought only a statement that a residential use in a BL zone is governed by the regulations that govern the adjoining residential zone. Once again, Lucky Star took no position. People's Counsel did not oppose the granting of a variance under *Cromwell v. Ward.* 102 Md. App. 691 (1995).

The Board held a virtual public hearing on February 17, 2022. The parties thereafter submitted post-hearing memoranda. The Board held a remote public deliberation using Webex on April 21, 2022. In its public deliberation, the Board determined that, under the facts of this matter, the governing criteria from the neighboring residential zone applied and that Petitioner was required to obtain a variance in order to have an accessory building greater than fifteen feet high. The Board further determined that the *Cromwell* factors were satisfied, and the Petitioner was entitled to a variance.

The facts are uncontested. The Petitioner called two witnesses before the Board. The first witness was Patrick Richardson, a civil engineer. He testified that he drew plans for a twenty foot attached garage to the subject property, which is a residence at 11 Lynbrook Road. The property is zoned BL. The permitted uses in a BL zone are contained in BCZR § 230.1.A. A permitted use in a BL zone is any use in an adjoining residential zone, though that use is also restricted by any restrictions associated with that adjoining residential zone. BCZR § 230.1.A.1. In this instance, the adjoining residential zone – in fact, a sliver of the subject property itself – is D.R. 16. As an attached garage to a residential building its height could be sixty feet. BCZR § 1B02.2.A. He obtained a building permit for an attached garage from the County. As construction began, it was discovered that the topography prevented an attached garage, so it was built as an unattached garage, *i.e.*, an accessory structure. No alternative building permit was sought or obtained before construction of the unattached structure. When the County inspected the completed project, Petitioner was told that it needed to obtain a *post hoc* variance because, as an unattached garage, its height was limited to fifteen

feet. BCZR § 400.3. Though this was a BL zone, because the house was being used as residential rental property, the building requirements were found in BCZR § 230.1.A.1 which requires reference to the adjoining residential zone. The adjoining property was zoned D.R. 16. BCZR § 400.3 provides that an accessory building in a D.R. 16 zone can only be fifteen feet high. Mr. Richardson asserted that because this was a BL zone, the forty foot height requirement for BL zones applied notwithstanding the residential use. BCZR § 231.

The second witness was Wa-Yi Lau who is the principal of Lucky Star. The original Petition indicated that she wanted to use the garage for personal reasons. However, the situation became murkier when she testified that maybe she would use the garage for business purposes. Such a use would not require a variance. She acknowledged that the dwelling had historically been a residential rental property, but she indicated that she might use it as an office for Lucky Star in the future.

People's Counsel presented no live witnesses, but it did offer an email chain between People's Counsel and Jeffrey Perlow, Chief of the Baltimore County Office of Zoning Review. The emails reflect Mr. Perlow's view that the adjoining residential restrictions should apply.

DISCUSSION

The Petition and site plan were pegged to residential use, and the ALJ opinion likewise. It was initially presented to the Board in that context, and it was only when Ms. Lau off-handedly and unexpectedly raised the possibility of a commercial use for the residence did the analysis veer away from what everyone had believed was the framework for this matter. It is appropriate, therefore, to analyze this case as it was presented: as a request for approval for an accessory structure to a residential property in a BL zone.

Because the Board reviews this case *de novo*, the very act and fact of an appeal make the ALJ opinion a nullity. We view this matter on a clean slate as though no ALJ opinion had ever been issued. The record is too scanty, and the facts are far too muddled, to justify a change in the basic

approach to established variance law under these circumstances. Therefore, we reject the argument put forth by Mr. Richardson that no variance was needed. Instead, we turn to *Cromwell.*

Under *Cromwell v. Ward* a property owner can receive a variance from a zoning restriction if the property is unique **and** if the property owner would otherwise suffer practical difficulty or unreasonable hardship. These dual requirements are codified in the BCZR at § 307. The Lucky Star property is clearly unique. Its shape is narrow, irregular, and deep which makes any type of development difficult. Unlike neighboring properties, the flood plain covers the entire rear of the property which also makes for a reduced development area. Indeed, the property is in the Limited Development Area ("LDA") which itself is not typical.

As to practical difficulty, the subject property has typically been used for storage of personal pleasure watercraft. In order to have **indoor** boat storage – which is important for safety and security – it is necessary to have a garage with a height of twenty feet. Without being able to exceed the fifteen foot limitation, such storage is not possible. Additionally, Lucky Star wants to be able to store some shipments of imported tea, and the twenty foot height is necessary to offload shipments in inclement weather. These concerns satisfy the practical difficulty requirement.

Finally, the design of the garage is consistent with the design of the residence. Accordingly, the variance can be granted in strict harmony with the spirit and intent of the BCZR and without any detrimental effect on the health, safety, or general welfare of the public or of the surrounding property. It is noteworthy regarding the impact of the variance on the general welfare that neither People's Counsel nor the owners of any surrounding property oppose the variance.

CONCLUSION

For the reasons stated above, the request for a variance pursuant to *Cromwell v. Ward* is hereby granted.

ORDER

THEREFORE, IT IS this 7th day of June, 2022 by the Board of Appeals of Baltimore County

ORDERED that, for the reasons stated in the Opinion that accompanies this Order, the Petitioner's Request for Variance Relief pursuant to Section 307 of the Baltimore County Zoning Regulations ("BCZR") to permit the construction of a twenty foot unattached garage at 11 Lynbrook Road in lieu of the required height restriction of fifteen feet is **GRANTED**.

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

Deborah Dopkin, Panel Chair

Joseph L. Evans

Adam T. Sampson

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

June 7, 2022

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

Dino C. La Fiandra, Esquire
Law Office of Dino C. La Fiandra, LLC
100 West Pennsylvania Avenue, Suite 305
Towson, Maryland 21204

RE: In the Matter of: *Lucky Star, LLC*
Case No.: 21-109-A

Dear Counsel:

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

Sunny Cannington Hey

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Duplicate Original Cover Letter

c: Wai-Yi Lau/Lucky Star, LLC
Patrick C. Richardson, Jr./Richardson Engineering, LLC
Paul M. Mayhew, Managing Administrative Law Judge
Stephen Lafferty, Director/Department of Planning
C. Pete Gutwald, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
James R. Benjamin, Jr., County Attorney/Office of Law