IN RE: **PETITIONS FOR SPECIAL HEARING AND VARIANCE**	*	BEFORE THE
(414 Katherine Avenue)	*	OFFICE OF
15th Election District 7th Council District	*	ADMINISTRATIVE HEARINGS
Glen & Sheila Ogle *Legal Owners*	*	FOR BALTIMORE COUNTY
Petitioners	*	**Case No. 2022-0140-SPHA**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings ("OAH") for consideration of Petitions for Special Hearing and Variance filed on behalf of Glenn and Sheila Ogle, legal owners ("Petitioners") for the property located at 414 Katherine Avenue (the "Property"). The Special Hearing was filed pursuant to Baltimore County Zoning Regulations ("BCZR") §500.7 to confirm that the subject lot (Lot 10) was not merged with 416 Katherine Avenue, and for such other and further relief as may be deemed necessary by the ALJ for Baltimore County. In addition, Variances from BCZR § 1B02.3.C.1 were filed seeking the following relief:

1.) For the net lot area to be 8,678 sq. ft. in lieu of the minimum net lot area of 10,000 sq. ft.

2.) For the lot width to be 46 ft. in lieu of the minimum lot width of 70 ft.

3.) For the sum of the width of the side yards to be 20 ft. in lieu of the minimum sum of 25 ft.

4.) For the rear yard depth (to the street) to be 25 ft. in lieu of the minimum rear yard depth of 30 feet.

Due to COVID-19, a public WebEx hearing was conducted virtually in lieu of an in-person hearing. The Petition was properly advertised and posted. Petitioners, Glenn and Sheila Ogle appeared at the hearing in support of the Petition. Lawrence E. Schmidt, Esquire and Smith Gildea & Schmidt, LLC, represented the Petitioners. The adjoining neighbors on either side also attended

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and voiced their opposition to certain aspects of the requested relief. A letter of opposition, with attachments, was received from Kevin McDonough, the President of the Rockaway Beach and Turkey Point Improvement Associations. The letter urged that the subject Lot 10 has merged with 416 Katherine Avenue and that construction of a dwelling on Lot 10 should therefore not be permitted.

Substantive Zoning Advisory Committee ("ZAC") comments were received from the Department of Environmental Protection Sustainability ("DEPS") which indicate that the Petitioners must comply with critical area requirements. In addition, a ZAC comment was received from the Department of Planning ("DOP"). They did not oppose the requested relief subject to proposed conditions, which will be incorporated into the Order.

The Property is approximately 8,678 sq. ft., and zoned DR 3.5. Mr. Schmidt explained that the subject lot is part of the "Cape May" subdivision plat that was recorded in 1919, prior to the adoption of the Baltimore County Zoning Regulations. The Plat was admitted as Petitioners' Exhibit 2. Like the other lots on the plat it does not meet the area and width requirements of the DR 3.5 zone. Mr. Schmidt further explained that the Petitioners purchased the adjoining property at 416 Katherine Avenue in 1994 and the subject Lot 10 in 2008. He noted that the lots have always had separate tax IDs. The Petitioners averred that they purchased Lot 10 as an investment and have always viewed and treated it as a separate lot. Mr. Ogle testified that they have maintained it as lawn and have only used it to store firewood and/or a boat or car. There have never been any permanent structures on Lot 10. Petitioners sold 416 Katherine Avenue in 2019 but retained adjoining Lot 10 as an investment.

With regard to the Variances, Mr. Schmidt argued that the relief is covered by the "small lot" provisions of BCZR § 304, which "grandfathered" undersized lots such as this when the

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current zoning regulations impose more stringent area and width requirements. He further urged that the setback variances should be granted in order that a dwelling can be built that will be compatible in scale with the other dwellings on the street. The neighbors explained that this is a very narrow lot and that they believe the setbacks should be enforced in order to protect their views, their enjoyment of their properties, and their property values. Mr. Schmidt acknowledged that any construction on the site would have to conform with the Chesapeake Bay Critical Area ("CBCA") and Limited Development Area ("LDA") regulations.

SPECIAL HEARING

"A request for special hearing is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore County*, 163 Md. App. 194, 877 A.2d 1166, 1175 (2005). And, "the administrative practice in Baltimore County has been to determine whether the proposed Special Hearing would be compatible with the community and generally consistent with the spirit and intent of the regulations." *Kiesling v. Long*, Unreported Opinion, No. 1485, Md. App. (Sept. Term 2016).

In the instant case the Petitioners seek a declaration that Lot 10 has not merged with the adjoining lot at 416 Katherine Avenue. Under Maryland law "merger" occurs when a property owner who owns adjoining parcels treats them as if they are one. The typical factual scenario is where the owner of one lot with a dwelling on it uses the adjoining undeveloped lot in service of the dwelling. However, the mere use of the "servient" lot for recreational or incidental purposes does not result it merger under the common law. Rather, merger does not normally occur unless a substantial structure of some kind is built on the servient lot. *See, e.g., Remes v. Montgomery County,* 387 Md. 52, 66-69 (2005) (in-ground pool and driveway installed on adjoining lot resulted in merger); *But see, Mueller v. People's Counsel,* 177 Md. App. 43, 101 (2007) (boat launch and

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movable storage shed on adjoining lot did not result in merger). Based on the record evidence in this case I find that Lot 10 did not merge with 416 Katherine under the controlling legal precedents.

VARIANCE

A variance request involves a two-step process, summarized as follows:

(1) It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
(2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

Cromwell v. Ward, 102 Md. App. 691 (1995).

The Property is arguably unique in a zoning sense because it is a waterfront lot that is irregularly shaped and is subject to the CBCA. However, as counsel pointed out, this case is also covered – and in my view more properly analyzed – through the provisions of BCZR § 304, rather than under the general variance principles of BCZR § 307. Accordingly, the showing of uniqueness and hardship need not be made if the facts establish protection under BCZR § 304. *See, Mueller, supra,* 177 Md. App. at 86-87.

Baltimore County Zoning Regulation 304 provides as follows:

Except as provided in Section 4A03, a one-family detached or semidetached dwelling may be erected on a lot having an area or width at the building line less than that required by the area regulations contained in these regulations if:
A. Such lot shall have been duly recorded either by deed or in a validly approved subdivision prior to March 30, 1955;
B. All other requirements of the height and area regulations are complied with; and
C. The owner of the lot does not own sufficient adjoining land to conform to the width and area requirements contained in these regulations.

In the instant case all three requirements can be met. As explained above, Lot 10 is part of a subdivision plat that was recorded in 1919. Further, as in *Mueller, supra,* at no time did the Petitioners own sufficient *undeveloped* adjoining land to allow Lot 10 to conform with the DR 3.5 width and area requirements. When the Ogles purchased the property at 416 Katherine Avenue

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there was already a dwelling on it, and that lot is only 51 feet wide. Therefore, they did not have sufficient excess width to convey to Lot 10 in order to make it of conforming width. Finally, a dwelling can be constructed on Lot 10 which meets the setback requirements, and I believe that the adjoining neighbors are entitled to the enforcement of these setbacks because "citizens [of a given county or municipality] are entitled to strict enforcement of the existing zoning regulations." *Salisbury Bd. Of Zoning Appeals v. Bounds,* 240 Md. 547, 555-56 (1965); and, "the specific need for the variance must be substantial and urgent and not merely for the convenience of the applicant." *Mueller,* 177 Md. App. at 70. Here, although Petitioners would obviously prefer to have the right to construct a slightly larger dwelling, that does not constitute a "substantial and urgent" need, and their neighbors' property rights cannot be sacrificed unless such a showing was made.

THEREFORE, IT IS ORDERED and DECLARED this **9th** day of **August, 2022** by this Administrative Law Judge, that the subject lot (Lot 10) has not merged with 416 Katherine Avenue, and the Special Hearing relief is therefore **GRANTED**; and

IT IS FURTHER ORDERED that a Variance from to BCZR § 1B02.3.C.1 to permit a building lot with a net lot area of 8,678 sq. ft. in lieu of the minimum net lot area of 10,000 sq. ft.; and a lot width of 46 ft. in lieu of the minimum lot width of 70 ft are hereby **GRANTED**; and

IT IS FUTHER ORDERED that a Variance from BCZR § 1B02.3.C.1 to permit the sum of the width of the side yards to be 20 ft. in lieu of the minimum sum of 25 ft., and for the rear yard depth (to the street) to be 25 ft. in lieu of the minimum rear yard depth of 30 ft. are hereby **DENIED**.

The relief granted herein shall be subject to the following:

1. Petitioners may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioners are hereby made aware that proceeding at

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this time is at their own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If for whatever reason this Order is reversed, Petitioners would be required to return the subject property to its original condition.

2. Petitioners must comply with the DEPS ZAC comments, copies of which are attached hereto and made a part thereof.

3. The front building line shall be no closer to the water than either of the adjoining dwellings.

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

PAUL M. MAYHEW
Managing Administrative Law Judge
for Baltimore County

PMM:dlm

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BALTIMORE COUNTY, MARYLAND

Inter-Office Correspondence

RECEIVED
JUL 19 2022
OFFICE OF
ADMINISTRATIVE HEARINGS

TO: Hon. Paul M. Mayhew; Managing Administrative Law Judge
Office of Administrative Hearings

FROM: Jeff Livingston, Department of Environmental Protection and Sustainability (EPS) - Development Coordination

DATE: July 19, 2022

SUBJECT: DEPS Comment for Zoning Item # 2022-0140-SPHA
Address: 414 Katherine Avenue
(Ogle Property)

Zoning Advisory Committee Meeting of **June 20, 2022**

The subject property is located within the Chesapeake Bay Critical Area. According to BCZR Section 500.14, no decision shall be rendered on any petition for special exception, zoning variance, or zoning special hearing for a property within the Critical Area until the Department of Environmental Protection and Sustainability (EPS) has provided written recommendations describing how the proposed request would:

1. Minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;

The subject property is located within a Limited Development Area (LDA), and is subject to Critical Area lot coverage requirements. Critical Area lot coverage differs from BCZR lot coverage and is defined in Natural Resources Article §8-1802(a)(17), as follows:

(17) (i) "Lot coverage" means that percentage of total lot or parcel that is:

1. Occupied by a structure, parking area, driveway, walkway, or roadway; or
2. Covered with gravel, stone, shell impermeable decking, a paver, permeable pavement, or any manmade material

(ii) "Lot coverage" includes the ground area covered or occupied by a stairway or impermeable deck.

(iii) "Lot coverage" does not include:

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1. A fence or wall that is less than 1 foot in width that has not been constructed with a footer;
2. A walkway in the buffer or expanded buffer, including a stairway, that provides direct access to a community or private pier;

3. A wood mulch pathway; or
4. A deck with gaps to allow the water to pass freely.

The subject waterfront property, comprising approximately 8,678 square feet (sf), is located within a Limited Development Area (LDA) and a Modified Buffer Area (MBA) of the Chesapeake Bay Critical Area. The petitioner is requesting to determine that the subject Lot 10 was not merged with 416 Katherine Avenue, the net lot area is to 8,678 sf be in lieu of the minimum net lot area of 10,000 sf, that the lot width is to be 46 feet in lieu of the minimum lot width of 70 feet, that the sum of the width of the side yards to be 20 feet in lieu of the minimum sum of 25 feet, and for the rear yard depth (to the street) to be 25 feet in lieu of the minimum rear yard depth of 30 feet. In order to minimize impacts on water quality, any building permit and/or development plan will be reviewed for compliance with the LDA lot coverage limits, which, for a property this size is 31 ¼% (2,712 sf), and which cannot be exceeded, with mitigation required for lot coverage between 25% (2,170 sf) and 31 ¼% sf. In addition, the LDA regulations require minimum afforestation of 15%, equating to approximately 3 trees for a property this size. The MBA requirements further restrict lot coverage and structures within the Critical Area Buffer, which on this property is calculated a minimum of 100 feet landward of MHW. No lot coverage or impacts to the buffer are proposed at this time. By allowing the items requested by the petitioner, impacts on water quality will be minimized when a permit or plan is reviewed for compliance with the LDA and MBA regulations.

2. Conserve fish, wildlife, and plant habitat; and

Any development proposal for the property will be reviewed for the application of the Critical Area LDA and MBA requirements, which, if approved, will improve buffer functions, and conserve fish, wildlife and plant habitat in nearby Norman Creek.

3. 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.

The request by the petitioner will be consistent with established land use policies, provided that the applicants meet any LDA and MBA requirements applicable, when proposed The request, if granted, will have no environmental impacts.

Reviewer: Thomas Panzarella
Environmental Impact Review

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JOHN A. OLSZEWSKI, JR.
County Executive

PAUL M. MAYHEW
Managing Administrative Law Judge
MAUREEN E. MURPHY
Administrative Law Judge

August 9, 2022

Lawrence E. Schmidt, Esquire – lschmidt@sgs-law.com
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

RE: Petitions for Special Hearing & Variance
Case No. 2022-0140-SPHA
Property: 414 Katherine Avenue

Dear Mr. Schmidt:

Enclosed please find a copy of the decision rendered in the above-captioned matter.

Pursuant to Baltimore County Code § 32-3-401(a), "a person aggrieved or feeling aggrieved" by this Decision and Order 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 Office of Administrative Hearings at 410-887-3868.

Sincerely,

PAUL M. MAYHEW
Managing Administrative Law Judge
for Baltimore County

PMM:dlm
Enclosure
c: Glenn and Sheila Ogle – glennogle433@gmail.com
Kevin McDonough – kevinmcdonough@comcast.net
Brenda Montley – neicy92@comcast.net
Jeff Walsh – jeffwalsh@comcast.net
John Deinlein – cadeinlein@gmail.com
Linda Walsh – lindawalsh@comcast.net
Malissa Duffy – malissacan@msn.com
Sheila Ogle – glennogle433@gmail.com
William Montley – wmontley@comcast.net

Debra Wiley

From: Debra Wiley
Sent: Tuesday, August 9, 2022 3:31 PM
To: Lawrence E. Schmidt, Esquire –
Cc: Glenn and Sheila Ogle –; Kevin McDonough –; Brenda Montley –; Jeff Walsh –; John Deinlein –; Linda Walsh –; Malissa Duffy –; Sheila Ogle –; William Montley –; Donna Mignon; Alyssa Moyers; County Council; Henry Ayakwah; Jeffery Livingston; Jenifer G. Nugent; Peoples Counsel; Vishnubhai K Desai
Subject: Decision - Case No. 2022-0140-SPHA - 414 Katherine Ave. - Ogle
Attachments: 0033_001.pdf

Good Afternoon,

Please find attached ALJ Mayhew's Opinion and Order in reference to the above matter.

Have a great and safe day.

From: adminhearingcopier@baltimorecountymd.gov <adminhearingcopier@baltimorecountymd.gov>
Sent: Tuesday, August 9, 2022 3:32 PM
To: Debra Wiley <dwiley@baltimorecountymd.gov>
Subject: Attached Image

Debra Wiley

From: Mail Delivery System <postmaster@baltimorecountymd.gov>
To: neicy92@comcast.net
Sent: Tuesday, August 9, 2022 3:31 PM
Subject: Undeliverable: Decision - Case No. 2022-0140-SPHA - 414 Katherine Ave. - Ogle

The following message to <neicy92@comcast.net> was undeliverable.
The reason for the problem:
5.1.0 - Unknown address error 550-'5.1.1 Not our Customer'