

IN RE: PETITIONS FOR SPECIAL HEARING	*	BEFORE THE
AND VARIANCE		
(2301 Walnut Ave.)	*	OFFICE OF
13 th Election District		
1st Council District	*	ADMINISTRATIVE HEARINGS
Clyde Slacum		
<i>Legal Owner</i>	*	FOR BALTIMORE COUNTY
Petitioner	*	Case No. 2020-0032-SPHA

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (“OAH”) for consideration of a revised Petition for Special Hearing and Variance filed on behalf of Clyde Slacum, legal owner (“Petitioner”) filed on July 21, 2020. The Special Hearing was filed pursuant to §§ 32-4-107 and 32-4-414 of the Baltimore County Zoning Regulations (“BCZR”) to permit development of a site that is in a riverine floodplain. In addition, a Petition for Variance was filed pursuant to BCZR §§ 255.2 and 243.1 to allow a front setback of 53 ft. in lieu of the required 75 ft.; per §§ 255.2 and 243.2 to allow a side yard setback of 3 ft. in lieu of the required 50 ft.; and per §§ 255.2 and 243.3 to allow a rear yard setback of 4' in lieu of the required 50 ft. A site plan was marked and accepted into evidence as Petitioner’s Exhibit 1.

Due to the COVID-19 pandemic, a public WebEx hearing was conducted in lieu of an in-person public hearing. The Petition was advertised and posted in conformance with the BCZR. Petitioner Clyde Slacum appeared in support of the requests. Patrick (Rick) Richardson, Jr., the engineer who prepared the site plan, assisted with presenting the case. There were no protestants or interested person in attendance; however, a letter of opposition was submitted by a Mr. Matt Kibler who owns the adjacent properties at 2313 and 2317 Walnut Avenue, which both have residential structures.

FINDINGS OF FACT

Both Special Hearing and Variance relief are sought in this case. The Petitioner, Clyde Slacum, owns a construction business and wishes to build a 3200 sq. ft. storage warehouse on this site, which lies partially within a riverine floodplain. The site is bounded on the west by I-695. To the south is I-895. To the north is Hollins Ferry Road and to the east is Hammonds Ferry Road. The site is accessible only via a panhandle driveway off of Walnut Avenue, which essentially dead-ends near the front of the site but also serves as the only access to Mr. Kibler's properties at 2313 and 2317 Walnut Avenue.

Substantive Zoning Advisory Committee ("ZAC") comments were received from the Department of Planning ("DOP"). They did not oppose the requested relief, subject to proposed conditions. A comment dated February 13, 2010 was also received from the Department of Public Works ("DPW"). DPW observed that according to their files ("Landsdowne Area Study"), "the subject site is in the riverine flood plain." The DPW comment states further that "FEMA has provided updates to the FIRM (flood insurance rate maps) that have not become effective but flood plain elevations have been provided. These maps also show the subject site in the riverine flood plain based on existing conditions." DPW notes that, per Baltimore County Code § 32-4-414, and Baltimore County Building Code Part 125, there shall be "no building in a riverine flood plain." DPW therefore opined that "[a]n ultimate flood plain study of the property must be submitted for verification of the flood plain boundary. Once the flood plain boundary has been established, the Building Code requirements for riverine floodplain must be observed."

The property is approximately 38,244 sq. ft. in size and is zoned ML-IM. Mr. Richardson explained that the riverine floodplain on this property is caused by "backwater" coming from the

nearby Patapsco River. He submitted as Petitioner's Exhibit 4 a letter that he wrote to Thomas Kiefer, P.E., the Acting Director of DPW, on May 28, 2020. Presumably this letter was written in response to the DPW Comments referenced above. The letter states, in relevant part, that "[t]he location is in the fringe of the floodplain. The location and grading of the site to add a building that is accessed from the north will result in 1187 square feet of the building being in the floodplain area as determined by a survey of the property." Mr. Richardson goes on to state that "while determining the exact area of the floodplain to be impacted by the Patapsco River is not known, the area impacted between the Baltimore Beltway and Hollins Ferry Road is approximately 32 acres. The impact from this building is 0.03 acres, and a total volume of 0.0078 acre feet, which is negligent (*sic*) in size or scope of the overall floodplain. Therefore, based on my opinion, the construction of the building in this location will not have any adverse impacts on the upstream or downstream property owners. The owner understands that Baltimore County will not be responsible for any flooding issues that might occur as a result of this work being done."

Petitioner's Exhibit 5 is a reply letter dated July 2, 2020 from Mr. Kiefer. It states, in relevant part, that "[t]his project involves development in the form of grading and construction in the 1% annual special flood hazard, 100 year, riverine flood plain." The letter then cites Baltimore County Code § 32-8-303 (a) (3), which provides that a waiver of the prohibition on building in a floodplain may only be granted upon "a determination that the granting of a waiver will not increase flood heights, impact public safety, incur extraordinary public expense, create nuisances, cause fraud or victimization of the public, or conflict with existing local and state laws and ordinances." Mr. Kiefer notes that according to Mr. Richardson's May 28, 2020 letter, the floodplain on the site is due to the backwater condition from the Patapsco River, and that "the impact to the fringe floodplain from the building will be 0.03 acres and a total volume of 0.0078

acre-feet.” Subject to several conditions, Mr. Kiefer concluded that “[a]fter careful consideration of the Code above (presumably referring to B.C.C. § 32-8-303 (a) (3)), the Department finds that the grading and construction for this project in riverine floodplain areas is not detrimental to floodplain management programs.”

At the hearing the undersigned questioned Mr. Richardson about the stormwater runoff and drainage concerns raised by the neighbor, Mr. Kibler. Richardson stated that Kibler’s properties are upstream from the subject site and that this new structure should not impact those parcels. I note that Mr. Kibler is also opposed to the substantial setback variances that are requested in this case and he states in his letter that he assumes that such extreme variances would not be granted.

CONCLUSIONS OF LAW

A. Special Hearing

Pursuant to BCZR § 500.7 the Petitioner asks me “to approve a waiver of BCC Sections 32-4-107 and 32-4-414 to permit development of a site that is in a riverine floodplain.” For the reasons that follow I do not believe that this relief can be granted.

The analysis of this issue must start with BCC § 32-4-414 (c), which is captioned “*Development in floodplain prohibited; exceptions.*” This section states in very clear language that “[t]he County may not permit development in a riverine floodplain except for:

- (1) The establishment of property subdivision lines; and
- (2) The installation of a pond, culvert, bridge, street, utility, or drainage facility that the county finds is not detrimental to floodplain management programs.”

The instant case does not fall under either one of these exceptions. There is no issue of property subdivision lines, and the Petitioner is not seeking to build a “pond, culvert, bridge, street, utility of drainage facility” – all structures designed to ameliorate flooding. Rather, Petitioner

seeks to construct a 3200 sq. ft. warehouse building with 1187 sq. ft. of it within the riverine floodplain.

Petitioner, however, seeks a waiver of the floodplain building prohibition. It is true that pursuant to BCC § 32-4-107 floodplain waivers can be granted in some limited situations; but *not* in the case of *new buildings* in a *riverine* floodplain. BCC § 32-4-107(a)(1) states in relevant part that “[a]t the request of a department director, the Hearing Officer *may grant a waiver of any or all requirements of Subtitles 3, 4, or 5* of this this title if the Hearing Officer finds that:

- (i)
 1. The size, scope, and nature of a proposed development does not justify strict compliance with this title;
 2. A waiver would be within the scope, purpose, and intent of this title; and
 3. All other county laws and regulations have been complied with; or
- (ii) Compliance with this title would cause unnecessary hardship.”

(emphasis added)

However, the very next subsection, BCC § 32-4-107(a)(2) states that “[a] *waiver can be granted only in accordance with Title 8 of this article.*” (emphasis added). Read together, these Code sections give the Hearing Officer discretion to grant floodplain waivers of any or all of the requirements of Subtitles 3, 4 or 5, but *only* to the extent Title 8 is complied with. This unambiguous condition is fatal to Petitioner’s request. That is because BCC § 32-8-304, entitled “Waivers Prohibited” states, point blank, that “Waivers may not be granted for the following : (1) Placement of fill or any development in the floodway if any increase in flood levels would result; or (2) *New buildings in the riverine floodplain.*” (emphasis added).

It is therefore clear that the requested waiver cannot be granted because according to the site plan and the other relevant record evidence the proposed new warehouse building would have

1187 sq. ft. within the riverine floodplain. I am mindful that two professional engineers, Mr. Richardson and Mr. Keifer, are of the opinion that this relatively small incursion into the riverine floodplain would not have substantial negative impacts on the floodplain. And I am sympathetic to Mr. Slacum, a Baltimore County business owner and resident. But in my view the law is clear: no new buildings are permitted in a riverine floodplain, and no waiver of that prohibition is permitted.¹

B. Variances

Petitioner also seeks variances from the applicable front, rear and side setbacks. 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).

As described above, the parcel in question is somewhat unique in that it is bounded by two interstates and is a long, narrow lot that is accessed only via a panhandle drive. As also noted, it is partially within a riverine floodplain. Without the requested variances the Petitioner will be unable to construct this proposed warehouse, or virtually any other structure. This would obviously cause him hardship and practical difficulty. I can therefore grant the requested variance relief if it is within the spirit and intent of the BCZR and would not cause harm to the public health, safety or welfare. However, I must also factor into my analysis the general rule that “the authority to grant a variance should be exercised sparingly and only under exceptional circumstances.” *Mueller v.*

¹ Because I have denied the Special Hearing floodplain waiver relief I need not reach the question of whether the variance relief should be granted. However, in the event this Decision and Order are appealed I will also rule on the request for variance relief.

People's Counsel for Baltimore County, 177 Md. App. 43, 71(2007). This is because “a variance is an authorization for that which is prohibited by a zoning ordinance.” *Cromwell, supra*, 102 Md. App. at 699. And 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).

As noted above, the adjoining residential property owner has voiced opposition to the requested variance relief based on storm water and drainage concerns. Therefore, “[t]he burden is on the applicant to show facts to warrant a variance,” and “the specific need for the variance must be substantial and urgent and not merely for the convenience of the applicant.” *Mueller, supra*, 177 Md. App. at 70.

The variance requests present a close question under the law and facts of this case. In my layperson’s view it is hard to see how the addition of 3200 square feet of impervious surface, plus the necessary access paving will not impact the floodplain and the existing drainage conditions. However, I do give weight to the professional opinions of Mr. Richardson and Mr. Kiefer, who state that this relatively small structure will have a negligible impact on the 32 acre floodplain in which it is located. Further, this is an unusual site that is otherwise ideally suited for the proposed warehouse use. And the requested setback variances, although substantial, will not significantly impact any adjoining properties, as the proposed structure remains a good distance from any surrounding structures. I am also mindful of the substantial investment that Mr. Slacum has made in the property. Therefore, in the final analysis I am convinced that the hardships to Petitioner outweigh any impacts to the public health, safety and welfare, and that the variance relief can be granted within the spirit and intent of the BCZR and subject to the comments of the DOP which will be incorporated in this case.

THEREFORE, IT IS ORDERED this 26th day of **August 2020**, by this Administrative Law Judge, that the revised Petition for Special Hearing seeking relief pursuant to approve a waiver of BCC §§ 32-4-107 and 32-4-414 to permit development of a new building in a riverine floodplain is hereby **DENIED**.

IT IS FURTHER ORDERED that the revised Petition for Variance seeking relief pursuant to BCZR §§ 255.2 and 243.1 to allow a front setback of 53 ft. in lieu of the required 75 ft., per §§ 255.2 and 243.2 to allow a side yard setback of 3 ft. in lieu of the required 50 ft., and per §§ 255.2 and 243.3 to allow a rear yard setback of 4' in lieu of the required 50 ft. be and hereby is **GRANTED**.

The relief granted herein shall be subject to the following:

- Petitioner may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioner is hereby made aware that proceeding at this time is at his 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, Petitioner would be required to return the subject property to its original condition.
- Prior to issuance of permits Petitioners must comply with the ZAC comment submitted by the DOP, which a copy is attached hereto and made a part hereof.

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

Signed
PAUL M. MAYHEW
Managing Administrative Law Judge
for Baltimore County

PMM/dlm