



Board of Appeals of Baltimore County

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October 24, 2016

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RE: *In the Matter of: Carol L. Morris – Legal Owner*
C.G. Homes – Contract Purchaser
Case No.: 15-302-SPHA

Dear Counsel:

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

A handwritten signature in cursive script that reads "Sunny Cannington Ham".

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosures
Multiple Original Cover Letters

c: See Distribution List Attached

Carol L. Morris – Legal Owner
C.G. Homes – Contract Purchaser
Distribution List
October 24, 2016
Page 2

Carol L. Morris
Thomas Faust/C.G. Homes
Lutherville Community Association
David and Marie Frederick
Walter Brewer, Jr.
Martin Reisinger
William Bafitis, P.E.
Eva Castillo
George Nixon
Marielana Svarez
William and Marie Irwin
Jane Brewer
Stephen Mill
James McGee
Ellen Rappaport
Lexi Liu
Dori Gottfried
Marcia Hettinger
Eric Rockel
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Arnold Jablon, Deputy Administrative Officer and Director/PAI
Andrea Van Arsdale, Director/Department of Planning
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF:
CAROL LYNN MORRIS AND
C.G. HOMES
206 MORRIS AVENUE

8th Election District
3rd Councilmanic District

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. 2015-302-SPHA

* * * * *

OPINION AND ORDER

This matter comes to the Baltimore County Board of Appeals (the “Board”) originally as an appeal filed by Michael R. McCann, Esquire, on behalf of Lutherville Community Association and affected residents (“Protestants”) of the Administrative Law Judge’s Order granting the Motion for Reconsideration, dated October 9, 2015. However, prior to any hearing on the merits, People’s Counsel for Baltimore County filed a Motion to Dismiss Amended Petition. At deliberation on the Motion, the Board granted the Motion to Dismiss. After the Opinion and Order regarding the disposition of that Motion was drafted but just prior to its issuance, the Board received a request from Lawrence E. Schmidt, Esquire on behalf of Petitioner that the Opinion and Order be stayed so that the above-captioned case could be consolidated with a new, related appeal. A public deliberation on the request to stay the Opinion and Order and consolidate the cases was held on August 9, 2016. This Opinion and Order addresses both, the original Motion to Dismiss as deliberated and the subsequent request to stay and consolidate.

Procedural History

On June 25, 2015, Petitioner, Carol Lynn Morris filed a Petition for Zoning Hearing concerning the above-captioned property, located in historic Lutherville. The Petition requested: (1) a Special Hearing pursuant to Baltimore County Zoning Regulations Section 500.7 seeking

confirmation that the request will not affect the density of the surrounding neighborhood; and (2) a Variance of required setback and lot size minimums. Following the filing of the Petition, a Notice of Zoning Hearing identifying the requests for Special Hearing and the Variances was published in The Jeffersonian. In addition, the property at issue was posted with a Zoning Notice identifying the same requests. The subject matter of the hearing as identified by the public notice was as follows:

Special Hearing to approve a confirmation that density of the surrounding neighborhood is not being affected. Variance to permit a proposed dwelling with a side setback of 10 feet in lieu of the minimum setback of 15 feet with a sum of 25 feet in lieu of required 40 feet; to permit a lot width of 63 feet in lieu of the required 100 feet, a lot area of 14,189 sq. ft. in lieu of the required 20,000 sq. ft.

A hearing was held in front of the Administrative Law Judge on September 4, 2015. Petitioner was represented by counsel, as were Protestants. People's Counsel also entered its appearance. On September 9, 2015, the Administrative Law Judge issued his Opinion and Order ("ALJ Original Opinion"), denying the Petition for Special Hearing and denying the Petition for Variance. As set forth in the ALJ Original Opinion, a discussion arose during the hearing concerning Baltimore County Zoning Regulation § 304 ("Use of Undersized Single-Family Lots"). The ALJ Original Opinion commented that B.C.Z.R. §304 may have been better designed to accommodate the wishes of Petitioner rather than B.C.Z.R. §307, which was the subject matter of the Petition and the hearing. In the end, however, the Administrative Law Judge denied variance relief, finding that the property was not unique as required by B.C.Z.R. § 307.

With that in mind, on September 18, 2015, Petitioner filed a Motion for Reconsideration seeking approval for an undersized lot pursuant to B.C.Z.R. §304, and variance(s) to accommodate the same, as well as reconsideration of the earlier Petition for Special Hearing and Petition for Variance that sought relief pursuant to B.C.Z.R. §307.1. As part of the Motion for

Reconsideration, Petitioner submitted a new, alternative plan for the proposed dwelling. The Motion was opposed by Protestants. There was no hearing on the Motion for Reconsideration.

On October 9, 2015, the Administrative Law Judge granted the Motion for Reconsideration finding that the new, alternate plan met the requirements of B.C.Z.R. § 304. In doing so, the Administrative Law Judge concluded that notice previously given on the original Petition was sufficient for the consideration of the application of §304 to the newly-submitted plan and that it did not matter, in terms of notice and due process, whether B.C.Z.R. §304 or §307 is the operative provision under which Petitioner sought relief. Moreover, the Administrative Law Judge concluded that notice and due process were particularly not at issue in the Amended Petition as the applicability, *vel non*, of Section 304 was identified by Protestants at the original hearing.

On November 9, 2015, counsel for Protestants appealed the October 9, 2015 Order (“ALJ Reconsideration Opinion”), as well as the ALJ Original Order. Petitioner did not appeal the Order as to the §307 Petition denied by the Administrative Law Judge.

On December 1, 2015, counsel for Petitioners filed a formal Amended Petition for Variance and Special Hearing. People’s Counsel filed its Motion to Dismiss on January 20, 2016. A hearing was scheduled in front of the Board of Appeals on February 4, 2016, at which time, it was decided that additional time was needed to review the Motion and materials at issue. As such, a Public Deliberation on the Motion was scheduled for March 9, 2016. At the Public Deliberation, this Board voted 2-1 to grant the Motion to Dismiss as the neither the original Petition, nor the Reconsideration, afforded Protestants adequate public notice or a public hearing on the attempted request for relief pursuant to Section 304.

Just prior to the intended issuance of this Board’s Opinion and Order regarding the decision reached at the March 9, 2016 Public Deliberation, Petitioner’s counsel filed a letter on May 25,

2016 requesting that the Board of Appeals, in essence, stay its issuance of its Opinion and Order, as a new, related Petition (Case No. 2016-0201-SPH) had been filed and had just been denied on May 18, 2016 by the Administrative Law Judge, and Petitioner wished to consolidate the above-captioned case with the appeal taken on Case No. 2016-0201-SPH.¹

Discussion

In disposing of the Motion to Dismiss, the Board examined whether there had been sufficient public notice and public hearing for the relief sought as part of the §307 Petition, §304 Reconsideration and/or Amended Petition, with respect to the new, alternative dwelling plan, first argued by Petitioner in writing post-hearing as part of its Motion for Reconsideration. For the reasons set forth below, the Board of Appeals concludes that, in this instance, the prior notice for the §307 Petition did not substantially comply with the public notice requirements to permit the §304 Reconsideration going forward. Similarly, the Board of Appeals concludes that the hearing on the §307 Petition did not satisfy the public hearing requirements required to proceed under §304 to grant the Motion for Reconsideration. These failures warrant dismissal of the Amended Petition.

A. The Hearing on the Original Petition Concerned Relief Under Section 307 Only

The §307 Petition filed by Petitioner identified, as is relevant, a variance from Section 1B02.3.C.1, the development standards for small lots, which identifies minimum widths, depths and area. Petitioner did not specifically identify whether relief was sought pursuant to B.C.Z.R. §304 or B.C.Z.R. §307. Both, §304 and §307, are methods by which an owner may seek relief to construct a dwelling on an undersized lot. *Mueller v. People's Counsel*, 177 Md. App. 43; 934

¹ As there are multiple Petitions being discussed, to make sure that the Petitions being discussed are properly differentiated in this Opinion, the original Petition shall be referred to as the "§307 Petition," or "Original Petition;" the Reconsideration shall be referred to as "§304 Reconsideration", the Amended Petition shall be "Amended Petition," and new § 304 Petition shall be "2016 Petition."

A.2d 974 (2007). However, §304 and §307 have differences, particularly: the elements that need to be proved; the evidence for the same; the procedure to obtain relief; and public notice and public hearing requirements.

At the hearing below on the Original Petition, Petitioner spent much time and effort on proving whether the property at issue was unique, an element under §307, but not §304. During that hearing, Petitioner asserted that the size of the lot made the property unique. The Administrative Law Judge, however, questioned whether the size of the lot should be considered as a factor of uniqueness; but, even assuming that it could be a factor, the evidence presented revealed that other lots in the community were similar in size and shape. (ALJ Original Opinion, p. 3-4.)

Ultimately, the Administrative Law Judge, in disposing of the §307 Petition, determined that Petitioner could not “satisfy the stringent requirements for variance relief,” noting that Petitioner’s property did not have any historic structure or inherent historic attributes, a factor of uniqueness identified in *Cromwell v. Ward*, 102 Md.App. 691, 710; 651 A.2d 424, 433-34 (1995). (ALJ Original Opinion, p. 3.) The Administrative Law Judge denied the variance request on the §307 Petition, as the requirements of B.C.Z.R. §307 were not satisfied.

In the ALJ Original Opinion, the Administrative Law Judge noted that B.C.Z.R. §304 is specific to undersized lots and theorized that if Petitioner could construct a dwelling that satisfies the setback requirements in a D.R. 2 zone, “they could take advantage of §304.” (ALJ Original Opinion, at p. 4.) It is clear from the Administrative Law Judge’s comments that Petitioner had not sought variance relief as an undersized lot. Based on the above, it is without question that the public hearing on the original Petition concerned only relief sought under B.C.Z.R. §307.

In Petitioner's Motion for Reconsideration, counsel for Petitioner stated that §304 "was raised as an issue at the hearing," and stressed judicial economy as a reason to avoid having "to file yet another petition and repeat the process." (Reconsideration, at pp. 1, 2.) However, as part of that Motion, Petitioner requested that the Court apply §304 to a new, alternative dwelling plan. The new, alternative plan one differed from the Original Petition and therefore, differed from relief identified in the public notice. Petitioner sought to bypass the requirements of filing a new petition and consequently, bypass the generation of a new public notice regarding the new relief sought. Counsel's statements and actions further illustrate that B.C.Z.R. §304 was not the subject of the Original Petition or hearing.

B. The Original Notice and Hearing Were Not In Substantial Compliance with the Requirements to Proceed Under Section 304

Counsel for both parties cite *Cassidy v. County Board of Appeals of Baltimore County*, 218 Md. 418, 421; 146 A.2d 896, (1958) in their Memoranda on the Motion to Dismiss, and, indeed, *Cassidy* is analogous to this case in certain respects and provides framework helpful in resolving this issue.

In *Cassidy*, one principal contention presented was whether proper notice of a hearing was provided and if not, was such failure fatal to the jurisdiction of the official or board to conduct the hearing. (*Id* at 897-98.) The deficiency claimed was the failure to name a request for a special exception when the notice identified only a reclassification. (*Id* at 898-99.) The Court upheld the decisions below, holding that the notice given was in substantial compliance with the requirements. (*Id.* at 900.) In doing so, the Court concluded that by being on notice of the request to reclassify, the public was on notice of special exception and therefore, preparing for one was akin to preparing for both. (*Id.* at 899-900.) In essence, the failure to specifically identify a request for special exception in addition to a reclassification did not change the course of the hearing or the evidence

needed to defeat the petition. Moreover, the method of notice required by each was identical. (*Id.* at 900.)

The case at hand, however, starkly contrasts with the facts relied upon in *Cassidy* in arriving at its conclusion. Here, §304 and §307 may have similar goals, but notably, the elements, and therefore, the proof needed for each, have significant differences. *Mueller*, 177 Md. App. at 87; 934 A.2d at 999. (e.g., “BCZR §304 does not contain elements of practical difficulty or uniqueness, which are embodied in § 307.”).

In particular, in order to obtain relief pursuant to B.C.Z.R. §307, the more general statute,² Petitioner must prove: (1) the property is unique; and (2) if variance relief is denied, Petitioner will experience a practical difficulty or hardship. *Trinity Assembly of God v. People's Counsel*, 407 Md. 53, 80; 962 A.2d 404, 420 (2008), citing *Cromwell v. Ward*, 102 Md.App. 691, 698-99; 651 A.2d 424, 427-28 (1995). The uniqueness of a property requires a particular property to have an inherent characteristic not shared by other properties in the area --- its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties, or other such restrictions. *Cromwell*, 102 Md.App. at 710; 651 A.2d at 433-34, citing *North v. St. Mary's County*, 99 Md.App. 502, 512; 638 A.2d 1175 (1994).

On the other hand, B.C.Z.R. §304.1 requires a party to prove its eligibility for relief by demonstrating: (A) the lot was duly recorded by deed or 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 in the regulations.

² *Mueller*, 177 Md.App. at 86-87; 934 A.2d at 999.

The Administrative Law Judge noted and counsel for Petitioner argued that Protestants raised the applicability, *vel non*, of §304 in the hearing on the Original Petition, and therefore, consideration of the same in the Motion for Reconsideration was not a surprise. This argument may be more persuasive if the original hearing concerned §304 or the plan at issue in the original hearing was the same plan at issue in the Reconsideration.

Instead, the dwelling plan under consideration pursuant to §304 was a new, alternative plan raised by the first time in the Motion for Reconsideration. It is axiomatic that the plan raised for the first time in the Motion for Reconsideration was not one at issue in the hearing, nor was it the one identified in the public notice. In *Cassidy*, the notice for reclassification and request for special exception concerned the same plan. There were no changes to the plan when under consideration for reclassification or when under consideration for the special exception.

As Petitioner's new, alternative plan was not an issue at the time of the hearing, the quantity and quality of evidence particular to §304 was not relevant. Rather, arguments over facts and issues germane to §304 were newly raised in letter form as part of the Motion for Reconsideration. Again, raising of new facts and issues as part of the Motion for Reconsideration is indicative as to whether the original public notice was sufficient, as well as whether the public hearing was sufficient. The failure to have a public notice and a public hearing regarding that which was at issue in the reconsideration is fatal to the §304 Reconsideration and related Amended Petition.

In addition, §304 has its own specific process (as alluded to above), as well as its own particular public notice and public hearing provisions. If Petitioner intended to proceed under §304 prior to the hearing, Petitioner was required to adhere to those requirements. The failure to do so dictates the same conclusion --- public notice was inadequate, and here, the matter fails under

Section 304.4 as well as there never has been a full public hearing pursuant to Section 304.4 on the new alternative dwelling plan.

It should be noted that there is a question as to whether relief under B.C.Z.R. §304 can be sought via Petition for Zoning Hearing in the absence of a building permit, as §304.3 states “*Upon application for a building permit pursuant to this section, the subject property shall be posted conspicuously...*” (emphasis added).

Petitioner argued that no particular notice under §304.3 was required here because there was no building permit issued as of yet. Petitioner also argued that no notice or hearing under §304 is required if and once a building permit is issued in this case because the Protestants had their day in court. Petitioner wants the relief pursuant to that section, but not the obligations that come with obtaining such relief. Section 304’s specific notice provision, as well as its specific hearing provision, cannot and should not be so lightly disregarded.

Moreover, in the ALJ Reconsideration Opinion, the Administrative Law Judge noted that this property is within the Lutherville historic district and the Landmarks Preservation Commission must review the proposal. (Baltimore County Code (“BCC”) §32-7-404.) The effect, importantly, is that a permit for construction cannot be issued unless the Landmarks Preservation Commission issues a notice to proceed. (BCC §32-7-405.)

Therefore, if it is accepted that a building permit triggers the public notice and public hearing sections on a petition for variance relief pursuant to §304, a party cannot raise the issue by amending an existing petition at a hearing or post hearing, without a building permit *and* without compliance with the public notice and public hearing provisions distinct to §304. By virtue of this analysis, in light of the fact that there has never been a building permit and there has not been public notice following the issuance of a building permit issued under §304.3, this issue is not

properly in front of the Board of Appeals, and the §304 Reconsideration and Amended Petition require dismissal.

This is not a matter where a full public hearing can be dispensed with either. To be excused from a hearing, the property must be an owner-occupied lot zoned residential, and in order to receive a variance without a hearing, the petitioner is required to file a supporting affidavit with the petition under oath made on the personal knowledge of the petitioner that sets forth facts that would otherwise satisfy the petitioner's burden of proof if a hearing were to be required. (BCC §§32-3-303(a)(1), (a)(2)(i).) The affidavit is in addition to the information required by the Administrative Law Judge³ on the petition. (BCC §32-3-303 (a)(2)(ii).) The Administrative Law Judge may not grant a variance under this section unless notice of the petition is conspicuously posted on the property for a period of at least 15 days following the filing of the application in accordance with the requirement of the Department of Permits, Approvals and Inspections. (BCC §32-3-303(a)(3).)

The property is not owner-occupied, as there is no dwelling on that lot. Moreover, none of the requirements to excuse a hearing on a variance request have occurred in order to substantiate the granting of the Motion for Reconsideration, and therefore, relief under Section 304, without a full public hearing. Therefore, the reconsideration and attempted amendment both run afoul of the specific public notice and public hearing sections under §304 that parties are compelled to comply with when proceeding pursuant to that section.

³ § 3-12-104(b) --- Any reference to the Zoning Commissioner, the Deputy Zoning Commissioner or the Hearing Officer in the Charter, the Code or the Baltimore County Zoning Regulations shall be deemed to be a reference to the Office [of Administrative Hearings].

C. The Amended Petition Cannot Be Heard For the First Time by the Board of Appeals

It was also argued that a full hearing on the §304 Reconsideration and/or Amended Petition can occur at the Board of Appeals as our review of variance requests is *de novo*. A *de novo* appeal, however, is an exercise of appellate jurisdiction rather than original jurisdiction. *Halle Companies v. Crofton Civic Ass'n*, 339 Md. 131, 143; 661 A.2d 682, 687-88 (1995); see *Hardy v. State*, 279 Md. 489, 492, 369 A.2d 1043, 1046 (1977). Whether a tribunal's exercise of jurisdiction is appellate or original does not depend on whether the tribunal is authorized to receive additional evidence. *Halle Companies*, 339 Md. at 143; 661 A.2d at 688. Instead, as Chief Justice Marshall explained, "[i]t is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause..." *Id.*, quoting, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175; 2 L.Ed. 60, 73 (1803).

In the Board's opinion, the plan at issue in the §304 Reconsideration and Amended Petition, submitted for the first time after the original hearing, is not simply new evidence to be received and considered in connection with the reconsideration or by the Board of Appeals. As outlined in detail above, there is a process for relief under §304, a process in which the public is required to have specific notice of as well as a public hearing to participate and present evidence in --- a process the Lutherville Community Association and affected residents were not provided as part of the original hearing or as part of the reconsideration.

In determining the scope of *de novo* hearings in front of the Anne Arundel County Board of Appeals in *Halle Companies*, the Court of Appeals concluded that access to the site and its impact upon public health was an issue "inextricably intertwined with the administrative hearing officer's decision," so that "it was an issue properly before the Board which could be addressed." 339 Md. at 145-46; 661 A.2d at 689. Here, the Board finds that the plan on which Petitioner

intended to proceed in the Amended Petition was not so intertwined for the reasons stated above and therefore, such issues are not properly in front of the Board at this time. For these reasons, the §304 Reconsideration fails as does the Amended Petition.

D. There is No Petition Presently In Front of the Board to Consolidate

Because the Board already deliberated and determined that the Motion to Dismiss should be granted, the pendency of a related Petition does not cause the Board to revisit or vacate its earlier determination. The Board's only course of action here is to issue the Opinion it intended just prior to the request to stay and consolidate.

As set forth above, the Board dismissed the §304 Reconsideration and the Amended Petition. Petitioner did not appeal the Administrative Law Judge's ruling on the §307 Petition. At this time, there is no petition pending in front of the Board to consolidate with the appeal of the Administrative Law Judge's Order denying the Petition in 15-302-SPHA. Therefore, with the issuance of the Opinion and Order on the Motion to Dismiss, the Board has no option but to deny Petitioner's request to consolidate as being moot.

Conclusion

While the recitation of procedural history and analysis above make this matter seem complicated, it really is not. In the end, Protestants did not have sufficient public notice or a public hearing regarding the new, alternative plan and relief under B.C.Z.R. §304. The failure to provide such adequate public notice and a full public hearing requires dismissal of the §304 Reconsideration Petition and the related, subsequent Amended Petition. People's Counsel's Motion to Dismiss is granted. The request to stay the issuance of the Board's Opinion and Order is denied. As the Board granted People's Counsel Motion to Dismiss, there is nothing for the Board to consolidate. Therefore, Petitioner's request to consolidate is denied as moot.

ORDER

THEREFORE, IT IS THIS 24th day of October, 2016, by the Board of Appeals of Baltimore County,

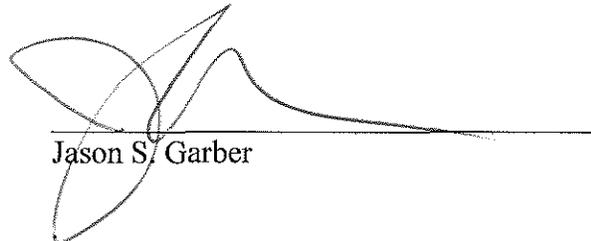
ORDERED that People's Counsel's Motion to Dismiss is hereby **GRANTED**. The Petitioners' §304 Reconsideration Petition and related Amended Petition are **DISMISSED**; and

ORDERED that Petitioner's request to stay the issuance of the Board's Opinion and Order disposing of the Motion to Dismiss is **DENIED**; and

ORDERED that Petitioner's request to consolidate the appeal on Case No. 2016-0201-SPH with the above-captioned case is **DENIED, as moot**.

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**



Jason S. Garber



James West

IN THE MATTER OF:
CAROL LYNN MORRIS AND
C.G. HOMES
206 MORRIS AVENUE
8th Election District
3rd Councilmanic District

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. 2015-302-SPHA

* * * * *

DISSENTING OPINION

I respectfully disagree with the Majority's Opinion as it relates to their interpretation of the public notice requirements enumerated in Section 304 of the Baltimore County Zoning Regulations (BCZR) and their conclusion that the Petition for Special Hearing filed by Carol Lynn Morris and C.G. Homes (hereinafter collectively referred to as the "Petitioners") should be dismissed because there was inadequate public notice provided to the Lutherville Community Association and several nearby property owners (the "Protestants") and that the Board of Appeals of Baltimore County lacked jurisdiction to conduct a *de novo* Special Hearing.

On June 25, 2011, the Petitioners filed a zoning petition for a D.R. 2 zoned lot located in the historic district of Lutherville, known as 206 Morris Avenue (the "Subject Property"), requesting a Special Hearing under BCZR Section 500.7 and Variances of the area size and setback requirements enumerated in BCZR Section 1B02.3.C.1 (Development Standards for Small Lots or Tracts in a D.R. Zone). The public notice requirement attached to the June 17, 2015 Site Plan was consistent with the Petitioner's proposed dwelling outline and setbacks. In accordance with BCZR 307.1 (Authority to Grant Variances; Procedures and Restrictions) and Baltimore County Code (BCC) Section 32-3-303 (Administrative Special Hearing), signs were timely and properly posted on the Subject Property and thereafter a hearing was held on September 4, 2015 (the "September

4th Hearing”) before Administrative Law Judge John E. Beverungen (the “ALJ”). The Lutherville Community Association and other nearby neighbors, David and Marie Frederick, Walter Brewer, Jr. and Martin Reis, were present at the September 4th Hearing before the ALJ¹. The Lutherville Community Association was also represented by legal counsel.

In his Opinion and Order dated September 9, 2015, the ALJ denied the Petitioners their requested relief because the Subject Property lacked the “inherent attributes or uniqueness required to obtain variance relief under BCZR Section 307.1...” Although the ALJ denied the Petitioners’ request for a variance, he opined the following:

Instead, and as discussed at the hearing, B.C.Z.R. §304 (entitled ‘Use of Undersized Single-Family Lots’) was designed to address the scenario in this case; i.e., where a lot of record, by virtue of a subsequent down-zoning, becomes undersized or deficient, preventing the owner from erecting a house thereon. In Mueller v. People's Counsel, 177 Md. App. 43 (2007), the court of special appeals described the two methods by which an owner may receive permission to construct a dwelling on an undersized lot: B.C.Z.R. §307, which requires a showing of uniqueness and practical difficulty, and B.C.Z.R. §304, which does not. Id. at 87. While Petitioners satisfy two of the required elements under §304 (a lot recorded prior to 1955 and they own no adjoining land), they do not satisfy the area requirements of the zone (i.e., side yard setbacks). Assuming Petitioners could construct on this lot a dwelling which complied with the setback requirements of the D.R. 2 zone, they could take advantage of §304.

Apparently based upon the ALJ’s comments, on September 18, 2015, the Petitioners filed a Motion for Reconsideration requesting that the ALJ grant the Petitioners relief from the area size and setback restrictions imposed by BCZR Section 1B02.3.C.1 under BCZR Section 304 (Use of Undersized Single Family Lots). On October 2, 2015, the Protestants represented by legal counsel filed an Opposition to the Motion for Reconsideration. No additional public notice was requested by the Petitioners and none of the parties to the dispute requested that the ALJ hold a hearing on

¹ The Citizen’s Sign-in Sheet show that 14 Lutherville residents appeared at the September 4th Hearing.

the Motion for Reconsideration.

On November 9, 2015, the Protestants appealed the October 9, 2015 Order (“ALJ Reconsideration Opinion”), as well as the ALJ Original Order. The Petitioner did not appeal the Order as to the §307 Petition denied by the Administrative Law Judge.

On December 1, 2015, the Petitioners filed an Amended Petition for Variance and Special Hearing. On January 20, 2016, People’s Counsel filed a Motion to Dismiss the Petition for Variance and Special Hearing. People’s Counsel asserted that the Petitioner’s failed to provide adequate public notice and therefore must be dismissed by the Board. A Majority of the Board agreed stating that the Petitioner failed to provide adequate notice pursuant to §304 of the Baltimore County Zoning Regulations (BCZR); therefore, its amended Petition for Variance and Special Hearing must be dismissed without a *de novo* hearing.

DISCUSSION

I respectfully disagree with the Majority that the Board lacked jurisdiction to hear this matter because the Petitioner’s failed to provide adequate notice. The purpose of the requirement of public notice is to inform any affected party there is a request or application that is intended to affect the zoning of a particular property. See, Largo Civic Association v. Prince George’s County, 21 Md. App. 318 (1974). Where there has been substantial compliance the statute or rule by one party and the other party has not been prejudiced, technical irregularities cannot be used to deny a person’s legal rights. Furthermore, failure to provide proper notice is a jurisdictional issue and perhaps fatal to the petitioner’s action, the requirement of notification may be satisfied if the objecting party actually appears at the hearing. McLay v. Maryland Assemblies, Inc., 269 Md. 465 (1973).

The notice requirements enumerated in Sections 304² and 307³ of the Baltimore County Zoning Regulations (BCZR) are substantially similar. The public notice requirements issued for the Petitioner's request to deviate from the requirements set forth in §303 of the BCZR clearly advertized to the persons interested that a specific activity would affect the Subject Property. The public notice clearly put all interested persons on notice that the Petitioner wanted a variance to construct a house on an undersized lot. In the ALJ hearing, it was determined that the Petitioner had not met her burden to support the issuance of a variance. However, at that same hearing, the Protestants raised the issue *sua sponte* that the Petitioner could have used §304 of the BCZR (Use of Undersized Lots) to construct a dwelling on the Subject Property. In fact, ALJ stated in the Petitioner's Motion for Reconsideration that the Protestants provided extensive testimony on the use of §304 of the BCZR to construct a dwelling on the Subject Property. Based upon the Motion for Reconsideration and over the opposition filed by the Protestants, the ALJ held that, pursuant §304.4 of the BCZR, the Petitioner could construct a dwelling on the Subject Property subject to certain conditions.

Pursuant to §4-305 of the Land Use Article of the Annotated Code of Maryland (the "Land Use Article"), the Board may "hear and decide appeals when it is alleged that there is an error in any order, requirement, decision, or determination made by an administrative officer or unit under this division or of any local law adopted under this division. As such, clearly, the appeal of the ALJ Reconsideration Opinion was within the purview of the Board.

The Protestants were fully aware that the Petitioner wanted to construct a dwelling on the undersized Subject Property pursuant to the terms and conditions set forth in §304 of the BCZR. The Protestants filed an opposition to the Petitioner's Motion for Reconsideration as such it cannot

² See, Section 304.3 of the BCZR at Appendix, Page 20.

³ See, Section 32-3-302 of the BCC at Appendix, Page 22.

be said that they were unaware of subject matter of the Special Hearing. Indeed, the Protestant's participated in every proceeding involving the Subject Property. Also, the grounds for the Special Hearing were properly formulated and issues to be presented in the Special Hearing were adequately delineated. See, Board of County Commissioners v. Southern Residential Management, 154 Md. App. 10 (2003). In addition, the Protestants were neither surprised nor prejudiced by the impending Special Hearing that was to be held by the Board and could have adequately defended their position that the Petitioner did not meet the statutory requirements set forth in §304 of the BCZR.

Even though a hearing before the Board may not have offered the Petitioner the relief they sought, the Board had jurisdiction because the Protestants had adequate notice and it is a matter squarely within §4-305 of the Land Use Article. In sum, there was substantial notice because (1) the publication issued by Petitioner, pursuant to §307.1 of the BCZR, is very similar to the publication requirements set forth in §304.3 of the BCZR, (2) the Protestants actually participated in every aspect of the proceedings involving the Subject Property, (3) the grounds for the Special Hearing were properly formulated and issues to be presented in the Special Hearing were adequately delineated for Protestants review and (4) the Protestants were they neither prejudiced nor surprised by any issue that would have been adjudicated, *de novo*, before the Board.

For the reasons stated above, I respectfully disagree with the Majority Opinion that the Board lacked jurisdiction to hear this matter because the Petitioner's failed to provide adequate notice.

October 24, 2016
Date


Benfred B. Alston

APPENDIX

ARTICLE 3 (BCZR). Exceptions to Height and Area Requirements

SECTION 300 Height Exceptions

§300.1. Applicability.

- A. The height limitations of these regulations shall not apply to barns and silos, grain elevators or other accessory agricultural buildings, nor to church spires, belfries, cupolas, domes, radio or television aerials, drive-in theater screens, observation, transmission or radio towers, or poles, flagstaffs, chimneys, parapet walls which extend not more than four feet above the limiting height, bulkheads, water tanks and towers, elevator shafts, penthouses and similar structures, provided that are such structures shall not have a horizontal area greater than 25% of the roof area of the building. A satellite receiving dish is subject to the height limitations of the zone in which the dish is located.

However, in residential zones, the height of an accessory satellite dish may not exceed 15 feet, unless it is located on the roof of a building.

- B. Notwithstanding the provisions of Subsection 300.1.A, no appurtenances to any building in a B.L. B.M. or B.R. Zone shall exceed the heights specified in Section 231 except any flagstaff, any church spire and any pole for a radio and television aerial not exceeding 50 feet in height *above* the base thereof and not displaying any lettering, sign or other advertising emblem or device.

SECTION 303. Front Yard Depths in Residence and Business Zones

§303.1. Standards for D.R.2, D.R.3.5 and D.R.5.5 Zones.

In D.R.2, D.R.3.5 and D.R.5.5 Zones, the front yard depth of any building hereafter erected shall be the average of the front yard depths of the lots immediately adjoining on each side, provided such adjoining lots are improved with principal buildings situate within 200 feet of the joint side property line, but where said immediately adjoining lots are not both so improved, then the depth of the front yard of any building hereafter erected shall be not less than the average depth of the front yards of all improved lots within 200 feet on each side thereof, provided that no dwelling shall be required to be set back more than 60 feet in D.R.2 Zones, 50 feet in D.R.3.5 Zones and 40 feet in D.R.5.5 Zones. In no case, however, shall nonresidential principal buildings have front yards of

less depth than those specified therefore in the area regulations for D.R.2,D.R.3.5 and D.R.5.5 Zones respectively.

SECTION 304. Use of Undersized Single-Family Lots

§ 304.1. Types of dwellings allowed; conditions.

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.

§304.2. Building permit application.

- A. Any person desiring to erect a dwelling pursuant to the provisions of this section shall file with the Department of Permits, Approvals and Inspections, at the time of application for a building permit, plans sufficient to allow the Department of Planning to prepare the guidelines provided in Subsection B below. Elevation drawings may be required in addition to plans and drawings otherwise required to be submitted as part of the application for a building permit. Photographs representative of the neighborhood where the lot or tract is situated may be required by the Department of Planning in order to determine appropriateness of the proposed new building in relation to existing structures in the neighborhood.
- B. At the time of application for the building permit, as provided above, the Director of Permits, Approvals and Inspections shall request comments from the Director of the Department of Planning (the "Director"). Within 15 days of receipt of a request from the Director of Permits, Approvals and Inspections, the Director shall provide to the Department of Permits, Approvals and Inspections written recommendations concerning the application with regard to the following:
 - 1. Site design. New buildings shall be appropriate in the context of the neighborhood in which they are proposed to be located. Appropriateness shall be evaluated on the basis of new building size, lot

coverage, building orientation and location on the lot or tract.

2. Architectural design. Appropriateness shall be evaluated based upon one or more of these architectural design elements or aspects:
 - a. Height.
 - b. Bulk or massing.
 - c. Major divisions, or architectural rhythm, of facades.
 - d. Proportions of openings such as windows and doors in relation to walls.
 - e. Roof design and treatment.
 - f. Materials and colors, and other aspects of facade texture or appearance.
3. Design amendments. The Director may recommend approval, disapproval or modification of the building permit to conform with the recommendations proposed by the Department of Planning.

§304.3. Public notice.

Upon application for a building permit pursuant to this section, the subject property shall be posted conspicuously, under the direction of the Department of Permits, Approvals and Inspections, with notice of the application for a period of at least 15 days.

§304.4. Public hearing.

Within the fifteen-day posting period: (1) Any owner or occupant within 1,000 feet of the lot may file a written request for a public hearing with the Department of Permits, Approvals and Inspections, or (2) the Director of Permits, Approvals and Inspections may require a public hearing. The Department of Permits, Approvals and Inspections shall notify the applicant within 20 days of the receipt of a request for a public hearing. A hearing before the Zoning Commissioner shall be scheduled within 30 days from receipt of the request for public hearing. At the public hearing, the Zoning Commissioner shall make a determination whether the proposed dwelling is appropriate.

SECTION 307. Variances

§ 307.1 Authority to grant variances; procedures and restrictions.

The Zoning Commissioner of Baltimore County and the County Board of Appeals, upon appeal, shall have and they are hereby given the power to grant variances from height and area regulations, from off-street parking regulations, and from sign regulations only in cases where

special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship. No increase in residential density beyond that otherwise allowable by the Zoning Regulations shall be permitted as a result of any such grant of a variance from height or area regulations. Furthermore, any such variance shall be granted only if in strict harmony with the spirit and intent of said height, area, off-street parking or sign regulations, and only in such manner as to grant relief without injury to public health, safety and general welfare. They shall have no power to grant any other variances. Before granting any variance, the Zoning Commissioner shall require public notice to be given and shall hold a public hearing upon any application for a variance in the same manner as in the case of a petition for reclassification. Any order by the Zoning Commissioner or the County Board of Appeals granting a variance shall contain a finding of fact setting forth and specifying the reason or reasons for making such variance.

SUBTITLE 3 (BCC). Variances

§ 32-3-301. - Authority Of Zoning Commissioner.

- (a) *In general.* Except as provided in § 32-3-515 of this title and consistent with the general purpose, intent, and conditions set forth in the Baltimore County Zoning Regulations, upon petition, the Zoning Commissioner may:
 - (1) Grant variances from area and height regulations;
 - (2) Interpret the zoning regulations; and
 - (3) Grant special exceptions.
- (b) *Appeal.* A decision of the Zoning Commissioner under subsection (a) of this section may be appealed to the Board of Appeals as provided in this article.
- (c) *Conditional or restricted variance.* The Zoning Commissioner may grant a variance with conditions or restrictions that the Zoning Commissioner determines are appropriate for the purpose of protecting the health, safety, or general welfare of the surrounding community.

§ 32-3-302. - Same - Hearing Required; Notice.

- (a) *In general.* Except as provided in § 32-3-303 of this subtitle, the Department of Permits, Approvals and Inspections shall schedule a public hearing on a petition for a variance or special exception for a date not less than 21 days and not more than 90 days after the petition is accepted for filing.
- (b) *Notice.*
 1. The Department of Permits, Approvals and Inspections shall ensure that notice of the time and place of the hearing relating to the property under

petition be provided:

- (i) By conspicuously posting the notice on the property for a period of at least 20 days before the date of the hearing;
- (ii) By a notice in at least one newspaper of general circulation at least 20 days before the hearing; and

(iii) By posting notice on the county's internet website.

2. The notice shall provide:

- (i) The address of the property under petition or, if not available, a description of the property; and
- (ii) The action requested by the petition.

(c) *Referral to Director of Planning.* Once a hearing date for a petition is established, the Department of Permits, Approvals and Inspections shall promptly forward a copy of the petition to the Director or Deputy Director of the Department of Planning for consideration and a written report containing findings relating to planning factors.

§ 32-3-303. - Same - Administrative Special Hearing.

(a) *In general*

(1) Notwithstanding the hearing requirements under § 32-3-302 of this subtitle, the Zoning Commissioner may grant variances from area and height regulations without a public hearing if the variance petition involves an owner-occupied lot zoned residential, as defined by the Baltimore County Zoning Regulations.

(2) (i) In order to receive a variance without a hearing, the petitioner shall file a supporting affidavit with the petition under oath made on the personal knowledge of the petitioner that sets forth facts that would otherwise satisfy the petitioner's burden of proof if a hearing were to be required.

(ii) The affidavit is in addition to the information required by the Zoning Commissioner on the petition.

(3) The Zoning Commissioner may not grant a variance under this section unless notice of the petition is conspicuously posted on the property for a period of at least 15 days following the filing of the application in accordance with the requirement of the Department of Permits, Approvals and Inspections.

1. *Request for public hearing.*

- Within the 15 day posting period required under subsection (a)(3) of this

section, an occupant or owner within 1,000 feet of the lot in question may file a written request for a public hearing with the Department of Permits, Approvals and Inspections.

- The Department shall schedule a hearing to be held on a date within 75 days after receiving a request for a public hearing.

2. *Discretion of Commissioner to require a hearing.* If a written request for a public hearing is not filed, the Zoning Commissioner may:

- Grant the variance without a public hearing, if the requested variance is in strict harmony with the spirit and intent of the height and area requirements of the Baltimore County Zoning Regulations, and any other applicable requirement; or
- Require a public hearing during which the petitioner shall be required to satisfy the burden of proof required by the Baltimore County Zoning Regulations for the variance to be granted.

Section 4-305 of the Land Use Article of the Annotated Code of Maryland

A board of appeals may:

- A. hear and decide appeals when it is alleged that there is an error in any order, requirement, decision, or determination made by an administrative officer or unit under this division or of any local law adopted under this division;
- B. hear and decide special exceptions to the terms of a local law on which the board is required to pass under the local law; and
- C. authorize on appeal in specific cases a variance from the terms of a local law.