

IN RE: <b>PETITION FOR VARIANCE</b>	*	BEFORE THE
S/W Corner Miller and Woodland Avenues		
(formerly the Eastern Manor Subdivision)	*	ZONING COMMISSIONER
<b>(The Cove)</b>		
15 <sup>th</sup> Election District	*	OF
6 <sup>th</sup> Council District		
	*	BALTIMORE COUNTY
The Cove, L.L.P.		
Petitioner	*	<b>Case No. 2010-0307-A</b>

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter comes before the Zoning Commissioner for consideration of a Petition for Variance filed by the legal owner(s) of the subject property, The Cove, L.L.P., through Simon Rosenberg, the limited partnership’s general partner, through their attorney Michael P. Tanczyn, Esquire. A series of variances are requested from the Baltimore County Zoning Regulations (B.C.Z.R.) and the Comprehensive Manual of Development Policies (C.M.D.P.) as set forth in the Petition for Variance. Specifically, relief is requested from B.C.Z.R. Section 1B01.2.C.1.b (Single-family detached chart) and the C.M.D.P. (Single-Family detached Residential Standards Page 4 et. seq.) to permit: (a) side-yard setbacks from side building face to the property line in a D.R.3.5 zone of eight (8) feet in lieu of the required fifteen (15) feet for Lots 29½-30, 31-35, 38, 47-50, 51-57, and 64-68; (b) side-yard setbacks from side building face to eight (8) feet in lieu of the required twenty-five (25) feet for Lots 30, 31, 50, 51, and 68; and (c) side-yard setbacks from building face to building face of eight (8) feet on each side in a D.R.16 zone in lieu of the required twenty (20) feet for Lots 12 and 13.<sup>1</sup> The subject property and requested relief are more particularly described on the colorized site plan and aerial photograph submitted which were accepted into evidence and marked as Petitioner’s Exhibits 1 and 3, respectively.

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<sup>1</sup> The Stevens Road Improvement Association requested an explanation at the outset of the hearing concerning the actual distance between building faces on Lots 12 and 13. Petitioner’s counsel explained the separating distance between structures would be 16 feet. Mr. Tanczyn acknowledged the Petition’s language was cumbersome and could lead to confusion. He stated there will be a distance of 8 feet from a side building face to the property line and an additional 8 feet from the property line to the other building face. This explanation was satisfactory to the Association’s representative.

Appearing at the requisite public hearing in support of the requests were Simon Rosenberg, on behalf of the property owner, Michael Tanczyn, Esquire, representing the Petitioner, and Herbert Malmud, of H. Malmud & Associates, the consultant and land surveyor who prepared the site plan for this property. Appearing as an interested citizen was David R. Cahlander residing at 218 Stevens Road and Vice-President of the Stevens Road Improvement Association. There were no Protestants or other interested persons in attendance.<sup>2</sup>

Testimony and evidence offered revealed that the subject property known currently as “The Cove” and formerly as “Eastern Manor,” is a large, irregularly shaped tract of land, split-zoned D.R.16 and D.R.3.5, located in the Essex (Greater Bengie’s neighborhood) area of the County on the southern side of Eastern Avenue, east of Stevens Road, and west of Woodland Avenue. The subject property has frontage on Frog Mortar Creek, which feeds into Middle River and thereafter the Chesapeake Bay. The subject property can be seen more clearly from the aerial photograph marked and accepted into evidence as Petitioner’s Exhibit 3 and from the photographs of the subject property marked and accepted into evidence as Petitioner’s Exhibit 10. The majority of the property is zoned D.R.3.5 and a small portion of the property on the north side of Miller Avenue is zoned D.R.16. As it pertains to this case, only Lots 12 and 13 are located in the D.R.16 zoning classification. A zoning map for the subject property was marked and accepted into evidence as Petitioner’s Exhibit 4. The area surrounding the subject property includes Bengie’s Drive-In Theatre to the east, on the opposite side of Woodland Avenue; Hughes Shore Road, a residential development, and Frog Mortar Creek, to the south; the Fairwinds residential development to the west; and on the opposite side of Eastern Avenue to the north, the Williams residential park and a Royal Farms store. These varied uses are reflected in the surrounding zoning that consists of a variety of residential, business and manufacturing designations. Petitioner’s Exhibits 3 and 4 more accurately illustrate this surrounding area.

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<sup>2</sup> D. Edward Vogel contacted the undersigned Commissioner following the hearing and advised that he and his attorney, T. Wray McCurdy, while not opposed to the Cove development, voiced concerns on behalf of the adjacent property owner and well-known Bengies Drive-In Movie Theater. These concerns revolved around sufficient screening and safeguards so that lighting does not inappropriately spill onto the adjacent drive-in movie theater operation. Counsel were advised to meet and address these issues prior to this Order being released.

As background to the Petitioner's request for variance relief, it is imperative to establish a history of the development of the subject property. Testimony and evidence revealed that the subject property was initially plotted, approved, and recorded in the Land Records of Baltimore County as "Eastern Manor," on June 20, 1947. The record plat for Eastern Manor was marked and accepted into evidence as Petitioner's Exhibit 8. As originally plotted, Eastern Manor called for the development of sixty-eight (68) lots. However, this plan did not come to fruition due to the economic difficulties of the owner of the land, George Miller. Furthermore, since the plat was recorded in 1947, sporadic development and a succession of environmental legislation have severely limited the number of buildable lots available in the subdivision. Development occurred in the form of, single-family dwellings constructed at 3224 George Street (Lots 36 and 37 of Eastern Manor), 3213, 3215, 3217, and 3219 Miller Avenue (Lots 23-29½ of Eastern Manor), and an apartment building at the northwest intersection of Miller Avenue and Woodland Avenue (Lots 9 and 10 of Eastern Manor). Environmental legislation began constraining development of the subject property in 1984, when the State of Maryland enacted critical area laws mandating Counties in Maryland to enact their own critical area legislation or be forced to adopt Maryland's laws for areas designated as critical. In 1988, Baltimore County promulgated its own Critical Area legislation that today is codified in the Baltimore County Code Article 33, Title 2. Petitioner proposes to develop twenty-five of the remaining vacant lots with single-family dwellings in a neo-traditional concept of housing, wherein the house are set back from the street with variable distances. This concept has gained popularity and the Petitioner presented an example of one such development, the Kentlands, which was marked and accepted into evidence as Petitioner's Exhibit 7. Petitioner's proposal involved renaming the development of the subject property from *Eastern Manor* to *The Cove*.

In connection with the proposed development, a Petition for Variance seeking relief from Section 1B01.2.C.1.b of the B.C.Z.R. was filed and approved in Case No. 97-77-A by then Deputy Zoning Commissioner Timothy M. Kotroco. Variance relief was granted permitting a front-yard setback between zero (0) and twelve (12) feet in lieu of the required twenty-five (25)

feet for Lots 12-68 and a side building face to public street setback of between five (5) feet and fifteen (15) feet in lieu of the required fifteen (15) feet for Lots 29½-30, 31, 50, 51 and 68. The Order in Case No. 97-77-A was marked and accepted into evidence as Petitioner's Exhibit 2.

In support of the variance requests, Petitioner explained the uniqueness of the property and the subsequent hardship that would result if strict adherence to the Zoning Regulations were mandated. Petitioner noted the extensive environmental constraints on the property and the irregular shape of the parcel. Petitioner indicated that the subject property has significant environmental constraints that encumber development; specifically, there are forest buffers, streams and wetlands covering much of the western portion of the property, a 100-year floodplain, and an environmental easement created to protect much of the wooded areas in the rear of each lot. These environmental encumbrances are enumerated in a letter from Patricia Farr dated February 14, 1996, that was marked and accepted into evidence as Petitioner's Exhibit 6. Moreover, a visual depiction of all the environmental constraints on the property can be seen on the approved drainage map and storm water management plan, marked and accepted into evidence collectively as Petitioner's Exhibit 9. Petitioner further noted that the impervious area requirements extremely limit the building envelope area. Due to all of these variables, Petitioner explained that absent zoning relief, what was a previously approved and recorded development would be rendered un-buildable, thereby depriving Petitioner of the use of the property.

Petitioner further opined that development would create only twenty-five (25) homes, a substantial reduction from the original sixty-eight (68) lots of the former Eastern Manor subdivision, but also would comply with impervious area requirements and avoid infringing on any environmentally protected areas. However, because the constraints on the property make each lot have a buildable depth of sixty-five (65) feet, and in order to comply with environmental restrictions, Petitioner indicated that variance relief is necessary in order to develop the property

with a desirable product.<sup>3</sup>

Appearing as an interested citizen, Dave Cahlander, a local resident and community leader with the Stevens Road Improvement Association, testified as to his concerns regarding density and environmental impact. Petitioner noted that the density is extremely decreased from the original plat and that all environmentally protected areas would be maintained.

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. Comments received from the Office of Planning dated June 14, 2010, state that the lots on the subject property are wide enough for an adequate house width with a 10 foot side building face to lot line and private road setback and a 20 foot side building face to side building face setback. Also, the comments noted that these setbacks were preferred to provide for adequate light and ventilation. Comments were also received from the Department of Environmental Protection and Resource Management (DEPRM), dated May 20, 2010, which state that development of this property must comply with the Chesapeake Bay Critical Area Regulations (Sections 33-2-101 through 33-2-1004, and other Sections, of the Baltimore County Code). Moreover, additional comments were offered indicating that zoning relief is being requested to minimize impacts to water quality and forest while allowing development of the site commensurate with the neighborhood.

The determination of a variance request from the Zoning Regulations is governed by Section 307.1 of the B.C.Z.R., as interpreted by the Court of Special Appeals of Maryland in *Cromwell v. Ward*, 102 Md. App. 691 (1995). As indicated by the Court in *Cromwell*, “The general rule is that variances and exceptions are to be granted sparingly, only in rare instances and under peculiar and exceptional circumstances.” 102 Md.App. at 700. The two-part variance test involves finding that a property is unique and unusual and that if strict adherence to the

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<sup>3</sup> The Department of Environmental Protection and Resource Management (DEPRM) requires that any building remain 35 feet away from the Forest Conservation Easement which effectively pushes everything towards the front of the lots. These constraints drive the location of the buildable areas. Mr. Tanczyn, in support of the evidence presented, cited the cases of *North v. St. Mary's County*, 99 Md. App. 502 (1994) and *McClellan v. Soley*, 270 Md. App. 208 (1973) for the proposition that a variance may be and should be granted if it is shown that strict application of the regulations would deprive the Petitioner of using its property for a permitted purpose.

regulations were required absent relief, an unreasonable hardship or practical difficulty would result. Self-inflicted or created hardship is not considered proper grounds for a variance. *Id.* at 707.

Considering all of the testimony and evidence presented, I am persuaded to grant the requested variance relief. I find special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request. Specifically, I find that the significant environmental constraints, irregular parcel shape, and age of the original record plat combine to render the property unique. Further, I find that strict compliance with the Zoning Regulations would create a hardship that would result in a denial of a reasonable and sufficient use of the property. *See, Belvoir Farms v. North* 355 Md. 259 (1999). Thus, refusing to grant variances would result in unreasonable hardship and practical difficulty. When considering that the original plat for the development was approved and recorded in 1947, and that with the enactment of environmental legislation, absent zoning relief, the subdivision rendered economically unbuildable, it is palpable that Petitioner would suffer unreasonable hardship absent approval of the requests. Further, I also find these variance requests can be granted in strict harmony with the spirit and intent of Section 307.1 of the B.C.Z.R., as interpreted in *Cromwell*, and in such a manner as to grant relief without injury to the public health, safety and general welfare. The proposed development by the Petitioner is an environmentally sensitive plan that responsibly makes use of land long planned for development. These aims will limit any adverse affects on the surrounding community. While the comments submitted by the Office of Planning are given weight, considering there was no objection from adjacent property owners, the plan, as DEPRM noted, aims to minimize environmental impact and that the improvements will be compatible with the area, I find that the proposal adequately addresses the concerns these comments delineate.

Pursuant to the advertisement, posting of the property, and public hearing on this petition held, and after considering the testimony and evidence offered by the Petitioner, I find that variance relief should be granted.

THEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County this 23<sup>rd</sup> day of August 2010 that the Petition for Variance seeking relief from Section 1B01.2.C.1.b (Single-Family Detached Chart) of the Baltimore County Zoning Regulations (B.C.Z.R.) and the Comprehensive Manual of Development Policies (C.M.D.P.) Single-Family Residential Standards Page 4 et. seq. to permit: (a) side-yard setbacks from side building face to the property line in a D.R.3.5 zone of eight (8) feet in lieu of the required fifteen (15) feet for Lots 29 ½-30, 31-35, 38, 47-50, 51-57, and 64-68; (b) side-yard setbacks from side building face to private road of eight (8) feet in lieu of the required twenty-five (25) feet for Lots 30, 31, 50, 51, and 68; and (c) side-yard setbacks from building face to building face of eight (8) feet on each side in a D.R.16 zone in lieu of the required twenty (20) feet for Lots 12 and 13, in accordance with Petitioner's Exhibit 1, be and are hereby GRANTED, subject to the following restrictions:

- 1) The Petitioner may apply for its building permit and be granted same upon receipt of this Order; however, the Petitioner is hereby made aware that proceeding at this time is at its own risk until the 30-day appeal period from the date of this Order has expired. If an appeal is filed and this Order is reversed, the relief granted herein shall be rescinded.
- 2) Compliance with Chesapeake Bay Critical Area regulations and all other appropriate environmental, floodplain and B.O.C.A. regulations relative to the protection of water quality, streams, wetlands, and floodplains. See attached ZAC comments from the Department of Environmental Protection and Resource Management (DEPRM).
- 3) The Development and the homes constructed pursuant to the approved site plan for The Cove will not direct, erect or attach lighting visible to the outdoors whether or not shielded which will unduly impact the adjacent Bengies Drive-In movie theater operation.
- 4) In the event a claim arises concerning objectionable lighting, the theater owner shall give written notice by detailed claim to the party believed to be causing the problem with a proposed remedy for the problem so that it may thereafter be corrected to the extent necessary. A copy of the claim shall be sent to the Developer until the development is fully built out and sold.

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

WJW:esl:dlw

\_\_\_\_SIGNED\_\_\_\_  
WILLIAM J. WISEMAN, III  
Zoning Commissioner  
for Baltimore County