

IN RE: <b>PETITION FOR VARIANCE</b>	*	BEFORE THE
NE/Side Clarke Boulevard, 228.9' N of		
Washington Boulevard	*	ZONING COMMISSIONER
<b>(1837 Clarke Boulevard)</b>		
13 <sup>th</sup> Election District	*	OF
1 <sup>st</sup> Council District		
	*	BALTIMORE COUNTY
Clinton J. Fuchs, et ux		
Petitioners	*	<b>Case No. 2011-0001-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 owners of the subject property, Clinton J. Fuchs, and his wife, Kathleen Nora Flynn-Fuchs. The Petitioners request variance relief from Section 1B02.3.C.1 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit a rear setback for an existing dwelling of as close as 24 feet in lieu of the required 30 feet. Apparently, the contemplated sale by the Petitioners of their adjacent rear lot fronting on Superior Avenue, known as Lot 9, in the subdivision of Superior Heights, First Section, led to the discovery of the rear yard setback deficiency.<sup>1</sup> The subject property and requested relief are more particularly described on the site plan and recorded subdivision plat submitted which was accepted into evidence and marked as Petitioners' Exhibits 1 and 2, respectively.

Appearing at the requisite public hearing in support of the request were Clinton and Kathleen Fuchs, property owners, and Ronald W. Fuchs – Clint's father.

The issues presented in this case generated significant public interest. The contract purchasers and their realtor were present as were surrounding adjacent neighbors Dennis P.

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<sup>1</sup> In the late 1930's, Clinton Fuchs' grandfather purchased several Superior Heights lots. Among them, Lot 11 – the subject property – was improved with the grandfather's dwelling, a 1,790 square foot, two-story brick colonial. The home's footprint has remained unchanged to date. An adjacent unimproved lot – Lot 12 – is now owned by Ronald William Fuchs, the Petitioners father. In August 2005, the Petitioners purchased Lots 9 and 11 from Kenneth R. Fuchs, the Petitioners uncle. As evidenced by the Maryland Department of Assessments and Taxation Map No. 108, Lots 9 and 11 have one (1) tax account number – 1306820064.

Clampett (1832 Superior Avenue), James H. Persing (1839 Clarke Boulevard) and Melissa Snyder. Messrs. Clampett and Persing testified in opposition to the request.

Testimony was offered describing the subject property and its historical value to the Petitioners family. Briefly, the Superior Heights subdivision, located in Relay, Maryland was platted in 1924, long before The Board of County Commissioners of Baltimore County implemented the first set of zoning regulations. Clinton Fuchs' grandfather purchased, among other lots, Lot 11 – the subject property at 1837 Clarke Boulevard. This lot has 99.96 feet of frontage on the east side of Clarke Boulevard and contains an area of 0.214 acres or 9,317 square feet. On this lot, he built his home in 1938. Lot 9, to the rear of Lot 11, was also purchased by the Petitioners' grandfather. This lot is somewhat smaller having 80 feet of frontage on the west side of Superior Avenue. This lot contains 0.203 acres or 8,860 square feet and remained vacant and unimproved for many years. Clinton Fuchs and his father meticulously presented the factual information spanning some 72 years in duration. The pertinent facts here disclose the Petitioners desire to now sell Lot 9, which has been under contract to be sold. The lot is a platted lot of record and meets the current D.R5.5 zoning regulations that were later imposed (minimum net lot area – 6,000 square feet and minimum lot width – 55 feet) for development. Apparently, however, it was discovered that the elder Kenneth W. Fuchs' placement of his home on Lot 11 – within the current setbacks to the rear lot line – some 70 years ago created a non-conforming deficiency that needed to be resolved prior to sale. Petitioners' nightmare began when they filed for a property line adjustment with the Department of Permits and Development Management (DPDM) to correct the six-foot deficiency. According to the Office of Planning in its Zoning Advisory Committee (ZAC) comment, dated August 2, 2010, DPDM's Development Review Committee (DRC) elected not to approve the lot line adjustment between Lots 9 and 11. *See* DRC No. 031610A. Moreover, the Fuchs attempt to create a six-foot easement between the parcels failed to meet with the lending and title company requirements. Failing to conform to existing rear yard setbacks, variance relief is requested as set forth above to allow the sale and development of Lot 9 by the contract purchasers. Without relief, Petitioners submit that the

present zoning ordinance will restrict the use of their property so that it cannot, within the specter of present zoning, be used for its intended purpose. When this occurs, they submit zoning goes beyond permissible and legal regulation and must yield to the rights of the property owner. *Belvoir Farms v. North*, 355 Md. 259 (1999) and *White v. North*, 356 Md. 31 (1999).

Government regulations of land use are largely a local function. The Baltimore County Council adopts zoning maps in Baltimore County every four (4) years, pursuant to the Comprehensive Zoning Map Process (CZMP), and under those maps, every property in Baltimore County is assigned one of the nearly 40 zoning classifications listed in the Baltimore County Zoning Regulations (B.C.Z.R.). Those classifications contain specific regulations that govern particular land uses and D.R.5.5 zoned lots are required to have a minimum area of 6,000 square feet, a minimum front yard setback depth of 25 feet, side yard setbacks of 10 feet, and a minimum rear yard depth of 30 feet. Variance relief can be granted only if the requirements contained in Section 307 of the B.C.Z.R. are met. This section states that the Zoning Commissioner may grant variances:

*... 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 of Baltimore County would result in practical difficulty or unreasonable hardship.*

Variances are not favored under the law and presumed to be in conflict with the regulations. As stated in *Cromwell v. Ward*, 102 Md. App. 691, 703 (1995):

*The general rule is that authority to grant a variance should be exercised sparingly and only under exceptional circumstances.*

As noted above, the Protestants are neighbors from the community who raised a variety of concerns in this regard. In short, they believe that the Petitioners are trying to take advantage of the County's system and point out that the variance request must be denied on the grounds that "it is incumbent upon the Petitioner to obtain an accurate survey of the property's disputed size

and area before requesting relief ... that any hardship or practical difficulty that they (Fuchs) now claim was self-inflicted” since they knew before obtaining the lots in 2005 that Lot 9 was “a small unbuildable parcel” created by his ancestor and predecessor in title’s consolidated use. *Roeser v. Anne Arundel*, 368 Md. 294 (2002). See Protestants’ multiple photographs of the properties and depicting their use submitted as Protestants Exhibit 1 and 2.

This is not a simple case. From the evidence before me, I must conclude from a zoning standpoint that the prior owner(s) intended to merge the subject Lot 11 with Lot 9”. Erecting a swimming pool, brick shed and driveway on and across Lot 9 without a principle dwelling thereon and then attempting to transfer ownership of this lot used accessory to the primary residence built on Lot 11 is the kind of overt actions conducted in a public forum that demonstrates an intent to merge Lot 9. There is no physical evidence that the lot was treated separately. See *Friends of the Ridge v. Baltimore Gas & Electric Company*, 352 Md. 645 (1999), and *Remes v. Montgomery County*, 387 Md. 52 (2005) for Maryland cases on the doctrine of zoning merger. The question now presented is whether the subsequent transfer of this lot (Lot 9) by the heirs and assigns of the Petitioners’ grandfather can undue his prior merger? This is a difficult question in my view. Did the discontinuance of the “pool, driveway and shed” on Lot 9 by Clinton and Kathleen Fuchs over the past ten (10) years negate the prior merger? The record in the *Remes* case, a case factually similar to the case before me, shows the court noted that the doctrine of zoning merger operated two (2) ways. While it permitted consolidation, it also prohibited the undoing of the process once merger had occurred. It was pointed out by the court that if it was only applied to permit consolidation, the inevitable result over a period of years would be the proliferation of unlawful non-conforming uses. The court went on as follows:

*“ ... We stated in Ridge: ‘We shall hold that a landowner who clearly desires to combine or merge several parcels or lots of land into one larger parcel may do so. One way he or she may do so is to integrate or utilize contiguous lots in the service of a single structure or project...’ That is precisely what the elder Duffies did when, in making additions to their home and in constructing a pool on a lot adjacent to their home, they employed Lot 11 in the service of Lot 12 for zoning purposes.*

...

*“Thus, based on the setback encroachments existing as a result of structures on Lot 12, the proposed construction on Lot 11, would make Lot 12, if in separate ownership, a new and illegal nonconforming lot, unless, under the doctrine of zoning merger, the uses of Lot 11 are appropriately limited.*

...

*“... To allow Lot 11 to be used as proposed, thus creates an illegal nonconformance as to lot 12 and, by implication, grants an improper variance as to the rear yard setback for Lot 12. Should this Court permit Lot 11 to be so used and a home constructed thereon, what becomes of Lot 12’s ability to comply with existing rear yard and side yard setback requirements? Such action effectively waives the zoning requirements as to Lot 12.*

...

*“[If zoning merger only applied to permit consolidation, but did not operate to prohibit the undoing of merger] The owner would have the benefit of avoiding zoning violations by treating the parcels as merged for zoning purposes, but later seek benefit from the sale of two separate parcels of land. That is exactly what is occurring in the instant case.”*

In summary, Judge Cathell noted in *Remes* that there is a national effort by counties to restrict undersized parcels, especially where the owner has or had contiguous parcels. He indicated that the doctrine of zoning merger generally prohibits the use of individual parcels if the contiguous parcels have been, at any relevant time, in the same ownership.

I find from the facts before me that the subject lot had merged with the other “Superior Heights” Lot 9 owned by Mr. Fuchs’ grandfather, and his children prior to the Petitioners’ acquiring the property. Once this occurred there can be no variance without the parcel proceeding through the minor subdivision process, which has not occurred. Therefore, I will deny the requested variance, as there are no internal divisions between lots recognized by zoning against which variances can be granted.

Pursuant to the advertisement, posting of the property and public hearing on this Petition held, and for the reasons set forth above, I find that the Petitioners' variance request should be denied.

THEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County this 31<sup>st</sup> day of August 2010, that the Petition for Variance relief from Section 1B02.3.C.1 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit a rear yard setback of 24 feet in lieu of the required 30 feet, be and is hereby DENIED.

Any appeal of this decision shall be taken in accordance with Baltimore County Code Section 32-3-401.

WJW:dlw

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