

\IN RE: <b>PETITION FOR VARIANCE</b> (2022 Sue Creek Drive) 15 <sup>th</sup> Election District 6 <sup>th</sup> Councilmanic District  Richard J. and Donna L. Schissler <i>Petitioners</i>	* BEFORE THE  * OFFICE OF  * ADMINISTRATIVE HEARINGS  * FOR BALTIMORE COUNTY  * <b>Case No. 2010-0295-A</b>
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**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings for Baltimore County as a Petition for Variance filed by the legal ownser of the subject property, Richard J. and Donna L. Schissler. As filed, the Petitioners requested a variance from Section 417.4 of the Baltimore County Zoning Regulations (B.C.Z.R.), to permit a setback of 5 feet and an encroachment of 15 feet over the established divisional property line and an open access strip of 15 feet and 18 feet between a facility of adjoining property owners in lieu of the required 10 feet, 10 feet, 20 feet and 20 feet respectively for a new pier. That Petition was filed on or about April 28, 2010 by David Billingsley, on behalf of the Petitioners. Former Zoning Commissioner Wiseman held a hearing on the Petition, but a ruling was never issued and the parties attempted to amicably resolve the case.

That did not occur, and the Petitioners hired Mr. Schmidt and William Bafitis, Professional Engineer, who prepared and submitted a revised plan (Exhibit 1). At the hearing on the amended plan, counsel argued variance relief was not required, given that the proposed floating pier would not extend beyond the “mean low tide” mark, rendering B.C.Z.R. § 417 inapplicable.

Appearing at the hearing in support of the request were Richard and Donna Schissler, property owners, and William Bafitis, P.E., of Bafitis & Associates, Inc, the

consultant who prepared the site plan(s). Lawrence E. Schmidt, Esquire appeared as counsel and represented the Petitioners. John and Mary Schaefer and Paul and Mary McMullen the adjacent property owners and neighbors attended the hearing and indicated they opposed the relief sought by the Petitioners.

Testimony and evidence offered at the hearing revealed that the property is 14,252 square feet and is zoned DR 3.5. The Petitioners have lived at the property since 1996, and had a floating pier in place when they purchased their home. As a result of recent storms the pier was destroyed, and Petitioners now seek to replace the pier.

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. The only substantive comment was from Department of Environmental Protection and Sustainability (DEPS), which indicated Petitioners must comply with certain Critical Area regulations as set forth in B.C.Z.R. § 500.14

Section 417 of the B.C.Z.R. contains regulations concerning “waterfront construction.” Those regulations are applicable only when the construction will extend “into navigable waters beyond mean low tide.” B.C.Z.R. § 417.1 Thus, the crucial issue in any such case involves the location of the “mean low tide” mark. The term is not defined in the B.C.Z.R., but is widely acknowledged to refer to “the average of all low tides-both low and lower low- over a fixed period.” Black’s Law Dictionary 1619 (9<sup>th</sup> ed. 2009).

Mr. Bafitis, an engineer who was accepted as an expert, testified he prepared the amended site plan (Exhibit 1) and noted thereon with dashed lines the mean low water elevation, using NAVD 88 datum. Baltimore County regulations specify that NAVD 88 (North American Vertical Datum of 1988) must be used in preparing vertical survey measurements (in this case, the “mean low tide” elevation). Baltimore County Design

Manual, p. 3-2. And courts have recognized that licensed surveyors and engineers are qualified to “determine the line of mean low tide.” Seaway Co. v. Attorney General, 375 S.W. 2d 923 (Tex. 1964).

I am persuaded by and credit Mr. Bafitis’ testimony concerning the mean low tide elevation, which I believe is a determination that must be made by an expert witness. See Spillane v. Adams, 922 N.E. 2d 803, 812 (Mass. 2010). Mr. Bafitis testified he performed an onsite survey in the water before making the mean low tide determination, and he opined B.C.Z.R. § 417 is inapplicable, since (as shown on the plan) the proposed pier (which Mr. Schissler testified is “similar to what was there before”) does not extend beyond the mean low water mark.

Neighbor Mary McMullen questioned Mr. Bafitis about a prior case (06-365-SPH) in which he testified that the “mean low tide” elevation in a nearby cove was the shoreline itself. Mr. Bafitis explained that the mean low water mark will vary depending on the location at issue, and while the record was not clear as to the precise location of the property in that earlier case, Mr. Bafitis testified that there are occasions where the shoreline will be the mean low water mark, but that was not the case with the Petitioners property.

In summary, I believe it was incumbent upon the protestants to present expert testimony in opposition to that provided by Mr. Bafitis. Having failed to do so, and finding Mr. Bafitis to be a credible and articulate witness, I am persuaded that his determination of the low water mark is correct.

THEREFORE IT IS ORDERED by the Administrative Law Judge for Baltimore County this **10th** day of January 2013, that the Petition for Variance seeking relief from

Sections 417.4 of the Baltimore County Zoning Regulations (B.C.Z.R.), be and is hereby,  
DISMISSED WITHOUT PREJUDICE.

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

JEB: sln

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Signed  
JOHN E. BEVERUNGEN  
Administrative Law Judge  
for Baltimore County