

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
[www.montgomerycountymd.gov/content/council/boa/index.asp](http://www.montgomerycountymd.gov/content/council/boa/index.asp)

(240) 777-6600

**Case No. A-6444**

**PETITION OF ROBERT WILLIAMS, JR.**

OPINION OF THE BOARD

(Opinion Adopted November 12, 2014)  
(Effective Date of Opinion: December 8, 2014)

Case No. A-6444 is an application for a variance to allow the construction of an accessory structure (a solar panel array) in the front yard. Section 59-C-1.326(c) of the Zoning Ordinance (Mont. Co. Code, 2004, Chap. 59, as amended) requires that accessory structures be located in a property's rear yard.

The Board of Appeals held a hearing on the application on November 12, 2014. Robert Williams, Jr., appeared and testified in support of his petition.

Decision of the Board:                      Variance Denied.

**EVIDENCE PRESENTED**

1. The subject property is Lot 13, Block A, Windmill Farm Subdivision located at 13813 Turkey Foot Road, North Potomac, Maryland, 20878, in the Zone RE-2. It is 5.629 acres. [See Exhibit 3].
2. Mr. Williams testified that the subject property contains five acres, and is steeply sloped to the southwest, with a level area to the northeast. He stated that because of the topography, there are limited locations suitable for the septic field. Mr. Williams testified that he built a passive solar house on a hill on the property in 1981, and converted the barn, which is to the north of and behind the house, into an office. In response to a Board question, Mr. Williams confirmed that the house receives ample sunlight.

3. Mr. Williams stated that there are existing large trees behind the house that make it too shady for solar panels to function.
4. In response to a Board question, Mr. Williams described the location of the current septic tank, and noted the area in the northern corner of the property, which is required as a reserve septic area. [See Exhibit 4(a)].
5. In response to a Board question, Mr. Williams stated that the solar panels cannot be located behind the house, on the level area between the house and the barn, because to the east of that area, along the northeast property line, there are large trees on the neighboring property which would render solar power ineffective. He then stated that the solar panels cannot be located west of the area between the house and barn because the property's slope in that location would make the installation of solar panels cost prohibitive. [Transcript, November 12, 2014, page 11].
6. Referring to the photographs marked as Exhibit Nos. 5(e)-(r), Mr. Williams testified that his property is not visible from Turkey Foot Road, and that the proposed solar array would not be visible from the road. He stated that although the array would be visible from the abutting properties on Lots 4 and 5, neither of those property owners objects to the proposed location. [Transcript, p. 18].

## FINDINGS OF THE BOARD

A variance permits a use of a structure that otherwise would not be permitted by the zoning ordinance, which has led the Maryland Court of Special Appeals to clarify that "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances," *Cromwell v. Ward*, 102 Md. App. 691, 703, 651 A.2d 424, 430 (1995) (citation omitted). Review of a variance application under an ordinance like Montgomery County's involves a two-step process to discern a unique characteristic of the property and then to determine whether a practical difficulty results from the uniqueness of the property:

The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is -- in and of itself -- unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is

unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, i.e. a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance caused by the property's uniqueness, exists.

*Cromwell*, 102 Md. App. at 694-695, 651 A.2d at 426. That the variance might allow an improvement to property that is "suitable or desirable or could do no harm or would be convenient or profitable to its owner" does not provide a basis for granting a variance. *Cromwell*, 102 Md. App. at 707, 651 A.2d at 432. The need for the variance must arise from the application of the zoning ordinance to the unique or peculiar characteristics of the property. See *Cromwell*, 102 Md. App. at 717-718, 651 A.2d at 437. The zoning ordinance must impact upon the land in a unique manner that does not exist where a restriction applies "equally to all lots of similar size." *Cromwell*, 102 Md. App. at 720, 651 A.2d at 438.

In *Salisbury Board of Zoning Appeals v. Bounds*, 240 Md. 547, 554-55, 214 A.2d 810, 814 (1965), the Maryland Court of Appeals enunciated the concept of a self-created hardship;

If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have been themselves caused by the property owner or his predecessor in title, the essential basis of the variance, i.e. that the hardship be caused solely through the manner of operation of the ordinance upon the particular property, is lacking. In such a case a variance will not be granted; the hardship, arising as a result of the act of the owner or his predecessor will be regarded as having been self-created, barring relief.

Finally, in *Montgomery County v. Rotwein*, 169 Md. App. 716, 732-733; 906 A.2d 959 (2006), the Court of Special Appeals reiterated that financial hardship is not grounds for granting a variance and that economic loss alone does not constitute a practical difficulty:

Economic loss alone does not necessarily satisfy the "practical difficulties" test, because, as we have previously observed, "[e]very person requesting a variance can indicate some economic loss." *Cromwell*, 102 Md. App. at 715 (quoting *Xanthos v. Bd. of Adjustment*, 685 P.2d 1032, 1036-37 (Utah 1984)). Indeed, to grant an application for a variance any time economic loss is asserted, we have warned, "would make a mockery of the zoning program." *Cromwell*, 102 Md. App. at 715.

Section 59-G-3.1. of the Montgomery County Zoning Ordinance ("Authority – Board of Appeals") provides that the Board of Appeals may grant petitions for variances as authorized in Section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;

It is under this subsection that the Board must employ the analysis from the *Cromwell* case, set forth above. The Board acknowledges that from Mr. Williams' perspective, the property's slope and the presence of large trees constrain where the solar array can most conveniently be located. The Board notes Mr. Williams' testimony that he cannot locate the solar panels to the rear of the house, in the western portion of the area between the house and the barn, because of the prohibitive cost of constructing solar panels on the slope there, but finds that these reasons describe the convenience and desirability that *Cromwell* states are not grounds for a variance. The Board further notes that under *Rotwein*, the fact that it would be more expensive to install solar panels on the sloped ground to the west of the area between the house and barn than it would be to install them in the southeast corner of the property does not constitute a practical difficulty, and cannot be grounds for the grant of a variance. Finally, the Board notes that the availability of suitably sunny areas for solar panels on the subject property is constrained by the location of the house (and barn)<sup>1</sup>, which Mr. Williams constructed. This is a five-plus acre property. If Mr. Williams had sited his house closer to the front (south) of his property, he could have constructed the solar panels where the house, which he testified receives ample sunlight, is located. Under *Salisbury*, the choice of where to locate the house is attributable to Mr. Williams as a self-created hardship, and precludes the grant of a variance.

On a motion by John H. Pentecost, seconded by Carolyn J. Shawaker, Vice-Chair, with Stanley B. Boyd, Edwin S. Rosado, and David K. Perdue, Chair, in agreement, the Board adopted the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

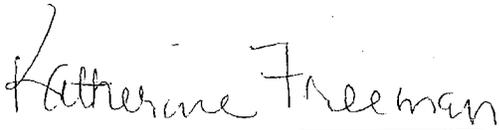
---

<sup>1</sup> Although it is not clear that the barn was constructed by Mr. Williams, even if it were constructed by his predecessor in title, it would still be considered a self-created hardship under *Salisbury*.



David K. Perdue  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
This 8<sup>th</sup> day of December, 2014.



Katherine Freeman  
Executive Director

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.