

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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CASE NO. A-6480

PETITION OF SAEID SEIF

OPINION OF THE BOARD

(Public Hearing Date: January 6, 2016)
(Effective Date of Opinion: January 29, 2016)

Case No. A-6480 is an application by Saeid Seif for a 5.80-foot variance from the 25.60-foot side street lot line setback required by Section 59-4.4.8.B.2 of the Montgomery County Zoning Ordinance. The variance is sought for the construction of a new single family dwelling.

The Board of Appeals held a public hearing on the application on January 6, 2016. Mr. Seif, the property owner, testified in support of the variance (the "Petitioner"). He was represented by Mr. Charles Chester, Esquire. Ms. Anne Smith, who lives in the neighborhood, testified in opposition to the application.

Decision of the Board: Requested Variance Denied.

EVIDENCE PRESENTED

1. The subject property is Lot 7, Block 7, Wildwood Manor Subdivision located at 10221 Tyburn Terrace, Bethesda, MD, 2014, in the R-90 Zone.
2. Counsel for the Petitioner submitted a written Statement of Justification for the variance. See Exhibit 3. This Statement explains that Mr. Seif properly and timely sought and received all necessary approvals from the County for the demolition and reconstruction of a new home, including a building permit for the construction of a new single family dwelling which was issued based upon architectural drawings that placed the new home in conformity with all of the setback requirements. The Statement explains that after the foundation and basement were constructed, at a cost of approximately \$120,000, a County Inspector determined that a corner of the foundation wall was 5.8

feet over the required side street setback along Cheshire Drive (i.e. 19.8 feet from the property line along Cheshire Drive).¹ Counsel stated that without the variance, the Petitioner will have to remove the foundation, backfill the excavation, and reconstruct. He indicated that this would be a hardship to his client, that it would be expensive, and that he did not know from an engineering perspective if it was technically feasible to rebuild after such an undertaking, expressing concern about such things as the support of the backfill, drainage and water infiltration.

Counsel explained that once the construction is complete, the "front" of the new house will face on Tyburn Terrace, and that it is the (left) side of the house, including the corner which encroaches into the setback, which will be oriented towards Cheshire Drive. He stated that the encroachment into the Cheshire Drive setback was unintentional and was due to the fact that the property was not staked properly before construction began.

Counsel argued, as is set forth in the written Statement, that the frontage along Cheshire Drive should be treated as a side yard for setback purposes, and that if the variance were granted, the proposed construction would substantially conform to the established traditional development pattern of the street or neighborhood, which Counsel describes as being comprised of properties, built before 1954, that are set seven (7) feet—not 25 feet—from their side lot lines.² Counsel stated that this circumstance makes the subject property unique, and that the proposed construction comports with this established development pattern. See Exhibit 7(a).

Counsel argued that it is the placement of the house on the lot, whereby the front of this house faces Tyburn and the side is along Cheshire (as opposed to the front of the house actually facing the corner of the two streets, as was the case with the (now-demolished) house previously located on this lot), as opposed to the configuration of the lot itself (i.e. that the lot is located at the intersection of two streets), which makes this property unique and should allow the County some discretion in determining which setbacks to apply.

In addition, Counsel stated that there is a 15-foot strip of land between the subject property and the edge of Cheshire Road which, at least visually, results in the existing foundation for which the variance is sought being located approximately 35 feet from the road itself, well in excess of the required 25.6 foot setback. See Exhibit 4(b). He argued that this was another unique factor favoring the grant of the requested variance.

Counsel argued that the variance requested, to allow the encroaching corner of the foundation to remain in its current place, is the minimum necessary to overcome the practical difficulties imposed by compliance with the Zoning Ordinance. He argued that the requested variance could be granted without substantial impairment to the intent or

¹ Counsel explained in response to a Board question that DPS does not inspect the surveyor's work in staking the property, but does inspect the foundation to ensure that it is properly located before additional construction can take place.

² The written Statement of Justification at Exhibit 3 states that this lot was recorded on November 30, 1951, and that the side setback under the Zoning Ordinance applicable at that time was seven (7) feet.

integrity of the general plan. Finally, he stated that the grant of the variance would not adversely impact the use and enjoyment of abutting and confronting property owners, noting that nine adjacent and confronting homeowners had submitted a letter supporting the grant of the variance. See Exhibit 10(b).

3. In response to a Board question, Mr. Seif testified that he is the general contractor for the construction of this new dwelling. When asked by the Chair whether the subcontractors he hired acted on his behalf and whether he was responsible for what they do, Mr. Seif answered in the affirmative. His attorney then clarified that Mr. Seif did not instruct his subcontractors to incorrectly stake the property or to deviate from the drawings that were submitted to DPS in connection with issuance of the building permit, stating that all of the subcontractors had copies of the approved plans and the his client was not responsible for their deviation from those plans.

In response to further Board questions asking if it would be possible to move the foundation, Mr. Seif testified that it would be extremely difficult, explaining that the concrete had been strengthened in weak spots and that the foundation was built like a fort. He testified that one could not simply remove the corner of the foundation since pipes and drainage had already been installed in the existing concrete. Finally, he testified in response to Board questions that, cost aside, he could put in a new foundation, and that if the variance were denied, he would build the same size house.

4. Ms. Anne Smith, who lives on a corner lot at 5953 Avon Drive, in the Wildwood neighborhood but not adjacent to or confronting the subject property, testified that she had just moved back into her house after a massive renovation. She expressed her sentiment that if one house were allowed not to follow the setbacks (i.e. were granted a variance), others would follow.

FINDINGS OF THE BOARD

Based on the Petitioner's binding testimony and the evidence of record, the Board finds that the requested variance must be denied. The requested variance does not comply with the applicable standards and requirements set forth in Section 59-7.3.2.E.

1. *Section 59-7.3.2.E.2.a: one or more of the following unusual or extraordinary situations or conditions exist:*

The Board makes no finding under this section except to confirm the fact that the subject property, located at the corner of Tyburn Terrace and Cheshire Drive, is a corner lot for the purpose of determining the applicable setbacks, irrespective of the orientation of the proposed house. The fact that the lot is a corner lot is not, by itself, an unusual or extraordinary situation or condition.

While the Board notes that the Petitioner has asserted that the proposed construction comports with the established traditional development pattern of the street or neighborhood, the Board makes no finding with respect to this assertion

in light of its finding below that the proposed variance fails to meet Sections 59-7.3.2.E.2.b and c of the Zoning Ordinance.

2. *Section 59-7.3.2.E.2.b.* the special circumstances or conditions are not the result of actions by the applicant;

Section 59-7.3.2.E.2.c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;

The Board finds that the Petitioner, by his own admission, is the general contractor in charge of the construction of this new single family dwelling, and is responsible for the work of the subcontractors building this house. The Board further finds that it was the work of these subcontractors which caused the encroachment of the basement and foundation into the side street setback. In addition, although the requested variance may be the minimum needed to legitimize the existing encroachment, the Board finds that there is room on this lot to locate the basement and foundation without encroaching on any setbacks and therefore without the need for a variance, as was stated in the Petitioner's Statement of Justification for the Variance and shown on Drawing 1 attached to that Statement, and as was represented to the County's Department of Permitting Services in connection with their issuance of the building permit for the construction of this single family dwelling. See Exhibit 3.

The Board finds that because the encroachment for which the variance is sought was the result of actions attributable to the Petitioner, and because there is room on this property for the Petitioner to construct his home in compliance with the established setbacks and without the need for a variance, the requested variance cannot be granted. The requested variance is not necessary to overcome any practical difficulty that full compliance with the Zoning Ordinance would impose; there is room within the confines of the buildable envelope to accommodate the desired construction.

3. The Board recognizes that the Petitioner has already spent considerable money on this construction, and that the removal and reconstruction of the foundation encroachment will undoubtedly entail additional expense. The Board notes that the financial hardship that may result from this removal and reconstruction is not a sufficient reason to justify the grant of a variance.³ The Board further finds that because the Petitioner in this case is ultimately responsible for the construction of the existing

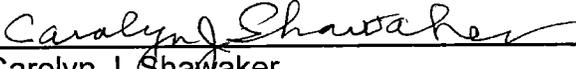
³ See *Montgomery County, MD v. Frances Rotwein*, 169 Md. App. 716, 732-33; 906 A.2d 959, 968 (2006) ("Economic loss alone does not necessarily satisfy the "practical difficulties" test, because, as we have previously observed, "[e]very person requesting a variance can indicate some economic loss." *Cromwell*, 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. Financial concerns are not entirely irrelevant, however. The pertinent inquiry with respect to economic loss is whether "it is impossible to secure a reasonable return from or to make a reasonable use of such property." *Marino v. City of Baltimore*, 215 Md. 206, 218, 137 A.2d 198 (1957). But *Rotwein* has not demonstrated that, unless her application is granted, it will be "impossible [for her] to make reasonable use of her property." *Id.*)

foundation in derogation of the required setbacks, that to the extent that this could be said to pose a hardship, this hardship is self-created, and cannot be the basis for a variance.⁴

5. Because the application fails to meet the requirements of Sections 59-7.3.2.E.2.b, and c, the application must be denied and the Board does not address its compliance with the other standards under Section 59-7.3.2.E.

On a motion by Edwin S. Rosado, seconded by John H. Pentecost, Vice-Chair, with Carolyn J. Shawaker, Chair, in agreement, with Bruce Goldensohn not in agreement, and with Stanley B. Boyd necessarily absent, the Board voted to adopt 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.



Carolyn J. Shawaker
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 29th day of January, 2016.



Barbara Jay
Executive Director

⁴ In Salisbury Board of Zoning Appeals v. Bounds, 240 Md. 547, 554-55, 214 A.2d 810, 814 (1965), the Maryland Court of Appeals agreed with 2 Rathkopf, The Law of Zoning and Planning, 48-1, that,

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 or created by the property owner or his predecessor in title, the essential basis of a 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.

See also Montgomery County, MD v. Frances Rotwein, 169 Md. App. 716, 733, 906 A.2d 959, 968-9 (2006) ("the 'hardships' about which Rotwein complains are self-created and, as such, cannot serve as a basis for a finding of practical difficulty. See Cromwell, 102 Md. App. at 722. Rotwein contends that the requested location for her garage is the only feasible location. But that is so only because of the location of the other improvements to the property, and the decision whether to build those improvements and where to place them was Rotwein's.").

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. 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.