IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2004
No. 2414

MONTGOMERY COUNTY, MARYLAND,

Appellant

v.

FRANCES ROTWEIN,

Appellee

On Appeal from the Circuit Court for Montgomery County, Maryland
(Patrick L. Woodward, Judge)

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case involves an application for two variances to construct a two-car garage submitted by Frances Rotwein—7 feet from the front setback and 3 feet from the sum of the side yard setbacks. (E. 1, 3) The Board of Appeals for Montgomery County conducted two hearings and voted to deny the requested variances based on a failure of the application to establish that the property was unique or that the variances were the minimum reasonably necessary to overcome a practical difficulty. (E. 22-26) Ms. Rotwein filed a petition for judicial review challenging the sufficiency of the board's findings of fact as well as the accuracy of the board's interpretation of the zoning ordinance.

Based upon its review, the circuit court reversed the board's decision and remanded the case for the board to consider additional evidence and testimony regarding alternatives for placement of the garage. (E. 125-126) The court specifically directed the board to consider structural characteristics, i.e., the location of the front door of the house in relation to the proposed construction of the garage. (E. 126) The County appealed that decision to this Court.[1]

QUESTION PRESENTED

> Did the board of appeals properly construe the zoning ordinance to require it in reviewing an application for a variance to make findings based on the unique characteristics of the property without considering the location of existing structures on the site?

STATUTES, ORDINANCES, AND CONSTITUTIONAL PROVISIONS

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[1]The board of appeals has original jurisdiction to hear and decide applications for variances. Montg. Co. Code § 59-A-4.11(b) (2004). Judicial review by the circuit court and further appeal to this Court are provided by Montg. Co. Code § 59-A-4.64.

The full text of all relevant statutes, ordinances, and constitutional provisions appears in the appendix to this brief.

STATEMENT OF FACTS

Ms. Rotwein owns property improved by a one-story single-family home at 6605 Tulip Hill Terrace in Bethesda, Maryland. (E. 1, 20) The R-90 zoned lot contains about 31,091 square feet of land (almost 3/4 acre) and measures 83 feet across the front, 87 feet across the rear, 415 feet along one side, and 325 along the other side. The house measures 59 feet wide by 38 feet deep, and the front lot line angles along the road. (E. 9, 17, 20, 33, 45-46, 57) The front of the lot slopes slightly from east to west. (E. 10, 11, 20) The house sits 8 feet from the side lot line and 23 feet from the front lot line. In front of the house, there is a carport with a driveway that accesses the road at two locations. The rear yard contains a deck, a slate patio, a concrete swimming pool, and a tennis court, which consume the bulk of the central portion of the lot. (E. 10, 14, 20)

The application requested a 7-foot variance from the front setback and a 3-foot variance from the sum of the side yard setbacks to accommodate replacing the carport with an enclosed garage.[2] (E. 1, 22) Rather than enclose the carport, Ms. Rotwein wanted to place the garage away from the house (closer to the road) to keep her front door accessible for visitors. (E. 2, 34) Direct access to the house from the garage would exist through a

[2]The zoning ordinance requires that each side yard have a minimum setback of 8 feet. Along with this provision, the sum of the two side yards must not be less than 18 feet. Montg. Co. Code § 59-C-1.323(b)(1). The latter provision has the effect of preventing construction to the full setback.

connecting hallway entry into another part of the house. (E. 3) Upon completion, the garage would sit 3 feet from the east side lot line and 18 feet from the front lot line, which encroaches 7 feet into the 25-foot front setback and 3 feet into the required total side yard setback of 18 feet. (E. 3) *See* Montg. Co. Code § 59-C-1.323(a) and (b)(1). Although the lot is a bit narrower than others in the neighborhood, it is deeper than many other lots and wider than the 75-foot minimum width required by the zoning ordinance. (E. 17; App. 4)

Ms. Rotwein claimed that the narrowness, shape, and topography of the property caused peculiar or unusual practical difficulties in complying with the setback restrictions. (E. 1) Her architect, Mr. Brenneman, testified that the existing carport overhangs the front door of the house. He indicated that enclosing the carport to create the garage would eliminate the front door to the house. (E. 18, 34, 38) Moving the garage back within the building envelope would require grading to bring the southwestern driveway closer to the house, requiring the creation of wells in front of some of the basement-level windows located on the front of the home. (E. 10, 12, 36) Mr. Brenneman further explained that no other home in the block has a carport and that other homes in the neighborhood generally have two-car garages. (E. 39) He conceded that a one-car garage could fit within the required setbacks, but noted that it would reduce the property's value. (E. 39-40) In addition, the rear of the property slopes down steeply to an undeveloped alley behind the lot. (E. 41)

The board held a second hearing to permit Ms. Rotwein to submit additional items that had been omitted from the application. During that hearing, Mr. Brenneman testified that the other lots on Tulip Hill Terrace ranged from 98 feet to 115 feet wide, for an average width

of 108 feet. (E. 58) Mr. Brenneman again pointed out that enclosing the existing carport would "obliterate" the front door, while moving the proposed garage within the setback lines would require grading that would effectively "bury" the basement-level windows. (E. 62) Ms. Rotwein's son confirmed that she purchased the lot in 1955 and that the pool and tennis court were constructed around 1970. (E. 76-77) The board specifically asked the applicant about alternative locations for the garage and the possibility of reducing the size of the garage to accommodate only one car. (E. 35, 37-40, 61, 68)

The board concluded that the petition did not establish the requirements for granting the variances. Neither the narrowness of the lot nor its topography resulted in a practical difficulty in locating a reasonably sized garage within the building envelope on the property. Moreover, the board viewed the applicant's desire to avoid reconfiguring the front door to be a matter of convenience that related to the location and layout of the house on the lot and not to a peculiar aspect of the land itself. (E. 24) The board determined that the inability to place a garage in the back yard was self-created, because any difficulty associated with that location derives solely from the improvements made by Ms. Rotwein. (E. 25) The board, therefore, denied the variance requests.

ARGUMENT

Variances must be granted sparingly.

A variance permits a use or a structure that otherwise would not be permitted by the zoning ordinance, which has led this Court 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). The applicant for a variance bears the burdens of production and persuasion as to each of the variance standards. *Angelini v. Harford County*, 144 Md. App. 369, 376-377, 798 A.2d 26, 30-31, *cert. denied*, 370 Md. 269, 805 A.2d 265 (2002). In effect, the nature of a variance places on the applicant "the burden of overcoming the presumption that the proposed use is unsuitable." *North v. St. Mary's County*, 99 Md. App. 502, 510, 638 A.2d 1175, 1179, *cert. denied*, 336 Md. 224, 647 A.2d 444 (1994). 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.

Carried to its logical conclusion, granting a variance in this case urges property owners to take a relatively modest lot and turn it into an estate with every conceivable convenience constructed upon it and then use the existence of those modifications to justify additional improvements that could not be built without the grant of a variance. This Court's decision in *Cromwell* correctly encourages a more tempered approach that preserves the legislatively adopted zonal restrictions. Simply put, sometimes a person must choose fewer

of the conveniences than he may wish to construct on the property in order to ensure that the property continues to conform with the zoning laws.

Standard of review

This appeal involves review of the board's denial of a request for a variance. Judicial review of an administrative decision requires the court to determine "whether there was substantial evidence on the record as a whole to support the agency's findings of fact and whether the agency's conclusions of law were correct." *Motor Vehicle Administration v. Atterbeary*, 368 Md. 480, 490-491, 796 A.2d 75, 81 (2002) (citations omitted). The reviewing court will not substitute its judgment for the expertise of the agency or make its own findings of fact when the record contains substantial evidence to support the administrative decision. *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 450-451, 800 A.2d 768, 774-775 (2002). When the issue is fairly debatable, and reasonable persons could reach different conclusions based on the evidence, the court will not second-guess the agency's decision. *Stansbury v. Jones*, 372 Md. 172, 183, 812 A.2d 312, 318 (2002). In fact, when the inference made by the board could reasonably be drawn from the evidence, the reviewing court must not substitute its judgment—the standard is "reasonableness, not rightness." *Alviani v. Dixon*, 365 Md. 95, 108, 775 A.2d 1234, 1242 (2001) (citations omitted). Moreover, the agency decides how to resolve any conflicting evidence and determines what inferences to draw from the evidence. *Gigeous v. Eastern Correctional Institution*, 363 Md. 481, 497, 769 A.2d 912, 922 (2001).

The court may substitute its judgment only as to an error made on an issue of law. *Relay Improvement Association v. Sycamore Realty Company*, 105 Md. App. 701, 713-714, 661 A.2d 182, 188 (1995), *aff'd*, 344 Md. 57, 684 A.2d 1331 (1996). Even for issues of law, the court extends a degree of deference to the agency and often gives considerable weight to the agency's interpretation and application of the statute that the agency administers. *Annapolis Market Place, LLC v. Parker*, 369 Md. 689, 703, 802 A.2d 1029, 1037 (2002).

When reviewing administrative decisions, this Court's role is precisely the same as that of the circuit court—to apply the substantial evidence test to the agency's decision and to determine whether the agency's decision is legally correct. *Gigeous*, 363 Md. at 495-496, 769 A.2d at 921; *Capital Commercial Properties, Inc. v. Montgomery County Planning Board*, 158 Md. App. 88, 95, 854 A.2d 283, 287-288 (2004). The agency's order will be upheld on judicial review "if it is not based upon an erroneous determination of law, and if the agency's conclusions reasonably may be based upon the facts proven." *Montgomery County v. Buckman*, 333 Md. 516, 519 n.1, 636 A.2d 448, 450 n.1 (1994) (citations omitted).

The present appeal requires this Court to determine whether the board properly interpreted the provisions in the zoning ordinance regarding the elements of proof to obtain a variance. The board is entitled to a degree of deference based on its zoning expertise. As long as the board's findings are based on substantial evidence in the record, those findings will not be disturbed, even if this Court disagrees with the inferences made by the board.

The board of appeals properly construed the zoning ordinance to require consideration of the unique characteristics of the property as a basis for determining whether practical difficulties exist to support the grant of a variance, and properly did not consider the location of existing improvements on the property.

Maryland recognizes two types of variances. An area variance involves relief from area, height, density, setback, or sideline restrictions, and includes situations that affect the distance required between buildings. A use variance permits a use other than that permitted in the particular district by the ordinance, much like a special exception. *Anderson v. Board of Appeals*, 22 Md. App. 28, 37-38, 322 A.2d 220, 225-26 (1974). Montgomery County permits only area variances and prohibits the board from granting a variance "to authorize a use of land not otherwise permitted." Montg. Co. Code § 59-G-3.1(d). To obtain an area variance, an applicant must establish four criteria:

> (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;
>
> (b) Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;
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> (c) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property; and
>
> (d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties . . . .

Montg. Co. Code § 59-G-3.1. The applicant's failure to prove even one of these four elements prevents the board of appeals from granting the application.

A unique quality of the property must create a practical difficulty.

Review of a variance application under an ordinance like Montgomery County's involves a two-step process to discern a unique characteristic of the site 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 for 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 application of the zoning ordinance to the unique or peculiar characteristics of the property must create the need for the variance. *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.

The inherent nature of a variance from setback restrictions tends to disrupt and destroy the uniformity of the spatial relationships between structures in derogation of the zoning plan. For this reason, they are to be granted sparingly and only under exceptional circumstances, for "to do otherwise would decimate zonal restrictions and eventually destroy all zoning regulations." *Marino v. Mayor and City Council of Baltimore*, 215 Md. 206, 216, 137 A.2d 198, 202 (1957); *see also Cromwell*, 102 Md. App. at 722, 651 A.2d at 439-440. The uniqueness requirement guards against the proliferation of variances within a uniformly developed community and thereby preserves the land-use patterns established by the community's zoning classification:

> If the hardship is one which is common to the area the remedy is to seek a change of the zoning for the neighborhood rather than to seek a change through a variance for an individual owner. Thus some exceptional and undue hardship to the individual landowner, unique to that parcel of property and not shared by property owners in the area, is an essential prerequisite to the granting of such a variance.

A. Rathkopf, 3 *The Law of Zoning and Planning* § 58:11 (2004) (citation omitted). The land itself must be unique or unusual in relation to other parcels in the area—improvements to the land do not satisfy this requirement:

> "Uniqueness" of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

Cromwell, 102 Md. App. at 710, 651 A.2d at 434 (quoting *North v. St. Mary's County*, 99 Md. App. at 514, 638 A.2d at 1181). Although this Court did not delineate the architectural aspects that satisfy uniqueness, it acknowledged that a zoning ordinance may explicitly set out the basis for uniqueness. *North*, 99 Md. App. at 514, 638 A.2d at 1181. The decision in *North* quoted the Queen Anne's County ordinance as an example of the general meaning of uniqueness, and the provision is virtually identical to the language in the Montgomery County zoning ordinance, which includes no mention of considering structures on the property to determine uniqueness. *Id.*

Only if a unique or peculiar characteristic exists on the property does it become necessary to consider whether the exceptional condition "result[s] in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property." Montg. Co. Code § 59-G-3.1(a). Because the zoning ordinance uses the two terms in the disjunctive, the more lenient standard applies:

> When the terms unnecessary hardship (or one of its synonyms) and practical difficulties are framed in the disjunctive ("or"), Maryland courts generally have applied the more restrictive hardship standard to use variances, while applying the less restrictive practical difficulties standard to area variances because use variances are viewed as more drastic departures from zoning requirements.

Belvoir Farms Homeowners Association v. North, 355 Md. 259, 276, 734 A.2d 227, 237 (1999) (citations omitted); *see also Stansbury v. Jones*, 372 Md. at 177, 812 A.2d at 315. The logic of applying the lesser standard to area variances derives from the view that an area variance does not change the essential character of the neighborhood. *Belvoir Farms*, 355

Md. at 276 n.10, 734 A.2d at 237 n.10; *Loyola Federal Savings & Loan Association v. Buschman*, 227 Md. 243, 249, 176 A.2d 355, 358 (1961). But the applicant must show that he is unreasonably burdened by the zoning restriction. *Anderson v. Board of Appeals*, 22 Md. App. at 39, 322 A.2d at 226-227.

The totality of the circumstances approach recognized in *Lewis v. Department of Natural Resources*, 377 Md. 382, 833 A.2d 563 (2003), does not apply nor affect the practical difficulties standard required by the Montgomery County Code. First, the zoning ordinance considered in *Lewis* applied the unwarranted hardship standard, rather than the practical difficulties standard articulated in the Montgomery County Zoning Ordinance. 377 Md. at 409-410, 833 A.2d at 580. In addition, the Wicomico County ordinance listed the variance criteria as factors or guides to be considered in their totality in assessing whether a variance is warranted. *Compare Lewis*, 377 Md. at 413-414, 833 A.2d at 582, *with* Montg. Co. Code § 59-G-3.1. Finally, *Lewis* addressed a variance located within a buffer area established under the Chesapeake Bay Critical Area Protection Program, which has no bearing on Ms. Rotwein's application.[3]

When Ms. Rotwein applied for the variances from the front setback and the sum of the sideyard setback, she sought area variances. The Montgomery County Zoning Ordinance

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[3]The differences between the critical area program and a variance are significant. The Critical Area Protection Program is designed to minimize damage to water quality and natural habitats along the shoreline and adjacent lands of the Bay and its tributaries. Md. Code Ann., Nat. Res. § 8-1801 (2004). On the other hand, zoning area restrictions are designed to provide light, air, and privacy, and to preserve spatial patterns between structures in a community. A. Rathkopf, 3 *The Law of Zoning and Planning* § 53:2 (2004).

specifically requires a variance application to show exceptional conditions that "result in peculiar or unusual practical difficulties to, *or* exceptional or undue hardship upon, the owner of such property." Montg. Co. Code § 59-G-3.1(a) (emphasis added). Under Maryland law, the plain disjunctive standard in the zoning ordinance makes the practical difficulty standard applicable, because it is the least restrictive of those mentioned.

Even under the less stringent standard, Ms. Rotwein had to establish the uniqueness of the property that caused a practical difficulty in achieving compliance with the setback restrictions. She also had to show that the requested variances were the minimum reasonably necessary to overcome the practical difficulty. Despite showing that her property is narrow, Ms. Rotwein did not establish that the building envelope on the property is unreasonably restricted by its narrowness, shape, or topography. In fact, the site plan shows ample room in the front and rear yards to construct a two-car garage. (E. 3, 18, 20) And the uniqueness or the narrower width than other properties in the area did not clearly show a practical difficulty, when considered in conjunction with the depth of the property and the total area of the lot—the 31,091 square feet exceeded the minimum lot size for the R-90 zone (9,000 square feet) by almost 3 1/2 times, and the 83-foot width exceeds the 75-foot minimum width for the zone. *See* Montg. Co. Code § 59-C-1.323.[4]

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[4]The variance granted for the enclosure of a patio in 1983 does not assist Ms. Rotwein in this application. Not only does the board's opinion in 1983 make no mention of a unique characteristic, but the decision preceded this Court's clarification of the two-step process for determining whether a unique characteristic creates a practical difficulty. (E. 15-16) *See North*, *supra*; *Cromwell*, *supra*. Whether the variance granted in 1983 was legally supportable is not before this Court.

Ms. Rotwein's architect conceded that there is sufficient room within the building envelope at the southeast portion of the lot to construct a two-car garage that would either face the street or face west, and by placing it to face the street, it would cover the same area currently occupied by the carport, but would require relocating the front door. (E. 34) Mr. Brenneman also showed the board the alternative placement with the proposed garage facing west and attached to the house without encroaching into the setbacks. (E. 18) The drawing clearly showed that the garage would fit within the building envelope without the necessity of a variance and that the front door could be moved to a section of the proposed new entry to provide access to visitors. (E. 18) Yet, Ms. Rotwein persisted that placing the garage within the building envelope would block the existing front door and block the basement windows on the front of the house. (E. 34, 38, 62)

The conditions relied upon by Ms. Rotwein to support the variance requests relate to the existing improvements upon the property, rather than derive from a unique characteristic of the land itself. But the location of the house or other improvements on the property cannot establish the peculiar condition that supports a practical difficulty. *Cromwell*, 102 Md. App. at 710, 651 A.2d at 433-434; *North*, 99 Md. App. at 514, 638 A.2d at 1181. Only where an ordinance provides for consideration of a structure will that aspect of the property be considered, but the County's zoning ordinance does not extend to improvements. *North*, *supra*.[5]

[5]The circuit court misread *North* to allow consideration of the structures based on "unusual architectural aspects" or party walls. (E. 126) A front door and basement windows

Although Ms. Rotwein asserted that the topography of the rear yard precluded placing the garage there, the evidence showed that the portion of the lot behind the house has ample room in which to locate a garage, and could be accessed from a driveway that could run from Tulip Hill Terrace along the west side lot line to the rear of the home. (E. 20) What prevents the construction of a garage behind the home is not the topography of the site, but the fact that a deck, a patio, a concrete swimming pool, and a tennis court already occupy that portion of the property.[6] Because improvements are not conditions peculiar to the land itself, they do not satisfy the first requirement for a variance.

Ms. Rotwein failed to show that her property was disproportionately impacted by the zoning restriction. *Cromwell*, 102 Md. App. at 695, 651 A.2d at 426. It does not suffice that an applicant cannot use her property in a particular way due to the setback restriction, but rather, an applicant must show that the setback restriction unreasonably prevents her from using the property for a permitted purpose. In addition, the practical difficulty must not result from an action of the owner, such as the prior construction of improvements that reduce the building area that remains for additional structures. *Id.* at 721-722, 651 A.2d at 439-440. Without this standard that requires the zoning ordinance to create the hardship, a

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are neither unusual architectural aspects nor party walls, even if the board could consider these factors.

[6]Apparently, a variance was obtained for the enclosed patio, but the opinion issued in 1983 does not reflect a finding of a unique characteristic of the property. (E. 15-16) Moreover, to the extent that the variance preceded this Court's clarification in *North*, it carried little weight before the board regarding the present application. (E. 78)

variance could be granted for virtually anything an applicant wants, contrary to the notion that a variance is to be granted sparingly. Moreover, the board already heard testimony regarding alternative placement of the garage as well as the possibility of reducing its size.

The applicant remained steadfast in her request to construct a two-car garage in the front yard with a courtyard between the house and the garage. Based on the absence of a unique characteristic of the property itself, the board had ample evidence from which to infer that the property did not have an unusual condition that created a practical difficulty in complying with the setback restrictions and properly denied the variances.

The variance must be the minimum reasonably necessary to overcome the practical difficulty.

Even if Ms. Rotwein had shown a unique characteristic that resulted in a practical difficulty based on the shape or topography of the lot, she still had to prove that the variances were "the minimum reasonably necessary to overcome the aforesaid exceptional conditions." Montg. Co. Code § 59-G-3.1(b). The evidence revealed that she could accommodate a one-car garage without encroaching on the setbacks and that even a two-car garage could be located in the front yard without needing a variance. (E. 10, 12, 36, 39-40) The impact on the windows and the front door cannot be considered by the board. Moreover, to the extent that the proposal included a new foyer, the board reasonably could infer that the front door could be moved or modified to accommodate the garage and access for visitors. (E. 18)

Having failed to show that she could not locate the requested two-car garage elsewhere within the building envelope, the application failed to meet this criterion. The board's decision was based upon substantial evidence and should be affirmed.

CONCLUSION

The board correctly interpreted the zoning ordinance to require an applicant for a variance to establish four criteria, each of which are specified in the ordinance. As *Angelini* teaches, an applicant bears the burden of proof and of persuasion. The board properly found that the applicant's proof did not show the property to have a unique characteristic that caused a practical difficulty, nor did the applicant satisfy the board that the requested variances were the minimum reasonably necessary to overcome the difficulties the applicant felt existed. The board already considered several alternatives, making a remand to consider additional evidence and alternative placement of the garage unnecessary and burdensome.

Inasmuch as the applicant's failure to establish even one of the four criteria requires the board to deny a variance request, this Court should affirm the board's decision in this case.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

APPENDIX

Excerpts from Maryland Annotated Code

Nat. Res. § 8-1801 (2004)

(a) *Findings.* The General Assembly finds and declares that:

(1) The Chesapeake and the Atlantic Coastal Bays and their tributaries are natural resources of great significance to the State and the nation;

(2) The shoreline and adjacent lands constitute a valuable, fragile, and sensitive part of this estuarine system, where human activity can have a particularly immediate and adverse impact on water quality and natural habitats;

(3) The capacity of these shoreline and adjacent lands to withstand continuing demands without further degradation to water quality and natural habitats is limited;

(4) Human activity is harmful in these shoreline areas, where the new development of nonwater-dependent structures or the addition of impervious surfaces is presumed to be contrary to the purpose of this subtitle, because these activities may cause adverse impacts, of both an immediate and a long-term nature, to the Chesapeake and Atlantic Coastal Bays, and thus it is necessary wherever possible to maintain a buffer of at least 100 feet landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands;

(5) National studies have documented that the quality and productivity of the waters of the Chesapeake Bay and its tributaries have declined due to the cumulative effects of human activity that have caused increased levels of pollutants, nutrients, and toxics in the Bay System and declines in more protective land uses such as forestland and agricultural land in the Bay region;

(6) Those portions of the Chesapeake and the Atlantic Coastal Bays and their tributaries within Maryland are particularly stressed by the continuing population growth and development activity concentrated in the Baltimore-Washington metropolitan corridor and along the Atlantic Coast;

(7) The quality of life for the citizens of Maryland is enhanced through the restoration of the quality and productivity of the waters of the Chesapeake and the Atlantic Coastal Bays, and their tributaries;

(8) The restoration of the Chesapeake and the Atlantic Coastal Bays and their tributaries is dependent, in part, on minimizing further adverse impacts to the water quality and natural habitats of the shoreline and adjacent lands, particularly in the buffer;

(9) The cumulative impact of current development and of each new development activity in the buffer is inimical to these purposes; and

(10) There is a critical and substantial State interest for the benefit of current and future generations in fostering more sensitive development activity in a consistent and uniform manner along shoreline areas of the Chesapeake and

the Atlantic Coastal Bays and their tributaries so as to minimize damage to water quality and natural habitats.

(b) *Purpose.* It is the purpose of the General Assembly in enacting this subtitle:

(1) To establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats; and

(2) To implement the Resource Protection Program on a cooperative basis between the State and affected local governments, with local governments establishing and implementing their programs in a consistent and uniform manner subject to State criteria and oversight.

Excerpts from Montgomery County Code (1994), as amended

§ 59-A-4.11. Authority.

The County Board of Appeals may hear and decide the following matters as provided in Section 2-112:

* * *

(b) Petitions for variances from the strict application of this chapter, as provided in article 59-G-3.

* * *

§ 59-A-4.64. Appeal.

Any party aggrieved by a decision of the Council or Board of Appeals may appeal to the circuit court for the county and thereafter to the Court of Special Appeals within the time and manner prescribed within the Maryland Rules of Procedure relating to administrative appeals. The time for appeal runs from the date of the order of approval or denial or from the date the application was denied for lack of the necessary affirmative votes.

* * *

§ 59-G-3.1. Authority-Board of Appeals.

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;

(b) Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;

(c) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property; and

(d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties. These provisions, however, shall not permit the board to grant any variance to any setback or yard requirements for property zoned for commercial or industrial purposes when such property abuts or immediately adjoins any property zoned for residential purposes unless such residential property is proposed for commercial or industrial use on an adopted master plan. These provisions shall not be construed to permit the board, under the guise of a variance, to authorize a use of land not otherwise permitted.

(e) Any allegation of error or any appeal from any action, inaction, order or decisions pertaining to calculation of building height or approved floor area ratio (FAR) standard shall be considered according to the provisions governing appeals for a variance (section 59-G-3.1), rather than as an administrative appeal (section 59-A-4.11(c)).

An appellant seeking a variance will be subject to the requirements for filing and notice in section 59-A-4.2 and section 59-A-4.46. The Board may request technical advice from the Planning Board or technical staff. Upon request, the Planning Board or its technical staff must respond by submitting a written report making a recommendation. If there is an issue of public interest, the Planning Board or its technical staff may, on its own initiative, submit a written report making a recommendation on a variance under this section. Any response will be submitted at least 5 working days before the date set for public hearing, with a copy sent to the parties of record.