

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6420

Case No. CBA-1290

PETITION OF AMERICAN NATIONAL RED CROSS

OPINION OF THE BOARD

(Opinion Adopted October 16, 2013)

(Effective Date of Opinion: December 6, 2013)

Case No. A-6420 is an application for variances to allow the construction of a utility building to house Comcast equipment on property owned by the American National Red Cross. The proposed construction requires a 14.08 foot variance as it is within 10.92 feet of the front lot line. The required setback is 25 feet, under Section 59-C-1.323(a). The proposed construction also requires a 19.58 foot variance as it is within 0.42 feet of the rear lot line. The required setback is 20 feet, under Section 59-C-1.323(b)(2).

The proposed construction of the utility building also requires a modification of Case No. CBA-1290, an existing special exception that the Board of Appeals granted to the American National Red Cross effective September 7, 1962, to permit an office building and addition for a charitable and philanthropic use, under Section 104-29(m-1) of the Zoning Ordinance (Chap. 104, Mont. Co. Code 1960, as amended).

The Board of Appeals held a hearing on the petition on October 16, 2013. Samantha Mazo, Esquire, appeared on behalf of the American National Red Cross. She called Josh Bokee, Comcast Communications' Director of Government Affairs, Chad Sumner, Director of Operations for Sabre Industries and David Allen, Director of Network Engineering for Comcast, Beltway Region, as witnesses.

Decision of the Board:

Variances Denied.

Administrative Modification Granted

EVIDENCE PRESENTED

1. The subject property is Parcel 470/468, 0001/0501 Subdivision, located at 2020 East-West Highway, Silver Spring, Maryland 20910, in the R-60 Zone.
2. The American National Red Cross leases a portion of the eastern section of its property to Comcast of Potomac, LLC, f/k/a Comcast Cablevision of Potomac, LLC, f/k/a Prime Communications-Potomac, LLC (Comcast).
3. Effective September 29, 2004, the Board of Appeals granted a modification of Case No. CBA-1290, allowing various changes to the building and surrounding property, including approval of the then-existing structure to house telecommunications equipment, which is now a Comcast Communications equipment hub. That 238 square-foot structure is in violation of the required front and rear lot line setbacks. [Exhibit 4(b)]. There is no record of variances granted to allow it.
4. The proposed replacement equipment structure or hub would comprise 704 square feet, with a height of 14'4". It is proposed to be constructed over the existing structure, which is approximately 9 feet tall. The proposed replacement structure would be 10 feet closer to East-West Highway than the existing structure.
5. Confronting the subject property to the north across East-West Highway is the Fox Chase Nursing and Rehabilitation Center. Abutting to the west is the Sudbury House Condominium. The subject property abuts an abandoned and vacant Western Avenue right of way to the south, and to the east Parcel 410, a vacant parcel.
6. Ms. Mazo stated that the closest residential structures are about 245 feet away from the existing equipment building. She further stated that the existing structure is barely visible from a passing car travelling east on East-West Highway, and that landscape screening of the new structure is proposed along East-West Highway, which she stated would decrease the visibility of the structure for traffic travelling in a west-bound direction.
7. Mr. Bokee testified that the existing structure houses a Comcast hub consisting of equipment which receives and sends out signals via Comcast's fiber optic lines, to its customers. He stated that this hub generally serves "Bethesda East, West Silver Spring, down through Chevy Chase," providing "video to high speed data, voice, and our X-Home Services" to residential and commercial customers [Transcript, October 16, 2013, p. 20]. Mr. Bokee stated that Comcast needs to expand its services based on increased demand from existing and new customers.

Mr. Bokee stated that "the existing structure just is not adequate to be able to handle the equipment that we need to be able to accommodate the demand that's increasing" [Transcript, p. 21], and that if the variances to expand this particular hub are not granted, Comcast "would not be able to provide the same

level of service that we are throughout the rest of the County" [Transcript, p. 22]. In response to a Board question, Mr. Bokee stated that expansion of the hub would allow Comcast to "meet the demand within [the existing service area] that's grown" rather than to expand the service area [Transcript, p. 23].

7. Mr. Sumner testified that the expanded structure to house the hub must be constructed over the existing structure to avoid an interruption in service to the customers served by this hub. He confirmed that the width of the property where the existing structure is located is 52 feet, that "the shape and overall depth of where the building needs to go to maintain existing services does create limitations." In response to questions, Mr. Sumner stated that gradient changes and the presence of existing trees restrict the ability to build east of the existing structure, and that the property is exceptionally narrow and shallow [Transcript, pp. 26-27].

In response to Board questions, Mr. Sumner confirmed that the subject property is wider than 52 feet at its widest point. When asked how far west the new hub would have to be located to meet the required front and rear setbacks, Mr. Sumner stated that such a move would disrupt service and eliminate parking. He went on to say that the resultant building would not be a "functional building...therefore eliminating the need for that building to be built, or the desire for that building to be built" [Transcript, p. 31]. In response to questions from Ms. Mazo, Mr. Sumner confirmed that the proposed structure will be the "minimum reasonably necessary to overcome the property's uniqueness and peculiarity" and that the structure is proposed to be constructed "as small as possible" [Transcript, p. 32], and that the proposed construction and variances would have no impact on the abandoned Western Avenue right-of-way, as it is vacant [Transcript, p.34-35].

8. In response to a Board question, Ms. Mazo explained that the land east of Parcel 468 is an abandoned portion of the Western Avenue Extended right-of-way [Exhibit 11]. Ms. Mazo stated that after the filing of an abandonment, half of the property reverts to each of the abutting property owners. Ms. Mazo further stated that "at some point it's possible that a portion of that property could have reverted to the American Red Cross. But no steps were ever taken for...that portion of the property to go under the ownership of the American Red Cross" [Transcript, p. 33].

9. David Allen described the type of equipment contained in the existing Comcast equipment building, growing demand for service, the type of equipment needed to meet that demand, and how the new equipment building would be constructed to house that equipment.

In response to a Board question, Mr. Allen stated that Comcast "had no success finding any other areas...[to] place a facility like this that would be able to meet the engineering requirements that we need" [Transcript, p. 39].

Mr. Allen stated that the existing hub is "connected by multiple...high count fiber optic cables to the service area" through both aerial and buried conduits under East-West Highway, so that relocating them would cause service

interruption. He stated that it is not easy to relocate this equipment, and that the best option is to upgrade in place, asserting that based on the existing constraints, the proposed structure could not be constructed elsewhere on the site without major service disruption.

In response to questions, Mr. Allen stated that the proposed structure is as compact as it can be, describing it "as an unmanned facility with a minimal footprint" [Transcript, p. 42], and that the structure could not be re-oriented to reduce the required variances because of the way that existing cables are routed to the equipment.

In response to Board questions, Mr. Allen stated that there would be a larger back-up generator in the new, larger structure, but that it would be "ultra-quiet," would be screened, and would only be used for emergencies and tested periodically [Transcript, p. 44-45].

In conclusion, Ms. Mazo emphasized that that portion of the subject property, Parcel 468, where the existing structure is located is exceptionally narrow and shallow, and that its shallowness is increased by the curvature of East-West Highway. Ms. Mazo pointed out there are portions of this property that are wider, but that the American National Red Cross has parking on Parcel 468 to the west of the existing equipment building, and that the North and West Silver Spring Master Plan says that there should be parking on Parcel 468. She pointed to the requirement for parking as increasing the uniqueness of the property and noted that relocation of the equipment hub to the west would infringe on the Master Plan's recommendation for parking.

FINDINGS OF THE BOARD

A variance permits 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.

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 notes that the lot on which the equipment hub is proposed contains 38,766 square feet,¹ and thus has a large buildable area, contradicting the Petitioner's claim that the lot is unusually narrow and shallow. See Exhibits 3 and 7(a). The Board finds that the presence of the

¹ The Board noted that the minimum lot size in the R-60 zone is 6,000 square feet, so this lot is much larger than the minimum.

existing Comcast equipment and cables in their current location does not constitute a characteristic of the property itself that is "in and of itself -- unique and unusual in a manner different from the nature of the surrounding properties" under *Cromwell*. The Board finds that the presence of existing parking, established by the property owner, is a self-created hardship under *Salisbury Board of Zoning Appeals v. Bounds*, and thus cannot be a basis for granting the variance. Because the application does not meet the threshold requirements of Section 59-G-3.1(a), the variances must be denied.

Section 59-G-1.3(c)(1) of the Montgomery County Zoning Ordinance provides, pertaining to modification of special exceptions:

If the proposed modification is such that the terms or conditions could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood, the Board, without convening a public hearing to consider the proposed change, may modify the term or condition.

The Board finds that replacement of the unmanned equipment building will not substantially change the nature, character or intensity of the use or its effect on traffic or on the immediate neighborhood, and that therefore, the administrative modification can be granted.

Therefore, based upon the foregoing, on a motion by David K. Perdue, Vice-Chair, seconded by John H. Pentecost, with Carolyn J. Shawaker and Catherine G. Titus, Chair, in agreement and Stanley B. Boyd not in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the request for a 14.08 foot variance from the front lot line setback, and for a 19.58 foot variance from the rear lot line setback is denied; and

BE IT FURTHER RESOLVED by the Board of Appeals for Montgomery County, Maryland that the request to administratively modify the special exception to allow replacement of the unmanned equipment building is granted; and

BE IT FURTHER RESOLVED by the Board of Appeals for Montgomery County, Maryland that all terms and conditions of the original special exception, together with any modifications granted by the Board of Appeals, remain in effect.



Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 6th day of December, 2013.



Katherine Freeman
Executive Director

NOTE:

Any party may, within fifteen (15) days of the date of the Board's Resolution, request a public hearing on the particular action taken by the Board. Such request shall be in writing, and shall specify the reasons for the request and the nature of the objections and/or relief desired. In the event that such request is received, the Board shall suspend its decision and conduct a public hearing to consider the action taken.

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.

