

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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(240) 777-6600

Case No. A-6440

PETITION OF JOHN B. AND MARY B. SMITH

OPINION OF THE BOARD

(Opinion Adopted September 10, 2014)
(Effective Date of Opinion: October 17, 2014)

Case No. A-6440 is an application for two variances, each of 10.77 feet from the 20-foot rear lot line setback required by Section 59-C-1.323(b)(2) of the Zoning Ordinance. The proposed construction consists of the enclosure of an existing first floor screened porch and construction of a second floor room addition above it.

The subject property is Lot 25, Block 34, Chevy Chase Sec 2 Subdivision located at 6016 Western Avenue, Chevy Chase, Maryland, 20815, in the Zone R-60.

The Board of Appeals held a hearing on the application on September 10, 2014. Shawn Buehler, an architect with Bennett Frank McCarthy Architects, gave testimony on behalf of the property owners. David Brown, Esquire appeared on behalf of James Vassilikos, who lives next door to the subject property. Mr. Vassilikos also testified.

Decision of the Board: ***Variance for first floor of existing home – granted.
Variance for second story addition – denied.***

EVIDENCE PRESENTED

1. The existing home was built in 1940, and is owned by John B. and Mary B. Smith. The northern corner (right rear) of this home was constructed in the rear setback. See Exhibits 1(a), 3 and 4(a).

2. Mr. Buehler testified that the shape and configuration of the lot, "particularly the dogleg in the back of it effectively makes the lot narrower ...from front to back than it really is, and the end result is a much smaller buildable area on the lot...when considered as a percentage of the lot area, our lot is much smaller than any of the lots in the immediate vicinity." [Transcript, September 10, 2014, p. 7-8].

3. Mr. Buehler compared the buildable area of the subject property, as a percentage of the lot (34%) with surrounding lots, which he said are closer to between 47% and 50%. [See Exhibit No. 4(b)].

4. Mr. Buehler stated that the requested variances would increase the buildable area of the lot by 124 square feet. He said that the purpose of the proposed construction is to install an elevator that would produce an accessible bedroom and bathroom suite. In response to a Board question, Mr. Buehler explained that the accessible bedroom is intended to accommodate one of the property owners' parents, when they visit the home, and that the property owners view the improvement as allowing them to age in place. In response to a Board question Mr. Buehler confirmed that the variance is not requested as a reasonable accommodation under the Americans With Disabilities Act. He further stated, "there are other places, candidly, that we could find an elevator shaft, but we're trying to find a solution that doesn't increase the footprint of the house, that doesn't put an ugly shaft on the side of the house close to any of the neighbors, and, ...by locating the shaft internally it's a more feasible project for our clients and we think it's a more reasonable solution for the neighborhood...". [Transcript, p. 10].

5. In response to a Board question, Mr. Buehler stated, "We're increasing the mass over the existing footprint, again, the alternative is to produce new building bulk elsewhere on the site..." [Transcript, p. 12].

On cross examination, Mr. Buehler conceded that there are 345 feet of potential buildable area on the lot, but qualified that by saying that that buildable area is in "three different parcels" on the lot "and so the combination of the shape of the lot, and the location of the house on the lot, and the amount of area available to build on the lot is conspiring against what I think is a pretty reasonable purpose," conceding also that there are alternatives to the proposed construction but that they are less practical and more expensive. [Transcript, p. 26].

6. James Vassilikos testified that he lives at 6020 Western Avenue, which abuts the subject property to the east. [Exhibit Nos. 4(a), 7]. Mr. Vassilikos stated that his reaction to the proposed construction was "the idea of this huge bulk being added to the existing very tall brick wall that faces my house, and absolutely there's no light, I mean, no air." [Transcript, p. 31]. Referring to Exhibits 12 A-C, Mr. Vassilikos pointed out the houses located at 6024 Western Avenue, and directly behind his property on East Kirke Street, and stated that with the proposed construction "I'm blocked three ways." [Transcript, p.35]. In response to a Board question as to whether he would prefer an elevator that would be closer to his

property to the proposed construction, Mr. Vassilikos stated, "I would prefer not to have either, but if I had to have one or the other, I would have the elevator against the already existing bulk than eliminate my ability to access sun and air from the side that's already there." [Transcript, pp. 43-44].

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 *McLean v. Soley*, 270 Md. 208, 214-15, 310 A. 2d 783, 787 (1973, quoting 2 Rathkopf, *The Law of Zoning and Planning* (3d ed. 1972) 45-28, 29, the Court of Appeals adopted criteria for determining whether an applicant has established practical difficulty, including, in pertinent part, "1) Whether compliance

with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the use of the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.”

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;

1. It is under the first subsection that the Board must employ the analysis from the *Cromwell* case, set forth above. Based on Exhibit 4(a) and the testimony of Mr. Buehler, the Board finds that the shape of the subject property, which is not orthogonal and has a dogleg, is unique. In addition, the Board finds, based on Exhibit 4(a), that the application of the setbacks to this property results in an unusually-shaped buildable area, including an angled rear setback line, but that there remains un-built space within that buildable area which could accommodate an elevator shaft without the need for a variance. Indeed, Mr. Buehler testified that there is available buildable area on the lot to accomplish the property owners’ objectives, albeit in a less practical and more expensive manner for them. The Board therefore finds that because there is room to locate the proposed construction elsewhere within the buildable area on property, the application of the rear setback does not unreasonably prevent the use of the property or render conformity so burdensome as to cause the property owners a practical difficulty. Thus the Board finds that the application for a variance to allow construction of a second floor room addition fails to meet the requirements of Section 59-G-3.1(a), and the variance for the proposed addition must be **denied**. Because the application for this variance does not meet the threshold requirements of Section 59-G-3.1(a), the Board did not consider its conformance with subsections (b)-(d).

2. With respect to the variance requested for the first floor of the existing home, the Board finds that the requested variance does not increase the footprint of the home, which has been situated on the property since 1940, and complies with the applicable standards and requirements set forth in Section 59-G-3.1, as follows:

- (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;

As noted in paragraph 1, above, the Board finds that this property has a unique shape. The Board further finds that because of this shape, and the dogleg in particular, the rear setback line is not parallel to the front setback line, but rather is set at a sharp angle to the front setback line, and significantly constrains the buildable area along the northern (right rear) side of the house. See Exhibit 4(a). The Board further finds based on the evidence of record that the northern (right rear) corner of the existing house, which is located in the rear setback and includes a portion of the existing screened porch, was constructed as part of the original house in 1940. See Exhibits 3 and 4(a). In light of the foregoing, and given that the proposed enclosure of the existing porch will not increase the footprint or mass of this long-existing structure, the Board finds that strictly applying the restrictions of the Zoning Ordinance to prohibit the proposed minor improvement (enclosure) of this portion of the existing house would be unnecessarily burdensome to the property owners, and constitutes a practical difficulty.

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

The Board finds that the requested variance for the northern corner of the first floor of the existing home is the minimum reasonably necessary. Here again, the Board notes that the grant of this variance will not increase the footprint or mass of the existing home.

(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.

The Board finds that the proposed construction will continue the residential use of the property and that the variances will not impair the intent, purpose, or integrity of the general plan or approved area master plan.

(d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties.

The Board finds that the grant of this variance, to allow improvements to construction that has been on-site since 1940, would not be detrimental to the use and enjoyment of adjoining and neighboring properties. The Board notes that the concerns of Mr. Vassilikos, who lives next door to the property owners, centered on the property owners' proposed second story addition, and the effect that that addition would have on his light and air. The grant of this variance does not allow the proposed second story.

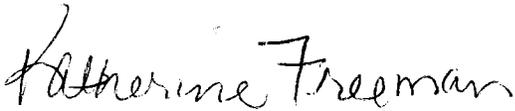
Therefore, based upon the foregoing, on a motion by David K. Perdue, seconded by Carolyn J. Shawaker, with Stanley B. Boyd, John H. Pentecost, and Catherine G. Titus, then Chair, in agreement, the Board adopted the following Resolution:

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.



David K. Perdue
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
This 17th day of October, 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.