BOARD OF APPEALS
for
MONTGOMERY COUNTY

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CASE NO. A-6786

PETITION OF VICTOR AND MARIA FERNANDES

OPINION OF THE BOARD
(Hearing Held February 1, 2023)
(Effective Date of Opinion: February 15, 2023)

Case No. A-6786 is an application by Victor and Maria Fernandes (the "Petitioners") for two variances necessary for the construction of a left-side carport. The proposed construction of a carport requires a variance of seven (7) feet as it is within 0.00 feet of the left side lot line. The required setback is seven (7) feet, in accordance with Section 59.4.4.6.B and 59.7.7.1.D.2.c of the Montgomery County Zoning Ordinance. In addition, the proposed construction of a carport on the left side lot line requires a variance to exceed maximum lot coverage by 37.41%. The carport exceeds the maximum lot coverage by 22.41%. The maximum lot coverage for the RE-1 Zone is 15%, in accordance with Section 59.4.4.6.B and 59.7.7.1.D.2.c of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on Wednesday, February 1, 2023. Petitioners Victor and Maria Fernandes both participated in the proceedings in support of the requested variances, along with their daughter, Carla. The Petitioner's abutting neighbor to the left, Tibebe Showandagne, was also present in support of the requested variances.

Decision of the Board: Variances **DENIED.**

EVIDENCE PRESENTED

1. The subject property is Block A, Lot 11, Rocky Brook Park Subdivision, located at 716 Tanley Road in Silver Spring, Maryland, 20904, in the RE-1 Zone. It is an interior property, rectangular in shape, with a depth of 201.78 feet and a width of 60 feet wide, giving it an area of 12,107 square feet. The property is located on the north side of Tanley Road. See Exhibits 3, 4(a), and 8(a).

2. The Petitioner's Statement of Justification ("Statement") indicates that they are seeking variance relief for a carport that was constructed on their left side lot line. The

Statement states that the carport was built above their existing driveway, which "met the required guidelines" at the time their house was built in 1985. The Statement indicates that the carport provides additional security for their home. See Exhibit 3.

3. The Statement states that the Petitioners' lot is narrow. The Statement proceeds to state that the narrowness of the property, and the location on the property of the house, driveway, and existing fence, which the Statement indicates have been in place for "nearly 37 years," "caused the carport to be built on the property line," explaining that "[t]he carport was simply a roof built above the existing driveway that met with the existing fence." See Exhibit 3.

4. The Statement states that the "proposed property uses an existing legal nonconforming structure," stating that the "driveway was installed and met the conforming guidelines set by Montgomery County nearly 37 years ago." The Statement states that through the years, the "guidelines and rules have changed." It states that the Petitioners' carport "was built above [their] driveway that was conforming to the guidelines." See Exhibit 3. The building permit denial issued by DPS indicates that the variance request is for a nonconforming condition, but does not indicate if that condition is the location of the carport or the existing lot coverage, or both. See Exhibit 6.[1]

5. The Statement asserts that the Petitioners' carport substantially conforms with the established development pattern of the street and neighborhood, stating that the carport "does conform with the traditional development of Tanley Road, and it's development," and noting that "[t]he carport is closed w/ a garage door, therefore it appears to look like a garage when facing the property." See Exhibit 3.

6. The Statement at Exhibit 3 acknowledges that the construction of the carport was the result of actions taken by the Petitioners, as follows:

> The carport being built is a result of the actions taken by the petitioners. We, Victor and Maria are the sole owners of a construction company. When COVID hit and the world shut down- The carport was built, to give our employees work, so they could provide for their families. During this time- we were unable to get access a building permit as everything was closed and shutdown.

7. The Statement states that the requested variances are the minimum necessary to allow the Petitioners' carport, which was built to provide additional security for the property. The Statement notes in this regard that "[w]ith the carport/door being closed it does not allow anyone to access the property thru the back." See Exhibit 3.

8. The Statement states that granting the variances will not be adverse to the use or enjoyment of neighboring properties, noting that "[t]he carport does not impact any abutting properties," and that the Petitioners' "abutting neighbor whom (sic) resides on

[1] Given that per Exhibit 4(a), the footprint of the carport is 153 square feet, which as a percentage of the entire 4,529 square feet of lot coverage is 3.3%, the Board surmises, but does not know, that the reference on the building permit denial to a nonconforming condition is to the existing lot coverage.

the side of the carport, has told us that he will be willing to give us the required setback needed from his property. Or help with anything we may need to get our variance approved." See Exhibit 3. The record contains a letter of support from the Petitioners' neighbor at 714 Tanley Road stating just that. See Exhibit 7.

9. At the hearing, Petitioner Victor Fernandes testified that he bought the subject property in the early 1980s. He testified that he designed a house, with County approvals, and has lived there since its construction. He testified that he knew that the house needed to adhere to an 18 foot sum of both sides setback, and that the house was built with 11 feet on one side for that reason.

Mr. Fernandes testified that he worked in construction for many years, primarily on utilities and storm drains. He testified that when COVID hit, everything stopped, and that he needed to give his workers hours so they could pay their mortgages. Mr. Fernandes testified that he had them construct a roof over a 14 foot stretch of his existing driveway. He testified that he spoke with his abutting neighbor to the left before undertaking this construction, and that his neighbor said it was fine and thanked him for asking.

In response to a Board observation that there are accessory structures/sheds on his property that contribute to lot coverage, Mr. Fernandes testified that those structures have all been in place for over 25 years, and that the County has records pertaining to their construction. In response to a Board question asking if the construction of the carport would prevent fire equipment from being able to access the rear of the property, including the accessory structures, Mr. Fernandes testified that the fire department could access the property, but would have to use a hose to reach the rear of the property, noting that a firetruck would not fit regardless.

10. Carla Fernandes testified that the subject property has an existing driveway and fence that were approval almost 40 years ago. She testified that her father had covered a portion of this existing driveway. Ms. Fernandes testified that they did not think this would be a problem because the driveway had been approved. She testified that she was responsible for getting the necessary building permits, and that she had personally tried numerous times to get through to the County's Department of Permitting Services during COVID, but could not. She testified that this was done in good faith. Ms. Fernandes testified that her father has more than 20 workers who needed to feed their families during the pandemic.

Regarding the existing sheds, Ms. Fernandes testified that their construction was approved by the County, and that they have been on the property for almost 40 years. She testified that the lot coverage rules have changed over the past 40 years, and she reiterated that all of the construction on the property was undertaken in good faith. In response to a Board question asking if the sheds could be removed or made smaller to reduce lot coverage, Ms. Fernandes testified that they are used to store construction equipment and that it would be costly to decrease their size. In response to the Board question about fire truck access to the rear of the property, she testified, building on her father's response, that a truck could not get to that area because it was wooded.

11. Petitioner Maria Fernandes testified that she and her husband are in the construction business, but that they work on utilities as opposed to residential construction. She testified that during the pandemic, her husband gave their employees work hours building the carport so that these workers could provide for their families. Following on her daughter's testimony that she was unable to get in contact with the County's Department of Permitting Services, Ms. Fernandes testified that she had actually gone to the Department's physical offices, but was not able to get in, and thus was unable to obtain the necessary permits in person.

12. Mr. Showandagne testified that he has known Victor Fernandes for 20 years. He testified that Mr. Fernandes came over to request his permission before constructing the carport. Mr. Showandagne testified that he gave Mr. Fernandes his permission to build the carport. He testified that Mr. Fernandes is a helpful person, and stated that Mr. Fernandes had plowed him out during a big snowstorm.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the requested variances from the left side line and lot coverage limitation must be denied. Section 59.7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board must find that:

(1) denying the variance would result in no reasonable use of the property; or
(2) each of the following apply:
a. one or more of the following unusual or extraordinary situations or conditions exist:
i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;
ii. the proposed development uses an existing legal nonconforming property or structure;
iii. the proposed development contains environmentally sensitive features or buffers;
iv. the proposed development contains a historically significant property or structure; or
v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;
b. the special circumstances or conditions are not the result of actions by the applicant;
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;
d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and

e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.

Section 59.7.1.1 of the Zoning Ordinance provides that the applicant has the burden of production and has the burden of proof by a preponderance of the evidence on all questions of fact.

The Board notes that there was no attempt in this case to argue the standard in Section 59.7.3.2.E.1 of the Zoning Ordinance. For that reason, the Board must analyze the instant case under Section 59.7.3.2.E.2 of the Zoning Ordinance. Section 59.7.3.2.E.2 sets forth a five-part, conjunctive ("and") test for the grant of a variance, and thus the Board cannot grant a variance if an applicant fails to meet any of the five elements required by this Section.

Section 59.7.3.2.E.2.a: one or more of the following unusual or extraordinary situations or conditions exist:

i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;

ii. the proposed development uses an existing legal nonconforming property or structure;

* * * * *

v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;

The Petitioners assert in their Statement that their property satisfies the "uniqueness" test in Sections 59.7.3.2.E.2.a.i, ii, and v of the Zoning Ordinance. The Board makes the following findings with respect to the satisfaction of Section 59.7.3.2.E.2.a:

The Petitioners have asserted that the subject property is narrow, but the Board finds, based on the Zoning Vicinity Map at Exhibit 8(a), that this characteristic appears be shared with the majority of properties on this side and block of Tanley Road. Thus the Board cannot find that the narrowness of the lot is peculiar to the subject property, and finds that Section 59.7.3.2.E.2.a.i of the Zoning Ordinance is not satisfied.

In addition, the Board finds that while the Petitioners contend that the location of their driveway that is legal and nonconforming, the Board cannot find that the construction uses an existing legal nonconforming property or structure in satisfaction of Section 59.7.3.2.E.2.a.ii. The Board notes that there has been no argument that the subject property itself, as opposed to the improvements on the property, is nonconforming. Moreover, the Board notes that it is not clear that a driveway can or should be considered a "structure" for zoning purposes, since the Zoning Ordinance defines "structure" as a "combination of materials that requires permanent location on the ground or attachment to something having permanent location on the ground, including buildings and fences." That said, even if the Board were to accept, without finding, that the Petitioners' driveway is a nonconforming structure, per the Statement, the Petitioners' carport is "simply a roof

built **above** the existing driveway" (emphasis added), and, likewise, the garage door that has been constructed has been added to the carport, not the driveway. Thus the Board cannot find that the construction "uses" the driveway.

Finally, while the Statement asserts that the Petitioners' carport conforms with the established traditional development pattern of the street or neighborhood, in satisfaction of Section 59.7.3.2.E.2.a.v, the Board notes that the Petitioners have provided no evidence to support this assertion. In addition, Exhibit Nos. 4(a) and 5(a)-(c) show the construction of the carport with a garage door on the left side of the house and Exhibit No. 4(b) shows a rear addition to the right side of the house within two feet of the property line; together these severely limit access to rear of their home and the accessory storage structures in the rear of the property. The Petitioners further testified that woods also prevent access to their property through abutting properties at the rear of their property. The set back obstruction by the carport demonstrates that the property with the carport is not in keeping with the development pattern of the neighborhood. Thus the Board cannot find that the request satisfies this element of the variance test.

Having found that the requested variances fail to satisfy the first element of the variance test, as set forth in Section 59-7.3.2.E.2.a of the Zoning Ordinance, the Board will not address the remaining elements, since the variance test is conjunctive, and all parts of the test must be met if a variance is to be granted.

The Board recognizes that the Petitioners have spent money on the construction of this carport, and that its removal will 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.[2] The Board further finds that because the Petitioners in this case are ultimately responsible for the construction of this carport in derogation of the required side setback and lot coverage limitations, 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.[3]

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[2] 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.*).

[3] 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.

Based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Caryn Hines, Laura Seminario-Thornton, and Alan Sternstein 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.

John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 15th day of February, 2023.

Barbara Jay
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. 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.

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.").