

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-5922

PETITION OF STANLEY SMITH

(Hearings held October 8 and 29, 2003)

(Worksession held November 12, 2003)

OPINION OF THE BOARD

(Effective Date of Opinion, January 15, 2004)

Case No. A-5922 is a petition filed pursuant to Section 59-A-4.11(b) of the Montgomery County Zoning Ordinance (Chapter 59, Montgomery County Code, 1994, as amended) from Section 59-C-1.323(b)(2). The existing covered porch requires a variance of twelve (12) feet as it is within eight (8) feet of the rear lot line. The required rear lot line setback is twenty (20) feet.

The subject property is Lot 68, Block 4, Bradley Hills Subdivision, located at 5103 Bradley Boulevard, Chevy Chase, Maryland, 20815, in the R-60 Zone, (Tax Account No. 07-00447053).

Pursuant to Section 59-A-4.4 of the Zoning Ordinance, the Board held a public hearing on the petition on October 8, 2003.¹ Steven A. Robins, Esquire, and Martin Hutt, Esquire, represented the Petitioner. Stanley Smith and Phil Perrine testified in support of the petition. No one testified in opposition to the petition.

Decision of the Board: Requested variance **denied**.

EVIDENCE PRESENTED TO THE BOARD

1. The Property is a quadrilateral-shaped lot consisting of about 6,600 square feet. The Property is located on the north side of Bradley Boulevard, near its intersection with Fairfax Road. The Property has about 100 feet of frontage on Bradley Boulevard.

¹The Board also heard oral argument on the petition on October 29, 2003.

The west side lot line is about 114 feet long and east side lot line is about 106 feet deep, resulting in a slightly angled rear lot line that is about 60 feet wide.

2. The Property is improved with a two-story, stone and vinyl-sided frame dwelling that is about 49 feet deep and 45 feet wide. The house fronts on, and is situated about 40 feet from, Bradley Boulevard. The northeast rear corner of the house is about 21.5 feet from the rear Property line. Attached to the northeast portion of the rear of the house is a 13.5' deep by 16.5' wide deck, which is about 8 feet from the rear lot line.²

A board on board wood fence runs along the west side lot line. Approximately 13 Leyland Cyprus trees, each about 15 feet tall, are located along the rear lot line.

3. The zoning vicinity map (Exhibit 11) indicates that the Property is smaller than most of the lots in the immediate vicinity, although it is larger than four other lots (Lots 49, 50, 59 and 60) in the middle of the same block, and is equivalent in size to many other lots in neighboring blocks. The Property is also shallower than several lots to the west, but is approximately the same depth as the four lots (Lots 64-67) to the east and north. It is deeper than the four smaller lots in the middle of the block and of similar depth to many other lots in surrounding blocks. The shape of the Property is similar to Lots 64-67, which also have angled rear lot lines. The surrounding properties are at a higher elevation and slope toward the Property. According to the Petitioner, a 1952 record plat subjects all of the lots along Bradley Boulevard, including the Property, to a 40-foot front setback requirement.
4. The Petitioner purchased the Property and built the house and deck in 1998. In 2003, without obtaining building permits, the Petitioner enclosed the deck with a roof and screening. The Petitioner testified that he enclosed the deck because his backyard had become infested with mosquitoes and "other potentially dangerous and annoying insects". According to the Petitioner, this invasion of insects has made it difficult for him to enjoy his open deck and backyard. The insects, he alleges, are the result of an inordinate amount of standing water that has accumulated in his rear yard. He claims that this standing water,

²The Petitioner represented that the deck, before it was enclosed, was in compliance with the yard requirements of Zoning Ordinance. Section 59-B-3.1, however, permits any open or roofed deck to encroach into the minimum rear setback by not more than 9 feet. It appears from the record that the deck encroached 12 feet.

in turn, has been caused by the sloping topography of the surrounding properties, which directs storm water runoff onto his Property. This condition has been exacerbated, he contends, by the recent removal of trees and development of houses on the surrounding lots.

5. Mr. Perrine, a land planner, testified that in order to correct the drainage problem on the Property, the grade of the Property would have to be raised. This would require also raising the grade of adjoining properties and removing trees. He stated that before the surrounding lots were redeveloped, the Property was dry to the extent that the builder installed a sprinkler system for the landscaping. He also testified that the Petitioner had attempted to solve the drainage problem by installing a French drain system, which is a series of perforated pipes placed under the yard, but that the system failed because the yard has insufficient pitch to drain off the storm water.

FINDINGS OF THE BOARD

Based upon the Petitioner's binding testimony and the evidence of record, the Board finds that the variance must be denied. The requested variance does not comply with the applicable standards and requirements of 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.*

The Petitioner has failed to show any peculiar, exceptional, or extraordinary condition of the Property that caused a practical difficulty in locating the enclosed porch in compliance with the required 20-foot rear setback. The Petitioner contends first that the size and shallowness of the Property are exceptional conditions peculiar to the Property because they are different from many of the vicinal properties. As the Maryland courts have advised, however, the "uniqueness"³ prong of the variance test has a rather specialized meaning:

³The Zoning Ordinance's "peculiarity" requirement is synonymous with "uniqueness." See Umerly v. Peoples's Counsel, 108 Md. App. 497, 506, 672 A.2d 173, 177 (1996).

The “unique” aspect of the a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. “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 restriction imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

North v. St. Mary’s County, 99 Md. App. 502, 514, 638 A.2d 1175 (1994)(italics added).

The Board finds that the Property’s size, while small relative to the immediately adjacent lots, is larger than at least four other lots in the same block, and it is equivalent in size to many other lots in neighboring blocks. Likewise, the Property may be shallower than several of the lots to the west, but it is approximately the same depth as the four lots to the east and north, is deeper than the four smaller lots in the middle of the block, and is of similar depth to many other lots in surrounding blocks. While the 1952 record plat imposes an additional setback requirement on the Property that is in excess of the County zoning restrictions, this setback is common to all properties on Bradley Boulevard.⁴

In summary, the size and shallowness of the Property, while different from some vicinal properties, are nevertheless shared by many other properties in the area. Consequently, we cannot conclude that the size or shallowness of the Property are exceptional or peculiar to this specific parcel within the meaning of Section 59-G-3.1(a).

The Petitioner’s second, and primary, argument is that the Property is peculiar or unique because of its topography - i.e., that the Property sits below the surrounding properties, which slope toward it. The Petitioner contends that this topographical condition, in combination with the development of the surrounding properties, causes

⁴No evidence was adduced as to whether this restriction is also common to other properties in the area.

exceptional storm water runoff to drain and collect in his rear yard. This unusual amount of water, in turn, has attracted mosquitoes and other insects. These insects then caused him discomfort and a “practical difficulty” in enjoying his back yard. His solution was to build an enclosed porch within the 20-foot rear yard setback.

Again, while the Petitioner has shown that the Property’s topography is different from that of the lots immediately surrounding it, he has not presented any evidence of the topography of other properties in the block or other blocks in the area. Without this evidence, we cannot conclude that the topography is “unique.”

Even if we were to find the topography unique, we see two fundamental flaws in the Petitioner’s reasoning. First, in order to approve a variance, the Board must find that the uniqueness or peculiarity of the property causes the zoning provision to have a disproportionate impact on it. Cromwell v. Ward, 102 Md. App. 691, 721, 651 A.2d 424 (1995). This requires a finding of a direct “cause-effect” relationship between the peculiar condition of the site and the practical difficulty of which the property owner complains. In this case, the Petitioner has failed to adduce sufficient evidence linking the topography of the site and the Petitioner’s inability to use and enjoy his back yard. The Petitioner admits that when the house was first built, the Property was dry. He claims that it was the subsequent development of adjoining properties that has caused the excess water on his land, but he has offered no credible proof of it.⁵ He further claims that the excess water has attracted mosquitoes and other “dangerous” insects to his Property, but neither is this fact clearly shown. In short, any direct nexus between the topography of the site and the Petitioner’s inability to use and enjoy his back yard is both speculative and attenuated.

Secondly, we find that the Petitioner’s argument that he must be allowed to build an enclosed porch within the rear setback of his Property in order to enjoy his back yard turns the concept of “practical difficulty” on its head. Ordinarily, a landowner who encounters topographical or other physical impediments of the land seeks a variance in order to avoid the impediment and build elsewhere on the lot (see, e.g.,

⁵We take administrative notice of the fact that, as of this writing, more precipitation fell in the Montgomery County area in 2003 than in any year since 1889.

Loyola Federal Savings & Loan Association v. Buschman, 227 Md. 243, 176 A.2d 355 (1961), in which the petitioner was given a variance to build a taller building in order to avoid subsurface waters; and McLean v. Soley, 270 Md. 108, 310 A.2d 783 (1973), in which the landowner was permitted to build into a side yard setback in order to preserve trees on the opposite side of the property).

In this case, the Petitioner does not seek to avoid the impediment posed by his wet grounds, but wants permission to build within it. The circumstances of this case are not materially different than those involved in North v. St. Mary's County, 99 Md. App. 502, 638 A.2d 1138 (1994), in which the property owner sought to build a gazebo within the critical area buffer zone. There, the owner's justification for building the gazebo was to "furnish shade and protection from the rain" while he "read and contemplated" from a particularly scenic portion of his property. The Court of Special Appeals found that "a desire to have a gazebo ... in which to contemplate a particular spot when that gazebo is not permitted at that location is not evidence of an unwarranted hardship." *Id.*, at 519. See also Citrano v. North, 123 Md. App. 234, 717 A.2d 960 (1998) (construction of a deck in order to have a view of the sunset is merely a pleasant amenity, the denial of which does not rise to the level of an "unwarranted hardship.") .

The Petitioner's rear yard and, in particular, the northeast corner of it, is almost entirely located within the rear setback. It is this location, according to the Petitioner, that is rendered unusable by the topography of the Property. Yet, it is at this location that the Petitioner desires to locate his enclosed porch in order to "enjoy" the back yard. Like the property owner in North, the Petitioner desires to locate a structure within a restricted area in order to gain enjoyment of that spot. This is simply not a sufficient argument to warrant a variance. As the court stated in North, "under the appellees' theory, it would be unreasonable and an unwarranted hardship to deny [the owner] anything he wants." North, at 518.

In order to prove that a "practical difficulty" exists, the Petitioner must show that the setback restriction "would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restriction unnecessarily burdensome." Anderson v. Board of Appeals, Town of Chesapeake Beach, 22 Md. App. 28, 322

A.2d 220 (1974); Red Roof Inns, Inc. v Peoples's Counsel for Baltimore County, 96 Md. App. 219, 624 A.2d 1281 (1993). It is not enough for an applicant to demonstrate that his or her proposal, if allowed, would be suitable or desirable, would do no harm, or would be convenient for the applicant. See Kennerly v. Mayor of Baltimore, 247 Md. 601, 606-07, 233 A.2d 800 (1967).

We find that the Petitioner's construction of the enclosed porch within the rear yard setback may be a convenience and a pleasant amenity, but does not rise to the level of a "practical difficulty" if denied. The Petitioner has provided no evidence that rear yard setback restriction "unreasonably" prevents him from using his property or that it is "unnecessarily" burdensome. The Petitioner has already built a reasonably sized dwelling on the site, the location and size of which the Petitioner determined or controlled.⁶ The Petitioner provided no evidence as to the relative size and amenities of other homes in the area, or whether enclosed porches are commonly found there. Consequently, we have no basis to find that the Petitioner is being unreasonably prevented from using his property in the same manner as other similarly situated property owners.

The Petitioner has therefore failed to show that any peculiar, exceptional, or extraordinary condition of the Property has caused a "practical difficulty" in locating the enclosed porch in compliance with the required 20-foot rear setback. Consequently, the petition does not meet the requirements of Section 59-G-3.1(a).

- (B) *Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions.*

The Petitioner has not shown that the variance requested is the minimum reasonably necessary to afford relief. The site plan (Exhibit 4) indicates that there is space available within the building envelope at the northwest corner of the rear of the house in which an enclosed porch could reasonably be

⁶The Maryland courts have held that the siting of a structure on a lot does not create a zoning reason for the grant of variance. Any practical difficulty must be the result of a unique physical condition of the land. Indeed, because the Petitioner built his home, any claimed hardship based upon its size or location on the lot would be considered self-created. See Umerly v. People's Counsel, 108 Md. App. 497, 506 (1996), *citing* North v. St. Mary's County, 99 Md. App. 502, 514 (1994).

located. At this location, the extent of any necessary variance would be reduced if not eliminated. In addition, the Petitioner has not shown that the depth of the enclosed porch (13.5 feet) could not reasonably be reduced so as to further minimize the variance needed.

Consequently, the petition does not meet the requirements of Sections 59-G-1.3(a) and (b); the Board need not consider the other requirements of that section for the grant of a variance. Accordingly, the requested variance of twelve (12) feet from the required twenty (20) foot rear lot line setback for the existing covered porch is **denied**.

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the Opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

On a motion by Donna L. Barron, seconded by Allison Ishihara Fultz, with Louise L. Mayer, against, and with Angelo M. Caputo and Donald H. Spence, Jr., Chairman, for, the Board adopted the foregoing Resolution.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of

Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 15th day of January, 2004.

Katherine Freeman
Executive Secretary to the Board

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 on accordance with the Maryland Rules of Procedure.