IN RE: PETITION FOR VARIANCE	*	BEFORE THE
(2808 5th Street)		
15th Election District	*	OFFICE OF ADMINISTRATIVE
7th Council District		
Robert Alvis and Fiona Chuo	*	HEARINGS FOR
(Legal Owners)		
	*	BALTIMORE COUNTY
Petitioners		
	*	**CASE NO. 2022-0217-A**

* * * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings ("OAH") for Baltimore County for consideration of a Petition for Variance filed by the legal owner of the subject property, Robert Alvis and Fiona Chuo ("Petitioners") for the property known as 2808 5th Street, Sparrows Point (the "Property"). The Petitioner are requesting Variance relief pursuant to the Baltimore County Zoning Regulations ("BCZR"), §427.1 to approve a 6 foot fence in rear and side yard which is situated within 10 feet of the adjoining front yard of another residential lot.

Due to COVID-19 a public WebEx hearing was conducted virtually in lieu of an in-person hearing. The Petition was properly advertised and posted. Petitioners appeared at the hearing *pro se*. There were no Protestants or interested citizens who appeared at the hearing.

A Zoning Advisory Committee ("ZAC") comment was received from the Department of Planning ("DOP") which agency did not object to the relief. Department of Plans Review ("DPR") provided a comment in regard to an 8-inch sewer in a 10-foot Drainage and Utility Easement along the Property line adjacent to Hinton Rd., and noted that any fence along Hinton Rd. must be located at least 1-foot away from the existing Drainage and Utility Easement. Notwithstanding the proximity to Hawk Cove and the application of the Chesapeake Bay Critical Area Regulations ("CBCA") to the Property, there was no ZAC Comment provided by Department of Environmental

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Protection and Sustainability ("DEPS").

This case was filed as a result of a Code Violation (Case No.: CC2211532) for erecting a fence without a permit, and in violation of BCZR, §427.1. The Petitioners constructed a 6 foot tall fence in the rear and side yard which abuts the front yard of 9015 Hinton Ave. While rear and side yard fence are 6 feet tall, the Petitioners erected a 3.5 ft tall (42 inches) in height in the front yard of the Property which Petitioners contend was merely for aesthetic purposes. Street view photographs were provided showing the entire fence around the Property. (Pet. Ex. 3A-3N).

Petitioners testified that they purchased the Property on July 29, 2022 and shortly thereafter, contracted with Pyle Fence Company to erect the fence. Petitioners admitted that they personally filed for the fence permit but claim that it was "hung up." Without the permit in hand, Petitioners concede that they permitted Pyle Fence Company to erect the fence which they stated was in September, 2022. However, the date of fence construction provided by the Petitioners does not coincide with Code Enforcement Complaint which confirms that a constituent Complaint for the illegal fence had already been filed by August 26, 2022. (See File). Upon receipt of the Complaint, the County Inspector visited the Property on August 31, 2022 where he found the fence had already been constructed. (See File). At the time of the inspection, a Correction Notice was provided to reduce the height of the fence in the rear and side yard which are in front of the front building line of 9015 Hinton Avenue, to 42 inches by September 30, 2022.

A site plan was drawn by the Petitioners but inaccurately reads that there are no previous zoning cases and no Code Violation case(s). The Property is 0.172 acres +/- (7,500 sf) and is improved with a remodeled single family dwelling. The Property is zoned Density Residential (DR 5.5). Petitioners did provide letters of support. (Pet. Ex. 4A-4C). One of those letters of support was from the property owner of 9015 Hinton Ave. (Pet. Ex 4C). It should also be noted

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that another letter of support was provided by CMW Properties, LLC, who was the seller of the Property to the Petitioners. (Pet. Ex. 4A).

A variance request involves a two-step process, summarized as follows:

(1) It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
(2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

Cromwell v. Ward, 102 Md. App. 691 (1995).

There was no evidence provided by the Petitioners in this case that the Property is unique under the standards set forth in *Cromwell, supra.* The Property is 50 ft wide and 150 ft deep, rectangular in shape, with no odd topographical features. It is physically the same as the abutting and neighborhood rectangular properties which measures 50 ft by 150 ft deep. The Property was created as Lot 78 on the Plat of Swan Point (the "Plat") recorded in the Land Records of Baltimore County on October 4, 1924 (Plat Book WPC 7, page 162). (See File for Plat). The Plat shows the extent of the similarities between all the lots in this neighborhood created in 1924.

Notwithstanding the lack of unique physical characteristics, there was a prior Order in Case No.: 08-200-A in which the Property was found to be unique and relief was granted to construct a replacement dwelling on the Property. The Opinion and Order in that case reads that the contract purchaser, William Robert Aburn, testified that he needed Variance relief for the proposed dwelling for his wife who was inflicted with Lupus and had difficulty walking. (See File). That Order does not provide any factual basis for the finding of uniqueness.

While I disagree with the prior finding of uniqueness as the Property is devoid of unique features, and no evidence of uniqueness was provided at the hearing, that factual finding is applicable to this case under the doctrine of collateral estoppel. *Garrity v. Maryland State Bd. of*

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Plumbing, 447 Md. 359, 368 (2016). (See also *Colandrea v. Wilde Lake Community Ass'n, Inc.*, 361 Md. 391 (2000); *Washington Suburban Sanitary Commission v. TKU Associates*, 281 Md. 1, 18-19 (1977)).

As to practical difficulty factor, there was no evidence provided by the Petitioners other than arguably, the fence is already erected and having to reduce the fence height to 3.5 ft in the rear and side yard of the Property which is in front of the front foundation line of 9015 Hinton Avenue, is an economic hardship for them. This is a textbook case of self-inflicted hardship. The law in Maryland is clear that self-inflicted hardship cannot form the basis for a claim of practical difficulty. Speaking for the Court in *Cromwell, supra*, Judge Cathell noted:

> Were we to hold that self-inflicted hardships in and of themselves justified variances, we would, effectively, not only generate a plethora of such hardships but we would also emasculate zoning ordinances. Zoning would become meaningless. We hold that practical difficulty or unnecessary hardship for zoning variance purposes cannot generally be self-inflicted.

Cromwell, at 722. The factual chronology set forth above supports a finding of self-inflicted hardship. Often in these cases, a permit is never sought. Here, Petitioners knew they needed a building permit and even applied for one. Incredulously, rather than wait for it to be issued, they took the risk of erecting the fence without it. While a property owner is presumed to know what the law requires, had they waited for the permit to be issued prior to fence installation, the permit would have reminded them of the fence height limit.

Through their actions and decisions, Petitioners here created the alleged hardship. *Chesley v. Annapolis*, 933 A.2d 475, 176 Md. App. 413 (Md. App. 2007). The Court of Appeals examined self-inflicted hardships in *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County*, 368 Md. 294, 793 A.2d 545 (2002); *Stansbury v. Jones,* 372 Md. 172, 812 A.2d 312 (2002); and *Lewis v. Dep't of Natural Resources*, 377 Md. 382, 833 A.2d 563 (2003). The lessons from those cases are

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instructive here. Writing for the Court, Judge Cathell explained that:

> [t]he types of hardships that are normally considered to be self-created in cases of this type do not arise from purchase, but from those actions of the landowner, himself or herself, that create the hardship, rather than the hardship impact, if any, of the zoning ordinance on the property.

Id. at 314, 793 A.2d 545. Thus, the "typical type of self-created hardship [is] ... an act of commission by the owner[.]" *Id.* at 317, 793 A.2d 545.

Granting of Variance relief must be for more than economic hardship of the Petitioners. *Cromwell, supra*, at 715. Under Maryland common law "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances." *Mueller v. Baltimore County,* 177 Md. App. 43, 71 (2007). This is because "a variance is an authorization for that which is prohibited by a zoning ordinance." *Cromwell, supra, at* 699. And because "citizens [of a given county or municipality] are entitled to strict enforcement of the existing zoning regulations." *Salisbury Bd. Of Zoning Appeals v. Bounds,* 240 Md. 547, 555-56 (1965). Therefore, "[t]he burden is on the applicant to show facts to warrant a variance," and "the specific need for the variance must be substantial and urgent and not merely for the convenience of the applicant." *Mueller,* 177 Md. App. at 70.

While a letter of support was provided by the owner of 9015 Hinton Avenue, a constituent complaint was filed almost immediately upon the installation of the fence. For the reasons provided herein, I find that the Variance request is not within the spirit and intent of BCZR, §307.1, which prohibits the grant of a Variance unless it is in "strict harmony" with the BCZR.

THEREFORE, IT IS ORDERED, this **28th** day of **November, 2022**, by the Administrative Law Judge for Baltimore County, that the Petition for Variance pursuant to BCZR §427.1 to approve a 6 foot fence in rear and side yard which is situated within 10 feet of the adjoining front

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yard of another residential lot respectively is hereby **DENIED.**

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

Maureen E. Murphy

MAUREEN E. MURPHY
Administrative Law Judge
for Baltimore County

MEM:dlm

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JOHN A. OLSZEWSKI, JR.
County Executive

PAUL M. MAYHEW
Managing Administrative Law Judge
MAUREEN E. MURPHY
Administrative Law Judge

November 28, 2022

Mr. Robert Alvis – alvisrob@gmail.com
Ms. Fiona Chuo
2808 5th Street
Sparrows Point, MD 21219

RE: Petition for Variance
Case No. 2022-0217-A
Property: 2808 5th Street

Dear Mr. Alvis and Ms. Chuo:

Enclosed please find a copy of the decision rendered in the above-captioned matter.

Pursuant to Baltimore County Code § 32-3-401(a), "a person aggrieved or feeling aggrieved" by this Decision and Order may file an appeal to the County Board of Appeals within thirty (30) days of the date of this Order. For further information on filing an appeal, please contact the Office of Administrative Hearings at 410-887-3868.

Sincerely,

Maureen E. Murphy

MAUREEN E. MURPHY
Administrative Law Judge
for Baltimore County

MEM:dlm
Enclosure
C: PAI Code - paienforce@baltimorecountymd.gov