

<b>IN RE: PETITION FOR VARIANCE</b>	*	BEFORE THE
<b>(1222 Tugwell Drive)</b>		
1st Election District	*	OFFICE OF ADMINISTRATIVE
1st Council District		
Sister Servants of Mary Immaculate, Inc.	*	HEARINGS FOR
Legal Owner		
	*	BALTIMORE COUNTY
Petitioner		
	*	<b>CASE NO. 2020-0222-A</b>

\* \* \* \* \*

**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings (OAH) as a Petition for Variance filed by Sister Servants of Mary Immaculate, Inc. (the “Petitioner”) for property located at 1222 Tugwell Drive in Catonsville (the “Property”). The Petitioner is requesting variance relief from Baltimore County Zoning Regulations (“BCZR”) §400.1 to approve a gazebo in the side yard.

Due to the COVID-19 pandemic, a public WebEx hearing was conducted virtually in lieu of an in-person hearing. The Petition was properly advertised and posted. Sister Carol Carne appeared on behalf of the Petitioner along with Aaron Kensinger P.E. from Century Engineering who prepared and sealed a redlined site plan (the “Redlined Site Plan”). (Pet. Ex. 1). Jennifer Busse, Esquire and Whiteford, Taylor and Preston represented the Petitioner. Neighboring property owners, James and Kelly Fox, 405 Newburg Avenue, Catonsville appeared in opposition at the hearing.

Zoning Advisory Committee (“ZAC”) comments were received from the Department of Planning (“DOP”) and the Department of the Environmental Protection and Sustainability (“DEPS”). Those agencies did not oppose the requested relief. DOP provided comments as reflected in the file.

## FACTS AND EVIDENCE

The Property is approximately 4.28 acres and is zoned DR 2. Aaron Kensinger, PE was accepted as an expert in civil engineering, zoning and land development. (Pet. Ex. 3). Mr. Kensinger testified that he visited the Property prior to the hearing and that he prepared and sealed the Redlined Site Plan. (Pet. Ex. 4). He described the Property as an irregularly shaped parcel improved with a nursing home and convent constructed in the 1950s. He explained that the odd layout and configuration of these buildings, along with a center driveway which bisects the Property, accessed by 2 entry points off Tugwell Drive, adds to its peculiarity. The front entrance to the nursing home is located off this center driveway.

The nursing home building is primarily T-shaped and envelopes an outdoor courtyard as reflected on the Redlined Site Plan. (Pet. Ex. 1). The courtyard is handicap accessible for wheelchairs and walkers and plays an important in caring for the residents in providing access to the outdoors. Mr. Kensinger testified that the proposal here is to erect a 16x16 gazebo located 13 ft. from the Property line. There was a 28x28 gazebo erected in the 1970s which has been removed.

Mr. Kensinger opined that strict compliance with the BCZR would result in a practical difficulty because the courtyard area is the only recreation area near the nursing home building which permits wheelchair access for the residents. The rear of the Property is sloped and too small to install a gazebo. The rear has historically been used for deliveries to the nursing home. Thus, while there are other green areas on the Property, in Mr. Kensinger's opinion, it would be impracticable and unreasonable to develop a new, handicap accessible recreation area with sidewalks in a distant location to which the residents would likely need to be transported.

Mr. Kensinger presented an aerial photograph showing the Property is surrounded by residences. (Pet. Ex. 5). He also identified photographs of the courtyard area where the proposed

gazebo is to be located. (Pet. Ex. 6A and 6B). It was his opinion that the variance is within the spirit and intent of the BCZR as the gazebo will face the rear yards of the homes along Newburg Avenue. He also opined that no injury or harm will come to the public health, safety or general welfare from granting the requested relief because the courtyard has been used as a recreational area by the nursing home since the 1950s and previously had a larger gazebo.

Robert Jones, President of Carroll Landscaping, Inc., 9700 Old Court Rd., Windsor Mill, MD 21244 testified that he was initially hired by the Petitioner to revitalize the landscaping when the Petitioner put an addition on the nursing home. As part of that construction, he was hired to upgrade the drainage system. In that regard, drainage pipes were installed in the area where the previous 28x28 gazebo was located. Mr. Jones explained that the current location of these drainage pipes prevents the location of the new gazebo in the area of the old gazebo.

Mr. Jones added that the rear yard has a 3 to 1 slope and is therefore not functional, useable or accessible for residents. All amenities for the residents are in the side courtyard area. (Pet. Ex. 8). In regard to the architectural style of the proposed gazebo, he explained that the style of gazebo will be similar to the photograph. (Pet. Ex. 7). The gazebo roof will mirror the nursing home roof but will also have a cupola. Mr. Jones stated that the proposed gazebo will be octagonal, 13 ft. tall, and large enough for 20-25 people. The dimensions of the gazebo are reflected in the specifications. (Pet. Ex. 9).

Sister Carol Carne testified that she has lived in the convent on the Property since 1967. Sister Carol confirmed that the rear of the Property is sloped and not functional or accessible for a new recreational area for residents. She stated that the larger gazebo was installed in the 1970s and was used for birthday parties and other gatherings for residents, their family and friends. She emphasized the importance of taking the residents outside. The purpose of the gazebo is to provide

them with some shelter from rain, sun and/or heat. Sister Carol added that the average age of the residents is 97 years old.

James and Kelly Fox were provided the opportunity to ask questions of the Petitioners' witnesses. They declined to testify. Their home is directly behind the proposed gazebo area. Mr. Fox wanted to confirm the setback distance from their property line to the gazebo will be 13 ft. Mr. Fox also inquired as to whether the Petitioner investigated other areas for the gazebo location. The response was the courtyard has been the amenity/recreational area for the nursing home and that there were no other handicap accessible, proximate locations for a gazebo area.

### **DECISION**

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).

As described by the Petitioners' witnesses, the Property is unique as a result of its size shape and topography. The outline of the nursing home building reflects a 1950s configuration which is asymmetrical and T shaped with numerous wings which jut out and surround an outdoor courtyard. The historical use of the courtyard for the residents of the nursing is practical and functional. A larger gazebo had been used there since the 1970s. As a result of these facts, I find that the Petitioner would suffer practical difficulty and unreasonable hardship if the variance relief were denied. To require the Petitioner to find another amenity area on the Property when the outdoor courtyard has been used since 1950s is unreasonable. The architectural style and modest height of the proposed gazebo is in keeping with the prior gazebo and will have a roof which

mirrors the nursing home. Indeed, I would add that, even without a gazebo, nothing would prevent the residents from continuing to use the courtyard as a recreational area, for parties and gatherings as has been done for years. Yet, the installation of the gazebo as proposed on the Redline Site Plan is a benign use which offers some comfort from weather to the residents without causing injury to the neighboring properties. Accordingly, I find that variance can be granted within the spirit and intent of the BCZR and without harming the public health, safety, or welfare.

THEREFORE, IT IS ORDERED, this 12<sup>th</sup> day of **January 2021**, by the Administrative Law Judge for Baltimore County, that the Petition for Variance pursuant to BCZR, §400.1 to approve a gazebo in the side yard is hereby GRANTED.

The relief granted herein shall be subject to the following:

1. Petitioner may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioner is hereby made aware that proceeding at this time is at their own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If for whatever reason this Order is reversed, Petitioner would Any appeal of this decision must be made within thirty (30) days of the date of this Order.
2. Petitioner must comply with the DOP comment, a copy of which are attached hereto and made a part thereof with the exception that since the 28x28 gazebo has been razed, the type and style of proposed gazebo shall reflect the photograph and dimensions as provided in the Exhibits.

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

\_\_\_\_\_  
Signed  
MAUREEN E. MURPHY  
Administrative Law Judge  
for Baltimore County

MEM/dlm