IN RE: PETITION FOR ADMIN. VARIANCE (7317 Bellona Avenue)	*	BEFORE THE
9th Election District	*	OFFICE OF ADMINISTRATIVE
2nd Council District		
Bradley J. and Amy B. Murphy	*	HEARINGS FOR
Petitioners	*	BALTIMORE COUNTY
	*	**CASE NO. 2021-0334-A**

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OPINION AND ORDER

This matter comes before the Office of Administrative Hearings ("OAH") for Baltimore County for consideration of a Petition for Administrative Variance filed by the legal owners, Bradley J. and Amy B. Murphy ("Petitioners") for the property located at 7317 Bellona Avenue, Baltimore, MD 21212 (the "Property"). Petitioners are requesting Variance relief pursuant to the Baltimore County Zoning Regulations ("BCZR"), §400.1 to permit a proposed in-ground pool (accessory structure) to be located in the side yard in lieu of the required rear yard. The Property and requested relief is more fully depicted on the site plan (the "Site Plan") that was marked and accepted into evidence as Petitioners' Exhibit 1.

The Zoning Advisory Committee ("ZAC") comments were received and are made part of the record of this case. A ZAC comment was received from the Department of Environmental Protection and Sustainability (DEPS") dated December 10, 2021, indicating that development must comply with the Forest Conservation Regulations.

The Petitioners having filed a Petition for Administrative Variance and the subject property having been posted on November 28, 2021, and there being no request for a public hearing, a decision shall be rendered based upon the documentation presented. The Petitioners have filed the supporting affidavits as required by Baltimore County Code ("BCC"), §32-3-303.

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).

First, the Site Plan is misleading because it states that there are no previous zoning cases for this Property. Indeed, there are two (2) prior zoning cases namely: Case No.: 2005-0656-SPH and 1981-0169-A. In the 1981 Case, the Property was found to be unique. As such, in comparing the 1981 Site Plan with the Site Plan filed in this case (Pet. Ex. 1), I find that the Property has not changed. The doctrine of collateral estoppel bars relitigation of an issue of fact or law that was "actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." *Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359, 368 (2016). Accordingly, the previous finding of uniqueness will apply here under the doctrine of collateral estoppel. Second, the Site Plan indicates that the proposed pool would not only be located in the side yard but also in the front yard as the pool deck extends beyond the front foundation line of the home. As a result, the requested relief should have included a variance for a pool partly located in the front yard.

Based upon the information available, the requested Administrative Variance must be denied. In the opinion of the Administrative Law Judge, the information, photographs, and affidavits submitted are not sufficient to provide facts to comply with the requirements of §307.1 of the BCZR. *Montgomery County v. Rotwein*, 169 Md. App. 716, 906 A.2d 959 (2006). *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). The practical difficulty alleged by the Petitioners (i.e. 'that the side yard is the only option for best management practice') is not the

type of practical difficulty required by case law. Specifically, this Property is 5 acres. The photographs and Site Plan reveal that there are no structures or other obstacles which would prevent the construction of a pool in the rear yard. (Pet. Exs. 1, 3A-3G). In fact, the 1981 Site Plan describes the rear yard as a "slope." The topographical site plan confirms a gentle slope from the front yard to the farthest part of the rear yard; declining in 10 ft. increments. (Pet. Ex. 4). This 'slope' does make construction of a pool in the rear yard impossible; it may cost the Petitioners more money to build a rear yard pool. (Pet. Ex. 4). Furthermore, the topographical Site Plan shows that the proposed side/front yard where the pool would be located has the same degree of slope as the rear yard. Moreover, the photographs of the rear yard and the Site Plan reveal that trees would not have to be cleared to construct a pool in the rear, whereas the Site Plan shows the removal of trees in the side yard. There is no evidence about the condition of those trees other than a bald characterization on the Site Plan that those trees are dead. Thus, there is no more hardship in the construction of a rear yard than with a side yard pool.

Even if a rear yard pool would cost more money, the law 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.

Id. at 722. The Court of Special Appeals in *Montgomery County v. Rotwein*, 176 Md. 716, 732-33 (2006) citing *Cromwell*, held that economic loss alone does not satisfy the 'practical difficulties' test:

> Economic loss alone does not necessarily satisfy the 'practical difficulties' test because, as we have previously observed, 'every person requesting a variance can indicate some economic loss.' *Cromwell* at 715…..Indeed, to grant a variance application any time economic loss is asserted, we have warned, 'would make a mockery of the zoning program.

As applied here, there is no evidence that not having a pool in the side yard would unreasonably prevent the Petitioners' use of the Property as a home. While a pool in the side yard might be a more convenient place to build, and a pool might be a nice feature, I cannot find that not having a pool in the side yard would deprive the Petitioners use of their Property as a 'home.' Indeed, the fact that the Property is improved with a garage per the 1981 Site Plan (now labeled as existing building on the Site Plan), and with both rear and side yard decks, confirms that the Petitioners are maximizing the use of the Property. Variance relief runs with the land and the proposed pool in the side yard would negatively impact this established neighborhood and cannot be granted within the spirit and intent of the BCZR which requires pools to be located in the rear yard.

Pursuant to the posting of the property and the provisions of both the BCC and the BCZR, and for the reasons given above, the requested variance will be **DENIED**.

THEREFORE, IT IS ORDERED, this **21th** day of **December, 2021**, by the Administrative Law Judge for Baltimore County, that the Petition for Variance seeking relief from BCZR, §400.1 to permit a proposed in ground pool (accessory structure) to be located in the side yard and the front yard in lieu of the required rear yard, be and is hereby **DENIED**.

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:dlw