

IN RE: PETITION FOR VARIANCE
(11307 Beach Road)
11th Election District
6th Council District
Antonio Gargiulo
Legal Owner

* BEFORE THE
* OFFICE OF ADMINISTRATIVE
* HEARINGS OF
* BALTIMORE COUNTY
*
* **CASE NO. 2021-0098-A**

Petitioner

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (“OAH”) as a Petition for Variance filed by the Petitioner, Antonio Gargiulo (“Mr. Gargiulo”) for property located 11307 Beach Rd., White Marsh (the “Gargiulo Property”). Mr. Gargiulo is requesting variance relief from the Baltimore County Zoning Regulations (“BCZR”) §§ 400.1 and 427.1.B.1 & 2 to permit an existing 6 ft. rear yard fence (waterside) to remain located on the property line adjoining a neighboring front yard property line (waterside) in lieu of the required 10 ft. setback; and to permit an existing accessory garage to remain in the front yard (street side) in lieu of the required rear yard placement.

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. Zoning Advisory Committee (“ZAC”) comments were received from the Department of Environmental Protection and Sustainability (“DEPS”) which indicates that the subject property is located with the Chesapeake Bay Critical Area (“CBCA”). A ZAC comment was also received from the Department of Planning (“DOP”) which did not oppose the requested relief.

Mr. Gargiulo appeared, *pro se*, at the hearing in support of his Petition. Jerry Welsh, the owner of the neighboring property addressed as 11311 Beach Rd., appeared in opposition (“Mr.

Welsh”). Mr. Welsh initiated a Code Violation Complaint in regard to the construction by Mr. Gargiulo of a 6 ft. high fence between their properties. The Gargiulo Property is a waterfront lot facing Bird River. It measures approximately 11,440 sf and is zoned Agricultural (RC2). The topography is relatively flat on the street side along Beach Rd. but slopes down severely as it approaches the water. It is improved with a 1½ story home built in 1934, and has an older garage at the driveway entrance on Beach Rd.

Mr. Welsh’s property consists of two (2) lots and is improved with a home built in the 1930s (the “Welsh Property”). It is also improved with an above-ground swimming pool with an attached deck and gazebo on the water side, as well as a 6 ft. high privacy fence between the Welshes Property and the adjacent property owned by Samuel and Joanne Lee (the “Lee Property”) addressed as 11313 Beach Rd. The Welsh Property was previously subject to a Variance Order dated November 24, 2003 (Case No. 04-144-A), and an Order by the Board of Appeals on August 27, 2004, as well as subject to a Decision denying a fence height waiver dated December 8, 2003. According to the findings of fact by the Deputy Zoning Commissioner in Case No.: 04-144-A, the Welshes had erected the 6 ft. high privacy fence between their property and the Lee property without a permit. At the time of that hearing, Mr. Welsh testified that he had erected an identical fence between his property and the Gargiulo Property without objection.

Of relevance to the facts here, factual findings were made that the water side of the Welsh Property was their front yard and the street side was their rear yard. Additionally, it was found that the water side of the Lee property was the rear yard and the street side was the front yard. As a result, in that case, a variance was needed (and was granted) for the Welshes to erect a fence taller than 42 inches because that fence was within 30 ft. of the Lees’ front property line.

In the fence waiver case, the Welshes were denied their request for a privacy fence with a

height of 8 -10 ft. between the Welsh home and the water. Importantly, a waiver was granted for the Welshes to erect a 6 ft. high fence between the Welsh property and the Lee property on the water side.

In this case, before erecting the fence, Mr. Gargiulo (who is not a zoning attorney and was admittedly unaware of the meaning of BCZR, §427.1.B.1 and 2) filed an application to erect a fence in his ‘rear’ yard. As a result, the fence permit authorized him to do so. In response to the Code Violation Complaint, Mr. Gargiulo filed the instant Petition for Variance requesting relief for the fence on the water side which he erroneously believed was his ‘rear’ yard. Notwithstanding the Code Violation Complaint he filed, Mr. Welch agrees that the water side of Mr. Gargiulo’s Property is indeed the ‘front’ yard as he succinctly stated in his email to OAH dated June 7, 2021 (Prot. Ex. 1):

I contend that the root issue that needs to be addressed is the orientation of the front and back of 11307 Beach Rd prior to its sale a couple years ago to Mr. G. We contend that the home has always faced the water just as mine does. The layout of the houses are the same with the street side entrances opening to the kitchen area with the living area being on the water side of the house. If the court confirms the water side is the front of 11307, it would make putting a 6 ft. fence in the front side a non-starter regardless (sic) of the fact that it is my front yard. It would also eliminate the need for variance to put a garage on the back (street side) of the property.

Indeed, Mr. Welsh’s recitation of the facts in regard to the ‘front’ and ‘back’ of the Gargiulo’s Property is correct. Given his position, it is unclear why Mr. Welch was opposing the Petition here particularly in light of the fact that he erected a 6 ft. fence on the water side between the Welsh Property and the Lee Property. I find that the water side of Mr. Gargiulo’s Property is the ‘front’ and the side facing Beach Rd. is the ‘rear.’ This factual finding is consistent with the Zoning Commissioner’s Policy Manual (“ZCPM”), § 400.2.a – *Accessory Buildings - Waterfront*

Setbacks:

- (1) On all waterfront, when the proposed house fronts on the water, use the water as the front of the property line.

Based on the testimony presented, I find that, in filing for the fence permit as well as the Petition for Variance, Mr. Gargiulo applied his common knowledge about the front and rear of the home, and could not be expected to have reached a legal conclusion in regard to the application of BCZR, §427.1 or the ZCPM. The factual findings by the Deputy Zoning Commissioner in Case No. 04-144-A that the water side of Mr. Welsh's home is the front applies to the facts here under the doctrine of collateral estoppel. As a result, Mr. Gargiulo does not need a variance under either BCZR, §400.1 because the garage is located in the rear/street side, or under BCZR, §427.1 because the fence is located between two (2) front yards. Accordingly, Mr. Gargiulo's fence is permitted to remain in its present location on the water side.

THEREFORE, IT IS ORDERED, this 9th day of **July, 2021**, by the Administrative Law Judge for Baltimore County, that the Petition for Variance pursuant to BCZR §§ 400.1 and 427.1.B.1 & 2 to permit an existing 6 ft. rear yard fence (waterside) to remain located on the property line adjoining a neighboring front yard property line (waterside) in lieu of the required 10 ft. setback and to permit an existing accessory garage to remain in the front yard (street side) in lieu of the required rear yard placement are hereby **DISMISSED AS MOOT**.

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



MAUREEN E. MURPHY
Administrative Law Judge
for Baltimore County

MEM/dlm