

IN RE: PETITION FOR VARIANCE	*	BEFORE THE
(2203 Forest Ridge Road)	*	OFFICE OF ADMINISTRATIVE
8th Election District	*	HEARINGS OF
3rd Council District	*	BALTIMORE COUNTY
Gregory Schaub and Karen Schaub	*	CASE NO: 2021-0162-A
Legal Owners	*	
Petitioners	*	
* * * * *		

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (“OAH”) as a Petition for Variance filed by the Petitioners, Gregory and Karen Schaub (“Petitioners”) for property located 2203 Forest Ridge Road, Timonium (the “Property”). The Petitioners are requesting variance relief from the Baltimore County Zoning Regulations (“BCZR”), §400.1 to approve an accessory structure (above-ground pool) in the side yard in lieu of the required rear yard only.

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. Petitioners appeared, pro se, at the hearing in support of their Petition. Many neighbors were present and testified in opposition to this Variance request. A Zoning Advisory Committee (“ZAC”) comment was received from Department of Public Works & Transportation (“DPWT”) which agency noted that the proposed above-ground pool is located in the existing drainage and utility easement and must be moved.

The Property is approximately 41,304 sf. and is improved with a 2-story home built in 1971 which fronts on Forest Ridge Rd. The Property is zoned Density Residential (DR 2). Mr. Schaub explained the site plan and the need for the variance relief. (Pet. Exs. 1 and 2). The Property is shaped wider in the rear than in the front. (Pet. Ex. 2). Outside of the western boundary line of the

Property is the drainage and utility easement noted by DPWT. The request for Variance relief here arose out of a Code Enforcement citation for the installation of an above-ground pool located on the western side yard. The above-ground pool measures 12 ft. x 24 ft. (288 sf). (Pet. Ex. 2). It is proposed to be located 5 ft. from the western Property line, an area where the Petitioners previously graded and leveled. (Pet. Ex. 2). The Petitioners propose to screen the pool with landscaping.

Photographs of the Property were submitted showing that the rear of the Property has a concrete patio on a level area surrounded by a retaining wall. (Pet. Ex. 4). The topography in the rear gradually rises in slope and is lined with trees on the northern boundary. (Id.). Photographs of the side yard show the proposed location of the pool. Petitioners emphasized that the pool is seasonal. Petitioners assert that they will suffer a practical difficulty and unreasonable hardship if the above-ground pool had to be located in the rear yard due to the grading required. Additionally, if the pool were located on the rear patio, Petitioners would not be able to use the patio.

There were many Protestants/neighbors who testified in opposition. Each person in attendance was also permitted to ask questions of the Petitioners and the Petitioners were permitted to ask questions of the Protestants. The Protestants were as follows:

1. Frank Hodgetts - 2202 Forest Ridge Rd.
2. Julie Hubbard, President Pine Valley Valleywood Comm. Assoc., PO Box 434, Timonium, 21094
3. Kathy Langan – 2105 Forest Ridge Rd.
4. Mark McCoy – 309 Jody Way
5. Jennifer Stick – 313 Gail Ridge Rd.
6. Joan Mahan – 2114 Old Pine Rd.
7. Kim Walz – 315 Presway
8. Chris Richardson – 2137 Pine Valley Dr.
9. Rebekah Richardson – 2137 Pine Valley Dr.
10. Susan Hyde – 220 Burning Tree Rd.
11. David Alexander – 2104 Forest Ridge Rd.

In support of his position that the pool location will have a negative impact on adjacent and nearby properties, Frank Hodgett used My Neighborhood map and measured the distance from the pool location to 2205 Forest Ridge Rd. as 120.3 ft., and the distance to 2204 Forest Ridge Rd. as 172.5 ft. (Prot. Hodgett, Exs. A1, A2). Mr. Hodgett's home is directly across the street from the pool and he provided a photograph of his view of the pool when it has installed. (Prot. Hodgett, Ex. C). Mr. Hodgett argued that the pool can be located in the rear yard and provided an exhibit showing that there is a 779.4 sf. area in the location of the rear patio where a 288 sf. pool could be located. (Prot. Hodgett, Ex. B). Mr. Hodgett also testified that the Property is not unique as 95% of the rear yards in the neighborhood have sloping yards and trees. He believes there are no special circumstances or conditions which would create an undue burden on the Petitioners to install the above-ground pool in the rear yard. In reviewing the topography, Mr. Hodgett indicated that the slope is not as severe as alleged by the Petitioners. Mr. Hodgett testified that the cost to level an area in the rear yard would be comparable to the cost that the Petitioners spent renting equipment to level and grade the side yard.

Kathy Langan testified in opposition and also submitted exhibits. A rendering of the type of above-ground pool was provided. (Prot. Langan, Ex. B). Several photographs of the pool location from different angles were also provided. (Prot. Langan, Ex. A, H). In Exhibit C, Ms. Langan testified that the property line from My Neighborhood shows the Petitioners' western boundary line crossing through their front walkway. As such, Ms. Langan agrees with DPWT that the location of the pool is in the Utility and Drainage Easement. (Prot. Langan, Ex. C-1). She also highlighted a discrepancy between the proposed 5 ft. setback indicated on the site plan and the proposed 10 ft. setback in the Petitioners' narrative as in Pet. Ex. 1. (Prot. Langan, Ex. C-2). Ms. Langan provided signatures of property owners who are opposed to the Petition. (Prot. Langan,

Ex. E).

Jennifer Stick, who is licensed appraiser with 44 years of experience, who has previously been admitted as an expert witness, was admitted here as an expert appraiser. It was her opinion that the above-ground pool in the side yard is a safety hazard for neighborhood children and would be an attractive nuisance. She opined that property values will decrease in the neighborhood and houses will be less marketable if the Petition is granted. She indicated that above-ground pools negatively impacts property values. She agreed that the rear yard is large enough to accommodate this pool.

Kim Walz reiterated that the neighborhood has steep areas but that it is not overly burdensome for property owners who wish to have pools in their rear yards. Because there will be a 3-sided view of this pool in this side yard, she noted that shrubs will not be tall enough to adequately screen the pool; the 24 ft. length of the pool which will remain visible. She highlighted that it would be a very tight space to plant a tree in a 5 ft. setback. Ms. Walz foresees that while the Petitioners indicated that they would put the ladder to the pool away when not using it, there will be situations, whether emergency or not, when the ladder will be left on the pool and will be used by unattended children.

Julie Hubbard, President of Pine Valley Valleywood Community Association acknowledged that Restrictive Covenants which apply to the Property in this neighborhood would need to be separately enforced in a court proceeding and are not evidence here. Ms. Hubbard testified that of the 460 homes within the Community Association area, only a small fraction have pools. She reiterated that the Community Association's official position is against this above-ground pool as it is an eye sore and visible from the Forest Ridge Rd.

Mark McCoy emphasized that properties on Forest Ridge Rd. and Jody Way have hills and trees in the rear. While it may be difficult to put construct a pool, the slope does not make the Property unique.

Both Chris Richardson and Rebekah Richardson brought a different perspective. Mr. Richardson testified that property values are about supply and demand and not someone's perception of what is an eye sore. He indicated that the neighborhood has other eye sores such as sheds and fences in need of repair. Ms. Richardson testified that most of the properties in the neighborhood are flat and that the Petition should be granted if there is an economic hardship.

Susan Hyde testified that she has lived in the neighborhood since 2002 and is concerned about the above ground pool in this side yard. She stated that most properties do not have pools but if they do, the pools are in the rear yard. She pointed out that the Petitioners have not suffered an economic hardship simply because grading the rear yard may cost more money.

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). In requiring a finding of "uniqueness", the Court of Special Appeals in *Cromwell* referred to the definition of "uniqueness" provided in *North v. St. Mary's County*, 99 Md. App. 502, 514 (1993):

In the zoning context the "unique" aspect of 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 has 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 restrictions 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 in bearing or parting walls.

Cromwell at 710. The *Cromwell* Court connected the variance law in Baltimore County with the law in Maryland and emphasized that:

We conclude that the law in Maryland and in Baltimore County under its charter and ordinance remains as it has always been a property's peculiar characteristic or unusual circumstances relating only and uniquely to that property must exist in conjunction with the ordinance's more severe impact on the specific property because of the property's uniqueness before any consideration will be given to whether practical difficulty or unnecessary hardship exists.

Id. When comparing the property at issue with other properties to determine 'uniqueness,' the terms 'area', 'neighborhood' and district have all been used interchangeably. (*Easter v. Mayor & City Council*, 195 Md. 395, 400 (1950) citing *Rathkopf, Zoning, 2d Ed.*, p. 215); *Marino v. City of Baltimore*, 215 Md. 206, 219 (1957); *Chesley v. Annapolis*, 933 A.2d 475, 176 Md. App. 413 (Md. App., 2007). The Court in *Cromwell, supra*, emphasized that the 'uniqueness' element of a property in Baltimore County must consist of a peculiar characteristic or unusual circumstance relating only and uniquely to the Property at issue, different and apart other properties in the neighborhood. The evidence presented here was overwhelmingly that the Property is similar to other properties in the neighborhood in that the rear yards have both slopes and trees. Indeed, the rear yard is a larger area than the side yard. Accordingly, in this case, I find that the Property is not 'unique' for zoning purposes, based on the evidence presented.

If the Property is determined to be "unique," then the issue of practical difficulty or unreasonable hardship must be decided. Toward this end, a variance may be granted where strict application of the zoning regulations would cause practical difficulty to a petitioner and his property. *McLean v. Soley*, 270 Md. 208 (1973); *Trinity Assembly of God v. People's Counsel*, 407 Md. 53

(2008). To prove practical difficulty for an area variance, a petitioner must produce evidence to allow the following questions to be answered affirmatively:

1. Whether strict compliance with the requirement would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome;
2. Whether the grant would do substantial injustice to applicant as well as other property owners in the district or whether a lesser relaxation than that applied for would give substantial relief; and
3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Mclean at 214-215.

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, in the event that an appellate court would find that the Property is ‘unique’, I find that the facts here do not satisfy the ‘practical difficulties’ test to justify approval of the

variance. First, because this is an above-ground pool, it is seasonally set up and dismantled. Indeed, as demonstrated by the photographs and the site plan provided by Mr. Hodgett, the proposed aboveground pool can be located in the rear yard. It may take grading an area to make it flat or using the patio area while the pool is seasonably used. Thus, I find that the Petitioners' alleged practical difficulty is the result of a self-imposed hardship created by the choice of recreational amenities in the rear yard.

Applying the 3-part test in *McLean*, there was no evidence that not having a pool in the proposed side yard would unreasonably prevent the Petitioners' use of the Property as a 'home.' While a pool in the side yard might be a nice feature, and a more convenient place for the Petitioners, the Petitioners are not deprived of the 'use' of their Property if they cannot erect this above-ground pool. Indeed, the fact that the Property is improved with a concrete patio, retaining wall, grass area and garden, confirm that the Petitioners are maximizing the use of their Property. However, approving a pool in the side yard would be for the convenience of the Petitioners only and contrary to the variance case law.

Second, I cannot find that denying a pool in the side yard would cause 'substantial injustice' to the Petitioners. At worst, the Petitioners would need to level an area in the rear yard as they did in the side yard, or use the patio area for their seasonal use of this pool, dismantling it when not in season. The evidence was inconclusive at best that grading an area in the rear yard would be cost prohibitive. Even if there is a cost to grade, the case law is clear that economic hardship cannot form the basis for approving a variance request.

Conversely, I find that granting this variance would cause substantial injustice to this established neighborhood, in that variance relief runs with the land. In particular, I make this finding in light of the fact that very few homes have pools, much less above-ground pools, and that to the

extent they exist, the pools are located in the rear yards. Given the open space surrounding this side yard, I find that this above-ground pool, in this particular side yard, will be visible from 3 sides, even if landscaping is added to screen it. I find both the size and location of this pool will present an open and obvious danger to neighborhood children and even to children who do not reside in the neighborhood; it is an attraction sitting in plain view. On the other hand, if this above-ground pool is set up in the Petitioners' rear yard, it would substantially reduce the risk of a child drowning as it is blocked from view and contained within the rear property lines behind the house. Thus, I agree with the Protestants that the proposed relief here would negatively impact this established neighborhood.

THEREFORE, IT IS ORDERED, this 5th day of **October 2021**, by the Administrative Law Judge for Baltimore County, that the Petition for Variance pursuant to BCZR, §400.1 to approve an accessory structure (pool) in the side yard in lieu of the required rear yard only 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/dlm