

<b>IN RE: PETITION FOR VARIANCE</b>	*	BEFORE THE
<b>(3401 Overbrook Road)</b>		
3rd Election District	*	OFFICE OF ADMINISTRATIVE
2nd Council District		
Yoseph Orshan and Randi Orshan	*	HEARINGS OF
Legal Owners	*	BALTIMORE COUNTY
<b>Petitioners</b>	*	<b>CASE NO: 2021-0183-A</b>
* * * * *		

**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings (“OAH”) as a Petition for Variance filed by the Petitioners, Yoseph Orshan and Randi Orshan (“Petitioners”) for property located at 3401 Overbrook Road, Dumbarton the “Property”). The Petitioners are requesting variance relief from the Baltimore County Zoning Regulations (“BCZR”), §400.1 to approve an accessory structure (pool) in the right 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 at the hearing in support of the Petition. Adjacent neighbor, David Gichtin, MD, 3403 Overbrook Rd. appeared and testified in opposition and was represented by Michael McCann, Esquire.

A Zoning Advisory Comment was received from the Department of Environmental Protection and Sustainability (“DEPS”) which indicated that the file had been reviewed but there was no substantive comment on the Petition.

The Property is approximately 28,350 sq. ft. and is improved with a 2-story brick home built in or around 1933. The Property is part of the Dumbarton neighborhood which is listed on the National Register of Historic Places (BA-3237). (Prot. Rosen Ex. 1). It is zoned Density-Residential (DR 2). The Property is surrounded on 3 sides by Seven Mile Lane, Southvale Rd.

and Overbrook Rd. The Petitioners described the Property as a rectangle with equal front and rear yards. They purchased it in August of 2020.

Through the Petitioners' photographs of the Property, Mr. Orshan explained that he and his wife reside in the home with their 4 children. The photographs show that there is a 3-car detached garage (600 sf.) which can be accessed via Seven Mile Lane and Southvale Rd. (Pet. Ex. 4). In front of the detached garage, an in ground basketball net has been installed near Southvale Rd. The Petitioners are creating a basketball court in that area. (*Id.*). A stone fish pond is partly in the left side yard and partly in the rear yard near to Southvale Rd. A stone patio area (168 sf.) and various stone walkways are located in the rear yard. (*Id.*). There is an old Magnolia tree which is in the rear yard. (*Id.*). In the right side yard is a trampoline and swing set. Trees line the right side yard along a perimeter fence between the Property and Dr. Gichtin's property.

Petitioners desire to build the in-ground pool and pool deck in the right side yard. A site plan prepared by a pool company shows the proposed in-ground pool measuring 16 ft. by 34 ft. along with a pool deck. (Pet. Ex. 2). Petitioners explained that they did not want to remove the improvements and things in rear yard.

It was undisputed that the Dumbarton Development Corporation ("DDC") is the existing neighborhood organization which approves plans for alterations and additions to properties. The DDC is charged with enforcing restrictive covenants applicable to this neighborhood. Indeed, the Petitioners received approval from the DDC for their proposed pool in the right side yard. (Pet. Ex. 3).

Petitioners contend that they will suffer a practical difficulty if the pool is not able to be constructed in the right side yard as proposed because (1) they want a pool for their children; and (2) they believe that the rear yard will be destroyed if they have to construct a pool there. Petitioners

assert that Dr. Gichtin does not reside in this home year round, that the Gichtin's have a pool in their rear yard which is 5 ft. from the Property line, and that the proposed pool will be 30 ft. from the Property line. (Pet. Ex. 6). Petitioners also highlight that they received letters of support from neighbors/friends about their Petition. (Pet. Ex. 7). A list of pools located in the rear yards of properties in the neighborhood was submitted. (Pet. Ex. 8).

On cross examination, Mr. Orshan, an attorney, agreed that the Property was rectangular in shape and that it was similar to other lots in Dumbarton. Mr. Orshan further agreed that his Property was not the only corner lot in Dumbarton. Additionally, he acknowledged that other lots have large, mature trees as well as sheds and garages. Mr. Orshan agreed that the proposed pool could fit in the rear yard, especially without a pool deck surrounding it, but that to do so would "destroy the backyard" and the "expenses would be double." However, the Petitioners concede that they did not obtain estimate(s) for constructing the pool in the rear yard. On cross, Mr. Orshan also agreed that there were no pools in the side yards of any of the properties in the neighborhood.

Dr. Gichtin testified that he is opposed to the location of the pool in the right side yard which is adjacent to his house, even with the fence proposed along the perimeter. Dr. Gichtin stated that when he had his pool installed 20 years ago, it was done at great expense, where trees had to be removed, a new driveway had to be installed, and his garage had to be rebuilt and reconfigured. Dr. Gichtin believes that the proposed pool can fit in the Petitioners' rear yard and demonstrated the same on a copy of the Petitioners' site plan. (Prot. Gichtin Ex. 2). He contends that a pool located in a side yard in this neighborhood will set a precedent for other owners to request the same and it will negatively affect property values.

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. As admitted during cross examination, within this neighborhood, the Property is similar to other rectangular lots, to other corner lots, to lots with mature trees, sheds and garages. It is neither large nor small; rather it is similar in size to other lots in the neighborhood. 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 the 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, the 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.

As applied here, 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. Indeed, as demonstrated by Mr. McCann, the proposed pool can be located in the rear yard. The Petitioners need to make choices about whether they desire a pool or the existing arrangement of items in the rear yard. First, applying the 3-part test in *McLean*, there was no evidence that not having a pool in the right 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, I cannot find that not having a pool would deprive the Petitioners ‘use’ of their Property. Indeed, the fact that the Property is improved with a variety of recreational amenities such as a 3-car garage, basketball court, stone patio, fish pond and stone pathways confirm that the Petitioners are maximizing the use of the Property. Accordingly, approving a pool in the side yard would be for the convenience of the Petitioners only which is contrary to the variance case law. 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.

Second, I cannot find that denying a pool in the side yard would cause ‘substantial injustice’ to the Petitioners. At worst, the size of the pool would be reduced, the pool could be moved to the rear yard, and/or constructing a pool in the rear yard may (or may not) cost more money. Conversely, I find that granting this variance would cause injustice to Dr. Gichtin and subsequent owners of his property, particularly in light of the fact that there are no pools located in the side yards of homes in the Dumbarton neighborhood. Variance relief runs with the land and the proposed relief here would negatively impact this established neighborhood.

THEREFORE, IT IS ORDERED, this 4<sup>th</sup> 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 right 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.



MAUREEN E. MURPHY  
Administrative Law Judge  
for Baltimore County

MEM/dlm