IN THE MATTER OF ROBERT AND DIANE BROWN	*	BEFORE THE
	*	BOARD OF APPEALS
Legal Owner/Petitioner	*	OF
21 Greenwood Avenue Baltimore, MD 21206 North East of Greenwood Avenue 14th Election District 6th Council District	*	BALTIMORE COUNTY
	*	Case No.: 10-367-A
RE: Petition for Fence Setback Variance	*	

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OPINION

This case comes to the Board on appeal of the final decision of the Deputy Zoning Commissioner of Baltimore County in which a Petition for Variance from §427.1.B.2 of the BCZR to permit a fence on the side and rear yard with a height of 6 ft. and adjoining the front yard of another residence to have a setback of 0 ft. in lieu of the required 10 ft. was denied. The Petitioners, Robert and Diane Brown, (the "Petitioners") were represented by Gerald W. Soukup, Esquire. The Protestants, Doris White ("Mrs. White") and Sheila Coomer ("Ms. Coomer") were *pro se*. A public deliberation before this Board was held on March 10, 2011.

Factual Background

The Petitioners are the legal owners of the property located at 21 Greenwood Avenue, Baltimore, MD 21206 located in Overlea area of Baltimore County (the "Property"). The Property is zoned D.R. 5.5 and sits on the northeast side of Greenwood Avenue, southeast of Kenwood Avenue and Belair Road.. The Property measures approximately 16,000 square feet or 0.367 acres +/-. It is improved with a residence where the Petitioners have lived for 21 years. The property is also improved with a macadam driveway running along the right side leading to a garage that is located in the rear of the Property.

The Petitioners applied for a permit to build a 6 ft. high privacy (board on board) fence between their driveway and an existing chain link fence. The chain link fence separates the Petitioners' Property from the property owned by Mrs. White at 23 Greenwood Avenue. Mr. Brown testified that, after obtaining the building permit from the County, he bought materials and began to erect the fence.

Subsequently, a County inspector came to the Property, requested to see the permit and then allowed the Petitioner to continue building the fence. A second inspection occurred and again the Petitioners were permitted to continue. Thereafter, the Petitioners received a telephoue call informing them that they needed to apply for a variance. Mr. Brown testified that he stopped work on the fence and applied for the instant variance.

Photographs of houses located on Greenwood Avenue were admitted into evidence as Petitioners' Exhs.1 and 2. Those photographs show that all the homes along Greenwood Avenue are located in a row close to the street. A photograph of Petitioner's house shows that it is similarly situated close to Greenwood Avenue. (Pet. Exh. 3 and 4). Likewise, a photograph of the house owned by Mrs. White's daughter, Protestant Sheila Coomer, who resides at 25 Greenwood Avenue, shows that Ms. Coomer's house is situated along the same line as the Petitioner's house. (Pet. Exh. 5).

However, the photographs reveal that only Mrs. White's house is setback from Greenwood Avenue, such that it is even with the Petitioners' garage in the rear of the Brown Property. (Pet. Exh. 3 and 4). Mr. Brown testified, and the Photographs verified his testimony, that Ms. Coomer has a stockade fence surrounding the rear of her property which fence is partially falling down. Thus, Ms. Coomer's stockade fence is even with and adjoins Mrs. White's front yard. Mr. Brown testified that Mrs. White's house is setback 160-165 feet from Greenwood Avenue.

Mr. Brown added that the reason he wants the fence is to reduce the interaction between the Petitioners and Mrs. White. The parties did not dispute that they do not interact well with one another and have had numerous incidents between them that were less than ideal. As to remaining work to be completed on the fence, Mr. Brown stated that he intends to extend the fence to the front of his house but not to the street because it would interfere with ingress and egress of cars entering and exiting his driveway. According to Mr. Brown, there are other properties on another street which also have 6 ft. high fences.

Mr. Brown also explained that he had painted a few boards of the fence with stain and intended to complete the staining so that the fence will be consistent with the aesthetics of the community.

Mrs. White testified that she has lived in her home since 1967. She admitted that she and the Browns have had unpleasant exchanges and that the parties do not get along. Mrs. White testified that she wanted the existing chain link fence taken down because there was 12 inches between the chain link fence and the new wood fence which could pose a threat to young children who may climb into that space. Yet, while she wanted Mr. Brown to remove the chain link fence, she testified that she would not permit Mr. Brown to come onto her property to remove it. On redirect, Mr. Brown stated that he would be willing to remove the chain link fence.

Mrs. White further testified that she is opposed to the Petitioners' privacy fence because it interferes with air flow to her property. She stated that she now must sit on the side of her house closest to her daughter's house to get the amount of airflow to which she has become accustomed. She objects to height of the fence and explained that she can no longer see cars along Greenwood Avenue until the cars are past her house.

Ms. Coomer testified that she grew up in Mrs. White's house. She clarified that she has a chain link fence around her property. The stockade fence is located inside the chain link fence and is necessary due to the swimming pool in her back yard. Ms. Coomer stated that her mom applied for her own 6 ft. fence 30 yrs. ago but that request was denied and she was only allowed a 4 ft. high fence. It was for this reason that she is opposed to the Petitioners having a 6 ft. fence. Ms. Coomer added that the Petitioners' fence is only 20 ft. from Mrs. White's house whereas her stockade fence is separated from Mrs. White's house by what Ms. Coomer opined was "2 ½ lots." However, Ms. Coomer admitted that she did not measure the distance. Additionally, Ms. Coomer stated that Mrs. White uses her front yard to entertain and to sit in her gazebo because her property does not have a back yard.

In support of their request for variance, the Petitioners argued that their property is "unique" in the zoning sense because it is located next to Mrs. White's house which is the only house on Greenwood Avenue which is set back 160 - 165 feet from the street. Mrs. White's front yard is everyone else's backyard.

As to practical difficulty, the Petitioners argue that they did not impose this hardship on themselves but, as the testimony indicated, they did everything legally and were granted a permit to erect the fence by the County. The County then came to inspect the Property twice and allowed Mr. Brown to continue to erect the fence. As a result, the Petitioners claim that §427.1.B.2 of the BCZR disportionately impacts their Property.

BCZR- Fences

§427.1.B.2

1.

A residential occupancy fence may not be erected in the rear or side yard of a lot which adjoins the front yard of another on which a residence has been built, except in accordance with the provisions of this section.

2.

The fence may not exceed 42 inches in height if situated within 10 feet of the adjoining front yard property line.

3.

Any person may request a variance from the requirements of this subsection.

Law on Variances

In order for a variance to be granted, this Board must be convinced that the Petitioners have met their burden of proof as to both "uniqueness" and "hardship". Section 307.1 of the BCZR states, in pertinent part, as follows:

> "...(T)he County Board of Appeals, upon appeal, shall have and they are hereby given the power to grant variances from height and area regulations...only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship.... Furthermore, any such variance shall be granted only if in strict harmony with the spirit and intent of said height, area...regulations, and only in such manner as to grant relief without injury to public health, safety, and general welfare...."

This Board is guided by the holding provided by the Court of Special Appeals in *Cromwell v. Ward,* 102 Md. App. 691, 698 (1995), wherein the Court writes:

> ...The Baltimore County ordinance requires "conditions ...peculiar to the land...and...practical difficulty...." Both must exist. ...However, as is clear from the language of the Baltimore County ordinance, the initial factor that must be established before the practical difficulties, if any, are addressed, is the abnormal impact the ordinance has on a specific piece of property because of the peculiarity and uniqueness of that piece of property, not the uniqueness or peculiarity of the practical difficulties alleged to exist. It is only when the uniqueness is first established that we then concern ourselves with the practical difficulties...."

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....

Id. at 710.

If the Property is determined to be "unique," then the issue is whether practical difficulties also exist. Toward this end, the Board acknowledges that a variance may be granted where strict application of the zoning regulations would cause practical difficulty to a petitioner and his/her property. *McLean v. Soley*, 270 Md. 208 (1973).

At the same time, 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.

Decision

After reviewing all of the testimony and evidence presented, the Board has determined that the Petitioners have met their burden of proving that the Property is unique and that the Petitioner will suffer practical difficulty and unreasonable hardship if the variance is not granted.

As to uniqueness, the Board finds that this Property suffers a practical restriction of being located next to the only house on Greenwood Avenue (Mrs. White's house) which is set back from the street. Mrs. White only has a front yard, not a backyard. This restriction disportionately impacts the Petitioners' request to erect a fence which is greater than 42 inches next to a front yard. Moreover, the Protestants wanted the same fence. They admitted that the reason for protesting was grounded in spite.

As to the issue of practical difficulty, the Board finds, based on the evidence presented, that strict compliance with BCZR §427.1.B.2 would result in both practical difficulty and unreasonable hardship because the Petitioners' Property is deprived of the private use of the rear and side yards. This is particularly true given the deterioration of the relationship between the Petitioners and Mrs. White. The Board finds, based on the photographs in evidence, that but-for the practical restriction imposed by the location of Mrs. White's house, the Petitioners would not need a variance from §427.1.B.2.

In addition, this Board finds that there is no self imposed hardship. Any error was caused by the County in issuing the permit, followed by two (2) inspections at which the work was permitted to continue. Thus, this is not a case where the Petitioners erect the subject of the variance in violation of the law.

Finally, the Board finds that granting the variance is in strict harmony with the spirit and intent of B.C.Z.R.'s height regulation for fences and that granting this variance is not injurious to public health, safety, and general welfare of the neighborhood. Ms. Coomer's stockade fence is adjoining Mrs. White's front yard on the other side and Mrs. White has no objection to that fence. The Protestants wanted their own 6 ft. high fence and merely want to oppose the instant one because of the neighbor fights. The Board does not find the Protestants' reasons for opposing the variance to be reasonable.

ORDER

IT IS THIS 15th day of April, 2011, by the County Board of Appeals of Baltimore County

ORDERED, that the Petition for Variance seeking relief from §427.1.B.2 of the Baltimore County Zoning Regulations to permit a fence on the side and rear yard with a height of 6 feet and adjoining the front yard of another residence to have a setback of 0 feet in lieu of the required 10 feet be and the same is hereby GRANTED, subject to the following restrictions and conditions:

1. The wood privacy fence shall stop 50 feet from the Petitioners' front property line.

2. The Petitioners shall finishing staining the fence so that it is consistent with the aesthetics of the community.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules.*

BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Maureen E. Murphy

Wendell H. Grier