



Board of Appeals of Baltimore County

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February 19, 2014

Frank and Joyce Habicht
5809 Hazelwood Avenue
Baltimore, MD 21206

RE: *In the Matter of: Frank and Joyce Habicht - Legal Owners/Petitioners*
Case No.: 13-217-A

Dear Mr. and Mrs. Habicht:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

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*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all **Petitions for Judicial Review** filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington".

Krysundra "Sunny" Cannington
Administrator

Enclosure

c: Bill Baczynsky
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Arnold Jablon, Director/PAI
Andrea Van Arsdale, Director/Department of Planning
Nancy West, Assistant County Attorney
Michael Field, County Attorney, Office of Law

IN THE MATTER OF	*	BEFORE THE
THE APPLICATION OF		
<u>FRANK AND JOYCE HABICHT</u>	*	BOARD OF APPEALS
<u>LEGAL OWNERS/PETITIONERS</u>		
PETITION FOR VARIANCE ON THE PROPERTY*		OF
LOCATED AT 5809 HAZELWOOD AVENUE		
	*	BALTIMORE COUNTY
14 TH ELECTION DISTRICT		
6 TH COUNCILMANIC DISTRICT	*	CASE NO. 13-217-A

* * * * *

OPINION

This case comes before the Board of Appeals as a result of Petitioners, Frank and Joyce Habicht seeking zoning approval in the form of a Variance for a carport at 5809 N. Hazelwood Avenue which was denied by Administrative Law Judge. The Petition for Variance request is from Section 400.1 of the BCZR to permit an accessory structure (carport) in the side yard with 2 foot setback in lieu of the required rear yard setback of 2.5 feet.

A hearing was held before the Baltimore County Board of Appeals on September 10, 2013. Petitioners were represented by Deborah Engram, Esquire. Protestant, William Baczynsky, appeared pro se.

BACKGROUND AND TESTIMONY

The Petitioners filed a Petition for Variance to allow a carport on their property which had already been built without a permit. The Petitioners applied for a Variance to allow the carport to remain on the property. On June 3, 2013, the Variance was denied by Order of the Administrative Law Judge, John H. Beverungen. The subject property and requested relief was fully depicted on the sketch plan that was submitted by the Petitioners as Exhibit #1.

At the hearing before this Board, Petitioner, Frank Habicht, testified regarding the uniqueness of his property and the hardship which would exist if the carport were removed. There are other structures already on his property, including a garage, a swimming pool and three other carports. One carport is four feet from his house and has a separate driveway. The second carport is attached to his house but can only be used for one car. There is a patio attached to the carport. The third carport protects his mobile home. The sketch plan, (Petitioner's Exhibit #1), shows the locations of the three carports.

Mr. Habicht testified that his property is different from the other properties in the neighborhood. He has two lots, his property is 100 feet wide and 150 feet deep. His house is a rancher and runs the width of his property. The house is 65 feet long. Other houses in the neighborhood run the length of the property. Other properties have their driveways in the front of the house. There is no sidewalk from the front door to his driveway. There is no paved way to get to the first carport. There is a walkway from the house to the garage but it is cement and there is grass between the blocks making it difficult for him to walk due to his medical conditions. He suffers from the "bends" and was paralyzed for 30 days from scuba diving. He has arthritis in his knee, suffers from diabetes, and has back problems. He has trouble walking on unpaved surfaces because he has balance problems. Petitioner presented a doctor's note, (Petitioner's Exhibit #2), regarding his need for the carport. He has trouble walking in the rain and when it is icy. He has fallen before getting into his car and cleaning his car. Mr. Habicht works full time. He leaves for work around 4:30 a.m.

On cross-examination, the Protestant showed Mr. Habicht photographs of him cutting the grass on June 19, 2013 and using a leaf blower on July 31, 2013, (Protestant's Exhibit #1 A-F, and Protestant's Exhibit #2 A-C). He questioned the Petitioner about the carport housing the

mobile home on the side of the house. This carport is 40 feet long. The Petitioners' garage is a three car garage. The measurements the Petitioner used for his sketch came from a tape measure. In addition, the Petitioner acknowledged that the Site Plan he drew (Petitioner's Exhibit 1) did not accurately reflect the location of the buildings and/or carports on the Property. On re-direct, the Petitioner explained the photographs, explaining that it is easier for him to walk on the lawn when he is holding onto something, like the lawnmower. He doesn't cut the grass very often; usually one of his grandchildren does it for him. The existing driveway is behind his house. He could move the carport to two or two and one-half feet. If he moved it two and one half feet, he would not need the variance. He cannot use the existing carport because if more than one car is in the carport, the second car will stick out.

Protestant, William Baczynsky, testified in opposition to Petitioners' request. He grew up in the house next door to Petitioners and is currently living with his parents, having moved back in with them about three years ago. He has a power of attorney for his parents. He wants the carport where it belongs, behind the house, set back two and one-half feet from the house and property line. Where the carport is now, it is an eyesore and will cause him problems should he go to sell his parents' house. He is concerned that these additions will have a negative effect on the value of his parents' property. The property has three carports and a sidewalk, a three car garage and a mobile home. The carport which houses the mobile home is massive. The Petitioners own five vehicles. There are plenty of flat surfaces for Mr. Habicht to walk on. In addition to the photographs he took, Mr. Baczynsky saw the Petitioner in August with a chainsaw cutting down fallen debris. He did not take a photograph.

Petitioner built the carport without a building permit. Mr. Baczynsky argues that if he had obtained the permit, he would have known he could not put the carport where he did. Mr.

Baczynsky introduced a photograph, (Protestant's Exhibit #4), of a tape measure from the hedge to the carport. It showed that the post of the carport is sixteen inches from the hedge.

In response, Mr. Habicht testified that he offered to take down the carport if Mr. Baczynsky's parents ever wanted to sell their house.

DECISION

Maryland jurisprudence is well established regarding the factors to be considered when contemplating variance relief.

Baltimore County Zoning Regulations, Section 307.1, in pertinent part, states 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 (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...." *Id.* at 698.

In requiring a pre-requisite finding of "uniqueness", the Court defined the term and stated:

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.... *Id.* at 710.

Further, in *North v. St. Mary's County*, 99 Md. App. 502 (1994), the Court held that

...the 'unique' aspect of a variance requirement does not refer to the extent of improvements on the property, or upon neighboring property. 'Uniqueness' of a property for zoning purposes requires that the subject property have 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 and bearing or party walls. *Id.* at 514.

If the property is determined to be unique, then this issue is whether practical difficulties also exist. In *McLean v. Soley*, 270 Md. 216 (1973) the court established the following criteria for determining practical difficulty or unreasonable hardship:

"1) Whether compliance with the strict letter of the restrictions governing various variances would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.

"2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.

"3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured."

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.

Petitioner based his request for a variance on two arguments. His first argument is that his property is unique because he has two lots where everyone else in his neighborhood has one. His second argument is that his property is unique because of the way the buildings on his lot are situated. The Petitioner infers that these two conditions provide the uniqueness contemplated in *Cromwell* which makes granting the requested variance justified.

The Board must make a determination as to whether the Petitioner's property is "unique" as spelled out in *Cromwell*. *Cromwell* requires that the property itself be unique. The Board determined that in the instant case, the property itself is not unique as *Cromwell* does not allow uniqueness to be due to the development of the property.

It was also noted by the Petitioner that the additional carport was needed due to his health. A doctor's note was provided. The Board reviewed that the Petitioner already has a three-car garage and two other carports on his property. The Board discussed that any hardship is self-imposed due to the configuration of the buildings on his property. The Board determined that denying the variance does not restrict the use of the property as a residential property.

CONCLUSION

The Board finds that, based upon the evidence presented, the Petitioner has failed to meet his burden to prove that the property is unique by the standards of *Cromwell, supra*. As such, we do not have to address whether any practical difficulty exists. If we were to address that issue, we would have found that any hardship is self-imposed and denying the variance does not hinder the use of the property.

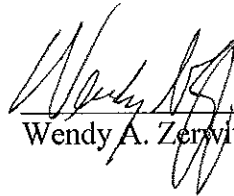
ORDER

THEREFORE, IT IS THIS 19th day of February, 2014 by the Board of Appeals of Baltimore County

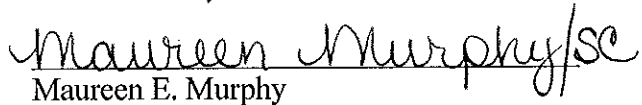
ORDERED that the Petitioner's request for a variance from Section 400.1 of the BCZR to permit an accessory structure (carport) in the side yard with a 2 feet setback in lieu of the required rear yard setback of 2.5 feet, is hereby **DENIED**.

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*.

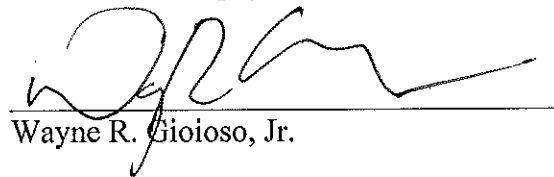
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Wendy A. Zerwitz, Panel Chair



Maureen E. Murphy



Wayne R. Gioioso, Jr.