

IN RE: PETITION FOR ADMIN. VARIANCE	*	BEFORE THE
E side of Manor Road, 100 feet N of the		
c/l of Morgan Mill Road	*	DEPUTY ZONING
11 th Election District		
3 rd Councilmanic District	*	COMMISSIONER
(11837 Manor Road)		
	*	FOR BALTIMORE COUNTY
Kirk Kness		
<i>Petitioner</i>	*	Case No. 2009-0208-A

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before this Deputy Zoning Commissioner as a Petition for Administrative Variance filed by the legal owner of the subject property, Kirk Kness for property located at 11837 Manor Road. The Variance request is from Sections 1A04.3.B.3 (1996), 103.3 and 301.1.A of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit an addition with a side yard setback of 26 feet in lieu of the required 50 feet, to permit an open deck with a side yard setback of 23 feet in lieu of the required 37.5 feet, and to amend the Final Development Plan of the Alice M. Smith Property, Lot 4 only.

This matter was originally filed as an Administrative Variance, with a closing date of March 9, 2009. On February 26, 2009 an adjacent property owner, Thomas A. Wilder of 11911 Manor Road, filed a Formal Demand for Hearing. The hearing was subsequently scheduled for Wednesday, April 1, 2009 at 9:00 AM in Room 104 of the Jefferson Building located at 105 West Chesapeake Avenue in Towson, Maryland. In addition, a sign was posted at the property on March 16, 2009, and an advertisement published in *The Jeffersonian* newspaper, giving neighbors and interested citizens notice of the hearing.

Appearing at the public hearing in support of the requested relief was Petitioner Kirk Kness and his wife Tammy Kness, and Austin B. Childs with Chickenranch Design Studio, the architect who prepared the site plan and assisted Petitioner in filing for the instant variance relief.

Appearing in opposition to the variance request was Thomas A. Wilder of 11911 Manor Road and Christopher R. Eberle of 11835 Manor Road. There were no other interested citizens in attendance at the hearing, although there were a number of letters contained in the case file in opposition to the requested relief, which will be discussed later in this Order.

As a preliminary matter, Mr. Childs noted that the site plan dated December 29, 2008 filed with the Petition for Variance showed a side yard setback on the left side of the property (which is the area of the instant variance request) of 37 feet. From this measurement, Mr. Childs calculated the variance relief -- based on the size of their proposed improvements -- as 26 feet for the proposed addition, in lieu of the required 50 feet, and 23 feet for the proposed open deck, in lieu of the required 37.5 feet; however, during this early stage of the hearing, Mr. Childs indicated he had made an error in calculating the existing side yard setback distance. Instead of 37 feet, Mr. Childs indicated the actual distance is 50 feet as was required by the Zoning Regulations when the home was originally built. Mr. Childs then submitted a revised site plan dated March 23, 2009 which -- when utilizing the actual side yard setback distance of 50 feet -- greatly reduces the variance relief needed. As such, Petitioner and Mr. Childs sought to amend the Petition for Variance in order to request a side yard setback of 45 feet for the proposed addition, in lieu of the required 50 feet. Moreover, Petitioner requested to withdraw the variance request for the proposed open deck because the side yard setback will be 40 feet, thereby exceeding the 37.5 feet that is required. Because the amended Petition for Variance requests less relief than what was filed with the original Petition and does not change the nature of the relief requested, the undersigned permitted the amendment and allowed the hearing to proceed. The revised site plan was marked and accepted into evidence as Petitioner's Exhibit 1.

Testimony and evidence offered revealed that the subject property is rectangular in shape and contains approximately 1.48 acres, more or less, zoned R.C.5. The property is located on a

private cul-de-sac on the east side of Manor Road, between Echo Valley Road to the north and Bridle Valley Road to the south and opposite of Morgan Mill Road to the west, in the Glen Arm area of Baltimore County. The property is known as Lot 4 of the "Alice M. Smith Property" that was subdivided and recorded in 1996 as shown on the Final Development Plan that was marked and accepted into evidence as Petitioner's Exhibit 2.

Petitioner and his wife have lived at the subject location since the home was built in 1997. The home is a two-story structure with a two car side loading garage located on the west side of the home. According to tax records the home is approximately 3,600 square feet. Photographs of the home and the property were marked and accepted into evidence as Petitioner's Exhibits 4A through 4E. The photographs show a driveway leading from the private cul-de-sac to an attractive home situated at an angle on the property. It also appears that the property slopes downward from the front to the back giving the home a "walkout" basement. The site plan also shows the existing septic area located in the southwest area of the property. At this juncture, Petitioner and his wife desire to construct a 16 foot by 16 foot addition to their home as depicted on the site plan, off the southwest corner of the home. The existing side entrance to the property (next to the two car garage) leads to a rather small mudroom. Petitioner desires the addition to serve as a larger mudroom and all-purpose room for his wife and children. In addition, Petitioner proposes an open deck that would wrap around the addition to the back of the home and meet up with an existing sunroom.

In support of the requested variance, Petitioner's architect, Mr. Childs, indicated that, although there would be sufficient space on the other side of the home due to the existing 70 foot side yard distance, the proposed location is the best location based on the current layout of the home. The driveway entrance, garage and laundry areas are located on the same side as the proposed addition. Petitioner and his family come and go from the home predominantly from this

side; hence, functionally, it is the best option as far as location. In addition, architecturally, the location of the addition depicted on the site plan is the best location. The addition would provide balance to the overall look of the home and the open deck that is proposed to wrap around the back of the home would meet up with the sunroom and existing deck that wraps around the other side of the home.

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. Comments were received from the Office of Planning dated March 9, 2009 which indicates they do not object to Petitioner's request provided a landscape buffer is planted along the western side of the property to provide screening for the adjacent neighbor at 11835 Manor Road.

Testifying in opposition to the requested relief was Christopher Eberle of 11831 Manor Road, the next door neighbor to the immediate west of the subject property. Mr. Eberle is the neighbor most affected by Petitioner's plans given his proximity to Petitioner's property. Although Mr. Eberle acknowledged that the amended variance request is much less than what was originally proposed, he maintains his opposition to the requested relief. He submitted a well prepared, comprehensive booklet that was marked and accepted into evidence as Protestant's Exhibit 1, which included his written arguments in support of his opposition and the relevant provisions of the "Declaration of Covenants and Restrictions" governing the Smith property, as well as maps, drawings, and photographs.

Essentially, Mr. Eberle believes that granting Petitioner's variance request would set a bad precedent for the neighborhood. He believes the original development of the Smith property configured the lots and building envelopes in such a manner as to provide each property owner with sufficient space and privacy between their homes. Granting Petitioner's variance request would unnecessarily disturb this balance of space and distance. He also believes that Petitioners

have alternatives to their preferred design of the addition and decking, in terms of size and exact location, which would eliminate the need for variance relief. In his view, the addition could be “thinner” and “longer” such as 12 feet wide by 18-20 feet deep (rather than the requested 16 feet by 16 feet).

At Mr. Eberle’s urging, a number of nearby neighbors also expressed their opposition to Petitioner’s variance request. Mr. Eberle provided neighbors with a form letter opposing the relief and space at the bottom for their signatures, as well as a self-addressed, stamped envelope. These letters were signed and mailed by Vicky Georgetti of 11833 Manor Road, Koon and Judy Wong of 11831 Manor Road, and Kent and Sheila Underwood of 11839 Manor Road, and were marked and accepted into evidence as Protestants’ Exhibits 2A through 2C, respectively. Mr. Wilder of 11911 Manor Road and Mr. Eberle also mailed separate letters in opposition that were marked and accepted into evidence as Protestants’ Exhibits 2D and 2E, respectively. Finally, a letter of concern was mailed by Peter J. Smith of 11905 Manor Road. This letter, which was marked and accepted into evidence as Protestants’ Exhibit 2F, does not support or oppose the requested relief, but requests an equitable solution to the issue.

Following the hearing, and in part due to the granting of the amendment to the variance petition, the undersigned permitted the record of this case to be kept open for approximately one week to allow neighbors and interested persons the opportunity to consider the effects, if any, of the amended petition on their respective positions in this matter. The undersigned received additional letters from Mr. Wilder and Mr. Eberle, reiterating their opposition to the requested relief. To paraphrase their position, in addition to their aforementioned testimony, they contend that Petitioner has not met his burden of proof under Section 307.1 of the B.C.Z.R. in establishing that special circumstances or conditions exist that are peculiar to the land or structure that is the subject of the variance request, nor have Petitioners proven that strict compliance with the Zoning

Regulations would result in practical difficulty or unreasonable hardship. Mr. and Mrs. Underwood also submitted a letter reiterating their position that altering the setback would be detrimental to the neighborhood. Mr. Smith submitted an email indicating he felt the amended variance request was reasonable and that there would still be adequate space between neighbors; however, he also expressed concern over Mr. Eberle's disapproval, since he would be the neighbor most affected by the variance. Finally, Mr. and Mrs. Kness submitted an email reiterating their desire to be granted the amended variance. They pointed to the fact that the proposed addition would only encroach into the 50 foot setback by 5 feet; that the placement of their home on the lot at an angle necessitates the variance relief; and that they wish to alter the entrance into their home and move it from right next to the garage, to an area further away from the garage for child and guest safety reasons.

This case presents an interesting and compelling example of the dichotomy between fact and law, and the inherent difficulty of deciding these types of cases, especially between opposing neighbors. On the one hand, the facts of the case are very straightforward and the competing parties have articulated their positions very clearly. On the other hand, the law as it pertains to variances is also very straightforward and clear. With such a backdrop, one would think this is a very easy matter to decide; but nothing could be farther from the case.

As originally filed, Petitioner was seeking substantial variance relief from the side yard setback requirement; to wit, Petitioner sought a side yard setback of 26 feet in lieu of the required 50 feet -- almost half of the required setback. This was a significant request and likely would have affected the adjacent property owner, Mr. Eberle, and would have disrupted the balance in this small neighborhood with fairly large homes and lots. However, as it turns out, due to a miscalculation, Petitioner was actually in need of a side yard setback of 45 feet -- only 5 feet less than what is required by the Zoning Regulations. Perhaps if this had been Petitioner's initial

request as filed, the head of steam that gathered in opposition to the request would not have been as great. Nonetheless, the case garnered almost universal opposition from the homes located nearby in this private cul-de-sac.

As a result of this sustained opposition, it was incumbent upon Petitioner in presenting its case to meet the burden of proof necessary for variance relief. Such proof could have effectively muted Protestants' opposition. There is no disputing that Petitioner has valid reasons for wanting to build the addition depicted on the site plan, such as providing a better and safer everyday entrance area for his family and guests. What is in dispute is whether Petitioner has fulfilled the requirements of the B.C.Z.R. governing variance requests, and the applicable case law interpreting the regulations. Unfortunately in this case, Petitioner has not met his burden of proof.

In considering a request for variance, I must do so in accordance with the mandate of *Cromwell v. Ward*, 102 Md.App. 691 (1995) and Section 307.1 of the B.C.Z.R. The Court of Special Appeals of Maryland interpreted the regulation to require that a two-prong test be met in order for variance relief to be granted. First, it must be shown that there exists a peculiar characteristic or unusual circumstances relating only and uniquely to that property and that this uniqueness drives the need for variance relief. Secondly, upon the determination that the property meets this "uniqueness" threshold, only then can it be considered as to whether compliance with the regulation would cause a practical difficulty or undue hardship upon Petitioner and be unnecessarily burdensome. It is also important to remember that self-inflicted hardship generally will not be recognized as the basis for the second prong -- that is, Petitioner cannot be the creator of his own misfortune that necessitates the need for variance.

In the instant matter, other than the placement of the home on the property at an angle, there is insufficient evidence to find unusual conditions or characteristics that are unique to this lot. In fact, several of the lot sizes and angled placement of homes in this neighborhood are

similar. As such, Petitioner is unable to meet the uniqueness requirement. Moreover, even if I did find that Petitioner had overcome this threshold, there would still be the issue of practical difficulty or unreasonable hardship. In this case, the design and size of Petitioner's addition and open deck are what create the need for the variance. As indicated by the main Protestant, Mr. Eberle, Petitioner has several alternatives and could easily design his addition and decking to be within the 50 foot side yard setback requirement.

In conclusion, I am compelled in this case to deny Petitioner's variance request based on the facts as presented and the applicable law which I am duty-bound to follow. Unfortunately, whether the request is for 5 feet or 25 feet, the law treats the requests the same and does not account for the "degree" or "extent" of the request. I will say that it is disappointing that neighbors, especially in a small neighborhood such as this, would not have better communication and understanding amongst themselves. In the whole scheme of things, Petitioner's request for a 5 foot intrusion into the 50 foot setback is, in my view, benign and would have little if any negative effect on the neighborhood. In that sense, it is regrettable that Mr. Eberle would take such a hard line against Petitioner's request and also spur other neighbors to take the same position. One could argue it is a disproportionate response to the nature and extent of the requested relief. On the other hand, as I indicated previously, if the variance request had been filed accurately at the outset and neighbors, including Mr. Eberle, had seen from the beginning that the request was relatively minor, perhaps the opposition would not have been as prevalent. That is an issue that cannot be resolved at this juncture.

For the reasons given above, pursuant to the advertisement, posting of the property, and public hearing on this petition held and after consideration of the testimony and evidence offered by the parties, the requested variance should be denied.

THEREFORE, IT IS ORDERED, by the Deputy Zoning Commissioner for Baltimore County, this 28th day of April, 2009 that Petitioner's amended request for Variance from Section 1A04.3.B.3 (1996) of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit an addition with a side yard setback of 45 feet in lieu of the required 50 feet, and to amend the Final Development Plan of the Alice M. Smith Property, Lot 4 only, pursuant to Section 103.3 of the B.C.Z.R. be and are hereby DENIED.

IT IS FURTHER ORDERED that the Variance request to permit an open deck with a side yard setback of 23 feet in lieu of the required 37.5 feet be and is WITHDRAWN, since the amended request for an open deck with a side yard setback of 40 feet does not require variance relief.

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

SIGNED
THOMAS H. BOSTWICK
Deputy Zoning Commissioner
for Baltimore County

THB:pz