



Board of Appeals of Baltimore County

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October 28, 2016

Raymond M. Atkins, Jr., Esquire
The Parsonage
410 Delaware Avenue
Towson, Maryland 21286

Tracy and Ryne Laxton
13 Ryan Frost Way
Essex, Maryland 21221

RE: *In the Matter of: Tracy and Ryne Laxton*
Case No.: 16-165-A

Dear Messrs. Atkins and Laxton:

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,

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: Robert G. and Pamela Lavonne Kuhl
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Lionel van Dommelen, Chief of Code Enforcement/PAI
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF: * BEFORE THE
TRACY AND RYNE LAXTON * BOARD OF APPEALS
PETITIONERS FOR VARIANCE * OF
ON THE PROPERTY KNOWN AS * BALTIMORE COUNTY
13 RYAN FROST WAY * Case No. 16-165-A
15TH ELECTION DISTRICT
7TH COUNCILMANIC DISTRICT

* * * * *

OPINION

This matter comes to the Baltimore County Board of Appeals (the “Board”) as an appeal of the Administrative Law Judge’s (ALJ) Opinion and Order issued on March 23, 2016 following a hearing on Petitioner’s Request for a Variance. In particular, Petitioners requested variance relief from the Baltimore County Zoning Regulations (B.C.Z.R.) § 427.1.B.1 to permit a 6 ft. high privacy fence in the rear and side yard of the property which adjoins the front yard of an existing residence in lieu of the permitted 3.5 ft. fence. The Board of Appeals conducted a *de novo* hearing on August 3, 2016 and then publically deliberated on September 7, 2016. Petitioners appeared *pro se*. Protestants were represented by Raymond M. Atkins, Esquire.

By way of background, the subject property is approximately 6,250 square feet and is zoned DR 3.5. The property is improved with a single family dwelling which Petitioners purchased in 2014. Petitioners have a small child and wished to enclose their yard for privacy and safety. Petitioners testified they went to the County zoning and permits offices and were issued a permit for a fence 6 ft. in height in October 2015. The fence was constructed shortly thereafter, and within a month Petitioners were issued a zoning violation notice citing B.C.Z.R. § 427, which provides a height limit of 42” for any fence in the rear of a single family dwelling that adjoins the front yard of another single family dwelling.

In order to obtain a variance in this instance, Petitioner first would have to prove the uniqueness of the property and then that such uniqueness results in practical difficulty. See Cromwell v. Ward, 102 Md. App. 691, 703-722; 651 A.2d 424, 430-440 (1995). The uniqueness element requires that the subject property have an inherent characteristic not shared by other properties in the area, such as: shape, topography, sub-surface 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 710-11; 651 A.2d at 433-34, citing North v. St. Mary's County, 99 Md. App. 502, 514-15; 638 A.2d 1175 (1994). On the other hand, the uniqueness cannot be caused by improvements upon the property or a neighboring property. Id. at 710; 651 A.2d at 433-34. It is clear from the evidence presented before this Board that the Petitioners have not illustrated the necessary factors found in Cromwell. No evidence was presented which would establish the subject property as unique, and without a finding of "uniqueness", the Board does not consider the issue of "practical difficulty or hardship."

Although it is clear that grounds for variance relief do not exist in this case, the issue of whether the County is estopped from citing the Petitioners for a code violation stemming from the County's erroneous granting of the permit, still exists. It is undisputed that the Petitioners sought and were granted a permit, and in reliance upon that permit they purchased materials and constructed the fence at issue. The Petitioners and the ALJ, in his March 23, 2016 Opinion cite *Permanent Financial v. Montgomery County*, 308 Md. 239 (1986) as support of the argument that the Petitioners shall not be penalized for the County's obvious error. In *Permanent Financial*, a developer obtained a permit from the County to construct a four story commercial office building, with a fifth story "penthouse." The zoning regulation contained a height limitation of 35 feet, although it also provided that any non-inhabitable structures (i.e., a spire) may extend up to 8 feet

beyond the height limitation. The developer constructed the building 43 feet high, believing that 8 feet of that total would be attributable to a non-inhabitable space. The County initially agreed, although it later issued a violation notice alleging the building exceeded the height requirements. The Court held the County was estopped from enforcing the height limitation because the developer constructed the building in reliance upon the County's interpretation of the regulation, after receiving from the County a building permit, and in accordance with the plans approved by the County.

In light of *Marzullo v. Kahl*, 366 Md. 158, 194-99 (2001) which held that such instances where estoppel is found, there must exist some level of ambiguity in the relevant regulation at issue, the Board finds the facts in the case at bar distinguishable from the facts in *Permanent Financial*. In *Permanent Financial*, the regulation at issue was found to be ambiguous and had been interpreted in conflicting ways in the past. In the case at bar, the code requirement at issue is more clear-cut - (B.C.Z.R.) § 427.1.B.1 requires the fence at issue to be no more than 42." It can be interpreted in no other way and is not ambiguous.

Under Maryland law, variance requests are to be granted sparingly and only under exceptional circumstances. *Trinity*, 407 Md. at 79; 962 A.2d at 419 (citation omitted). Such circumstances are not supported by the evidence presented by the Petitioners. Additionally, the Board finds that in light of the holding in *Marzullo v. Kahl*, 366 Md. 158, 194-99 (2001), that the County is not estopped from code enforcement actions in this matter, whether they choose to do so, is not within the discretion of this Board.

O R D E R

THEREFORE, ON THIS 28th day of October, 2016, by the Board of Appeals of Baltimore County, it is hereby:

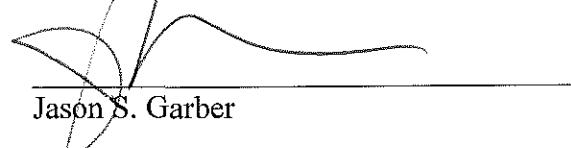
ORDERED that Petitioners requested variance relief from the Baltimore County Zoning Regulations (B.C.Z.R.) § 427.1.B.1 to permit a 6 ft. high privacy fence in the rear and side yard of the property which adjoins the front yard of an existing residence in lieu of the permitted 3.5 ft. fence is hereby **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**


Andrew Belt, Panel Chairman


Meryl W. Rosen


Jason S. Garber