

AGENDA ITEM 4  
November 26, 2002

**Enactment over Executive's disapproval**

**MEMORANDUM**

TO: County Council

FROM: *MF* Michael Faden, Senior Legislative Attorney

SUBJECT: **Enactment over Executive's disapproval:**  
Bill 16-01, *Board of Appeals – Attorney's Fees*

The Council enacted Bill 16-01 on September 24 by a 5-3 vote (Councilmembers Silverman, Praisner, and Dacek opposed and Councilmember Subin absent) and the Executive disapproved it on October 7. Under Charter §208, the Council may override the Executive's disapproval if 6 Councilmembers vote to re-enact the bill.

In the attached veto message, the Executive noted several policy objections to the bill as enacted. Most of the Executive's points are discussed in the staff memo prepared for Council consideration of this bill, which follows the veto message.

Bill 16-01



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OFFICE OF THE COUNTY EXECUTIVE  
ROCKVILLE, MARYLAND 20850

Douglas M. Duncan  
County Executive

MEMORANDUM

October 7, 2002

TO: Steven A. Silverman, President  
Montgomery County Council

FROM: Douglas M. Duncan, County Executive

SUBJECT: Bill 16-01, *Board of Appeals – Attorney's Fees*

You have delivered Bill 16-01 to me for approval or disapproval under Section 208 of the County Charter. I have decided to disapprove the Bill.

This Bill requires the County to reimburse certain prevailing parties in appeals from decisions of the Board of Appeals involving the grant or denial of a variance. A condition to reimbursement is certification by the County Attorney that (1) the Circuit Court or other appellate court reversed the Board's decision without remanding the case to the Board, (2) the party seeking reimbursement clearly prevailed on an important unsettled issue of law with implications beyond the interests of the immediate parties, and (3) the expenses for which reimbursement are sought are limited to court costs actually incurred and reasonable attorney's fees for pursuing the appeal. Reimbursements may not exceed \$25,000 and are available retroactive to court decisions on or after January 1, 1999.

Although in some instances litigants should be reimbursed for the costs of litigation, the Office of the County Attorney has advised me that it is unaware of any other American jurisdiction that has determined that it is in the public interest to expend taxpayer funds to reimburse a litigant who successfully appeals a decision of a judge, administrative law judge or quasi-judicial board, as Bill 16-01 seeks to do. Moreover, reimbursement may be appropriate when a litigant incurs expenses appealing a decision of an administrative tribunal that has wrongly decided a matter of *settled* law; Bill 16-01, however, provides reimbursement when a litigant prevails on an important *unsettled* area of law. The public should not undergo the expense of an appeal if a decision of an administrative tribunal on an *unsettled* matter is reversed by a court.

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Steven A. Silverman, President

October 7, 2002

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In addition, reimbursement under the Bill for attorney's fees is not limited to cases of *reported* appellate decisions. As you know, Circuit Court decisions and unreported appellate decisions are not precedent. The Bill is therefore internally inconsistent in that it contemplates an award for attorney's fees in unreported decisions while at the same time requiring as a condition of reimbursement certification by the County Attorney that the litigant prevailed in a matter with implications beyond the interest of the immediate parties.

Lastly, it is important to note that the Board of Appeals is generally not a party in the appellate process, and that when its decisions are appealed the County, through the County Attorney's Office, moves to intervene when important issues of law with implications beyond the interest of the immediate parties are at stake. Given this policy, Bill 16-01 proposes that the public pay for two sets of attorneys – who may even take opposite positions in a matter – in the same case.

DMD:jp

**MEMORANDUM**

TO: County Council

FROM: *MF* Michael Faden, Senior Legislative Attorney

SUBJECT: **Action:** Bill 16-01, *Board of Appeals - Attorney's Fees*

**Planning, Housing, and Economic Development Committee recommendation (2-1, Councilmember Denis dissenting): do not enact.**

Councilmembers Denis and Leggett and Council President Ewing introduced Bill 16-01, *Board of Appeals - Attorney's Fees* on April 24, 2001. A public hearing was held on June 12, 2001 (see testimony, ©4-7). The Planning, Housing, and Economic Development Committee held worksessions on June 18, 2001, and January 31, 2002. At the latter the Committee voted, with Councilmember Denis dissenting, to recommend that the bill not be enacted. The Committee also approved amendments which should be incorporated if the bill is enacted (see Bill 16-01 with Committee amendments, ©1-2).

Bill 16-01 would require the County to reimburse certain prevailing parties in appeals from decisions of the Board of Appeals involving the grant or denial of a variance<sup>1</sup> when an appellate court reverses the Board of Appeals and the County Attorney certifies that "the party clearly prevailed on an important unsettled issue of law with implications beyond the interests of the immediate parties".

**Issues/Committee amendments**

1) **Fee Shifting** The traditional policy throughout the American legal system is that each party must pay his/her own legal fees and court costs. That burden is shifted to a losing party only when a law expressly authorizes a court to award attorney's fees, most often in civil rights actions. This bill, precedent-setting in this County and probably the state<sup>2</sup>, not only shifts the

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<sup>1</sup>The bill does not apply to an appeal from the grant or denial of a special exception, or any other action the Board of Appeals takes. The Committee majority questioned whether parties to other kinds of cases are likely to seek similar relief if this bill is enacted.

<sup>2</sup>At the hearing Councilmember Silverman asked whether any other County law allows the award of attorney's fees. The only such provisions staff could find are in the County human rights law, §§27-7(h), 27-8(a)(1)(A), 27-9(a),(c),

burden of paying fees, but *assigns that burden to a non-party*, the County government (as a stand-in for the body that originally heard the case, the County Board of Appeals).<sup>3</sup>

The central issue this bill raises is whether the County should, in effect, assume financial responsibility for errors committed by an independent quasi-judicial board. While the citizens who considered themselves forced to take two appeals to vindicate their view of the law (and defend their property interests) certainly feel that they were unjustly made to bear these expenses, the longtime (if a bit callous) answer is that this is the cost of protecting one's rights in a litigious society, a cost that everyone who participates in the civil justice system bears.<sup>4</sup> This bill, within a very narrow scope, would reverse the traditional burden in a way that appeals to these citizens' sense of justice, but in so doing would set a broader – and in the Committee's as well as Council staff's mind, an inadvisable -- precedent.

At the first Committee worksession, then-Committee Chair Berlage questioned whether the Council should explore an alternative approach, such as a land use litigation assistance fund, to help citizens pursue important cases. To some extent this would overlap the functions of the People's Counsel.<sup>5</sup> In this concept, the fund would offer grants, which could be given retroactively, rather than an entitlement.

**Committee recommendation: do not accept the fee-shifting principle; thus do not enact the bill.**

2) **Clarity of standard** At the hearing then-Committee Chair Berlage asked whether the bill's primary standard for awarding costs -- whether "the party clearly prevailed on an important unsettled issue of law with implications beyond the interests of the immediate parties" -- is too subjective, especially when the County Attorney is assigned the duty to decide whether that standard has been met. He preferred a less discretionary, brighter-line test that would not require the County Attorney to subjectively interpret this law. He also questioned whether the standard should consider the relative financial resources of the parties in each case.

Staff noted that the County Attorney would make this decision *after* a court has defined the issues in an appeal and produced its opinion. We do consider this standard workable because lawyers can objectively discuss whether an issue of law is (a) important, (b) unsettled, and (c) has wider implications, perhaps more easily than they can agree about whether the case was correctly decided. County Attorney Division Chief Marc Hansen assured the Committee that in

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and in the merit system law (Code §33-15(c)), which requires the County to pay the employee's legal expenses when the County appeals a decision of the Merit System Protection Board. State laws allow awards of attorney's fees in many types of actions, ranging from consumer credit to workers' compensation. See Ann. Code of MD, 2001 Index, Attorney's Fees, pp. 150-151. However, these fees are normally paid by the losing *party* in the case, not the court or administrative agency that heard it.

<sup>3</sup>In the case that inspired this bill, the active parties were two groups of private citizens/property owners. *The Board of Appeals was not a party* despite incorrectly being listed as a defendant in the first appeal, and the County government was a nominal, nonparticipating intervenor only in the first appeal. See Circuit Court decision, ©11-19.

<sup>4</sup>It may or may not be relevant that the ultimately successful appellants in this case were respondents at the Board of Appeals – that is, they did not initiate legal action, but chose to oppose a petition for a variance knowing that in so doing they could incur an unpredictable level of legal expenses.

<sup>5</sup>It may be relevant that no similar fee request issue has arisen since the People's Counsel was created.

his view this standard could be fairly applied. As Councilmember Berlage noted, any appeal from the County Attorney's decision would be reviewed under an "abuse of discretion" standard. **Committee recommendation: do not amend the standard for awarding costs.**

3) **County as party** The County Attorney's office suggested (see memo, ©8-9) that the bill preclude the award of attorney's fees when the County intervenes in a case. Their rationale was that the County should not pay the expenses of more than one party in a case. This, of course, happens frequently under current law (e.g. criminal cases with a public defender, civil rights cases against public agencies). **Committee recommendation: do not exclude cases where the County is a party.**

4) **Court of record** The County Attorney's memo also noted that the bill would cover decisions of the Circuit Court, which is not a court of record, and unreported decisions of the Court of Special Appeals. They recommended that fees be awarded only when an appellate court issues a published opinion. **Committee recommendation: do not limit awards to cases with published opinions.** Non-precedential cases can decide legal issues that are quite important for the public (e.g. the Circuit Court's BELT and TDR opinions in the mid-1980's).

5) **Limit on award** At the hearing Michael Fischetti, speaking for the appellants in the case that led to this bill, said they would support an upper limit on reimbursements if Councilmembers are concerned about potential fiscal impacts. Because fee awards of this kind are a new concept with unpredictable results, the Committee agreed that a reasonable limit would be prudent. **Committee recommendation: limit each award under this law to a maximum of \$25,000.** The County Attorney would still have to find that the attorney's fee claimed is reasonable and the court costs were actually incurred (see ©2, line 11).

6) **Retroactivity** The applicability section of the bill (see ©2, lines 14-16) would allow payment of fees in a case which a court decided at any time on or after January 1, 1999. This would cover the case involving Mr. Fischetti and his neighbors. Normally County laws are effective prospectively. Councilmember Denis stressed that he would not expect any similar cases to appear, since they have not to date. OMB notes that 2 cases of this type were reversed by the Circuit Court since 1999 (see ©10). As Councilmember Silverman pointed out at the worksession, when the parties appealed this case they knew the law did not entitle them to have their attorney's fees reimbursed. **Committee recommendation (2-1, Councilmember Silverman dissenting): retain the retroactive applicability.**

7) **Source of funds** The County Attorney questioned the source of funds to pay any award under this bill. Council staff noted that the award would be treated like any court-ordered judgment -- that is, paid through the Self-Insurance Fund -- and, in any case, this kind of question can be resolved administratively or through the budget process. **Committee recommendation: do not add any language regarding source of funds.**

8) **Availability of funds** Mr. Hansen suggested that awards be made "subject to the availability of funds". **Committee recommendation: fee awards are subject to appropriation.**

9) **Sunset** Councilmember Denis, lead sponsor of the bill, suggested that it could be treated as a trial provision and, for example, expire after 2 years. **The Committee did not adopt any sunset provision.**

This packet contains:	<u>Circle #</u>
Bill 16-01 with Committee amendments	1
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Memo from County Attorney	8
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Bill No. 16-01  
Concerning: Board of Appeals -  
Attorney's Fees  
Revised: 9-20-02 Draft No. 2  
Introduced: April 24, 2001  
Expires: October 24, 2002  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: None  
Ch. \_\_\_\_\_, Laws of Mont. Co. \_\_\_\_\_

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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By: Councilmembers Denis and Leggett and Council President Ewing

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**AN ACT** to:

- (1) require the County to reimburse certain prevailing parties in appeals from decisions of the Board of Appeals involving the grant or denial of a variance; and
- (2) generally amend the law regarding the reimbursement of attorney's fees to parties in cases before the Board of Appeals.

By adding

Montgomery County Code  
Chapter 2, Administration  
Section 2-114A

<b>Boldface</b>	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

*The County Council for Montgomery County, Maryland approves the following Act:*

**Sec. 1. Chapter 2 is amended by adding Section 2-114A:**

**2-114A. Attorney's Fees.**

The Director of Finance must reimburse the prevailing party in an appeal from a decision of the Board of Appeals granting or denying a variance for the expense of pursuing that appeal if the County Attorney certifies that:

- (a) the Circuit Court or other appellate court reversed the Board's decision without remanding the case to the Board;
- (b) the party clearly prevailed on an important unsettled issue of law with implications beyond the interests of the immediate parties; and
- (c) the expenses for which reimbursement is sought are limited to court costs actually incurred and a reasonable attorney's fee for pursuing the appeal, and do not include the expense of any proceeding before the Board and any previous appeal.

Any reimbursement under this Section is subject to appropriation and must not exceed \$25,000 for each case.

**Sec. 2. Applicability.** Section 2-114A of the County Code, added by Section 1 of this Act, applies to any appeal from the Board of Appeals which a court decided on or after January 1, 1999.

*Approved:*

\_\_\_\_\_  
Steven A. Silverman, President, County Council Date

*Approved:*

\_\_\_\_\_  
Douglas M. Duncan, County Executive Date

*This is a correct copy of Council action.*

\_\_\_\_\_  
Mary A. Edgar, CMC, Clerk of the Council Date

## LEGISLATIVE REQUEST REPORT

Bill 16-01

### *Board of Appeals - Attorney's Fees*

**DESCRIPTION:** Directs the County to reimburse certain court costs and reasonable attorney's fees to prevailing parties in certain appeals of decisions on variances by the County Board of Appeals.

**PROBLEM:** Parties to appeals from decisions of the Board of Appeals may win their appeals on the legal merits but expend substantial funds in pursuing the appeal.

**GOALS AND OBJECTIVES:** To make the County responsible for costs incurred by parties who successfully appeal certain decisions of the Board of Appeals.

**COORDINATION:** County Attorney, Finance Department

**FISCAL IMPACT:** To be requested.

**ECONOMIC IMPACT:** To be requested.

**EVALUATION:** To be requested.

**EXPERIENCE ELSEWHERE:** To be researched.

**SOURCE OF INFORMATION:** Michael Faden, Senior Legislative Attorney, 240-777-7905

**APPLICATION WITHIN MUNICIPALITIES:** Applies only to decisions of County Board of Appeals.

**PENALTIES:** Not applicable

Testimony of Michael Fischetti  
Before  
The Montgomery County Council  
June 12, 2001 Hearing on Legislation 16-01

I want to thank Council Member Denis, Council President Ewing, and Council Member Liggett for co-sponsoring this legislation. My neighbors and I appeared before the Board of Appeals to oppose a zoning variance that clearly did not meet the standards established by the County Zoning Ordinance. Our new neighbors, the petitioners, already had a two car carport and were petitioning for a 21 foot variance out of a 25 foot setback. They wanted to build a two car garage in their front yard, when there were two other areas on the property where they could have built the garage with a minimal variance or no variance at all.

The Board approved the variance and we requested reconsideration which was denied. Our only recourse was to hire an attorney and appeal to the Circuit Court. The Circuit Court found deficiencies with the Board's decision, reversed the decision and remanded it back to the Board for action. The Board held another hearing and proceeded to reaffirm its initial decision so he had to go back to Circuit Court for the second time. This time, a second judge, simply reversed the Board's decision. In the process, we spent over \$ 17,000 in legal fees. Although the proposed legislation before you would enable us to recover only a fraction of the total costs, we believe that the legislation would establish sound public policy objectives.

These would be as follows:

1. To better enable citizens to participate in the zoning variance process
2. To better resolve unsettled variances issues
3. To assist citizens and the County in the clarification of difficult legal issues

Given the fact that reversals are uncommon, we believe that the legislation will have minimal fiscal impact, but if Council Members believe that passage of this legislation might have a severe fiscal impact, we would support an upper limit on reimbursements.

Thank you for this opportunity to testify today, and I urge you to support the proposed legislation.

Michael Fischetti  
10624 Great Arbor Drive  
Potomac, MD 20854  
(301) 299-8560

Statement in Support of Bill 16-01

Board of Appeals – Attorney’s Fees

By Algis A. Lukas

June 12, 2001.

I am here to support Bill 16-01 that would enable the County to reimburse county citizens their legal costs when they prevail in an appeal of a Board of Appeals decision that ultimately benefits the whole county.

I was a party to such legal action when my neighbors and I pursued an appeal of the Board of Appeals decision to grant a 21 ft variance from a 25 ft, front yard setback. The decision of the Board, based on unclear logic, would have permitted construction of a two-car garage in a front yard of a community with uniform 25 ft. set back of all houses, carports and garages.

Our appeal and ultimate reversal of the Board of Appeals decision benefited the rest of our community by avoiding a precedent, which would have made it easier for others to file for similar variances.

All Montgomery County benefited by our actions because the Board of Appeals chose to loosely interpret the meaning of hardship and minimal impact in applications for variance. If the findings of this case would have remained as a precedent, that hardship includes sheltering of expensive cars and that minimal impact means that leaving a 4 ft.

June 12, 2001

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green space of a 25 ft. front yard as sufficient for single home communities, all other Montgomery County communities would have suffered.

Unfortunately a County board on which we relied to correctly interpret the zoning laws and to protect the integrity of our community, failed to do so. There is no other review or recourse to the decisions of the Board of Appeals than to the Circuit Court. We, the citizens, were left to finance an appeal, to correct a flawed decision by a County Board. Our appeal resulted in a reversal of the Board of Appeals decision.

Our community and the County benefited by our pursuit and eventual reversal of this Board of Appeals decision. Unfortunately we bore the costs of these appeals. Bill 16-01 would permit us to recoup a part of our expenses: the cost of appeal to the Circuit Court during which the reversal was obtained. The bill would not reimburse us for all the other legal and out of pocket costs or the lost hours from work that we expended on this case.

The Board of Appeals is composed of citizens appointed by the County Council. There is no oversight of the actions of the Board other than an appeal to the Circuit Court.

Currently ordinary citizens are burdened with the costs of this oversight process that ultimately benefits the whole county. We ask your concurrence that the County should share some of this cost.

Statement in Support of Bill 16-01  
By Algis A. Lukas

June 12, 2001

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I want to thank Councilmen Denis, Ewing and Leggett for sponsoring this bill. I ask for the support of the other members of the Council for the passage for Bill 16-01.

Algis A. Lukas  
10622 Great Arbor Drive  
Potomac, Maryland 20854

301 983-0763

(7)



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan  
County Executive

Charles W. Thompson, Jr.  
County Attorney

MEMORANDUM

TO: Deborah Snead  
Assistant Chief Administrative Officer

FROM: Charles W. Thompson, Jr.  
County Attorney 

FROM: Marc P. Hansen, Chief   
Division of General Counsel

DATE: May 16, 2001

SUBJECT: Bill 16-01, Board of Appeals – Attorney's Fees

At your request, I have reviewed Bill 16-01, Board of Appeals – Attorney's Fees. This legislation requires the Director of Finance to reimburse the legal expenses of the prevailing party in an appeal from a decision of the Board of Appeals granting or denying a variance. The County Attorney must certify that the Court reversed the Board's decision; the legal expenses are reasonable; and the party prevailed on an "important unsettled issue of law with implications beyond the interest of the immediate parties."

There are three issues of concern; they are, in descending order of importance:

1. Since September 1999, the County Attorney's Office has implemented (with the approval of the Council) a policy of analyzing whether the County should intervene in legal actions challenging a decision of the Board of Appeals, including decisions granting or denying a variance. After consulting with the Board, the Planning Board's legal counsel, and the Council, the County Attorney's Office decides if the County should intervene in the legal action based on the following factors:
  - a. Whether the appeal challenges a County interpretation, or the validity of, a provision of the zoning ordinance;
  - b. Whether an issue exists regarding a matter of significant concern to the County;

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Deborah Snead  
Re: Bill 16-01, Board of Appeals – Attorney's Fees  
May 17, 2001  
Page 2

- c. Whether the case has become "high profile" so that the public perception of the effectiveness of County government may be at issue;
- d. Whether the case involves a matter of public interest rather than private interest; and
- e. Whether a resolution of the dispute will have a significant impact on the operations or authority of the County.

This policy does not require the County to support the decision of the Board. Accordingly, the County might intervene on the side of the party challenging the decision of the Board.

Under Bill 16-01 a prevailing party would only be entitled to reimbursement of legal expenses in those cases in which the County is most likely to participate as an intervener/party. The question is whether the public ought to finance both the County Attorney's Office participation in these cases and the participation of the appealing party. Accordingly, consideration should be given to amending Bill 16-01 to provide that the prevailing party would only be entitled to attorney's fees if the County is not a party to the case.

- 2. Bill 16-01 provides that the appealing party would be entitled to reimbursement of expenses if the "Circuit Court or other appellate court" decides an unsettled issue of law with implications beyond the interest of the immediate parties. Circuit Court opinions and unreported opinions of the Court of Special Appeals are not generally available to the public nor do they have binding precedential value. Accordingly, Bill 16-01 should be amended to provide for reimbursement of legal expenses only in a situation where an appellate court issues a published opinion.
- 3. It is unclear where the Director of Finance will obtain the funds to make reimbursement. Will the Director of Finance need to create a fund that will be appropriated each year in the annual budget? Seek a supplemental appropriation to pay the legal expenses certified by the County Attorney? Pay the fees directly from the unappropriated General Fund Reserve? Consideration should be given to an amendment clarifying this issue.

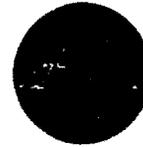
Tim Firestine, Director, Department of Finance  
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OFFICE OF MANAGEMENT AND BUDGET

Douglas M. Duncan  
County Executive

Robert K. Kendal  
Director

MEMORANDUM

June 11, 2001

TO: Blair G. Ewing, Council President  
Montgomery County Council

VIA: Bruce Romer  
Chief Administrative Officer

FROM: Robert K. Kendal, Director  
Office of Management and Budget

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SUBJECT: Council Bill 16-01, Board of Appeals – Attorney’s Fees

The purpose of this memorandum is to transmit a fiscal impact statement to the Council on the aforementioned proposed legislation.

LEGISLATION SUMMARY

Council Bill 16-01 requires the County to reimburse certain prevailing parties in appeals from Board of Appeals decisions involving the grant or denial of a variance under three specific conditions:

- a. the Circuit Court or other appellate Court reversed the Board’s decision without remanding the case to the Board;
- b. the party clearly prevailed in an important unsettled issue of law with implications beyond the interests of the immediate parties; and
- c. the expenses for which reimbursement is sought are limited to court costs actually incurred and a reasonable attorney’s fee for pursuing the appeal, and do not include the expense of any proceeding before the Board and any previous appeal.

FISCAL SUMMARY

The estimated fiscal impact is currently unknown, but thought to be minimal as letter “b” above must also apply. Two of the 19 Board of Appeals variance cases reviewed by the Circuit Court since September 1999, have been reversed without remanding back to the Board. In FY00, 528 cases were filed with the Board. Of these cases, 176 were variances, and two were reversed absent remand.

The following contributed to and concurred with this analysis: Bryan Hunt, OMB; Katherine Freeman, and Donald H. Spence, Board of Appeals.

RKK:bh

cc: K. Freeman, BOA

Office of the Director

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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

In Re: Petition of :  
Michael Fischetti, et al. :  
For Judicial Review of : Civil No. 199549  
the Decision of the :  
Board of Appeals for :  
Montgomery County :

In the Case of  
Petition of Alex Rosenbaum  
Case No. A-4842

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BY: \_\_\_\_\_

OPINION AND ORDER

This is an administrative appeal on the record from a decision of the Board of Appeals for Montgomery County, Maryland ("Board").

Introduction

In January 1997, Alex Rosenbaum ("Respondent") and his wife purchased a home located at 10623 Great Arbor Drive, in the Red Coat Woods subdivision in Potomac, Montgomery County, Maryland. On October 16, 1997, Respondent filed a Petition for Variance, seeking a 21-foot variance to the 25 foot front lot line set-back to accommodate the construction of a garage. On March 12, 1998, the Board of Appeals granted the requested variance. Petitioners, a group of several neighbors, appealed to the Circuit Court in Case No. V184286.

By Orders dated November 25, 1998 and January 28, 1999, the Honorable Durke G. Thompson remanded the matter to the Board of Appeals for further findings with respect to two specific issues: (1) whether the practical difficulties necessitating the variance were self-created and (2) whether the variance granted was the minimum reasonably necessary.

On April 13, 1999, the Board of Appeals found that the Respondent's practical difficulties were not self-created and that the variance was the minimum reasonably necessary. Accordingly, it again granted the requested variance. Petitioners filed this appeal seeking judicial review of this decision.

The parties presented oral argument on October 13, 1999 after which the Court took the matter under advisement. Upon the consideration of the entire record and for the reasons presented below, the decision of the Board of Appeals is reversed.

#### **Scope of Review**

The Administrative Procedure Act governs the scope of review for administrative appeals. Md. Code Ann. State Gov't §10-222 (1999). Generally, a decision of an administrative agency, including a local zoning board, is owed no deference when its conclusions are based on an error of law. Catonsville Nursing Home, Inc. v. Loveman, 349 Md. 560, 569 (1998). In judicial review of zoning matters, including special exceptions and variances, the correct test to be applied is whether the issue before the administrative body is fairly debatable--that is, whether the determination is based upon evidence from which reasonable persons could come to different conclusions. White v. North, 356 Md. 31, 44 (September 14, 1999) (citations omitted). For the conclusion to be fairly debatable, the administrative agency overseeing the variance decision must have substantial evidence on the record supporting its decision. Id. (citations omitted).

## Discussion

Section 59-G-3.1 of the Montgomery County Zoning Ordinance sets forth the criteria that must be met before an area variance may be granted:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations particular to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;
- (b) Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;
- (c) Such variance can be granted without substantial impairment to the intent, purpose, and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property; and
- (d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties.

On April 13, 1999, the Board of Appeals granted Respondent a 21-foot variance from the 25-foot front setback line. Petitioners challenge the Board of Appeals' determination that (a) and (b) of §59-G-3.1 were satisfied.

**I. Did the Board of Appeals err in finding that the strict application of the set-back regulation would result in peculiar or unusual practical difficulties to the Rosenbaums' property and that these practical difficulties were created by reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations particular to the Rosenbaums' property?**

Subsection (a) of §59-G-3.1 breaks down into three requirements. First, the property must have physical characteristics different from the neighboring properties. Second, the strict application of the zoning ordinance must result in peculiar or unusual practical difficulties. Third, the practical difficulties must be caused by the unique characteristics, not the actions or desires of the owner of the property.<sup>1</sup>

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<sup>1</sup> Respondent contends that the Court need not determine whether the practical difficulties are self-created because the inquiry is inapplicable in area variance cases. See McLean v. Soley, 270 Md. 208, 214-15 (1973). To the contrary, the Court in McLean merely stated that the due diligence requirement is less significant in area variance cases. See id. at 215.

**A. Did the Board of Appeals err in finding that the property had unique characteristics?**

Petitioners argue that the Rosenbaums' property is not unique because it is similar in size and topography to other properties in the neighborhood. Respondent argues that his property is unique because of the presence of a stream.

A property is unique if it has inherent characteristics not shared with other properties in the area. See North v. Saint Mary's County, 99 Md. App. 502, 514 (1994). The unique aspect of a variance requirement does not refer to the extent of improvements upon the property. Id. "Uniqueness of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area." Id.

In this case, the topographical features of Respondent's property are catalogued. The dispute boils down to whether this property is any different from the other properties in the neighborhood. The Board failed to itemize with specificity how Respondent's property differs from the neighboring lots.

Nevertheless, the finding of uniqueness is supported by substantial evidence in the record. Respondent's property is closer than other houses to the stream. See Exhibit # 21. Respondent's house is located closer to the road because of the stream. (Tr. at 48.) The slopes on the side and rear of the property render construction in these areas impractical. Although Petitioners may dispute whether these physical characteristics constitute an "extraordinary situation", the Board's conclusion on this requirement is supported by substantial evidence.

**B. Did the Board err in finding that the strict application of the front set-back requirement would result in peculiar or unusual practical difficulties for Respondent?**

Petitioners argue that Respondent needs the variance solely for reasons of convenience. Respondent argues that the variance is necessary because without it he would have to raze the carport and remodel his home in order to build the garage.

Practical difficulty can be roughly defined as a situation where the property, as a practical matter, cannot be used for a permitted use without coming in conflict with the restrictions of the setback ordinance. See 3 Rathkopf, The Law of Zoning and Planning, § 38.04 (4th ed. 1997). "The need sufficient to justify an exception<sup>2</sup> must be substantial and urgent and not merely for the convenience of the applicant." Carney v. City of Baltimore, 201 Md. 130, 137 (1952). In Carney, the applicant requested the variance from the side yard setback requirement to build a first floor bedroom to accommodate Mrs. Carney's weakened physical condition. See id. at 133. The zoning board denied the variance, and the Court affirmed this decision. See id. at 137. The Court of Appeals in McLean did not abandon this requirement; rather it recognized that public benefit should be a factor in the overall consideration of a variance request. See McLean, 270 Md. 208, 213 (1973); see also 3 Rathkopf, §38.04[3] n.37 (discussing the Court of Appeals attempt to distinguish practical difficulty from personal inconvenience in McLean).

In this case, it is not reasonable for the Board to conclude that the need for the variance is substantial and urgent, rather than merely for convenience. In their original application, in answer to a request to "describe the practical difficulty for the owner if the variance were not granted," Respondents stated, "Owner will not be able to park expensive vehicles out of the elements. Existing carport to be removed to construct an attractive front door porch entryway

and not this unattractive carport roof.” See Exhibit 1. On November 17, 1997, in their Supplement to the Petition for a variance, Respondents asserted two other reasons for the requested variance: (1) to avoid exposing their children to the elements and (2) to increase the value of their house. See Exhibit 7. While the reasons presented may be understandable and desirable, they are matters of convenience, not of substantial and urgent need.

Moreover, there is no evidence that the variance would provide a public benefit. In McLean, the applicant could have proceeded without the variance. The requested variance allowed the applicant to build his apartment building and provide a public benefit—namely, preserving a number of attractive trees. In this case, the requested variance only benefits Respondents.

Finally, it is not reasonable for the Board to conclude that strict application would be unnecessarily burdensome. Absent a variance, Respondents have a carport which accommodates two cars and the ability to remodel the carport into a garage. Adhering to the statutory criteria does not force buyers to anticipate future improvements; rather, it forces homeowners to live within the zoning regulations.

Because the Board of Appeals did not have before it substantial evidence to support finding that the need for the variance was substantial and urgent and that the strict application would be unnecessarily burdensome, the decision of the Board on this requirement is reversed.

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<sup>2</sup> In Baltimore City, both variances and exceptions are evaluated under the practical difficulties standard.

**C. Did the Board err in finding that practical difficulties were caused by unique characteristics of the property and not self-created?**

Petitioners argue that any practical difficulties result from the preference of Respondents to build a garage as an addition rather than enclosing the existing carport. Respondent argues that the stream and other unique conditions of the property are at the root of the request for a variance. Absent the unique conditions of the property, Respondents would not need a variance to build the garage elsewhere on the property.

Although the law is clear that a practical difficulty may not be self-created, what constitutes a self-created practical difficulty is not subject to a bright-line test. A practical difficulty is self-created when it arises solely out of construction in violation of an existing zoning ordinance. See, e.g., Cromwell, 102 Md. App. at 696-97 (denying request for variance after applicant built non-conforming garage); Salisbury, 240 Md. at 551 (denying request for variance after applicant had completed 85-90% of construction). However, practical difficulties are not self-created when they arise out of the unique features of a property. See, e.g., McLean, 270 Md. at 214-216 (granting variance to preserve stand of trees).

Certainly, the unwillingness of the Respondents to remodel the carport is, in one respect, a cause of their practical difficulties. If Respondents were willing to replace the carport with a garage, they would not need a variance. The question is whether zoning laws should be interpreted to require homeowners to modify their homes or existing structures to strictly comply with the zoning regulations.

The Board of Appeals interpreted the cases from the appellate courts not to impose such an onerous requirement. Although case law states that variances are to be granted sparingly, see Cromwell, 102 Md. App. at 703 (citations omitted), the appellate courts have also noted that "zoning ordinances are in derogation of the common law right to so use private

property to realize its highest utility.” White v. North, 356 Md. 31, 48 (1999). Further, the rule regarding self-created practical difficulties is more strictly applied in use variance cases. See McLean, 270 Md. at 215 (citations omitted); Board Opinion at 8.

The Board’s conclusion that the practical difficulties were caused by unique characteristics of the property and were not self-inflicted is supported by substantial evidence. Respondent may have envisioned building a garage, but it is not clear that he intended to build in the proposed location. Instead, the evidence suggests that Respondent settled on the proposed location after assessing the feasibility of other locations and determining that they were not feasible because of the unique characteristics of the property. Although this Court would have reached a different conclusion having found that the need for the variance is not substantial and urgent, the Board did not err.

**II. Did the Board of Appeals err in finding that the variance granted was the minimum reasonably necessary?**

Petitioners argue that the 21 foot (or 84%) variance is not the minimum reasonably necessary. Respondent argues that, although the variance is not the minimum variance, it is the minimum reasonably necessary variance (emphasis added).

Assuming that the Respondents suffer unusual practical difficulties by reason of the unique characteristics of their property, the determination whether the variance is the minimum reasonably necessary is a question of fact. Accordingly, this Court’s only inquiry is whether the decision is supported by substantial evidence.

Although the record includes evidence that Respondents could build the garage in other locations with a lesser or no variance, there is sufficient evidence to support the Board’s

conclusion. The Board specifically addressed and dismissed each of the alternative locations for the following reasons:

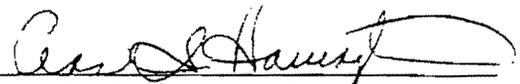
- Enclosure of the existing carport would be unreasonable because it would require significant redesign of the interior of the house. Bd. Op. at 10 (April 13, 1999).
- Construction on the south side of the property to the rear of the carport would require extensive re-grading as well as construction of a retaining wall and removal of several mature trees. Moreover, construction on this location would likely result in erosion and runoff that would negatively impact the stream. Bd. Op. at 10 (April 13, 1999).
- Construction on the north side of the house would still necessitate a variance and would require removal of several mature trees, modification of the driveway, and removal of the existing deck. These measures would radically effect the streetscape. Bd. Op. at 10 (April 13, 1999).

Based on the record of the proceedings, the Board could reasonably conclude that the 21-foot variance from the front setback line was the minimum reasonably necessary.

### Conclusion

For the reasons stated, and having concluded that the Board of Appeals made an error of law in granting the variance to Respondent when the record fails to establish that the need for the variance is substantial and urgent, it is this <sup>40</sup> 19 day of November, 1999, by the Circuit Court for Montgomery County, Maryland, hereby;

**ORDERED** that the decision of the Board of Appeals is **REVERSED**.

  
Ann S. Harrington, Judge  
Circuit Court for Montgomery County,  
Maryland