

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case No. A-6836
PETITION OF SIBTAIN KAZMI**

OPINION OF THE BOARD
(Hearing Date: November 15, 2023)
(Effective Date of Opinion: November 22, 2023)

Case No. A-6836 is an application by Petitioner Sibtain Kazmi for variance relief needed for the construction of an (existing) enclosed porch. The existing construction requires a variance of eleven (11) feet as it is within nine (9) feet of the rear lot line. The required setback is twenty (20) feet, in accordance with Section 59.4.4.8.B.2 of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on November 15, 2023. Petitioner Sibtain Kazmi participated in the proceedings in support of the requested variance. His abutting neighbors at 8242 Castanea Lane and 8238 Castanea Lane appeared in opposition to the variance request. Mariana Teran, Esquire, appeared on behalf of the local Homeowners' Association, also in opposition to the grant of the requested variance.

Decision of the Board: Variance **DENIED**.

EVIDENCE PRESENTED

1. The subject property is Block A, Lot 17, Piedmont Crossing Subdivision, located at 327 Picea View Court in Derwood, Maryland, 20855, in the R-90 Zone. It is a four-sided interior lot located on the south side of Picea View Court. The property is rectangular in shape, and is much deeper than it is wide, with a depth of 118.34 feet and a width of 50 feet. The property has an area of 5,917 square feet, which is substandard for the R-90 Zone, although the Zoning Vicinity Map indicates that the property is similar in size and shape to other properties in the neighborhood. It contains a house that was built in 2014. The property was purchased by the Petitioner in 2021. See Exhibits 3, 4 and 7, and SDAT Printout.

2. The Petitioner's Justification Statement ("Statement") states that the Petitioner is seeking a variance to allow his enclosed porch to extend into the required setback from his rear lot line. See Exhibit 3. The Petitioner's Site Plan and construction drawings show both a deck and a porch on the rear of the Petitioner's home. While the porch is described as an "open porch" or "open shed porch" on these plans, the construction documents show that the east side of the porch consists of a "privacy wall w/ siding and EZ Breeze windows." See Exhibits 4 and 5. The Statement notes that the "deck, roof, and wall" all passed inspection by the County's Department of Permitting Services ("DPS"). The Statement states that "[t]hese structures have already been built," and that it would cause the Petitioner "great hardship to demolish or leave the project unfinished without the porch." See Exhibit 3.

3. The Statement states that the abutting property at 8246 Castanea Lane has a deck which projects into the twenty (20) foot rear setback, and that granting a variance to allow the Petitioner's porch to extend into the rear setback would "make Petitioner's Lot 17A complementary with this neighbor."¹ See Exhibit 3.

4. The Statement states that granting the requested variance to permit the Petitioner to keep his enclosed porch will not be adverse to the use and enjoyment of neighboring properties. In support of this, the Statement states that the Petitioner's porch "is far from all residences and all but one of the adjoining or confronting property owners," and that the rear of the Petitioner's property is "partly abutted by an HOA-owned undeveloped plot." The Statement further states that the Petitioner's porch "will not have a detrimental effect on surrounding properties or the general neighborhood and will cause no objectionable nuisance, noise, vibrations, fumes, odors, dust, glare or physical activity," and that it "will not adversely affect the health, safety, security, morals, or general welfare of residents, visitors or workers in the area and will not cause an adverse impact on public facilities." Finally, the Statement states that granting the requested variance to allow the Petitioner's enclosed porch "will not impact any abutting properties since most homes are constructed on large lots and this home is on a portion of a road ending in a cul-de-sac." The Statement notes that the porch "will not impede property lines" and will be "mostly overlooking an undeveloped lot owned by the HOA." See Exhibit 3.

5. The Statement states that the requested variance can be granted without substantial impairment to the general plan and the applicable master plan. In support of this, the Statement states that the Petitioner's porch "will remain within existing property lines and will not challenge the integrity of the masterplan." See Exhibit 3.

¹ The Board notes that Section 59.4.1.7.B.5.a of the Zoning Ordinance permits "unenclosed" porches and decks to project nine (9) feet into the rear setback. DPS has determined that the Petitioner's porch, which projects eleven (11) feet into the rear setback, is an "enclosed" porch. See Exhibit 6. Section 59.1.4.2 of the Zoning Ordinance defines "Porch, Enclosed" as "[a] roofed structure abutting an exterior dwelling wall with any kind of vertical or horizontal obstruction at the perimeter with the exception of a column, guardrail, or pillar as required in the Building Code."

6. The Statement concludes that the “subject application meets the evidentiary requirement of demonstrating the Subject Property’s unique and unusual situation when compared to adjoining properties,” and requests that the Board grant the requested variance. See Exhibit 3.

7. At the hearing, the Petitioner testified that adding a deck to his property made his house a home. He testified that he received a building permit from the County for a deck with a wall on one side. In response to a Board question asking if he had documentation showing that the County had approved the construction, he referred the Board member to the County stamps on the construction drawings. See Exhibits 5(a)-(e). He testified that the County basically gave him permission to undertake this construction, inspected it, and then reversed its decision.

The Petitioner testified that DPS now classifies this as an enclosed porch, a characterization with which he disagrees, and he elaborated on his various interactions with staff at DPS. The Petitioner acknowledged that his deck was supposed to project nine (9) feet into the rear setback, and that it wound up projecting eleven (11) feet into that setback.

In response to a Board question asking what made his property unique for the purposes of granting a variance, the Petitioner testified that his property is not unique. He further testified that his deck is not unique because several other houses have similar decks, specifically mentioning 8246 Castenea Lane, which abuts the northern portion of the Petitioner’s left side lot line.

8. Neel Vanikar, whose property at 8238 Castanea Lane abuts the eastern portion of the subject property’s rear lot line, testified in opposition to the requested variance. Mr. Vanikar testified that the Petitioner’s deck is located in violation of the setback requirements, and that it has caused stormwater issues. Mr. Vanikar testified that he has suffered financial and physical hardships based on the actions of the Petitioner, and that he cannot sell his house because of the Petitioner’s deck. He stated that the Petitioner was warned “many times” that he was violating the setbacks, and that a permit cannot be issued to violate a County Ordinance. Mr. Vanikar testified that he filed a complaint with DPS about the Petitioner’s construction.

Mr. Vanikar testified that the variance sign was not posted until the day before the hearing, and that at that time, it was obscured by bushes. He testified that he took photographs in the weeks leading up to the hearing and on the morning of the hearing which he asserts show the Petitioner’s failure to properly post the sign. See Exhibits 9, pages 10-35, and Exhibit 10. He also took photographs showing the Petitioner’s deck/porch. See Exhibit 9, pages 1-9. Mr. Vanikar testified that the Petitioner’s porch has screens that are in fixed positions.² See Exhibit 9, page 5.

9. Ms. Teran stated that the variance request does not meet the statutory requirements for the grant of a variance. On behalf of the Homeowners’ Association,

² In response to this, the Petitioner testified that the screens are retractable and are not fixed.

she objected to the grant of the Petitioner's variance. Ms. Teran stated that the County does not believe that the Petitioner's deck/porch structure was built in accordance with the approved design.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the requested variance from the rear lot line setback must be denied. Section 59.7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board must find that:

- (1) denying the variance would result in no reasonable use of the property; or
- (2) each of the following apply:
 - a. one or more of the following unusual or extraordinary situations or conditions exist:
 - i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;
 - ii. the proposed development uses an existing legal nonconforming property or structure;
 - iii. the proposed development contains environmentally sensitive features or buffers;
 - iv. the proposed development contains a historically significant property or structure; or
 - v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;
 - b. the special circumstances or conditions are not the result of actions by the applicant;
 - c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;
 - d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and
 - e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.

Section 59.7.1.1 of the Zoning Ordinance provides that the applicant has the burden of production and has the burden of proof by a preponderance of the evidence on all questions of fact.

The Board notes that there was no attempt in this case to argue the standard in Section 59.7.3.2.E.1 of the Zoning Ordinance. For that reason, the Board must analyze the instant case under Section 59.7.3.2.E.2 of the Zoning Ordinance. Section 59.7.3.2.E.2 sets forth a five-part, conjunctive ("and") test for the grant of a variance, and thus the Board cannot grant a variance if an applicant fails to meet any of the five elements required by this Section.

Section 59.7.3.2.E.2.a one or more of the following unusual or extraordinary situations or conditions exist:

i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;

The Petitioner has not asserted that the substandard size of his property makes it unique for the purposes of satisfying this element of the variance test, and in fact, has testified that his property is not unique. The Board agrees, and so finds. In further support of this, the Board finds, based on the Zoning Vicinity Map, that the Petitioner's property is similar in size and shape to most of the properties on his street, and to the single-family properties on Castanea Lane. See Exhibit 7. In light of this, and given that the Petitioner has not asserted any other evidence of uniqueness under this element of the variance test, the Board cannot find that this element of the variance test is satisfied.

ii. the proposed development uses an existing legal nonconforming property or structure;

iii. the proposed development contains environmentally sensitive features or buffers;

iv. the proposed development contains a historically significant property or structure; or

The Petitioner has not asserted or provided any evidence to indicate that the variance request satisfies Sections 59.7.3.2.E.2.a.ii, iii, or iv of the Zoning Ordinance. Accordingly, the Board cannot find that these Sections of the Zoning Ordinance are satisfied.

v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;

The Petitioner has asserted in his Statement and in testimony that his deck is similar to the decks of several other houses, notably 8246 Castanea Lane, but he has not provided any evidence to indicate whether these decks project into the rear setbacks of their respective properties beyond the nine (9) feet allowed by the Zoning Ordinance. In addition, the Petitioner has not asserted that any of these decks are enclosed porches, or that there is a pattern of enclosed porches in his neighborhood extending into the required rear setback or being granted variance relief. Thus the Board cannot find that there is an established historic or traditional development pattern on the Petitioner's street or in his neighborhood of enclosed porches and decks extending farther than allowed into the rear setback, and cannot find that the Petitioner's proposed construction substantially conforms with a pattern that has not been shown to exist. Accordingly, the Board finds that this element of the variance test is not satisfied.

Having found that the requested variance fails to satisfy the first element of the variance test, set forth in Section 59.7.3.2.E.2.a of the Zoning Ordinance, the Board finds that the variance must be denied. The Board need not address the remaining

elements of the variance test, since the test is conjunctive, and all parts of the test must be met if a variance is to be granted. That said, because it is apparent that the Petitioner also cannot meet Section 59.7.3.2.b of the Zoning Ordinance, the Board will briefly address that element of the variance test:

Section 59.7.3.2.E.2.b. the special circumstances or conditions are not the result of actions by the applicant;

The Board finds, based on the Statement, Site Plan, and construction drawings, that the Petitioner is responsible for the construction for which he is now seeking variance relief. See Exhibits 3, 4, and 5(a), (b), (f), and (g). The Board further finds that because the Petitioner is responsible for this construction, that to the extent that the strict application of the twenty (20) foot rear setback set forth in the Zoning Ordinance could be said to pose a hardship for the Petitioner, this hardship is self-created and cannot be the basis for a variance.³ The Board understands that removal of the privacy wall and any other features that make the Petitioner's porch "enclosed," and otherwise reducing the extent of the structure's encroachment into the rear setback, is not without cost or hardship, but finds, in accordance with applicable case law, that the financial hardship is not a sufficient reason to justify the grant of a variance.⁴ In light of the foregoing, the Board finds that the variance request does not meet Section 59.7.3.2.E.2.b of the Zoning Ordinance, and must be denied, again because the variance test is a conjunctive test and all elements of the test must be satisfied for the variance to be granted.

³ In *Salisbury Board of Zoning Appeals v. Bounds*, 240 Md. 547, 554-55, 214 A.2d 810, 814 (1965), the Maryland Court of Appeals agreed with 2 Rathkopf, *The Law of Zoning and Planning*, 48-1, that,


If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have been themselves caused or created by the property owner or his predecessor in title, the essential basis of a variance, i.e., that the hardship be caused solely through the manner of operation of the ordinance upon the particular property, is lacking. In such a case, a variance will not be granted; the hardship, arising as a result of the act of the owner or his predecessor, will be regarded as having been self created, barring relief.

See also *Montgomery County, MD v. Frances Rotwein*, 169 Md. App. 716, 733, 906 A.2d 959, 968-9 (2006) ("the 'hardships' about which Rotwein complains are self-created and, as such, cannot serve as a basis for a finding of practical difficulty. See *Cromwell*, 102 Md. App. at 722. Rotwein contends that the requested location for her garage is the only feasible location. But that is so only because of the location of the other improvements to the property, and the decision whether to build those improvements and where to place them was Rotwein's.").

⁴ See *Montgomery County, MD v. Frances Rotwein*, 169 Md. App. 716, 732-33; 906 A.2d 959, 968 (2006) ("Economic loss alone does not necessarily satisfy the "practical difficulties" test, because, as we have previously observed, "[e]very person requesting a variance can indicate some economic loss." *Cromwell*, 102 Md. App. at 715 (quoting *Xanthos v. Bd. of Adjustment*, 685 P.2d 1032, 1036-37 (Utah 1984)). Indeed, to grant an application for a variance any time economic loss is asserted, we have warned, "would make a mockery of the zoning program." *Cromwell*, 102 Md. App. at 715. Financial concerns are not entirely irrelevant, however. The pertinent inquiry with respect to economic loss is whether "it is impossible to secure a reasonable return from or to make a reasonable use of such property." *Marino v. City of Baltimore*, 215 Md. 206, 218, 137 A.2d 198 (1957). But Rotwein has not demonstrated that, unless her application is granted, it will be "impossible [for her] to make reasonable use of her property." *Id.*)

Based on the foregoing, on a motion by Richard Melnick, Vice Chair, seconded by Alan Sternstein, with John H. Pentecost, Chair, and Laura Seminario-Thornton in agreement, and with Caryn Hines necessarily absent, the Board voted to adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 22nd day of November, 2023.



Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

