

TOWN OF WASHINGTON GROVE
Board of Zoning Appeals

Subject: Request for Variance by James J. and Margaret M. Debelius

Conclusion

The petitioners applied for a building permit to erect an 8 foot wood fence along the rear and part of one side of their property at 410 Brown Street. This application was denied because the Zoning Ordinance has established a maximum height of 4 feet for the rear and 6 feet on boundaries between property owners.

Petitioners sought redress before the Board of Zoning Appeals. The Board held a public hearing as required by the Ordinance. Two memoranda in support of the variance were submitted by the petitioners. Two memoranda in opposition were also submitted. The Board has given the matter extensive consideration and has concluded that a variance should be granted for the rear lot line and denied for the portion along the joint line with the neighbor.

Facts

The subject property is the only one in Washington Grove which is located with its rear yard located on the T intersection of two county highways. The two county roads involved are virtually a main highway for hundreds of cars every day, both going and returning from work. Even during the day the traffic is heavy. This heavy traffic is often stopped due to the railroad crossing which is a mainline for many freight trains. Invariably, the stopped cars tie up the automobile traffic around the T corner so that the petitioners are looking at a "parking lot".

This one-of-a-kind situation in Washington Grove has several adverse effects upon the petitioners. Some of these are:

1. There is a complete lack of privacy which makes the property unsuitable to:
 - a. Leave a minor child in the rear yard without adult supervision. The number of children kidnapped these days makes this a substantial consideration.
 - b. Allow the Debeliuses to use the back yard because of the obscene and rude remarks made by the passing motorists, particularly when the "parking lot" situation exists.
2. Petitioners probably suffer more noise reaching their property from sources outside Washington Grove than any other residence because of the screeching of tires when some people turn the corner at the T, the trucks and Ride-On buses passing by, and the noise from nearby railroad trains.

Zoning Ordinance

The Zoning Ordinance (Article VII) states that its purpose is, among other things, for the "promotion of the health, safety, morals, comfort, and other aspects of the general welfare..." It is also "to promote desirable living conditions". A Board of Zoning Appeals is established (Section 11) and variances are authorized (Section 12). The purpose of a variance is set forth as follows:

It is the purpose of this Section to provide a method whereby relief may be granted in specific cases where the peculiar dimensions, shape, topography, or other extraordinary characteristics of a particular lot are such that the strict and literal enforcement of this Article would result in unnecessary and exceptional hardship to the owner; provided that in so doing the intent, purpose, and integrity of the general plan, as embodied in this Article, will not be substantially impaired.

A variance, when granted, must overcome four hurdles, set forth at Section 12.31 as follows:

No variance may be granted unless the Board finds, on the basis of the evidence of record, that all of the following conditions exist:

- (a) That the condition because of which the building permit was refused is peculiar to the lot in question and is not common to other lots in the vicinity.
- (b) That the strict and literal application of this Article to the lot would result in exceptional and undue hardship to the owner by preventing its use for any and all uses permitted in the Zone. The following conditions do not constitute hardship for the purposes of this Section: [What follows is not applicable to this case.]
- (c) That the variance will be in harmony with the general purposes of this Article and will not be contrary to the public interest.
- (d) That substantial justice is done to all parties concerned, including the public.

Discussion

Since the purpose of a variance is to grant relief in specific cases where "...other extraordinary characteristics of a particular lot are such that the strict and literal enforcement of this Article would result in unnecessary and exceptional hardship to the owner", the property in question is a fit candidate to be given consideration for a variance. The fact that it is the only residence in the Town of Washington Grove which has its back yard border the T intersection of two county roads is, indeed, extraordinary. Subjecting minor children to such

an inviting target for kidnapping and the other residents of the house to obscene and rude comments from the passing motorists is both an unnecessary and exceptional hardship to the owners. Moreover, it is difficult to visualize how denial of the petition can be said to promote the "health, safety, morals, comfort, and other aspects of the general welfare" (From the Purpose of the Zoning Ordinance) of the owners.

With regard to the four conditions which must exist, the Board finds specifically as follows:

(a) The condition leading to the request of a building permit is peculiar to the lot as explained above.

(b) This part will be discussed below.

(c) The variance which we hereby grant is in harmony with the general purposes of the Zoning Article. As noted above, the purposes include relief from "other extraordinary characteristics of a particular lot". This has already been discussed. Further, the variance must not be contrary to the public interest. There has been no showing in the record that granting the variance would be adverse to the public interest. In fact, granting the variance will make the property, hence the Town, a safer place than it now is.

(d) Substantial justice will be done to all parties. The owners, the adjoining neighbors, and the public will be well served.

Returning to part (b) we note that the Board must find that the literal application of the Article would result in hardship by preventing the owner from "any and all uses permitted in the Zone." We hold that this language is in conflict with the purposes of the Zoning Ordinance and the purpose of the variance procedure. In fact, that language, "any and all uses permitted in the Zone", reduces the Board of Zoning Appeals to a mere name without authority. It is obvious that there are many uses which can be carried on in these situations. For example, grass can be grown, flowers grown, flagpoles erected, and games such as tag can be played. There are probably scores of other such "uses" which, when taken literally, mean that no variance can ever be granted.

While the members of the Board of Zoning Appeals had concluded that it would be a wrong to deny the variance on such a literal reading of the Ordinance, we nevertheless asked the petitioner to provide a legal opinion on this point. Since he is an attorney admitted to the bar in the State of Maryland, he did provide a memorandum which substantiates from a legal point of view the conclusion which common sense had dictated. That memorandum, and all other documents, are a part of the record in this case.

It has been suggested that the petitioners could plant hedges and/or trees, which in a few years, would shield the property in the manner desired by them. There are two problems with this approach:

1. The children will be grown by then and one of the many reasons for having the 8 foot fence will disappear.

2. More importantly, section 3.328 (b) of the Zoning Ordinance provides:

No wall, fence, shrubbery or other obstruction to vision over 3 feet in height above the curb level may be constructed, planted, or maintained within 25 feet of the intersection of two street lines.

If the "any and all uses" of section 12.31 is to be taken as literally as some suggest, then the solution whereby shrubbery is used to solve the problem trips on the same sword. The Board expressly holds that neither of these sections interfere with the granting of a variance.

Summary

Based upon the topographical character of the lot and its location on the outer perimeter of the Town of Washington Grove with its rear lot line adjacent to the "T" intersection of Montgomery County maintained roads, the Board of Zoning Appeals finds that a 6 foot fence along the back property line will accomplish the petitioners objectives and be in harmony with the intent of the Zoning Ordinance. The Board hereby grants such a variance subject only to the following provision: that the variance will be vacated in the event that Railroad Street ceases to be a through road.

The Board also finds that the request for a variance along the joint lot line is not supported; therefore, petitioners' appeal for a variance here is denied.

Date: _____

Phillip K. Edwards, III
Chairman

Date: _____

E. A. Keese

Date: _____

Warren S. Richardson