

BEFORE THE BOARD OF ZONING APPEALS
TOWN OF WASHINGTON GROVE

IN THE MATTER OF: :
AVIS ELIZABETH O'BRIEN and : Case No. 04-02
WILLIAM J. MILLER :
107 Pine Avenue :

OPINION AND ORDER

Avis Elizabeth O'Brien and William J. Miller, owners of a detached, single-family dwelling unit located at 107 Pine Avenue, have requested a variance from the special rules governing fences set out in section 3.328 of the Washington Grove Code of Ordinances.¹

The Board conducted a public hearing on this variance request on September 11, 2004.

Based on the evidence admitted into evidence, the Board makes the findings of fact and conclusions of law set forth below, and adopts, by a 2-1 majority, a resolution granting the variance application.

1. Notice of Hearing. The Board finds that a notice of public hearing to consider the applicants' variance request was given in compliance with section 11.311.

2. Denial of Building Permit. The applicants requested a building permit to construct a 6-foot-high fence along the rear property line of their residence at 107 Pine Avenue.

Significantly, the fence along the rear property line is part of fencing that will enclose an in-ground swimming pool in applicants' backyard. Applicants' building permit request was denied by John A. McClelland, a member of the Washington Grove Planning Commission, by letter dated September 8, 2004. On behalf of the Planning Commission, Mr. McClelland denied the applicants

¹ All section references are to Article VII of the Washington Grove Code of Ordinances.

a building permit because section 3.328 requires that any fence erected on a lot line must not be above 4 feet in height. Applicants' variance request, therefore, is in compliance with section 12.2(a)(1). The Board notes that applicants' swimming pool is so closely located to the rear lot line as to make it impossible for applicants to construct the fence anywhere other than on the rear lot line.

3. Variance Request is From Development Standards of the Zoning Ordinance.

Section 12.2(a)(2) limits variance requests to relief from requirements of the Zoning Ordinance governing development standards, including the special rules set forth in section 3.3. Applicants' variance request, therefore, is in compliance with section 12.2(a)(2).

4. Ownership. The applicants are the owner of 107 Pine Avenue and are, therefore, in compliance with section 12.2(a)(3).

5. Not Contrary to the Public Interest. In order to grant a variance, applicants must demonstrate that the variance, if granted, would not be contrary to the public interest. *See*, section 12.2(a)(4). Applicants submit that granting the requested height variance will better protect the health and safety of the public by more effectively deterring trespass into the swimming pool area. The Board agrees and therefore concludes that granting this variance would be in the public interest if the other criteria for granting a variance have been met.

6. Practical Difficulty. A variance cannot be granted unless the applicant demonstrates that complying with the zoning ordinance (i.e., in this case, erecting a fence along the rear property line no more than 4 feet high) would be unnecessarily burdensome. *See*, section 12.2(a)(5). The Montgomery County, Maryland Code requires fences surrounding swimming pools to be 5 feet high or higher. Despite the fact that the Town of Washington Grove is not subject to this provision of the county code (*see*, Article XIII, section 1 of the Washington Grove

Code of Ordinances), the Board acknowledges that the discrepancy between the Washington Grove ordinance and the Montgomery County Code creates an insurance and liability dilemma for the applicants. The Board, therefore, finds that compliance with the 4-foot-high maximum for fences along a lot line would result in a practical difficulty for applicants and would be unnecessarily burdensome to applicants.

7. Extraordinary Characteristics. Applicants must demonstrate that the condition that forms the basis for granting the variance arises exclusively from the dimension, shape, topography, or other extraordinary characteristics of the lot. *See*, section 12.2(a)(6). The Board considers the swimming pool, having been installed over 30 years ago, to be a unique element of the surface features, or topography, of applicants' backyard. Accordingly, the Board concludes that the request for variance arises exclusively from this feature of the topography and that this feature is an extraordinary characteristic of their property.

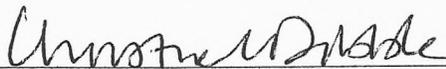
8. Uniqueness. The Board must find that the condition which forms the basis for granting the variance is peculiar to the lot in question and is not common to other lots in the vicinity. *See*, section 12.2(a)(7). One other swimming pool is located on private property in Washington Grove, at 319 Brown Street. That swimming pool is entirely surrounded by 6-foot fencing that is not located on a lot line. The Board finds that there are no other properties in Washington Grove that include a swimming pool enclosed by fencing on a lot line. The Board therefore concludes that the condition that forms the basis for granting the variance is unique to the lot in question and is not in common with other lots in the vicinity.

The Board strongly recommends that the Washington Grove Town Council amend the Code of Ordinances to require that all swimming pools be enclosed by fences, and that fences enclosing swimming pools be 5 feet high or higher. So that section 3.328 does not conflict with

this amendment, the Board further recommends that the Town Council exempt fences located on lot lines and enclosing swimming pools from the 4-foot-high maximum height restriction described in section 3.328.¹

Since applicants have carried their burden of proof and persuasion with respect to all of the criteria that the Board must find in order to grant a variance under Section 12.2, the Board resolves that applicants' variance request is granted, upon the following condition:

In the event that the Town Council, within 12 months from the date of this Opinion and Order, amends the Code of Ordinances to require that fences located on lot lines and enclosing swimming pools be less than 6 feet high, then applicants will, within 24 months from the date of this Opinion and Order, lower the portion of the fence that is located on the lot line to the height required by the Ordinances, and shall, if they so desire, construct latticework above that portion of the fence, so that the total height of the fence plus the latticework shall be 6 feet. No further action is required by applicants in the event that the Town Council, within 12 months from the date of this Opinion and Order, (a) amends the Code of Ordinances to permit fences located on lot lines and enclosing swimming pools to be 6 feet high, or (b) does not amend the Code of Ordinances with respect to the required or permitted height of fences located on lot lines and enclosing swimming pools.



Christine Dibble
Board of Zoning Appeals

Date: 11.18.04

¹Although Chair Marc Hansen votes in the negative on the adoption of this opinion, he joins with the majority of the Board in making these recommendations to the Town Council.

The Board of Zoning Appeals of Washington Grove
Minutes

The Board of Zoning Appeals met on September 11, 2004, at 9:00 a.m. in the Town Hall to conduct a public hearing on the variance request of Avis Elizabeth O'Brien and William J. Miller, 107 Pine Avenue, for a variance from the special rules for fences described in section 3.328 of Article VII of the Washington Grove Code of Ordinances.

Christine Dibble, Marc Hansen, and Ralph Hurst sat as the Board.

After conducting a public hearing on the variance application of Avis Elizabeth O'Brien and William J. Miller, the Board adopted, by a 2-1 majority¹, a resolution granting the variance application for the reasons set out in the attached Opinion and Order.

Respectfully submitted,



Christine Dibble,
Board of Zoning Appeals

Approved:

11-18-04

Date

¹Marc Hansen voted in the negative in the adoption of the opinion.