

IN RE: ADMINISTRATIVE WAIVER (Fence) *
(11611 Woodland Drive) *
Sidney and Jean Silber *
Petitioners *
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BEFORE THE OFFICE
OF ADMINISTRATIVE
HEARINGS FOR
BALTIMORE COUNTY
WAIVER NO. 14-020W

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OPINION AND ORDER ON ADMINISTRATIVE WAIVER (FENCE)

Petitioners seek an Administrative Waiver from the setback requirements so that she may retain a 7 foot high plastic deer fence less than 2 feet from her property line as well as an 8 foot high metal fence and gate less than 4 feet from the same property line, in lieu of the 6 foot height allowed by part 122.1 (2) of the Baltimore County Building Code. A request for a hearing was filed by the Protestant neighbor, and a hearing was held on September 30, 2014.

Petitioner describes the subject property as part of a 10 acre tract, which includes a lot upon which there is a structure which, until recently, was the domicile of Jean Silber (who has since relocated). He relates that the residence is approximately 1,000 feet from the public road and 750 foot from any adjoining residence. Access to the property is by way of a 20 foot wide strip, upon which is a 16 foot wide macadam driveway approximately 155 foot in length. Petitioner notes that when the road reaches the lot, the driveway bends 45 degrees to the southeast for approximately 800 feet to this structure. An underground power transmission line and above ground transformer extends along from the bend of the driveway along the southeastern boarder of the Petitioners property. Further, evidence was presented of an easement along that boarder obtained by the Petitioner in August 2010 from Protestants predecessors in title; "... for the right to access and maintain fencing and gates ...". The existing ornamental

gate, fence, and so called “invisible deer fence” runs along that easement line.

Further, Petitioner relates that the property contains an intricate and expansive garden which, for many years has been the subject of awards, magazine articles, and national recognition. Petitioner maintains that the “size, scale, scope, collection and reputation of the garden is quite unique and unusual, not only for the Woodland Drive Community, but for Baltimore County and the State as well”. Petitioner submitted a Certificate Of Appreciation from the Smithsonian Institution, recognizing the Petitioners “for generously allowing your garden to be included in the archives of the American Gardens, Horticulture Services Division, and Smithsonian Institution.” The garden’s documentation, now part of the Garden Club of America Collection, furthers the educational mission of the Smithsonian to promote “the increase and diffusion of knowledge.” Various articles and a brochure of the gardens was submitted into evidence.

Both Counsel directed much of their presentations at the hearing as well as in their post hearing memorandums regarding the Petitioner request in this case from the point of view of the granting of a “variance”, including the issues of “uniqueness” and “practical difficulty”. However, Petitioner is requesting a “fence waiver” which was clearly reflected on the documents filed with the County by the Petitioner as well as on the notice which was posted on the property in question. Therefore, Petitioners request must be considered under part 122.4 of the Building Code which addresses such fence “waivers”.

Unfortunately, that section of Building Code does not provide much if any guidance concerning fence waiver request. It only states that if a waiver is granted, the hearing officer shall set forth specific findings of fact specifying the reason for the grant of the variance. This indicates that such variances shall be granted for good cause, and based on the specific facts and

circumstances in the case at issue.

The Petitioner notes that the gate, ornamental fence and deer fence all located beginning at the bend of the driveway, at the farthest point that would still allow it to be seen from the public road; thus acting as an effective deterrent to burglary and vandalism to the residence, which is set back out of view. He asserts that in doing so, the gate still faces the rear yards of the adjoining residences (including that of Protestants).

Moreover, he argues that placing the gate any further south on the driveway would adversely affect the ability of larger delivery and service vehicles from turning and exiting the property.

Petitioner further points to the underground Baltimore Gas & Electric (BGE) line and transformer box following the affected property line, as a factor that further limits the location of the gate posts, as well as therefore of the ornamental and deer fence. He presents information supporting the concept that the 7 foot high deer fence is the appropriate height necessary to deter deer from being able to jump the fence and seriously damage the extensive gardens. He further notes that the gate, ornamental fence and deer fence are kept in a straight line along the property line, all within the easement.

Petitioner presented photographs of the existing gate, ornamental fence and deer fence to both support his arguments regarding the constraints within which those structures are placed as well as to their minimal visibility from Protestants property.

At the hearing, Protestants noted that the legal problems of the Petitioners herein was generated by their construction of the gate, ornamental fence and deer fence without pulling proper documentation and permission from Baltimore County. They believe that the Petitioners should not now be allowed to benefit thereby. Further, Protestants speculates that the positioning

of the gate is to ultimately serve as an amenity to the future development of the Petitioners property.

Protestant Dr. Svetlana Savchenko testified that she objects to the gate, the ornamental fence and the “invisible” deer fence because, in her view, their construction prior to obtaining the necessary waiver and permission rendered the entire act as “illegal”. She considers the structures unseemly, ugly, and not in any way ornamental. She is also concerned that the deer will be forced into her property and garden and that her ability to plant and utilize her property will thus be limited.

An old proverb provides that “good fences make good neighbors,” but that is unfortunately not the case here. These neighbors do not get along, which is an all too common occurrence in modern life. Therefore, it lies to the Hearing Officer (in this case the Administrative Law Judge) to apply part 122.4 of the Building Code and to determine if a waiver is appropriate.

Based upon the plats, photographs and evidence presented, I believe that the placement of the ornamental gate, fence and deer fence in no way “overwhelms” the residences nearby. There is sufficient space to accommodate Petitioners structures. The “invisible fence” is, I am convinced, of appropriate size for its task and while not totally “invisible”, is sufficiently difficult to see from Protestants property so as not to require its removal.

There is, I believe, validity in Petitioners position and presentation as to his security rationale for the placement of the ornamental gate. Certainly, a deterrent is only effective if those whose would be deterred are aware of its existence. Moreover, as Petitioner and his evidence and exhibits point out, even if the gate, fence and deer fence are moved further back (without the granting of a waiver), they would still be visible from Protestants property. Additionally, the

Baltimore Gas and Electric entities on the property do in fact restrict the positioning of the fence.

Petitioner's gardens are clearly a community asset and more. Considering the configuration and the size of Petitioner and Protestants property, the deer fence is a reasonable, effective step in the gardens' protection.

Finally I am not moved to deny the waiver simply because of the failure to document and obtain the waiver before Petitioners construction of the gate, fence and deer fence. The Building Code permits the Petitioner to request the waiver after construction, leaving the issue to be decided on the projects individual merits. I have done so.

Although the waiver request here is determined under section 122.4 of the Building Code and not pursuant to the requirements of Baltimore County Zoning Regulations 307.1 and cases thereon such as Cromwell or Trinity Assembly, the fact that counsel spent considerable time and effort addressing those requirements do deserve some comment. I believe the gardens on Petitioners property are clearly of historical and community value and significance, such that their existence on the subject property would render it unique. The existence of BGE facilities as well as the positioning and course of the entrance road would encumber the Petitioners ability to place the gate and fences appropriately. Finally, given the size and relationship of the properties of the Petitioner and Protestant, the Petitioners request could certainly be granted in harmony with the spirit and intent of the law and without injury to public safety, health or general welfare.

THEREFORE, IT IS ORDERED, this 8th day of January, 2015, by the Administrative Law Judge for Baltimore County, that the Petition for Administrative Waiver pursuant to Part 122 of the Baltimore County Building Code, be and is hereby GRANTED.

This decision may be appealed to the Baltimore County Board of Appeals within Thirty (30) days of the date of this Order.

Signed _____
LAWRENCE M. STAHL
Managing Administrative Law Judge
for Baltimore County

LMS:sln