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The Zoning Variance

Zoning ordinances are relatively recent creations of the law. The majority of Montgomery County communities enacted their first zoning ordinances some time in the 1950's. Prior to that time the only real land-use question at issue was: ownership. As owner of a parcel of real estate you were entitled to do with it pretty much as you pleased. Zoning changed all that.

As the name implies, local municipalities were divided into smaller geographic “Zones” within which a property owner was now limited in the ways she might use her property. For example, despite owning a ten acre parcel of property, its owner might be prohibited from operating a convenience store if the subject property was located in a “Residential” district which only permitted certain specified residential uses (for example, single family dwellings, twins, garden apartments, etc.).

Accordingly, a single property owner becomes restricted in the uses legally permissible upon her property. Conversely, she and other surrounding property owners enjoy the security of knowing that when their property is developed in a permissible residential manner, they won't run the risk of an obnoxious use (like a quarry) commencing operations just next door. This is sometimes referred to as the “reciprocity of zoning”.

In addition to regulating allowable use-types, most zoning ordinances also regulate applicable dimensional criteria. For example, an owner may avail herself of a residential use provided that the subject property is: located on a parcel at least one-acre in area; located no closer than 50 feet from the abutting roadway; and no taller than 25 feet in height; etc.

As with any type of legislation, zoning laws set forth broad-based, generalized rules. General rules become particularly troublesome in the area of land use, however, since every piece of property is different.

What happens when a municipality passes a general rule that within a particular zone only single-family-dwellings are permitted, and in order to construct a home the property must be at least one acre in area? Unfortunately, Mr. Brown only owns a ½ acre parcel of property. What happens? Mr. Brown certainly can't be prohibited from using his property. Remember, it wasn't that long ago individuals could use their property however they chose. More importantly, a property owner cannot be deprived of reasonable use of his property given the Constitutional prohibition against “taking” property without providing just compensation.

The law has developed a mechanism, or “escape valve” commonly referred to as a “zoning variance” to address just these types of situations. A variance allows a property owner to avoid otherwise applicable restrictions and, in essence, “vary” from the requirements of a zoning ordinance. The variance protects a property owner from being unduly burdened by the imposition of a zoning ordinance, and the variance avoids the possibility that a zoning ordinance will impact a particular parcel of property such as to constitute an unjust condemnation of property without just compensation.

Applications for a variance are heard by the local Zoning Hearing Board. The Zoning Hearing Board is a quasi-judicial arm of local government, separate and distinct from the governing body which actually drafts the zoning ordinance. In order to establish entitlement to a zoning variance an applicant must satisfy five criteria.

First, the applicant must show that her property possesses some unique physical characteristic not generally shared by other properties in the district. The rationale for this requirement is that it tends to show that the governing body probably didn’t have this property or type of property in mind when the general zoning regulations were formatted.

Second, the applicant must show that strict enforcement of zoning ordinance requirements would essentially deny any reasonable use for the property. This is sometimes referred to as “unnecessary hardship”. This requirement insures that the only properties to receive zoning relief are those properties which truly require such relief in order to avoid the possibility that enforcement of the zoning ordinance might rise to the unconstitutional level of condemnation without just compensation.

Third, the applicant must show that the “unnecessary hardship” is not self created. For example, suppose a local zoning ordinance allows only single-family-dwellings within the R-1 District. In addition, one of the applicable dimensional criteria is that in order to construct a single-family-dwelling the minimum lot size must be at least one acre, as are almost all lots in the R-1 District. Mr. Plum, however, owns an unimproved one-half acre lot upon which he desires to construct a single-family dwelling. Obviously he will need a variance from the otherwise-applicable minimum lot area requirement of one acre to realize his dream home. Does he satisfy the first criteria? Probably. As mentioned, the vast majority of lots in the R-1 District are greater than one acre, while the Plum property possesses the unique physical characteristic of being only one-half of one acre. Does he satisfy the second criteria? Probably, since the property is currently unimproved, the only use permitted upon the property is a single-family-dwelling, yet the dimensional criteria would deprive Mr. Plum of that use if the one-acre minimum lot area were strictly enforced, hence eliminating any reasonable use for the property, imposing an “unnecessary hardship”, and essentially condemning the property without just compensation in violation of the Constitution. But in order to satisfy the third criteria for a variance, Mr. Plum must also show that he hasn’t created the very hardship of which he now complains. For example, what if we find out during the zoning hearing that Mr. Plum’s property was once 2 acres in area, and that he subdivided-off the one-half acre parcel which is now the subject of his variance case? In that scenario, the “hardship” of the under-sized lot would be deemed to have been “self-created”, and the variance should be denied. Let’s assume, however for purposes of further discussion, that the one-half acre Plum property has not changed in the past one hundred

years, and that, in fact, Mr. Plum bought it in 1962 just as it exists today. In that case the “hardship” (the undersized nature of the lot) would not have been “self-created”, and we move on to the fourth and fifth criteria.

Mr. Plum must now satisfy the fourth criteria for the grant of a variance: specifically, that the relief requested is the minimum relief necessary in order to afford a reasonable use for the subject property. For example, Mr. Plum would probably be entitled to a variance to build a twenty-five hundred square-foot home on his undersized lot, but probably not entitled to a variance to build a ten-thousand square-foot home. The obvious rationale for this requirement is that the law seeks to preserve as much integrity as possible in the zoning ordinance as initially drafted, and grant only that relief necessary to avoid hardship, but no more.

The fifth and final criteria for the grant of a variance is that, if granted, it will not alter the essential character of the surrounding area and/or be in any way detrimental to the public health, safety, and welfare.

As you can see, it is very difficult to establish strict legal entitlement to a variance. That is not to say, however, that variances aren’t routinely granted. It is not uncommon for a local zoning hearing board to grant what is sometimes called a “winker”, if it is clear that there is no neighbor opposition to the variance request, and that the variance request makes good common sense. For example, suppose Mr. Mustard desires to construct a thirty-foot wide home upon a lot which was fifty-foot wide. Suppose further, that the local zoning ordinance requires two ten-foot side-yards, one on each side of the house. Mr. Mustard’s property is bounded by a permanently preserved park on the one side, and an existing single-family-dwelling of the other side. Clearly, Mr. Mustard has the ability to construct his thirty-foot wide home while still providing the two required ten-foot side yards. He desires however, to reposition his proposed home so as to provide only a five-foot side-yard next to the park, and a fifteen-foot side yard next to his nearest neighbor. In order to accomplish that design, Mr. Mustard would have to obtain a variance from otherwise applicable side-yard requirements to permit one five-foot side-yard where the ordinance otherwise mandates a minimum of ten-feet.

Has he met the technical legal requirements for a variance? Probably not, since strict enforcement of the ordinance would still allow a nice size home on the property, hence there has been no “unnecessary hardship” imposed. It is quite likely, however, that, from a practical perspective, Mr. Mustard may have a very good chance at success before the local zoning hearing board, particularly if he enlists the support of his neighbor to testify that they would greatly appreciate a fifteen-foot distance from their property to the new house, as opposed to only a ten-foot distance to the new house. Most likely, there would be no one on the other side (the park side) to oppose the five, rather than ten-foot set back, and relief would most likely be granted.

Perhaps the most important aspect of any variance application is: don’t be surprised. Go out and speak to your neighbors before-hand, so that when they receive notification of the upcoming hearing they’ll know exactly what you’re proposing. The forthright approach very often avoids an unnecessary emotional opposition from the neighborhood. In addition, it’s much better to hear about whatever opposition you might encounter while chatting over the back fence (and avail

yourself of an opportunity to eliminate such opposition), than it is to be blindsided by an angry neighbor in the middle of a packed township hall. Always be prepared, and don't be afraid to compromise. The support of, or opposition of, neighbors is very often determinative in local zoning cases.

If you have any questions or concerns regarding zoning, please contact Joseph C. Kuhls, Esquire at 215-362-2474 or jkuhls@dbyd.com.

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