



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 24, 2020

LETTER OPINION

Julia Kreyskop
Brian Buyniski
206 Scott Cir SW
Vienna, Virginia 22180
Pro Se Petitioners

Steven D. Briglia
BrigliaHundley, P.C.
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127 Center Street, South
Vienna, Virginia 22180
Counsel for the Respondents

RE: *In re: July 17, 2019 Decision of the Board of Zoning Appeals of the Town of Vienna, Virginia*
Kreyskop and Buyniski v. Town Council of the Town of Vienna, Virginia
Case Number CL-2019-11361

Dear Parties:

Before the Court is Julia Kreyskop and Brian Joseph Buyniski's ("Petitioners") Appeal from the Board of Zoning Appeals of the Town of Vienna, Virginia's ("BZA") denial of a request for a variance from Section 18-33.E of the Vienna Town Code. For the reasons set out below, the Court reverses the BZA's decision pursuant to Va. Code Ann. § 15.2-2314.

PROCEDURAL POSTURE

Petitioners filed an application for a variance from Section 18-33.E of the Vienna Town Code and a public hearing on the matter was held July 17, 2019. On July 19, 2019, the BZA

OPINION LETTER

entered an order denying Petitioners' request ("First BZA Order"). The Petitioners then filed a Petition for Writ of Certiorari and for Judicial Review with this Court on August 15, 2019. This Court heard oral arguments on Petitioners' Petition for Judicial Review on December 20, 2019 and thereafter took the matter under advisement. On January 22, 2020, this Court entered an Order remanding the matter to the BZA to provide clarification on the basis or bases of its rejection. The BZA held a second hearing on this matter on February 19, 2020 and issued a Supplemental Order of Clarification ("Supplemental Order") on March 3, 2020, again denying Petitioners' request for a variance. Pursuant to this Court's remand order, Petitioners filed a Memorandum in Response to BZA's Supplemental Order of Clarification on May 26, 2020 and the Town of Vienna filed a Supplemental Response to Petitioners' Petition for Judicial Review on May 27, 2020.

FACTUAL BACKGROUND

Petitioners live at 206 Scott Circle Southwest, Vienna, Virginia 22180, which is on a lot located at the corner of Scott Circle Southwest and Cottage Street. They applied to the BZA for a variance from Section 18-33.E of the Vienna Town Code so that they can build a screened porch in the rear of their house that extends into the Town's rear yard setback requirement. Section 18-33.E of the Vienna Town Code prescribes a 12' setback on side yards bordering other buildings or dwellings, a 25' setback requirement on side yards bordering its street side, a 35' rear yard setback requirement, and a 25' front yard setback requirement.

Currently, Petitioners have a deck in the rear of their home that is comprised of two distinct parts.¹ The left-hand² part of the deck encroaches into the rear yard setback by 7.4 feet.³ While this deck part is inconsistent with the setback requirements, it is permissible because taxes have been paid on it in excess of 15 years. See Va. Code Ann. § 15.2-2307(D).

In their application for a variance, Petitioners seek to replace the shorter, right-hand portion of the existing deck with an enclosed 12.3' x 14' screened porch, which, at its further point, would encroach 10.8' into the rear yard setback.

In their original application for a variance, Petitioners set for the following bases in support of their request for a variance:

The House (2,124 sq ft), the footprint of which was established when the house was first built in 1959, sits diagonally on a lot that is wider than it is deep. This unique configuration, together with the setbacks, creates a hardship with respect to adding any additional living space to the existing modest-size home. The corner of the

¹ Each part of the deck was built prior to Petitioners purchasing the property and Petitioners state that they were unaware that either part was non-conforming at the time of purchase. See Board of Zoning Appeals Public Hearing July 17, 2019 Transcript at 2 ("We didn't know that it was constructed without a permit and we didn't even know that it was nonconforming until we started this whole variance process.")

² When the Court refers to "left-hand", the perspective is based on facing the front of the house.

³ The rear yard setback requirement for decks is 25' under Vienna Town Code Section 18-33.

house closest to the rear property line is 35.7' away from the property line, making it virtually impossible to add any living area to the rear of the house. Adding any usable living area to the other sides of the house would also either be prohibited by setback requirements, or would be extremely challenging due to existing gas, cable, power lines and various easements. Adjoining property owners have no objection to the porch construction and retention of the deck.

Petitioners' Board of Zoning Appeals Variance or Appeal Application (Pet. For Writ of Certiorari and for Judicial Review Ex. B-1).

In the Statement of Justification attached to their original application for a variance, Petitioners provided the following explanations and bases for their request:

Unreasonable Restriction on the Utilization of the Property/Hardship

We purchased our house in 2010 in its current condition. Our house is 2 stories, does not have a basement, and is 2,124 square feet in area. We love living in the Town of Vienna and would like to be able to create more livable area in our home, to be shared with family and friends, but are unreasonably restricted from being able to do so by the unique combination of the setback requirements, the specific characteristics of the property, and the footprint of the house. Due to the shape of the lot (it being wider than it is deep) and the diagonal footprint of the house (with the closest corner being 35.7' away from the rear property line), we are effectively barred from making any enclosed additions to the rear of the house. We also cannot make any additions to the house at the front due to its closest corner being 26' from the front property line. Since ours is a corner lot, the setback requirement for the right side of the house (towards Cottage Street) is 25' rather than the 12' typical of non-corner lots. As a result, the setback on that side of the house would allow for only an unusable 5' expansion. While expansion on the left side of the house would be permitted from the standpoint of setback requirements, it is impracticable due to the presence on that side of the house of an underground gas line, cable lines, electric lines, and various meters, all of which would have to be rerouted and relocated, as well as, the presence of the air conditioner, which would also have to be relocated (to the opposite side of the house towards Cottage St, even though in its current location it directly connects to the house's utility room, containing the interior HVAC system, hot water heater and laundry area). Further, since that left side of the house contains the carport and the aforementioned utility room, access to any such addition from that side of the house would require completely rearranging the entirety of the gas lines, ducting and water lines serving the home from the existing utility room, resulting in having to make material interior modifications to our home. Building a screened porch in the rear is the most practical way to increase our living space while minimizing the impact on the surrounding community, existing utilities, easements and our existing house, but it requires a variance.

While we have a deck in the rear of our house (constructed in the 1980s), use of the deck is severely limited by the high mosquito presence. We love our backyard and invested heavily in landscaping it when we first moved in, but have discovered in our almost 9 years in Vienna that usage of our yard in the summer is virtually impossible due to the enormous number of mosquitos, a situation likely exacerbated by the stream that lies about 250' behind our property, in a park area. The addition of a screened porch would provide us with more livable area and allow us to enjoy our yard in the summer months without worrying about mosquitos and the diseases they carry.

Petitioners' Statement of Justification (Pet. For Writ of Certiorari and for Judicial Review Ex. B-1).

LEGAL STANDARDS

Va. Code Ann. § 15.2-2201 provides the definition of the term "variance" as used in this matter and provides criteria for their grant or denial. It reads in relevant part:

"Variance" means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

Va. Code Ann. § 15.2-2201.

Va. Code Ann. § 15.2-2314 provides in relevant part:

In the case of an appeal by a person of any decision of the board of zoning appeals that denied or granted an application for a variance, the decision of the board of zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision.

The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

Va. Code Ann. § 15.2-2314.

Va. Code Ann. § 15.2-2309 provides in relevant part:

Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of

the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, or alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability, and (i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A 4 of § 15.2-2286 at the time of the filing of the variance application. Any variance granted to provide a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability may expire when the person benefited by it is no longer in need of the modification to such property or improvements provided by the variance, subject to the provisions of state and federal fair housing laws, or the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 et seq.), as applicable. If a request for a reasonable modification is made to a locality and is appropriate under the provisions of state and federal fair housing laws, or the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 et seq.), as applicable, such request shall be granted by the locality unless a variance from the board of zoning appeals under this section is required in order for such request to be granted.

Va. Code Ann. § 15.2-2309.

Vienna Town Code § 18-33.E. provides in relevant part:

The following area requirements shall apply in the RS-16 zone:

- A. Lot area. Minimum lot area shall be 10,000 square feet.
- B. Lot width. All lots shall provide a minimum width of 45 feet at the street right-of-way line, 60 feet at the front building line, and 75 feet at the lot midline.
- C. Front yard. The building line shall not be less than 50 feet measured from the centerline of the street, when fronting upon a street of less than 50 feet in width; and not less than 25 feet measured from the street line fronting upon a street of 50 feet or more in width. In case of a through lot, the building line on any street or streets shall be determined in the aforesaid manner or as hereinafter required.
- D. Side yard. Side yards shall be a minimum of 12 feet in width. Buildings other than dwellings and their accessory buildings shall have a side yard on each side of

the building of not less than 40 feet in width. A corner lot shall have a side yard along its street side at least 25 feet in width.

E. Rear yard. Rear yards shall be the same as specified for RS-16 zone.

F. Lot coverage. Lot coverage shall be the same as specified for RS-16 zone.

Vienna Town Code § 18-33.E.

FINDINGS

In its Supplemental Order of Clarification, the BZA made three conclusions of law as its bases for the denial of the variance. The Court will address each of them in turn.

I. BZA's First Conclusion of Law

The first conclusion of law states as follows:

1. Enforcement of the rear yard setback, the effects of corner lot restrictions, and the location of the house would not unreasonably restrict the utilization of the property. The property owners can continue to have reasonable and enjoyable use of the property without the addition. The house has been occupied for sixty years without a screened porch. Although addition of a screened porch would be a convenience, the inability to add such a porch does not unreasonably restrict the utilization of the property. The presence of mosquitoes outdoors is common throughout Vienna, and many homes do not have screened porches, further, to permit construction of a screened porch, as a variance, is an extraordinary deviation and not required by the zoning ordinance.

Supplemental Order of Clarification at 2.

The Court finds by a preponderance of the evidence that the BZA erred in its decision with respect to its first conclusion of law for the following reasons.

First, the BZA places unjustified reliance on the fact that “[t]he house has been occupied for sixty years without a screened porch.” *Id.* This is the principal explanation that the BZA gives in support of its finding that strict enforcement of the ordinance would not unreasonably restrict utilization of the property. The fact that the house has been occupied for sixty years without a screened porch does not, however, justify the conclusion that the current homeowners are not unreasonably restricted in their utilization of the home. There are myriad possible explanations for why a prior homeowner might not have sought a variance to build a screened porch, including the financial resources of the prior homeowners, the number of residents in the house, the lack of desire or interest of the prior homeowners to spend time in a screened porch, or even the fact that the homeowner would have to go through the variance process in order to add a screened porch to the house. Yet the BZA posits this fact as proof that the current homeowners are not unreasonably restricted in the utilization of their property. The Court is not persuaded by this argument. The fact that no variance has previously been sought is not proof that no variance is now warranted. If it were otherwise, it would be hard to see how any variance

could be granted. And, certainly, as the Petitioners note, variances have been granted in the past for additions to homes.⁴

Second, the BZA does not address what the Court considers to be the compelling evidence that the “strict application” of the setback requirements “would unreasonably restrict the utilization of the property . . .” Va. Code Ann. § 15.2-2201. This is the evidence associated with the presence of utilities on the left side of their house. In their Statement of Justification, Petitioners stated that “[w]hile expansion on the left side of the house would be permitted from the standpoint of setback requirements, it is impracticable due to the presence on that side of the house of an underground gas line, cable lines, electric lines, and various meters, all of which would have to be rerouted and relocated, as well as, the presence of the air conditioner, which would also have to be relocated . . .” Petitioners’ Statement of Justification (Pet. For Writ of Certiorari and for Judicial Review Ex. B-1). The presence of underground utilities on the left side of Petitioners’ home is an important argument in support of their application as it identifies a characteristic of the home that prevents them from making any usable addition to the one side of their home where expansion would be allowed under the setback requirements. These facts take on additional significance when coupled with the configuration of the lot and the location of the house on the lot.

Third, while the law creates a rebuttable presumption that the decision of a board of zoning appeals is “correct,” Va. Code Ann. § 15.2-2314, that presumption assumes that the board considers the variance request in the context of the “particular landowner” and not based on the historical use of the dwelling by previous homeowners.⁵

II. BZA’s Second Conclusion of Law

The second conclusion of law states as follows:

2. The applicant failed to demonstrate the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance. The lot is nearly square in shape with the

⁴ As the exhibits cited in footnote 5 of Petitioners’ Memorandum in Response to the BZA’s Supplemental Order demonstrate, over the past decade, the BZA has granted variances to build additions on properties with existing homes in 14 out of 17 instances. *See* Memorandum in Response to Board of Zoning Appeals’ Supplemental Order of Clarification: Ex. D, E, F, H, I, J, K, L, M, O, P, Q, R, S.

⁵ *See Packer v. Hornsby*, 221 Va. 117, 122 (1980) (citations omitted), in which the Supreme Court stated that “[b]ecause a facially valid zoning ordinance may prove unconstitutional in application to a particular landowner, some device is needed to protect landowners’ rights without destroying the viability of the zoning ordinances. The variance traditionally has been designed to serve this function. In this role, the variance aptly has been called an ‘escape hatch’ or ‘escape valve.’”

depth being only 17 feet less than the width. Even if the rear wall of the house were parallel to the rear property line, the proposed porch would still extend well into the setback.

Supplemental Order of Clarification at 2.

The Court has reviewed Petitioners' Memorandum in Response to Boards of Zoning Appeals' Supplemental Order of Clarification and the Town of Vienna's Supplemental Response to Petitioners' Petition for Judicial Review – Remanded Board of Zoning Appeals Matter and concluded that the BZA did not err in its decision as to its second conclusion of law.

III. BZA's Third Conclusion of Law

The third conclusion of law states as follows:

3. The condition or situation of the property concerned is of a general or recurring nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance. Many homeowners in Vienna wish to expand their homes with screened porches because of the mosquitoes but are unable because setback requirements are greater for screened porches than for open decks. The zoning ordinance could be amended to reduce the setback requirements for screened porches.

Supplemental Order of Clarification at 2.

Va. Code Ann. § 15.2-2309 prescribes five enumerated requirements that must be found in addition to the unreasonable restriction or hardship requirements when granting a variance.

These five requirements are:

(i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) **the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance;** (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process

for modification of a zoning ordinance pursuant to subdivision A 4 of § 15.2-2286 at the time of the filing of the variance application.

Va. Code Ann. § 15.2-2309. (bold face added).

The board does not assert that the petitioners have failed to satisfy conditions i, ii, iv, or v. However, the board does assert that petitioners have failed to satisfy the requirement of section iii. But an examination of the board's rationale for this conclusion demonstrates that the board erroneously views the petitioners' "condition or situation of the property concerned" as solely being a problem with a 35' rear yard setback. During the February 19, 2020 hearing addressing this Court's remand order, one BZA member made the following statement when addressing the third conclusion of law:

And then finally in the third paragraph, I did look at those five enumerated conditions and the one that I felt had not been demonstrated by the preponderance of the evidence has to do with whether this particular circumstance is of a general or recurring nature. I think it's similar to what, the argument that you articulated few moments ago, that the remedy hear [sic] would really be to say, well we don't need a 35 foot rear yard setback and that, that setback is somehow too restrictive in general. To me that would really apply to virtually all of the similar loti [sic] in that same zoning district and therefore could be addressed by the Town Council saying 'well, we'll just chance [sic] that setback.'

...

[I]f there is a hardship, it's a hardship that is shared by everybody who has a lot in that zoning district, everybody has the 35 foot setback.

Board of Zoning Appeals Public Hearing Verbatim Minutes Wednesday, February 19, 2020 at 6-7.

This is, however, not a fair view of petitioners' "condition or situation of the property concerned." Va. Code Ann. § 15.2-2309. While it is certainly the case that the need for the variance is based on encroaching into the rear setback, that need must be understood in the context of: (1) a corner lot; (2) the diagonal footprint of the house; (3) on a lot that is "wider than it is deep"; (4) where expansion on the left side of the house is impractical due to the extensive utilities located on that side of the house; (5) where expansion on the right side of the house would not be possible due to the 25' setback requirement; and (6) where the screened porch would be replacing an existing deck, albeit not that portion of the deck that currently encroaches into the rear yard setback. *See* Petitioners' Statement of Justification (Pet. For Writ of Certiorari and for Judicial Review Ex. B-1).

In this context, the Court finds by a preponderance of the evidence that "the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance." Va. Code Ann. § 15.2-2309.

CONCLUSION

Based on the above findings, and in accordance with Va. Code Ann. § 15.2-2314, the Court reverses the Board of Zoning Appeals and orders that the variance be granted. An Order in accordance with this opinion shall issue.⁶

Sincerely,



Randy I. Bellows
Circuit Court Judge

⁶ Petitioners also ask this Court to take judicial notice of the fact that, in its Supplemental Order, the BZA found that “the structures at the rear of the house comprise two separate decks.” Supplemental Order of Clarification at Paragraph D. The Court understands that the one vs. two deck issue is significant. This is because if petitioners are deemed to have two decks at the rear of their home, the petitioners would not need an additional variance to retain the long deck upon construction of the screened porch since the only deck that would be altered would be the shorter of the two decks. If, however, it was determined that petitioners had one unitary deck, any alteration of a part of the deck would require an additional variance to retain the long part of the deck. Nevertheless, the Court does not believe it has the authority to take judicial notice of a fact that is not actually relevant or material to the resolution of the matter before it, because taking such notice would constitute an advisory opinion. Therefore, the Court declines the request of petitioners to take judicial notice of the Board’s finding with respect to this issue.

VIRGINIA:

IN THE FAIRFAX CIRCUIT COURT

Julia Kreyskop, et al.)

Petitioners,)

v.)

The Town Council of the)
Town of Vienna, Virginia)

Respondent.)

Case No. CL 2019-11361

FINAL ORDER

For the reasons stated in the Letter Opinion, the Court reverses the Board of Zoning Appeals' Order dated July 19, 2019 and the Board of Zoning Appeals' Supplemental Order of Clarification dated March 3, 2020 and orders that the variance be granted.

SO ORDERED this 24 day of July, 2020.

The Honorable Randy I. Bellows
Fairfax County Circuit Court