

## COUNTY OF FAIRFAX, VIRGINIA

### VARIANCE RESOLUTION OF THE BOARD OF ZONING APPEALS

MARK W. GRAPIN, VC 2011-MA-007 Appl. under Sect(s). 18-401 of the Zoning Ordinance to permit accessory structure in a front yard on a lot containing 36,000 sq. ft. or less. Located at 7415 Marc Dr., Falls Church, 22042, on approx. 12,916 sq. ft. of land zoned R-4. Mason District. Tax Map 50-3 ((2)) 94. (Reconsideration granted on 9/28/11) Mr. Hart moved that the Board of Zoning Appeals adopt the following resolution:

WHEREAS, the captioned application has been properly filed in accordance with the requirements of all applicable State and County Codes and with the by-laws of the Fairfax County Board of Zoning Appeals; and

WHEREAS, following proper notice to the public, a public hearing was held by the Board on November 30, 2011; and

WHEREAS, the Board has made the following findings of fact as reflected in the transcript of the motion, as follows:

In Application Number VC 2011-MA-007 by Mark W. Grapin, under Section 18-401 of the Fairfax County Zoning Ordinance, to permit an accessory structure to remain in a front yard of a lot containing 36,000 square feet or less, on property located at 7415 Marc Drive, Tax Map Reference 50-3 ((2)) 94, I move that the Board of Zoning Appeals adopt the standard variance resolution, and whereas the Board has made the following findings of fact:

This is a difficult case. It's -- actually the public hearing's gone a little shorter than I thought it would. There are a number of issues which were presented to us between the two hearings. I'm not sure if I've ever changed my mind on a reconsideration, but I think that -- or before today, but I think that at least I'm satisfied on one issue, that the procedural problem with granting a variance before now has been resolved.

I want to address a number of findings of fact and conclusions of law in somewhat greater detail than we usually do in anticipation that this may be headed for court no matter what and that the record be clear as to the basis for our decision. Approvals of variances seem to be reversed a lot more than denials. Our function, I think, is to sort these issues out in the context of the variance application only, the statutory criteria, and the Ordinance. I'm going to move approval with some modification to the development conditions, but I understand also that depending on the Board's wishes, it might be necessary to defer the decision briefly once I get the motion out on the table just to hammer out some of the development conditions or to allow perhaps the whole Board to vote on the motion. It's a -- it was a four-to-three vote, and we've only got five people here today.

I want to make a couple preliminary comments also. There's been a lot of media coverage over the past several weeks. We occasionally see that, not very often, thank goodness. Some of what's been in the newspapers or on television or on the internet hasn't always been entirely accurate, and some of the most inaccurate stuff is what seems to have provoked a lot of anger and outrage in material that's been transmitted to us, although happily I think this morning we really didn't see any of that. I want to make clear that this Board never ordered that the structure be removed. That's not something that we have historically done. It's not something that we really have the power to do. Whatever happened today, there wasn't really gonna be a showdown about removal of the structure. That's something a judge would have to order or

possibly the Zoning Administrator or maybe the Fire Marshal under certain circumstances, but we don't do that. We didn't do it, and that was not something on our agenda.

This whole situation started with a violation letter that I think I mentioned should not have gone out in the first place, and I think we recognize that in a county of a million people, there are many properties that have to be administered. There's a lot of letters that go out. Not every letter is gonna be perfect, but ordinarily letters with mistakes -- I shouldn't say ordinarily -- once in a while they are administratively withdrawn and reissued. And as far as I can tell from the record, the only letter that went out announced that there was a violation and ordered the homeowner to correct the violation by removing the swimming pool from the front yard. Well, there is no swimming pool, and I don't know exactly where that came from, but nothing else ever was issued. The letter wasn't appealed, and it's not clear to me why that was, but in any event, the letter becomes a thing decided not having been appealed. It's not clear to me, however, whether that really would have affected anything. I don't think it really affects our decision on the variance. I think that there may be enforcement problems later if the Zoning Administrator were to go to court with the letter about removing the swimming pool, not having reissued that.

That may give rise to a 60-day rule problem, but I don't think the 60-day rule problem, in and of itself, would be a basis for granting a variance. I want to address that briefly, not because it's really come up in great detail today, but, again, in a lot of the material that we've been given, there's sort of a fairness argument's been made, that Mr. Grapin went to the County before the thing was built and asked whether he needed a permit to put up the structure, was told that he didn't. Relying on that, he spent money, put it up. Ordinarily we don't get to consider estoppel on a zoning case. Historically, estoppel doesn't apply to the County except in narrow circumstances. The Zoning Administrator is allowed to change her mind notwithstanding what staff at the counter or over the phone may have said. The General Assembly has legislatively modified that in enacting the 60-day rule. If 60 days go by, they're not able to enforce something later. In this case, I don't think we know whether there was a 60-day rule determination been made or not. The issue of estoppel, though, is more of a defense to a violation than a basis for granting a variance. And I want to make clear that we are not granting the variance out of some reliance on -- if the variance is granted, we're not granting the variance on some reliance on the 60-day rule.

Let me go to 15.2-2309. We have to follow the variance statute when we're granting a variance. We have very little discretion. On a variance, we act only in an administrative capacity. I think the Cochran case confirms that, also Gayton Triangle versus Henrico County. That contrasts with our function on appeals where we are acting quasi-judicial and special permits when we have acted in a legislative capacity and we have much greater discretion. We do not have the discretion to grant a variance out of kindness or compassion. We don't have the authority to change the rules even if we think the rules may be inappropriate or obsolete. We act in an administrative capacity. We have to call balls and strikes.

Under 15.2-2309, we can grant a variance when a property owner can show that his property, among other things, was by reason of the exceptional narrowness, shallowness, size, or shape at the time of the effective date of the Ordinance or whereby reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property or if the condition, situation, or development of property immediately adjacent thereto, the strict

application of the terms of the Ordinance would effectively prohibit or unreasonably restrict the utilization of the property, and it goes on.

In this case, I think what's changed it for me is, although this -- I don't think this was really argued the -- previously, I think under the Zoning Ordinance, the R-4 District, this lot is already below the minimum width for a corner lot. It's 90 feet on the plat on the longer of the two short sides when it should have been at least 95 feet. The house also is situated much further back from the front setback line than it would otherwise be. The minimum front yard in an R-4 District is 30 feet. The house, for whatever reason, is set at 42.9 feet. And those two circumstances have reduced the available area behind the house such that there's no functional rear yard. It's five feet short to begin with, and they lose another 13 feet or so by the placement of the house. The size of the lot, the exceptional narrowness or shallowness of the lot below the minimum size in an R-4 District, coupled with the placement of the structure on the lot toward the rear of the property has eliminated a functional rear yard. I think that has some bearing, and I think that would allow us to go further under a Cochran analysis even if -- we don't have to conclude and I agree with Mr. Shaffer on this point, we don't have to conclude any longer that the Ordinance deprives the landowner of all reasonable beneficial use of the property taken as a whole. We still have to find that there's a statutory hardship, that it's something more than a special privilege or convenience for the applicant. My conclusion would be that because of the exceptional shallowness of the lot, we get past the first hurdle.

Let me say also -- and I disagree with Mr. Shaffer a little bit on this. I want to make clear that the basis for the motion is not the double front yard. The reason for that, I think that the Supreme Court has said in the Board of Zoning Appeals versus Nowak case that a double front yard on a corner lot is probably not an appropriate basis for concluding that there's hardship for a variance, and in the Nowak case the owner wanted to build a house closer to the side street than the front yard minimum setback would allow. There probably was another location on the lot where the structure could be placed, but they didn't want to do that. But essentially in that case, a double front yard wasn't a sufficient hardship. I think the other problem with a double front yard is that there are so many of them and that there are double front yards on every corner lot, and there's corner lots everywhere. There's many thousands. We probably in the county could have an amendment to the Ordinance to treat corner lots differently if we needed to, but I think in this case also the problem isn't really the double front yard. The problem is the prohibition on accessory structures in the front yard. The structure here is in the front yard however you slice it. It's forward of the front of the house, and it's forward of the side of the house. It's actually quite close to the intersection of the two streets.

Let me deal with the issue of clearly demonstrable hardship versus a special privilege or convenience. I think it's reasonable to expect that in a single-family home you would want some area in the rear yard for accessory structures, whether it's a shed or, in this case, a playhouse or a tree house, maybe a swing set, sometimes a detached garage, but it -- those are found customarily in residential neighborhoods, and you expect that there's going to be some area to do that. On this particular lot, because of the elimination of a functional rear yard, there really isn't any place for an accessory structure. I tried to think back again, going 12 years back. I think there may have been one occasion where we may have granted a variance for a playhouse of some sort on a weird through lot with no functional rear yard. So I don't think this is necessarily the first time we've done that.

I don't think it's necessarily a special privilege or convenience because of these problems with the lot, because there really isn't an effective place to put something else. I think it's possible that a structure could be placed on the east side of the house close to it, but with the -- the way this house is laid out with the windows and doors and rooms, that space isn't particularly accessible. It wouldn't really be visible from the kitchen area. It wouldn't be an appropriate location for something like a playhouse. It's not something that could easily be observed from the windows, and I don't think that's an appropriate location for it. I would conclude, at least for the basis of our decision, that the property had exceptional shallowness coupled with the circumstance of the placement of the structure rather than a double front yard as being the basis for going further under 15.1-2309.

Keep going here. Oh, factual findings regarding the structure. We don't really define the terms "tree house" or "playhouse." I think I would conclude that the structure is well constructed. It's framed and finished. It rests on the ground on four posts. There are masonry piers beneath the four posts. It doesn't seem to be resting on the tree. It seems to be built around the tree. It has windows and shutters, and it's painted. And, again, to me, it seemed more like a playhouse built around the tree rather than a tree house up in it. I don't think that necessarily, however, changes our approach to it. It is an accessory structure, I think, within the meaning of the Ordinance.

The -- one possibility I thought also was that perhaps the decision could have been deferred on this pending some review of the Ordinance and, if I understood correctly, that there was or is on the work program on Priority 2 an item for review of accessory structure regulations for front yards. Right now Fairfax County has an absolute prohibition, no sheds, no playhouses, no detached garages, no swing sets, no nothing. We, I think, raised that as a potential problem in the case with the World War II vet with the tomato plants in the railroad tie bed in the front yard, and I think he had railroad ties three high. And they said, well, that's an accessory structure, and you can't do that. And I don't remember -- we may have actually upheld the Zoning Administrator on that ultimately or maybe the case went away somehow, but I think that issue was still out there as to what extent do we really want to be regulating accessory structures in front yards. I don't think we've ever seen a case involving a tree house or something referred to as a tree house. I don't know that we want to see any more of them particularly, but maybe that should be looked at. However, Priority 2 is items that are probably a couple years away or more, and I don't think it makes any sense to defer this pending that.

If we -- if we're going forward with the variance, we have to conclude that the condition or situation of the property concerned is not of so general or recurring in nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the Ordinance, and I think that we're -- we clear that hurdle also in this case again because of the configuration of the lot and the structure on it. We're already beneath the minimum width for an R-4 corner lot. We already have a house that's placed fairly close to the rear line and well back of what the front setback would otherwise be. I don't think that's a recurring situation. I don't think we're gonna see that very often.

I would note also -- and I -- if I didn't mention this before, I meant to. Within the neighborhood, the houses are -- with a couple exceptions, they're generally similar, the same size, in the center of the lot, but many of the corner homes were -- corner lots, the homes were turned 45 degrees to the street, which created a triangular area in the back of the house that had somewhat greater depth in the center of the area, created sort of functional rear lot even if the

lots were of similar size. I don't know if any or all of those lots are gonna have the same minimum width problem under R-4, but at least on some of the lots, with the orientation of the house differently, there was an area created. This house is already up. It's square to the lot lines, and it just has this little slot in the back.

If we're going further, again, under 15.2-2309, in authorizing a variance, the Board may impose such conditions regarding the location, character, and other features of the proposed structure or use as it may deem necessary in the public interest, et cetera. We typically on the rare occasions when a variance is granted, we have development conditions, and I think that the conditions proposed by staff are a starting point. Again, I did go out there. I went out three times, and I tried to figure out what we would do to mitigate any impacts from this. And I expect that the -- even though we've -- I think we still don't know what exactly the complaint was, I expect it had to do with the appearance or the prominence of it. I thought there were three issues primarily that I wanted to try and address. I think two of those have been addressed already, and the third one, we can try and deal with today.

The first is the screening issue. At the first hearing we had talked about perhaps planting some evergreens. It seems that that's already been done, and although I think we might disagree exactly about the type or location of them, I think I'm satisfied, given the photographs that we've seen, and I think I saw one other photograph this morning, which should be in the record, looking from the driveway side that had some other landscaping planted between the structure and the driveway. So rather than requiring additional landscaping be planted, I think what we instead would do is -- I think I'm satisfied with the plants that have been planted, but we put in a condition that they be maintained in a healthy condition much as we've done on other cases with screening.

The second issue was the duration of it, and actually I think -- I don't have it this very second, but we got a proposed development condition this morning from the applicant, and it was thinking kind of along the lines -- here we go -- of what I was thinking. I guess I was thinking three years instead of five years, but I don't really have strong feelings about that. I don't think we've heard one way or the other whether that's a problem. So I think maybe we can go with that.

And then the third issue was the color of it. Don't -- I need this at some point. And we've kind of talked about that with the applicant, and I'll propose something at least for discussion purposes. We can talk about that.

I want to -- I'll go through those, the wording of those proposed conditions. I recognize that notwithstanding everyone's eagerness to be done with this, that we might not be able to do this just in one sitting, but we can try.

Let me make sure -- I think I've covered the basis for the variance, that estoppel doesn't apply. We're following the statute here and address the potential development conditions.

And I would find that the -- I'll put on the record that the applicant has satisfied the required standards for a variance, particularly under Section 2B in the standard variance motion, exceptional shallowness at the time of effective date of the Ordinance, that the lot would have been in existence before 1978. The houses all appear to be one of the Broyhill type subdivisions in the -- I'd say it's early '50s. It's certainly before 1978.

I've addressed Number 3 about the condition is not so general or recurring in nature as to make reasonably practicable the formulation of a general regulation.

On Number 4, that the strict application of the Ordinance would produce undue hardship, and in this case, there's no room for an accessory structure on this lot because of the absence of a functional rear yard.

Number 5, that such undue hardship is not shared generally by other properties in the same zoning district and the same vicinity, I think we've addressed that.

That the strict application would effectively prohibit or unreasonably restrict the utilization of the subject property, again, that they can't really have an accessory structure at all.

The granting of a variance would alleviate a clearly demonstrable hardship as distinguished from a special privilege or convenience, I think we've addressed that.

That the authorization of the variance will not be of substantial detriment to adjacent property, we really don't have any specifics about what the complaint would be. I think we all might disagree about the aesthetics of it, but I think with the implementation of the development conditions, any detriment has been mitigated, that the appearance of it will be toned down, that it's gonna be screened somewhat better from the street, and that it's not gonna be there forever with the term limitation.

That the character of the zoning district will not be changed by the granting of the variance, going through the neighborhood there are a number of other accessory structures. They may not be in front yards, but there are sheds nearby in rear yards or maybe side yards. There's some sheds in the -- on the property immediately to the south. There also are other things like satellite dishes and things that are maybe somewhat accessory on other homes in the neighborhood. It's -- although it seems to be the only sort of tree house/playhouse kind of structure in a front yard, there are other things in front yards in the neighborhood, and I don't think this one structure for a limited period of time with -- on a fenced lot with screening around it is necessarily gonna change the character of the zoning district.

And that the variance will be in harmony with the intended spirit and purpose of the Ordinance and will not be contrary to the public interest, again, I think in this limited situation, I think that the criteria have been satisfied.

I don't think we want to see a whole lot of applications all of a sudden for playhouses or whatever in front yards, and I don't think we will. I think this is a unique situation in which all the planets lined up, and I suppose if this were to happen again, we would take each case one at a time, but I don't think anyone should take this as an invitation or a precedent that we're gonna be modifying the Ordinance in some way. That's really the Board of Supervisors' prerogative. And I'm gonna have a follow on motion about that because we've gotten so much material, the petitions and letters and things about the Ordinance, and really that's not something we can really address. If the Board of Supervisors wants to go there, change something on -- whether it's on Priority 2 or Priority 1 or deal with accessory structures, there's some other strange rules about basketball hoops in front yards or whatever, maybe it's time to look at some of that, but that's really their area and not ours.

AND WHEREAS this application meets all of the following Required Standards for Variances in Section 18-404 of the Zoning Ordinance:

1. That the subject property was acquired in good faith.
2. That the subject property has at least one of the following characteristics:
  - A. Exceptional narrowness at the time of the effective date of the Ordinance;
  - B. Exceptional shallowness at the time of the effective date of the Ordinance;
  - C. Exceptional size at the time of the effective date of the Ordinance;
  - D. Exceptional shape at the time of the effective date of the Ordinance;
  - E. Exceptional topographic conditions;
  - F. An extraordinary situation or condition of the subject property, or
  - G. An extraordinary situation or condition of the use or development of property immediately adjacent to the subject property.
3. That the condition or situation of the subject property or the intended use of the subject property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted by the Board of Supervisors as an amendment to the Zoning Ordinance.
4. That the strict application of this Ordinance would produce undue hardship.
5. That such undue hardship is not shared generally by other properties in the same zoning district and the same vicinity.
6. That:
  - A. The strict application of the Zoning Ordinance would effectively prohibit or unreasonably restrict all reasonable use of the subject property, or
  - B. The granting of a variance will alleviate a clearly demonstrable hardship as distinguished from a special privilege or convenience sought by the applicant.
7. That authorization of the variance will not be of substantial detriment to adjacent property.
8. That the character of the zoning district will not be changed by the granting of the variance.
9. That the variance will be in harmony with the intended spirit and purpose of this Ordinance and will not be contrary to the public interest.

AND WHEREAS, the Board of Zoning Appeals has reached the following conclusions of law:

THAT the applicant has satisfied the Board that physical conditions as listed above exist which under a strict interpretation of the Zoning Ordinance would result in practical difficulty or unnecessary hardship that would deprive the user of reasonable use of the land and/or buildings involved.

NOW, THEREFORE, BE IT RESOLVED that the subject application is **APPROVED** with the following limitations:

1. This variance is approved for the size and location of an accessory structure, "Tree House," as shown on the plat prepared by B.W. Smith and Associates, Inc., dated April 18, 2011, as submitted with this application and is not transferable to other land.
2. This variance shall terminate five (5) years from its approval date or upon transfer of the Property by deed to a purchaser of the Property, whichever occurs first. This condition shall be recorded in the land records of Fairfax County, Virginia.
3. The applicant shall maintain the landscaping around the accessory structure in a good and healthy condition.

Chairman Ribble seconded the motion, which carried by a vote of 5-0. Mr. Byers and Mr. Hammack were absent from the meeting.