

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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(240) 777-6600

Case No. A-6495

PETITION OF DAVID FINK

OPINION OF THE BOARD
(Hearing Held: July 6, 2016)
(Effective Date of Opinion: July 22, 2016)

Case No. A-6495 is an application by David Fink for a variance from the requirement in Section 59-4.4.4.B.2.c of the Zoning Ordinance that accessory structures be located behind the rear building line of the principal building. The Petitioner wishes to locate a swimming pool in his yard.

The Board of Appeals held a hearing on the application on Wednesday, July 6, 2016. Mr. Fink appeared and testified in support of his application. He was represented at the hearing by Christopher M. Ruhlen, Esquire, of Lerch, Early & Brewer, Chtd.

Decision of the Board: Variance Granted.

EVIDENCE PRESENTED

1. The subject property is Lot 115, Block C, 0065 Subdivision located at 8601 Rapley Gate Terrace, Potomac, Maryland, 20854 in the RE-2C Zone.
2. The subject property contains a single family house, which was built in 2003, pursuant to a building permit plan approved in 2002. See Exhibit 3. The architectural front of the house faces Rapley Gate Terrace, as do the front entrance, front walkway, and driveway access; the architectural back of the house is towards Oaklyn Drive. The approved building permit plan depicts a pool on subject property which was never built. The proposed pool for which this variance is sought would be located directly behind the house, and slightly north of the location for the pool shown on the 2002 permit plan.

3. The subject property is a corner lot with frontage on three roadways: Oaklyn Drive to the east, Rapley Preserve Drive to the south, and Rapley Gate Terrace to the west. There is a 50-foot landscape easement along the property's boundary with Oaklyn Drive, and a 15-foot landscape easement along the property's boundary with Rapley Preserve Drive. The landscape easements are heavily planted and provide substantial screening from the abutting roadways, effectively precluding access to those streets. Record Plat No. 20057, which established these easements, specifically prohibits vehicular access from Oaklyn Drive. See Exhibits 3, 4 and 9.¹ The property's northern boundary is a side lot line shared with another single family property.

4. DPS considers this property to have three front lot lines and a side lot line. Because the property is not considered to have a rear lot line and because the methodology employed by DPS to determine a property's "rear building line" is dependent on the location of the rear lot line, DPS "lacks a point of reference by which to confirm that the proposed pool is located behind the rear building line," and has indicated that the proposed pool requires a variance to be located in the "front" of this lot, along Oaklyn Drive. See Exhibits 3 and 6.

5. Mr. Fink testified that the proposed pool would be located in a private area behind his house, thus fulfilling the intent of the Zoning Ordinance that accessory structures be located behind the rear building line of the property.² He testified that because DPS has interpreted the Zoning Ordinance such that his property has no "rear building line," it is impossible for him to locate a pool or even a shed on his property without a variance. Mr. Fink explained large Exhibits 11 and 12 to the Board, pointing out the location of his front door (facing Rapley Gate Terrace) and the three roads surrounding his property. He explained the photographs showing, among other things, the view of his property from Oaklyn Drive and Rapley Preserve Drive.

6. Mr. Ruhlen explained that it was his understanding that because access to the property from Oaklyn Drive was prohibited, DPS originally considered this property to have a rear yard, but that DPS' interpretation has changed over the years. Mr. Ruhlen explained large Exhibit 13 for the Board, showing other houses which have pools, and argued that the grant of this variance would allow for development on this property that is consistent with the historic or traditional development pattern of the neighborhood.³ He stated that the proposed pool would

¹ The subject property was originally subdivided pursuant to a preliminary plan approved in 1995. At this time, the landscape easements were established. The Petitioner purchased his property in 2000. See Exhibit 3.

² Exhibit 3 notes that the location of the proposed pool has already been approved by the Avenel Community Association, which also requires that swimming pools "may only be located in rear yards directly behind the foot print of the house...."

³ In addition, Exhibit 3 states the following:

Numerous properties with the Avenel community generally and in the immediate vicinity of the Property have swimming pools. Of those properties, at least ten (10) have swimming pools located

meet all of the other setback requirements except the requirement that accessory structures such as pools be located behind the "rear building line."

FINDINGS OF THE BOARD

Based on the petitioner's binding testimony and the evidence of record, the Board finds that the variance can be granted. The requested variance complies with the applicable standards and requirements set forth in Section 59-7.3.2.E as follows:

1. *Section 59-7.3.2.E.2.a - one or more of the following unusual or extraordinary situations or conditions exist:*

Section 59-7.3.2.E.2.a.i. - exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;

The Board finds that the subject property is an unusual corner property which, as a result of being bordered on three sides by roadways, has three front lot lines, a side lot line, and no rear lot line. Because this property lacks a rear lot line, DPS is unable to determine whether the proposed construction is located behind the rear building line, as is required by the Zoning Ordinance.

2. *Section 59-7.3.2.E.2.b. the special circumstances or conditions are not the result of actions by the applicant;*

Mr. Fink purchased the property as it is now, after it had already been subdivided, and took no actions to create its unusual characteristics.

3. *Section 59-7.3.2.E.2.c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;*

Since there is no rear lot line for this property, it is not possible to determine a location "behind the rear building line of the principal building" as the Zoning Ordinance requires for an accessory structure. Thus no accessory structure can be located anywhere on this lot without a variance, which the Board finds is a practical difficulty for the property owner.

between the architectural rear of the principal residence and Persimmon Tree Road (in other words, these houses "front" onto a street and have Persimmon Tree Road as their "rear" lot line) (Exhibit "F"). An additional nine (9) residences have swimming pools located between the house and Oaklyn Drive (Exhibit "G"). The proposed swimming pool will therefore be in keeping with the character and existing development pattern of the Avenel community.

4. *Section 59-7.3.2.E.2.d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and*

The Board finds that allowing Mr. Fink to have a swimming pool is entirely consistent with the residential uses contemplated for the neighborhood by the master plan. The written justification submitted with this variance and large Exhibit 13 presented by counsel at the variance hearing indicate that a number of other homes in this neighborhood have swimming pools, and that many of those pools are located in what a lay person would consider the rear yard of the relevant property, but in an area which DPS would consider a "front" yard because of its location between the house and a roadway. See Exhibits 3 and 13.

5. *Section 59-7.3.2.E.2.e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

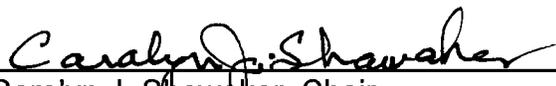
The Board can find no evidence that locating a pool in the proposed location, behind the architectural rear of the house, will adversely affect the use and enjoyment of abutting or confronting properties. Photographs in the record show the limited visibility of the subject property due to the landscaped buffer between the subject property and both Oaklyn Drive and Rapley Preserve Drive; the record also contains approval for this project from the Avenel Community Association and a letter of support from a neighbor. See Exhibits 7, 8(a) and 13.

Accordingly, the requested variance to allow construction of a swimming pool in the front yard is **granted**, subject to the following condition:

1. Petitioner shall be bound by his testimony and exhibits of record, to the extent that such testimony and evidence are mentioned in this opinion.

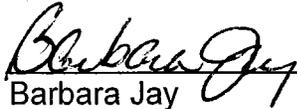
Therefore, based upon the foregoing, on a motion by Edwin S. Rosado, seconded by John H. Pentecost, Vice Chair, with Carolyn J. Shawaker, Chair, Stanley B. Boyd, and Bruce Goldensohn in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Carolyn J. Shawaker, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 22nd day of July, 2016.



Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59-7.3.2.G.1 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.