

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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CASE NO. A-6527

PETITION OF AUDUBON NATURALIST SOCIETY, INC.

**OPINION OF THE BOARD
(Opinion Adopted July 26, 2017)
(Effective Date of Opinion: August 15, 2017)**

Case No. A-6527 is an application by the Audubon Naturalist Society, Inc. ("Petitioner" or "ANS")) for a variance or variances necessary to allow the proposed construction of a ten (10) foot fence around the perimeter of the 33-acre portion of the Petitioner's property located on the west side of Jones Mill Road. The County's Department of Permitting Services ("DPS") has indicated that the grant of a variance or variances from the restrictions set forth in one of two Sections of the Zoning Ordinance is needed for the construction of this fence, as follows:

The proposed construction of a fence requires a variance of three and one-half (3.5) feet from the requirement in Section 59-6.4.3.C.3.c of the Zoning Ordinance which exempts fences six and one-half (6.5) feet or less in height from the building line and setback requirements. A grant under this Section would be for the additional 3.5 feet of height for the proposed fence, and would cover the fence in its entirety.

Alternatively, the proposed construction of a fence requires three variances from the required minimum setbacks set out in Section 59-4.4.8.B.2 of the Zoning Ordinance, including (1) a thirty (30) foot variance for that portion of the fence paralleling Brierly Road (northwest property line), (2) an eight (8) foot variance for the fence adjacent to the North Chevy Chase Swimming Pool lot and adjacent neighbors (south property line), and (3) an eight (8) foot variance for the fence adjacent to the Parkcrest subdivision (north property line).¹

¹ The Board notes here that while eight (8) feet is the closest that the proposed fence could be to either of the side lot lines (north and south property lines) if a variance is not granted, the required sum of the side setbacks is 25 feet. Thus to comply with the Zoning Ordinance, if the fence were set back eight (8) feet from one side lot line, it would need to be set back 17 feet from the other side lot line.

The Board held a hearing on the application on July 26, 2017. Jody S. Kline, Esquire, appeared on behalf of the Petitioner. Lisa Alexander, the Executive Director for the ANS, testified in support of the application, along with Nancy Pielemeier and Kathy Rushing. David W. Brown, Esquire, appeared on behalf of several abutting neighbors opposed to the application. See Exhibit 14 for a complete list of persons represented by Mr. Brown. He called Janet Rutsch, Hannah Lipman, Robert Rutsch, Howard Rosenberg, Tom Gilday and Pamela Hatton as witnesses.

Decision of the Board: Variances from minimum setbacks **GRANTED**.

PRELIMINARY MATTERS

1. In a July 18, 2017, letter, Mr. Kline asked that the Board incorporate their December 15, 2016, administrative modification decision in Case No. CBA-2643 regarding the proposed fence, and the transcript from the November 16, 2016, hearing held in connection with that modification, into the record of the instant variance case. Mr. Kline included both documents with his letter, and the package was accepted into the record as Exhibit 13.

2. In his Opponents' 10-Day Statement, received July 14, 2017, Mr. Brown included a Memorandum, also dated July 14, 2017, in which he argues, among other things, that the Board does not have the authority to grant a variance from the requirement in Section 59-6.4.3.C.3.c of the Zoning Ordinance which exempts fences six and one-half (6.5) feet or less in height from the building line and setback requirements because that section is an *exemption*, and under Section 59-7.3.2.A, the Board only has authority to grant variances from *requirements* of the Zoning Ordinance, not from *exemptions to requirements*. See Exhibit 14. At the outset of the variance hearing, Mr. Brown again made this point to the Board, arguing that for the reasons set forth in his Memorandum, the proposed fence would require the Board to grant the requested variances from the setback requirements, and not from the height exemption. Because the Board ultimately determined to grant the requested variances from the setbacks requirements, it did not need to rule on this argument.

Mr. Brown observed at the hearing that DPS, in determining the setbacks for the proposed fence, seems to have made a determination that the fence needs to meet the setbacks for a principal main structure. In light of this, he then asserted that the required side setbacks along the north (Parkcrest subdivision) and south (North Chevy Chase Swimming Pool lot and adjacent neighbors) sides of the property should have been a minimum of eight (8) feet and a combined total of 25 feet. Finally, Mr. Brown stated that his clients have no issue with the proposed variances to allow fencing along the east and west sides of the property (presumably referring to the 30 foot variance necessary for the fencing parallel to Brierly Road (west side)), but reiterated that they objected to the variances as depicted along the north and south sides.

EVIDENCE PRESENTED

1. The subject property consists of 40.4892 acres, "Clean Drinking" Subdivision, located at 8940 Jones Mill Road, Chevy Chase, Maryland in the R-90 Zone. The fence for which the requested variances are sought will encircle the approximately 33 acre portion of this property which is located on the west side of Jones Mill Road. This portion of the subject property is referred to herein as the "property" or "Woodend."

2. Ms. Lisa Alexander, Executive Director of the Audubon Naturalist Society, testified in support of the requested variances. Ms. Alexander testified that the mission of the Audubon Naturalist Society is to "inspire residents of the greater Washington, DC, region to appreciate, understand, and protect their natural environment through outdoor experiences, education, and advocacy." She proceeded to state that the ANS has maintained Woodend as a nature sanctuary that is open to the public 365 days a year. She then testified that over the past 30 years, Woodend's forest, meadows, and streams have been degraded because of overbrowsing by deer, causing (among other things) a loss of the forest understory, a loss of plant diversity, depleted insect and bird populations, a lack of saplings to replace the forest, and a diminishing ability to use Woodend as a living classroom. She testified that the damage done by the deer is detracting from the ability of the ANS to fulfill its mission, and from serving as a nature sanctuary. She testified that without any saplings, the ANS will lose its forest in about 20 years. Ms. Alexander testified that there is a proven method that the ANS can use to restore the biodiversity and to restore Woodend as a public learning center, and that is to erect a fence to exclude the deer.

Ms. Alexander testified that in determining what type of fence was necessary, she consulted first with Montgomery Parks to see how they exclude deer from their facilities, learning that they use a 10-foot fence at both Brookside Gardens and Pope Farm Nursery. She then consulted with the Montgomery Bird Club, the Maryland Native Plant Society, the Potomac Conservancy, the Rock Creek Conservancy, the Montgomery Forestry Board, the University of Maryland College of Agriculture and Natural Resources, and the Northern Virginia Parks Association, all of whom agreed that a 10-foot fence that is impervious to deer is the way to restore biodiversity to the ANS property. See Exhibit 18.

Ms. Alexander testified that she consulted with landscape architects in determining to use a black chain link fence, and referred the Board to the expert testimony at the administrative modification hearing. See Exhibit 13. She testified that she had appeared before the Historic Preservation Commission to get final permission for the fence, because Woodend is an historic property, and that Scott Whipple, Supervisor of the Historic Preservation Unit, agreed that a black-coated fence would tend to be less visible and more compatible with the ANS setting than the existing metal fence topped with barbed wire because a black fence would not draw your eye and would recede from view. Ms. Alexander testified that the ANS had made changes to their original fence plans to address the concerns of neighbors about the appearance of the fence. She testified that while the ANS had originally proposed a 10-foot black chain link fence with a black bar

across the top, they were now recommending removal of the top bar except at the corners and ends, where the bars were needed for stability, and addition of a tension wire which would also recede from view. She testified that while the original plan was for the fence to follow the existing fence line, the ANS had agreed to move the proposed fence on the east side of the property back an additional 30 feet from Jones Mill Road, so that it would now be located 60 feet from Jones Mill Road and would not need a variance. Finally, she testified that although statistics say that about four percent of deer can clear an eight foot fence, the ANS had agreed to lower the height of the proposed fence from ten (10) feet to eight (8) feet along the north and south sides of the property, except by the North Chevy Chase Swimming Pool, which requested a 10-foot fence. She testified that the four percent porosity will be a hardship for the ANS because some deer will get into the property. She testified that the ANS would work with Montgomery Parks to deal with those deer that do enter the property as a result of the lower fence height.

Ms. Alexander testified that the proposed fence would have two pedestrian gates, one at the front gate on the Jones Mill Road side, and one near the Brierly Road entrance. She testified that there would be slide gates across the driveways, but that they would be open except in emergencies, for example as a safety procedure if a child were to go missing. She testified that in response to concerns from the neighbors, the ANS has withdrawn a proposal to have pedestrian gates at Altimont Lane and Woodhollow Drive.

In response to Board questioning, Ms. Alexander testified that the landscape architects have testified that a person will look right through the black fence, and that once the understory regenerates, there will be a green screen behind it. She added that several companies have offered to donate trees which would also be planted inside the fence to soften its view, and that along Jones Mill Road, some larger, more deer-resistant trees might be planted outside of the fence. She testified that the ANS has offered to plant trees inside of the fence for those neighbors who want to screen their view of the fence.

3. Ms. Nancy Pielemeier testified that she is a member of the ANS' Board of Directors and a member of the ANS' Community Liaison Council ("CLC"). She testified that the ANS has created a CLC group within their ranks, composed of Diane Lil (Director of Education), Kathy Rushing (former Board member and volunteer), Carolyn Peirce (Member, Board of Directors) and herself. Ms. Pielemeier testified that prior to holding any official CLC meetings, this group contacted those neighbors that they knew to be concerned about the proposed fence (i.e. those who had testified at the administrative modification hearing) to hear their concerns, clarify the ANS' position, discuss possible compromises, and get input for the larger CLC meetings. She testified that they met four times (1/17/17, 2/2/17, 3/9/17, and 3/23/17), the last two times with mediators from the Conflict Resolution Center of Montgomery County.

Ms. Pielemeier testified that at the first meeting, the neighbors brought up six major issues. She testified that the neighbors were asked to review the list of adjoining and confronting neighbors so that the ANS could make sure that those neighbors were being notified of the meetings, and that they were asked to suggest additional ways the ANS

could communicate with the broader community. Ms. Pielemeier testified that at the second meeting, the ANS and the neighbors agreed to seek the assistance of a Montgomery County mediator. She testified that at the first meeting with the mediators, the neighbors stated that they had come to get initial information, and that they brought up additional concerns that they had not previously raised. She stated that the ANS came to the mediation with a proposed compromise and that the ANS clarified that the portion of the subject property on the east side of Jones Mill Road would not be fenced. Ms. Pielemeier testified that the second mediation was postponed because of weather, but that email exchanges continued the conversation between the concerned neighbors and the ANS. She testified that the ANS checked with their fence company to see if the top bar could be removed and, on finding that it could be, offered this as an additional compromise. Finally, she testified that when the group reconvened on March 23, 2017, it became apparent that no consensus would be reached, and the mediation was suspended.

Ms. Pielemeier stated that there had been discussion about how best to notify community members about the upcoming CLC meeting, and that in response, the ANS sent 47 certified letters to abutting and confronting property owners, sent emails to those neighbors for whom they had email addresses (an ever-growing list), and posted notice of the meeting on their website. See Exhibit 8. She testified that two CLC meetings were held, one on March 29, 2017, and that other on April 18, 2017, and that anyone within a half mile of Woodend or beyond was welcome to attend the CLC meetings. Ms. Pielemeier testified that 37 community members attended the first CLC meeting, and that 22 community members attended the second.

4. Ms. Kathy Rushing, a former President of the ANS Board of Directors and CLC member, testified about the CLC meetings. She testified that at the outset of the first meeting, the ANS presented information about the composition, purpose, ground rules and meeting schedule of the CLC, indicating that meetings would be organized and run by the ANS, that they were intended to inform the community about events and plans relating to the ANS and to hear neighbors' concerns and suggestions, and that they would be held at least twice a year. She testified that any neighbor is welcome to be a part of the CLC, and that if a neighbor requested that the ANS hold a special meeting, they would do that, notifying the entire community. She testified that the meetings to date have focused on the proposed fence, and have lasted about an hour and a half. She stated that she believed they have been a positive development which has enabled the ANS to communicate with community members in a new way. Ms. Rushing stated that at the April 18, 2017, CLC meeting, the ANS presented their final compromise position regarding the fence, which she testified the ANS believed honored the neighbors' concerns, but with which the neighbors did not agree. She testified the next CLC meeting is in September.

When asked by a Board member if the community members were given input on the agenda for the CLC meeting, Ms. Rushing testified that if a community member asks to present information, the ANS would let them do that, describing the CLC as an open forum with an open process. When asked on cross-examination if the CLC is a place

where issues are resolved, or if the ANS members take the information received at the CLC back to the ANS to decide what to do, Ms. Rushing testified that discussions to date have been about the fence, that the ANS understands the neighbors' concerns about the fence, and that while the CLC process is new to the ANS, the goal of that process is to be open to concerns and to take them into consideration as much as possible.

5. Ms. Alexander testified that the variances requested meet the statutory criteria set forth in Section 59-7.3.2.E.2 of the Zoning Ordinance. Specifically, she testified that Woodend is unique because it is 40 undeveloped acres in the 20815 zip code. She testified that during County deer-culling events, the number of deer on the property can double because the deer come onto the ANS property to hide. She testified that the deer are uniquely affecting Woodend because they make it impossible for the ANS to accomplish its mission and to serve as a nature sanctuary.

Ms. Alexander testified that there are multiple environmentally sensitive areas on the property, including four meadows which are unique habitats; wooded areas; forested areas, some of which are considered interior bird species habitats; an ephemeral stream; and a pond. She testified that all are suffering from overbrowsing by the deer.

Ms. Alexander testified that Woodend is an historic property, and that that designation applies to the building as well as to the grounds. Indeed, the Statement of Justification submitted with this variance application states that "The mansion, and the entire 'Woodend' property, is on the List of Historic Resources designated by the National Trust of Historic Preservation." See Exhibit 3. She testified that in its current iteration, the ANS is not doing a great job of protecting the natural features of this historic property because the deer are eating them. She testified that the ANS is not responsible for the overpopulation of deer on the property. When asked by a Board member if inaction by the ANS had led to the deer problem, Ms. Alexander disagreed. She then testified that the fence is the start of the ANS' effort to rejuvenate the nature sanctuary and restore its biodiversity. She testified that if you look back just 20 years, you will see lists of all the different species found at Woodend that are no longer resident there because their habitats are being destroyed. She testified that the new fence would let ANS preserve their property for the next 50 years.

Ms. Alexander testified that the fence is the minimum necessary to overcome the practical difficulties that the ANS will suffer if it cannot keep the deer out. She testified that having the fence on the property line would allow for required maintenance of the property. She further testified that if the ANS were to move the fence away from perimeter of the property, it would create a corridor that would be very difficult to maintain and that would be a haven for invasive plants. The Statement of Justification submitted with the variance application notes that construction activity and installation of a fence that met the required setbacks would "cause an inordinate amount of land disturbance and destruction of existing mature trees and shrubs on the property," and that it would "deprive the Society, its members and visitors of the benefits of substantial, and critical, areas where plants and wildlife can be observed and enjoyed." See Exhibit 3. Ms. Alexander echoed this, too, in her testimony, recounting the problems that would arise if the fence

were to be located in accordance with the required setbacks, including the loss of acreage for teaching, unsolvable maintenance issues for the property outside of the new fence, and an increase in cost because the existing fence poles could not be reused. The Statement of Justification notes with regard to the latter that it is "imperative that the new fence be installed in the same location as the existing fence in order to take advantage of the existing infrastructure to support the fence," citing a substantial increase in costs if new post holes have to be dug. See Exhibit 3. Ms. Alexander testified that the proposed fence is about a mile long, and estimated that with the reuse of existing poles, it will cost approximately \$250,000.

Ms. Alexander testified that the Master Plan does not discuss fences. The Statement of Justification indicates that the Master Plan does address the Woodend property, stating that "[t]he Bethesda Chevy Chase Master Plan recognizes the importance of the 'Woodend' property and its value to the community. Granting of the requested variances will allow the Society to continue to use 'Woodend' in the manner contemplated in the Plan." See Exhibit 3.

Regarding hardship, Ms. Alexander testified that if the variance is not granted and ANS cannot install the proposed fence, Woodend will become useless as a teaching nature sanctuary. She noted as a long term matter, if the ANS is not fulfilling its mission as a nature sanctuary, then as an organization, the ANS would have to consider the best use of its mission dollars. She theorized that the best use of those dollars probably would not be maintaining a 40-acre moonscape, and noted that there are no restrictions on the ability of the ANS to sell the property. In the near term, Ms. Alexander testified that the lack of fencing hurts the ability to use Woodend as a public teaching tool. She testified that the few areas of the property that have rich biodiversity have been fenced off with temporary deer fencing. She described one such area as beautifully biodiverse, but very small. She testified that the rest of the sanctuary has lost its spring wildflowers and fruit-bearing shrubs, all because of deer pressure.

On cross examination, Ms. Alexander testified that the 33-acre portion of the subject property that is located west of Jones Mill Road is currently fenced on all sides except the northeast. She testified that the fence is poorly maintained and has gaps. She explained where the four meadows were located on the property, and testified that the lawn around the historic mansion is historically protected and has to be maintained. Ms. Alexander gave an example of the environmental degradation that is being caused by the deer, testifying that when she first worked for the ANS as an intern after college, there were eight different goldenrod species in the meadows, each of which had distinct insect and bird communities associated with it. She testified that at present, there is almost no goldenrod left on the property, with only one species still present. She suggested that this kind of degradation has occurred across every kind of plant, every kind of shrub, and every kind of tree over the past few decades.

Still on cross examination, Ms. Alexander testified that she had seen deer jump the existing fence, although she was not sure which side of the property this had occurred

on.² She further testified that she had had conversations with people about deer jumping the ANS fence, although those conversations were not specific as to whether the jumping occurred over the north or south side fence. In response to questions asking whether the proposed pool fence would be on pool property or ANS property, Ms. Alexander testified that the fence would be on the existing fence line, which she believed was on the property line, explaining that it was not ANS' intention to locate that fence on the pool property. When asked whether screening material could be planted on the outside of the fence if the fence were set back from the property line, Ms. Alexander testified that it could not because the deer would eat it.

On redirect, Ms. Alexander confirmed the testimony of Mr. Balderson from the November 16, 2016, hearing, that landscaping inside of a black chain link fence would create a backdrop to draw your eye in and make the fence less visible. See Exhibit 13. She testified that this is also what the Historic Preservation Commission had told her. She testified that the existing fence on the north side of the property is galvanized and a little bit rusty. She testified that some of it has barbed wire, and that some of it is caved in. She testified that it was originally a six-foot, six-inch fence, but that now it is probably shorter. She testified that the fence along Brierly Road is also rusty with barbed wire.

6. Ms. Janet Rutsch testified in opposition to the grant of the proposed variances needed to allow the proposed new fence on the north and south sides of the ANS property. She testified that her property abuts the north side of the ANS property. She provided two large maps for the Board's information, one that has the existing fence outlined in blue, with breaks in the fence that the deer can get through shown in red, and the other showing where the various abutting neighbors opposing the variances requested live relative to the ANS property. See Exhibits 19 and 20.

7. Ms. Hannah Lipman testified on her own behalf and on behalf of her husband in opposition to the grant of the proposed variances needed to allow the proposed new fence on the north and south sides of the ANS property. She testified that her property abuts the north side of the ANS property. She introduced a photograph showing the view of the existing (four foot) fence from her front stoop, and a photograph from the Capital Crescent Trail showing a fence she testified is similar to proposed fence. See Exhibit 21.

Ms. Lipman testified that she opposed the grant of the variances because the grant would be adverse to abutting or confronting properties. She testified that as long-time residents, an increase in the height of the fence from the allowed six and a half feet to the proposed eight feet would diminish her enjoyment of her property and decrease her property value. She testified that the fence would be very close to her screened porch, that with its black coating, it would obscure her view into the ANS meadow, and that it would be "prison-like."

Ms. Lipman testified that she did not believe the ANS had complied with the CLC requirements, stating that the meeting was tightly controlled and that the ANS had

² Later in the hearing, Ms. Alexander testified in response to a Board question that she had seen a deer jump the existing six and a half foot fence to get into the ANS.

continued to move forward with their agenda. She testified that she had seen deer in her yard, and that she had seen them jump the four foot fence to the ANS. In response to Board questioning, Ms. Lipman testified that the ANS did listen to the neighbors regarding the height of the new fence, and stated that she would propose that the fence be six (6) feet, six (6) inches in height.

8. Mr. Robert Rutsch testified in opposition to the grant of the proposed variances needed to allow the proposed new fence on the north and south sides of the ANS property. Mr. Rutsch testified that he was speaking for his mother, whose property abuts the north side of the ANS property. He testified that he is the trustee for his mother's property.

Mr. Rutsch testified that his mother's house was built in 1971, and that his family moved in in 1972. He testified that he lived in the house until he went to college, and that his 84 year old mother has lived there since it was built. Mr. Rutsch oriented the Board to Rock Creek Park, testified that there are deer there, and testified that the Montgomery County deer work group has attempted to do culling in this area, as far south as East-West Highway.

Mr. Rutsch testified that there has been a 6-foot, 6-inch chain link fence along the 155-foot shared property line between his mother's house and the ANS property as long as his family has lived there. Using Exhibit 20, he testified that the area behind his mother's fence and out towards Jones Mill Road is mowed short for about eight feet, then maintained as a meadow. He testified that the area on either side of the entrance pathway toward the headquarters building is generally either mowed or maintained as a meadow. He testified that there is a thick stand of bamboo on the edge of his mother's property behind the ANS gatehouse. Mr. Rutsch testified that his mother and the other neighbors on Levelle Drive have 6-foot privacy fences next to their homes and around the sides. He testified that the deer have never entered his mother's back yard from Levelle Drive, explaining that deer will not jump where they cannot see. He testified that the deer on the ANS property were coming from unfenced area bordering Rock Creek Park, and concluded that the existing fence is an appropriate barrier and will keep deer out. Mr. Rutsch testified that he has seen deer jump from the ANS property to his mother's property, and that they simply shoo the deer back onto the ANS property. As further evidence that deer did not come through his mother's yard, Mr. Rutsch highlighted photographs of hostas and daisies in her yard which, as of last week, were doing well. Mr. Rutsch testified that until now, the ANS has not tried to prevent deer from entering the property from the east/Rock Creek Park.

Mr. Rutsch testified that he attended all of the concerned citizen meetings, the mediation, and the CLC meetings. He testified that there was some progress made at the CLC meetings, with both sides compromising, but that he believed the existing fencing was adequate (at least near his mother's house). Speaking about his sense of the mediation and CLC meetings, he testified that the ANS listened, but has not been responsive. He complained that the meetings lacked back and forth and were ANS-driven; he testified that it was his sense that of the 37 attendees at the first meeting, none

avored the proposed fence. He testified that when the second CLC meeting was held, it was as if the first meeting had not happened, and that while there were some persons in attendance at that meeting who supported the ANS efforts, he testified that they were not abutting or confronting neighbors, and he asserted that they were brought in by the ANS. Finally, Mr. Rutsch asserted that the ANS' desire to locate the proposed fence on the property line was due to expansion plans, testifying that their 50-year plan calls for an educational center behind his mother's home, where a meadow currently exists.

9. Mr. Howard Rosenberg testified that in addition to speaking for himself and his wife, he has been asked to speak in opposition to the requested variances on behalf of his neighbor Mr. Demorais, who lives across the street and was unable to attend. Mr. Rosenberg testified that the North Chevy Chase Swimming Pool Association property is located behind his property to the west, and that the six and a half foot fence behind his house is on the pool's property. He questioned how the 55 foot section of fencing between the pool and the ANS property, which he understands will be ten feet tall at the request of the pool, could be constructed if it, too, is on the pool's property.

Mr. Rosenberg testified that he and his wife have lived in their home, which abuts the south side of the ANS property, since 1989. He testified that they oppose the eight (or ten) foot fence proposed by the ANS because it would diminish their enjoyment of their property and the value of their home, and because it would be an eyesore. He testified that in all of their time in their home, they have never seen a deer leap over the fence, but that they have seen deer go through the 18-inch to two-foot gap at the corner of the ANS property and the pool property. He testified that his son had blocked that gap with fencing material. Mr. Rosenberg testified that there was a nine square foot gap in the fence at the end of Altimont Lane, and that he had fixed that gap too. He stated that he and his wife were the source of some of the allegations that the ANS did not maintain the current fence, and that over the years, they had worked to remove brush and dead trees from the fence line, sometimes in coordination with the ANS.

Mr. Rosenberg testified that before the gaps in the fence were fixed, he had seen lots of deer come from the ANS property to his property and to Altimont Lane, but that he had never seen the deer travel in the other direction (except for deer that came into his yard from the ANS going back to the ANS), adding that in his experience, deer go under and around fences if possible. He testified that the proposed fence would be 15 feet from the exterior wall of his home, and that he does not support it. He testified that the current fence is six and a half feet tall, and that he believes that if the gaps in the fence are closed, that is sufficient to keep the deer out.

Regarding the Demorais' property, Mr. Rosenberg testified that the ANS fence is approximately 35 feet from their front door, and that it bisects the Demorais' lot. He testified that the Demorais were unhappy about the proposed fence because it would impact their enjoyment of their property and their views. See Exhibit 14 (Demorais letter).

10. Mr. Tom Gilday, whose property abuts the south side of the ANS property, testified in opposition to the grant of the proposed variances needed to allow the proposed new

fence on the north and south sides of the ANS property. Mr. Gilday testified that he has lived in his home for 23 years. He testified that there is fencing on the left and right sides of his rear yard, and that while he has seen numerous deer in his front yard, he does not see deer coming into his back yard from his front yard. He testified that the ANS fence behind his house is six feet high with a foot of barbed wire on top, and that it is partially crushed. He testified that he has never touched the ANS fence.

Mr. Gilday testified that in the negotiations with the ANS over the fence, he and the others have not objected to the fence on the east and west sides of the ANS property, noting that Rock Creek Park is on the east side. He testified that he and the other ANS neighbors present object to the grant of the variances for the north and south sides of the ANS property because the neighbors should not have to suffer [with a taller fence] so that the ANS can have a minimal 4% incursion of deer, when the ANS has yet to try other solutions. Mr. Gilday stated that if the variances were granted, the ANS should revisit the material for the proposed fence, noting that a rusted fence is almost invisible, but a black fence will be visible. He testified in this regard that the black fence along Jones Mill Road is visible, whereas the existing rusted galvanized fence that is 30 feet from his rear deck is almost invisible. Finally, Mr. Gilday questioned whether the black coating on the proposed fence would deteriorate with age.

11. Ms. Pamela Hatton testified in opposition to the grant of the proposed variances needed to allow the proposed new fence on the north and south sides of the ANS property. Ms. Hatton testified that her property abuts the portion of the ANS property located on the east side of Jones Mill Road (which is not fenced), and confronts the 33-acre portion of the ANS property for which the fencing is proposed. She testified that the fencing on the south and west sides of the ANS property was erected in 1970, and contained barbed wire arms. She testified that the fencing on the north side was erected when the Wellses acquired the property, parcel by parcel, and that some of that fencing is four feet high and some is six feet high. She testified that the fencing along the east side of the property was also shorter, between four and six feet high, until 2015 when the ANS replaced it. She testified that the posts on the north side of the property are four feet tall.

Ms. Hatton asserted that the ANS was responsible for the deer on their property, citing, among other things, their failure to close off the east side of the property. She testified that the loss of plant species can be attributed to an increase in people and to the ANS mowing meadows, seedlings and saplings. She offered photographs and testified that despite testimony to the contrary, there are saplings on the ANS property. She testified that at the preliminary consultation with the Historic Preservation Commission, the ANS asked to take down trees and more understory in order to build a playground, trails, and a parking lot. Ms. Hatton testified that she believed the maintenance problems that Ms. Alexander suggested would arise if the fence were located in accordance with the required setbacks could be addressed through the use of service gates and a riding mower. She testified that if the variances were granted and the ANS installed plantings inside of the new fence, those plantings would eventually encroach on the neighboring properties.

Ms. Hatton testified that the CLC is not structured but rather is siloed and controlled. She testified that it is basically a public relations event for the ANS, and that the Minutes are not corrected. She testified that she is the CLC representative for the Coquelin Run Citizens Association, and that the ANS has never contacted her as such, and has not contacted representatives from the North Chevy Chase or Parkview Citizens Associations. She testified that the ANS only sent certified mail for the first CLC meeting, and that only five days' notice was given of that meeting. She testified that the neighbors had asked that the second meeting be delayed because it was scheduled over Passover and the MCPS school break. She testified that the CLC and its members were not listed on the ANS website, and that several neighbors at the Coquelin Run community meetings had complained that they did not know about the CLC meetings or the fence except from other neighbors.

Ms. Hatton testified that the proposed black vinyl fence was approved by the Historic Preservation Commission because it was the only option presented, and that a black vinyl fence would be very visible six months out of the year when there is no foliage. She testified that she personally objected to the installation of a black vinyl fence on the east side of the ANS property.

12. In response to Board questions asking her to respond to allegations that people were not notified about the CLC meetings, Ms. Alexander testified that that was not her perception. She testified that the ANS has worked very hard to communicate with their neighbors. She testified that the ANS had made presentations to the Coquelin Run and North Chevy Chase Citizens' Associations. She testified that they have posted a number of public meetings on their website. She testified that their efforts have been genuine but can be improved, adding that they have tried to be inclusive. Ms. Alexander stated that the ANS has tried to cooperate with its neighbors, testifying that the ANS has removed proposed pedestrian gates in the new fence and has reduced its height. She reiterated that she had consulted with experts in designing the fence, starting with Montgomery County, and that her goal is to have Woodend as an asset to its neighbors.

Ms. Alexander testified that it is institutionally challenging to design a fence which will meet the ANS' goals and satisfy their 19 abutting neighbors. She testified that a lower (8-foot) fence with no top rail and plantings to soften its appearance was the ANS' solution to accommodate their neighbors' concerns about the visual impact of the fence while at the same time preserving the character of the nature sanctuary in the neighborhood. She testified that the ANS had selected a black chain link fence based on the recommendations from landscape architects, and noted that a shiny galvanized fence or wrought iron fence would catch your eye.

FINDINGS OF THE BOARD

Based on the binding testimony of the Petitioner's witnesses and on the exhibits of record, including the transcript of the November 16, 2016, administrative modification

hearing pertaining to the proposed fence and the Board's December 15, 2016, written decision granting that administrative modification, the Board finds that the requested variances from the minimum setbacks can be granted. The requested variances comply with the applicable standards and requirements set forth in Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, 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 unique because it contains 40 undeveloped acres, inside of the Beltway, dedicated as a nature sanctuary with a mission to "inspire residents of the greater Washington, DC, region to appreciate, understand, and protect their natural environment through outdoor experiences, education, and advocacy." The Board finds that the ANS property is distinct from the surrounding residential properties not only in terms of its large size and undeveloped nature, but also in terms of its mission, which specifically calls for it to serve as an educational tool to teach residents about the natural environment. In addition, the Board finds per the evidence of record and the testimony of Ms. Alexander, and as it had in its December 15, 2016, decision in Case No. CBA-2643, that the ability of the ANS to carry out this mission on the subject property is being compromised due to the destruction of saplings and plant species by the overbrowsing of deer, which has caused (among other things) a loss of the forest understory, a loss of plant diversity, depleted insect and bird populations, a lack of saplings to replace the forest, and a diminishing ability to use Woodend as a living classroom. See Exhibits 3 and 13. The Board finds that this constitutes an unusual or extraordinary situation or condition specific to this property.

Section 59.7.3.2.E.2.a.iii the proposed development contains environmentally sensitive features or buffers;

The Board finds, per the testimony of Ms. Alexander and the Statement of Justification in the record at Exhibit 3, that as a nature sanctuary, Woodend has environmentally sensitive features including four meadows which are unique habitats; wooded areas; forested areas, some of which are considered interior bird species habitats; an ephemeral stream; and a pond. As noted above, the record indicates and the Board finds that the saplings, understory, and plant species which comprise and sustain these environmentally sensitive features, and the insect and bird populations that inhabit them, are being destroyed by the overbrowsing of deer on the property. As Ms. Alexander testified and as the Board found in CBA-2643, an eight-foot fence will keep approximately 96% of the deer out, and a ten-foot fence is needed to completely exclude deer. Thus the Board finds that the proposed development (eight- and ten-foot fencing) would protect the environmentally sensitive features on the ANS property from further degradation by keeping most if not all of the deer out.

Section 59.7.3.2.E.2.a.iv the proposed development contains a historically significant property or structure;

The Board finds that the property which the proposed fence would encircle, Woodend, is a historically significant property or structure, as evidenced by the fact that the mansion and the entire property are on the List of Historic Resources designated by the National Trust of Historic Preservation. See Exhibit 3. As was the case with the environmentally sensitive features, the proposed development (fence) would protect this historically significant property from further degradation by excluding deer. See Exhibits 3 and 13.

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

The Board finds that the degradation of the natural environment on the Woodend property and the consequent impairment of the ability of the ANS to carry out its mission is being caused by the deer, and is not the result of actions by the ANS. Thus the Board finds that the Petitioner took no action to create the unusual or extraordinary situation or conditions specific to this property.

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;*

The Board finds, based on the testimony of Ms. Alexander, the Statement of Justification, and Exhibits 3 and 13, that the requested setback variances are the minimum necessary to allow the proposed construction to proceed along the existing fence line. The Board further finds that construction along the existing fence line is necessary to overcome the practical difficulties that would arise if the new fence were to be located in accordance with the setbacks required by the Zoning Ordinance, on account of the unique characteristics of this property, i.e. a loss of available acreage for teaching; the elimination of the benefits of substantial, and critical, areas where plants and wildlife can be observed and enjoyed; challenging maintenance issues for the area outside of the new fence, including problems with invasive plants; the loss of existing mature trees and shrubbery due to the new construction; and a significant increase in cost because the existing fence poles could not be reused.

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;*

The Board finds that the Bethesda Chevy Chase Master Plan recognizes the importance of the 'Woodend' property and its value to the community. The Board further finds that the proposed fence will help preserve the Woodend property and will allow the ANS to continue to use 'Woodend' in the manner contemplated in the Bethesda Chevy Chase Master Plan, and thus finds that the grant of the requested setback variances is consistent with that Plan. See Exhibit 3.

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 finds, based on the testimony of Ms. Alexander and the exhibits of record, including its own December 15, 2016, decision in Case No. CBA-2643, in which the Board found that the visual impact of the proposed black-coated, ten-foot fence with a black top rail would be less than that of the existing fence and would not substantially change its visual effect on the immediate neighborhood, that granting the requested setback variances to allow the installation of the proposed black-coated fence will not be adverse to the use and enjoyment of abutting or confronting properties. In support of this, the Board notes that since the Board issued its December 15, 2016, decision in Case No. CBA-2643, the ANS has lowered the height of the proposed fence behind the residences along the ANS' north and south boundaries from ten (10) feet to eight (8) feet to address the concerns of those abutting neighbors, despite the attendant increase in the porosity of the fence to deer, and has removed the black top rail from the fence, except at the corners, for the same reason. The Board finds that both of these changes will further reduce the visual effect of the fence on the neighbors. The Board further finds, based on the testimony of Ms. Alexander and the testimony and findings made in Case No. CBA-2643, that black fencing recedes visually, and that the ANS has offered to install plantings inside of the fence, which will soften its appearance. Finally, the Board notes that under the Zoning Ordinance, the ANS could install a black, 6-foot, 6-inch fence along the property line without a variance; thus the requested variances on the north and south sides of the property are not needed to allow a black chain link fence on the property line, but rather to allow that fence to be 18 inches taller than would otherwise be allowed by the Zoning Ordinance.

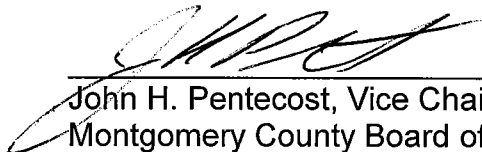
The Board recognizes that the abutting property owners represented by Mr. Brown and participating in the hearing are opposed to the new fence, and have testified that it would be adverse to their enjoyment of their properties. However, in considering the testimony and evidence of record in this case, including the expert testimony about this proposed fence from the administrative modification proceedings and the Board's findings in issuing that decision, the Board reiterates its finding that the grant of the requested setback variances, which would allow a fence that the Board found in the administrative modification proceedings will not substantially change the visual effect on the immediate neighborhood over that of the existing fence, will not be adverse to the use and enjoyment of abutting or confronting properties.

Accordingly, the requested variances from the required minimum setbacks set out in Section 59-4.4.8.B.2 of the Zoning Ordinance are **granted**, subject to the following conditions:

1. Petitioner shall be bound by the testimony of its witnesses and by the exhibits of record; and
2. Construction shall be in accordance with Exhibits 4 and 5 (inclusive).

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


John H. Pentecost, Vice Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 15th day of August, 2017.


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.