

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
www.montgomerycountymd.gov/content/council/boa/index.asp

(240) 777-6600

Case No. A-6448

PETITION OF JOHN AND JUNE HILLEGAS AND RACHEL NEVE

OPINION OF THE BOARD

(Opinion Adopted January 28, 2015)

(Effective Date of Opinion: February 25, 2015)

Case No. A-6448 is an application for a 21.5-foot variance from the required minimum lot width at the building line of 75 feet, under Section 59-4.4.8.B.1. The Petitioners propose to construct a new single family dwelling on a lot whose width at the front building line is 53.5 feet.

The Board of Appeals held a hearing on the application on January 28, 2015. Jody Kline, Esquire, appeared on behalf of the Petitioners. He called John Hillegas as a witness. Solomon Yohannes, the abutting neighbor to the west of the subject property, also testified.

EVIDENCE PRESENTED

1. The subject property is Parcel P931, Colesville Subdivision located at 3138 Fairland Road, Silver Spring, Maryland, 20904, in the R-90 Zone.
2. To obtain a building permit to construct the proposed house, Petitioners must have a plat of subdivision recorded. [Chapter 50-8 Montgomery County Subdivision Regulations]. The Maryland National Park and Planning Commission (MNCPPC) advises the Petitioners that it cannot accept or allow recordation of a plat for this property because it does not comply with the requirement of Section 4.4.8.B.1 of the Zoning Ordinance, specifically the property's width at the front building line.
2. The subject property was part of a six-acre tract of land originally known as "Sopers Fancy." That parcel was divided into nine parcels in accordance with an unrecorded plat of survey prepared by Joseph N. Starkey in November, 1949. The subject property was shown as Parcel A on that plat. [See Exhibits, 3, 4(a), 12].

3 The subject property was designated as a separate parcel of land, Parcel 931, at 3138 Fairland Road, in a conveyance by deed dated May 1, 1960, recorded in the Land Records of Montgomery County in Liber 2764 at Folio 311, from George Jackson and Emory Lee, joint tenants, to Herbert Henry Jackson and Grace Margaret Jackson as tenants by entirety. [Exhibit No. 6(a)].

4. Abutting Parcel 960, to the west of the subject property, with roughly the same shape and dimensions, was created simultaneously by recordation of a deed to the same grantees, recorded in Liber 2764 at Folio 313. [Exhibit No. 6(b)]. The address of that property is 3134 Fairland Road.

5. Anecdotal evidence suggests that there was a residence for Mrs. Grace Jackson on Parcel 931, although there are no records of permits for its construction. Incomplete records from the Department of Housing and Community Affairs indicate that this house came to be considered unsanitary and/or unsafe and that the County intervened and constructed a residence for Ms. Jackson on abutting Parcel 960, to which she relocated, leaving the structure on the subject property vacant. Subsequently, again according to anecdotal evidence, and without official records, the vacant structure was destroyed in a fire, leaving no markings or features that can be identified today.¹ [See, Exhibit No. 3, pp. 3-4, Transcript, January 28, 2015, p. 20-21].

8. Mr. Kline stated that the proposed construction substantially conforms with the established historic or traditional development pattern of the street or neighborhood since there is a development pattern of houses constructed on narrow lots on the block. [Transcript, January 28, 2015, p. 14].

9. Mr. Hillegas purchased the subject property and began paying taxes on it in 2001. He testified that he began the process to obtain a building permit shortly before the downturn in the housing market, so he abandoned that process. He had a copy of a September 14, 1995 memorandum from MNCPPC Subdivision Office, Development Review Division to the Montgomery County Health Department which states, in part, "Since this request is an exception to the subdivision regulations, no preliminary subdivision plan will be required for the release of a building permit by this office." [Exhibit No. 13].

He testified that eventually he decided to sell the property and that after four or five years, received a contract from Rachel Neve. Ms. Neve was told by the Maryland National Capital Park and Planning Commission that the lot is unbuildable because of its substandard narrowness at the building line. He noted that the lot contains 20,000 square feet, well above the minimum lot size for the zone.

¹ Under Subdivision Regulations Section 50-9-(f)(2), Montgomery County would allow replacement of a structure on an un-platted lot created after 1958 if the Petitioners could produce evidence that a house once existed on the Subject Property. But because there are no such County records, and no physical evidence of the prior house's existence, this avenue is not available to the Petitioners.

Mr. Hillegas stated that he discussed with MNCPPC staff the September 14, 1995 memorandum and the fact that other parcels, created out of 'Sopers Fancy' in 1960 like his, have houses on them, but was told that because his lot was created after June 1, 1958, it does not qualify for the exemption in the subdivision regulations that would make it buildable.²

Mr. Hillegas stated that without a variance, allowing a house to be built on it, the lot would have no reasonable use. He testified that during the time the subject property was for sale, he received no inquiries about using the property for something other than a single-family house. [Transcript, p. 23]. In response to a Board question, Mr. Hillegas confirmed that the contract to sell the subject property is contingent on receiving the variance.

10. Soloman Yohannes, the abutting neighbor to the west at 3134 Fairland Road, testified that the front door to his home faces the shared side lot line between his property and the subject property. He stated that he does not oppose a house being built on the subject property but that he prefers that it not be located in front of his front door. He also requested that a fence be installed.

Mr. Kline stated that he has talked to Mr. Yohannes about siting the proposed house to the rear of Mr. Yohannes's front door, and that they had also discussed use of a driveway area on Parcel 931, as well as installation of a fence.

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.1. denying the variance would result in no reasonable use of the property*

The Board finds that no house can be built on the subject property without the requested variance. The Board finds that 'reasonable use' as contemplated in this section of the variance standard means use for any reasonable purpose that is consistent with the surrounding properties, the neighborhood and the zone. This is clearly a residential neighborhood and the best use for this lot is to put a residence on it. Based on the foregoing and on Mr. Hillegas's binding testimony, that he attempted to sell the property for more than four years and received no offers to use the property for anything other than a residence, the Board finds that the variance can be granted on this basis.

² Under Subdivision Regulations Section 50-9-(f)(1), a lot created by deed prior to June 1, 1958 may be built upon even if the lot is not platted. This exemption appears to have applied to several of the lots created out of 'Sopers Fancy'.

Section 59-7-3.2.E.1.a - one or more of the following unusual or extraordinary situations or conditions exist:

2. *Section 59-7.3.3.E.1.a.v - the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood*

The evidence of record indicates that the historical pattern of development along the block includes several houses on narrow lots. The Board finds that granting the variance for the subject property would continue this pattern of development, which can be the basis for the variance.

3. *Section 59-7.3.2.E.1.b - the special circumstances or conditions are not the result of actions by the applicant*

Mr. Hillegas purchased the subject property thinking it was a buildable lot. He took no action that created the circumstances that constrain building on it.

4. *Section 59-7.3.2.E.1.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 that a variance to allow construction of a house on the lot is the minimum necessary to afford Mr. Hillegas reasonable use of his property. The proposed construction will conform with applicable development standards in all other respects. While narrow at the front building line, the property contains 20,000 square feet affording the ability to site the house away from neighboring homes.

5. *Section 59-7.3.2.E.1.d. - the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan*

The purposed of the variance is to allow construction of a single family home in a single family neighborhood, which is entirely consistent with the master plan.

6. *Section 59-7.3.2.E.1.e. - granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties*

The Board finds that the proposed construction continues the traditional development pattern on the block and as such, will not be adverse to the use and enjoyment of abutting or confronting properties. Exhibit No. 4(b) shows the proposed house to the rear of Mr. Yohannes's house and Mr. Kline stated that the Petitioners have agreed to accommodate Mr. Yohannes's concern that a new house not be placed directly in front of his front door. The property's large size allows flexibility to site the house to avoid such an impact.

Accordingly, the requested variance of from the required is granted subject to the following condition:

1. The petitioners shall be bound by the testimony presented and exhibits of record, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.

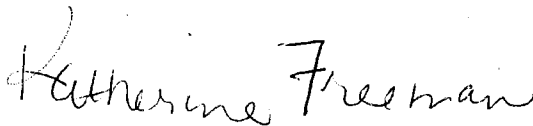
Therefore, based upon the foregoing on a motion by David K. Perdue, Chairman, seconded by Stanley B. Boyd, with Carolyn J. Shawaker, Vice-Chair, John H. Pentecost and Edwin S. Rosado in agreement, the Board adopted the following Resolution:

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.



David K. Perdue
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 25th day of February, 2015.



Katherine Freeman
Executive Director

NOTE:

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.

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 (See Section

59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.