

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6452

PETITION OF DASH 50W, LLC

OPINION OF THE BOARD

(Opinion Adopted: February 4, 2015)
(Effective Date of Opinion: March 16, 2015)

Case No. A-6452 is an application for a 10.12-foot variance from the 30-foot maximum height allowed by Section 59-4.4.8.B. The Petitioner proposes to build a single-family dwelling 40.12 feet in height.

The Board of Appeals held a hearing on the application on February 4, 2015. This case was heard at the same time as Case No. A-6451, Petition of Jenny Tsang and Keat Yam Yeoh. William Chen, Jr., Esquire, appeared on behalf of the Petitioner. He called Kenneth Mergner, David McKee and Chuck Krockner as witnesses. Albert Arking and Mark Arking, neighbors of the subject property, testified in opposition to the application. Albert Arking testified on his own behalf and on behalf of seven other households on Gainsborough Road, including Mark Arking's.

Decision of the Board: Requested Variance **Denied**.

EVIDENCE PRESENTED

1. The subject property is Lot 59, Block B, Willerburn Acres Subdivision located at 11821 Gainsborough Road, Rockville, Maryland, 20854, in the R-90 Zone.
2. The subject property and the abutting Lot 58, were created in a re-subdivision that was approved by the Montgomery County Planning Board in May,

2011. The Planning Board Resolution approving the subdivision contains the following condition:

“9) Any building permits for one-family residences that are issued pursuant to this preliminary plan must show that the buildings are to be built in substantially the same locations and orientations as shown on the certified preliminary plan”

3. Testimony of Kenneth Mergner

A. Kenneth Mergner is Vice-President of construction for Classic Homes of Maryland. Mr. Mergner testified that he has probably overseen the construction of close to 5000 homes over the course of 30 years. Mr. Mergner testified that the house proposed is a style that's typical of those he's seen throughout his 30-year career. He described the type of house as comprising a nine-foot foundation, with a nine-foot first floor, and an eight-foot second floor with a typical 8/12 roof pitch. [Transcript, February 4, 2015, p.28].

B. Referring to Exhibit 13, page 2, a map of the Willerburn Acres neighborhood, recognized by the Planning Board in the proceeding that created lots 58 and 59, Mr. Mergner stated that there is a mixture of house styles in the neighborhood, with ramblers being more typical of construction in the 1950s and 60s, and two story homes with basements being more typical of construction from the 1980s on.

4. Testimony of David McKee

A. David McKee testified as an expert in land planning and landscape architecture. Mr. McKee was engaged to provide site planning, site engineering, construction stake-out survey work and to assist the property owner to obtain permits, including filing the building permit application.

B. Referring to page 2 of Exhibit 13, Mr. McKee pointed out the neighborhood adopted by the Montgomery County Planning Board when Lots 58 and 59 were created. He stated that the neighborhood contains 52 houses of which 31 are two-story homes and the rest are one or one-and-a-half story homes.

C. Mr. McKee stated that the building permit for the proposed house on the subject property was denied because the proposed building height exceeded the maximum for the R-90 Zone, under Section 59-4.4.8.B.3 of the Zoning Ordinance. Section 59-4.4.8.B.3 allows a height of 35 feet to the highest point of a flat roof, or of 30 feet measured to mean height between the eaves and ridge of a gable, hip, mansard or gambrel roof. Mr. McKee highlighted as significant in this case, the

application of Section 59-4.1.7.C.1 of the Zoning Ordinance, regarding how building height is measured, and which states, in pertinent part:

- "a. Building height is measured from the average grade to the mean height level between the eaves and ridge of a gable, hip, mansard, or gambrel roof, or to the highest point of roof surface of a flat roof.
- b. Average grade is calculated using the weighted average of point grades for each wall length along pre-development or finished level of ground (whichever is more restrictive), along the front of the building parallel to the front setback line."

In this case, the pre-development level of ground is more restrictive.

D. Mr. McKee stated that the intention of this provision "is to prevent changing of the existing contour of a property for the purpose of achieving greater height or extra building height or a larger building that might appear too tall ... for its surroundings or too tall for the zone." [Transcript, page 54].

E. Mr. McKee stated that Lot 59 "is really sitting at the lowest point along Gainsborough Road," with an area that is 10 feet below the grade of the road, and that the back of the lot slopes upward at a 25 percent grade. He stated, "Lot 59 is a hole." [Transcript, page 61]. He described lot 59 as a drainage way from Gainsborough Road, from Lot 58 and from abutting park property to the rear.

F. Mr. McKee stated that under Section 59-4.1.7.C.1, the average front elevation, for the purpose of calculating height is 292.2, and that without a variance the house would be sited so that the basement floor is at 285.5. The variance application proposes to fill the lot, so that the basement floor would be at 295.4, in to achieve proper drainage, but that increases the height of the house, as defined by the Zoning Ordinance, to 40.12 feet.

G. Mr. McKee stated that the effect of Condition 9 of the Planning Board's approval of the subdivision creating Lots 58 and 59, is to require that the houses be located toward Gainsborough Road, in order to protect some specimen trees that are located at the rear of the lots.

H. He stated that the proposed construction would entail partial filling of the lot, about 10 feet, so that the house, measured from pre-development grade (as required by the Zoning Ordinance), would be 40 feet tall. He emphasized that the house would be 30 feet tall, as measured from the finished grade. Mr. McKee noted that the proposed design is intended to receive drainage from three sides of the

property and to correct the 20 percent downward slope of the home's driveway that would exist if the house were constructed without a variance.

I. Mr. McKee stated that in his expert opinion, the lot's topography is an unusual and extraordinary condition, as is the restriction imposed by Condition 9 of the Planning Board's Opinion. He opined that the combination of these conditions with the height restrictions of the Zoning Ordinance poses a practical difficulty because of the severe drainage issues that would occur and steep driveway that would be needed if the house were constructed without a variance.

J. Mr. McKee gave his opinion that the proposed construction conforms with the established historic and traditional pattern of development in the neighborhood, stating that most of the homes in the neighborhood are two-story homes that sit higher than the street.

K. Mr. McKee stated that granting the variance will not be detrimental to the use and enjoyment of neighboring property owners because the proposed, typical, two-story house will not be out of scale with surrounding homes.

L. Mr. McKee stated that the requested variance of 10.12 feet is the minimum reasonably necessary raise the proposed house out of the property's low, pre-construction grade hole

M. He stated that the property's topography is an existing condition in no way attributable to the owners of the lot. Mr. McKee stated that without a variance, no house can be built on the lot.

N. In response to Board questions about whether a different house could be built on the lot without a variance, Mr. McKee conceded that it might be possible to build a one-story home on Lot 59. He went on to say, "these two lots would be the only lots where you'd be forced to do that in this neighborhood because of the topographic conditions. That tells me that there's a condition here that requires variance." [Transcript, page 81].

O. Mr. McKee stated that the requested variance can be granted without substantial impairment to the Potomac Master Plan, adding that the Planning Board addressed this issue in its opinion granting the subdivision creating Lots 58 and 59.

5. Testimony of Chuck Krockner

A. Chuck Krockner testified as an expert witness in land development. Mr. Krockner stated that he was retained to assist in the permitting process as well as the site development of Lots 58 and 59.

B. He stated, "But for the fact that we have extreme topography on lot 59 as well as lot 58, ... one's a hole, one's a hill, we would not be here today asking for a variance. It's the topography and the definition of how height is measured in the Zoning Ordinance that is causing this." [Transcript, page 113]. Referring to the photographs in Exhibit 13, pages 5-10, Mr. Krocker testified about the topographical features of Lots 58 and 59.

C. Mr. Krocker stated that the houses proposed for each lot are sited to comply with Condition 9 of the Planning Board Opinion granting the subdivision creating the lots. Mr. Krocker stated that Condition 9 "really forces the location of the house relative to the front and back yard in order to protect the environmentally sensitive areas near the...back of the lot." He added that constructing a house on the lot without a variance would result in "a two-story structure being constructed in a hole" with "a greater than 20 percent drive that would go in a negative direction from the street to the house." [Transcript, page 110]. He stated, "we have weather conditions, we have icing and you can imagine if we had a rain or a snow event, trying to get down a driveway, it could be disastrous, so it's just, it's not common practice to do that." [Transcript, p. 112].

D. Mr. Krocker stated that in 35 years, he has "never worked on a project where we built a single-story home." Mr. Krocker stated that 60 percent of the 52 homes in the neighborhood designated by the Planning Board are two-story homes. He distinguished between homes built over the last 30 years, and homes built 40 years and longer ago, stating that "Single story construction was done more prominently ...in the 60s and 70s when land was less expensive, when you had greater land areas. It is still practiced today somewhat, usually by an elderly population who wants to avoid stairs, but again, in an urban environment, it's very unusual." [Transcript, page 113]. Referring to Exhibit 13, pages 19-28, Mr. Krocker testified about the development pattern in the neighborhood. He described the neighborhood as "eclectic," with "a lot of different style homes." [Transcript, page 124].

E. Mr. Krocker emphasized that the variance is needed because of the extremely low elevation of the pre-construction grade of the property. Referring to page 13 of Exhibit 13, Mr. Krocker stated that purpose of requesting a variance is to "get a more consistent relationship from the...house onto the roadway." [Transcript, page 112]. He stated that it is very undesirable, from the standpoints of water and safety, "to have a garage situation that is below the road."

F. Mr. Krocker gave his expert opinion that the extremely low pre-construction grade of the property is a very unusual situation, and that this lot is the only one in the neighborhood with this condition.

G. Mr. Krocker opined that granting the variance would not have an adverse impact on abutting or confronting properties, but rather stated that constructing a

house without a variance, at the extremely low elevation of the subject property would have such an adverse effect because it "would look out of character with the adjacent properties, being constructed in a hole." [Transcript, page 126]. Mr. Krocker elaborated, saying that Lot 59 abuts Park and Planning property, "And if you look at the one lot up from there to the north, which would be the second lot north of the Park and Planning property, the relationship of our proposed roof with the other existing house would be in character within a foot or two of what that roofline would be." [Transcript, page 127.].

H. Mr. Krocker testified that the amount of the requested variance is the minimum required, expounding, "I can't tell you how much time we've spent looking at this and finding the correct relationship to each other as well as to the adjacent properties and in order to create a scenario here that would not be an adverse effect." [Transcript, page 128].

I. Mr. Krocker stated that the property owner did not create the topographic condition on the lot.

J. Mr. Krocker stated that the houses proposed for Lots 58 and 59 fit in with the historic and traditional development pattern on of the neighborhood, reiterating that 60 percent of the homes in the neighborhood have two-stories.

6. Testimony of Mark Arking

A. Mr. Arking stated he believes that the variance requests do not meet the requirements of the variance standard because "the reason why they need a variance is a direct result of the design that they've created for the house and had they provided a different design, that would not be the issue so therefore, it's a direct result of their action to a design that they created that requires a variance."

B. Mr. Arking stated that granting the variances will be adverse to the use and enjoyment of abutting and confronting property owners, pointing to the letter of opposition from neighbors [Exhibit Nos. 9 and 10], who, he said, "don't want to see these very high houses in a neighborhood."

C. Mr. Arking stated "that typically in our neighborhood, there is no house that I can think of that is over 24 feet." On cross-examination, Mr. Arking stated that he's referring 30 or 40 of the houses in the neighborhood as not being over 24 feet tall, but that he had not measured them. He stated that his house has a 14-foot ceiling in one area and "then if you go to like the medium grade where you measure, it comes out to about 18 feet."

7. Testimony of Albert Arking

A. Referring to See Exhibit 13, page 12, and the photographs in Exhibit 14, top row, second from the left, Mr. Arking stated that the depiction of the roofs on Exhibit 13, page 12 is inaccurate. Pointing out the rooflines of the houses shown in Exhibit 14, Mr. Arking concluded "And that's why, from our point of view, that we consider a typical two-story house, and I found this on the web, is more like 20 feet or 22 depending upon what you do with the roof. But to call it 27 to 28 feet, that's what I consider gross exaggeration." [Transcript, page 154].

B. Mr. Arking stated that he agrees that "when you choose a house that's an action and if you take that action that is the real problem ... it's not just the terrain." [Transcript, page 154].

C. He stated that "the real issue is with an alternate house design or with reasonable changes to the current design, could the house be built in conformance with zoning regulations, and I feel and the homeowners (referring to the signatories to Exhibit Nos. 9 and 10) feel the answer is certainly yes. This is what most people do. They look at the terrain and design the house accordingly."

D. Mr. Arking stated that "the beauty of our neighborhood [is] that every house, as you can see from the discussion, is different. There's no such thing as a typical house in our neighborhood."

E. Mr. Arking opined that the property owners could make reasonable use of their properties "by just not building the so called typical house."

F. Mr. Arking pointed out his neighbor's property, the house on Lot 23, directly across Gainsborough Road from the subject property, which, he said, has "comparable depressions and highs" to the subject property [See Exhibit 14]. Mr. Arking stated "They faced the situation when they built their house and they built their house on top of the hill. They chose where you put the house in order to avoid having to do something very unusual." [Transcript, page 156].

G. Mr. Arking stated that the topographical condition of the subject property is "not so extraordinary that you couldn't build a reasonable house." He stated that the variance is not the minimum reasonably necessary because the requested variance "is not necessary ... if you permit consideration [of] modification of the house." [Transcript, page 158].

H. Mr. Arking stated that the eight homes nearest to Lots 58 and 59 "all expressed extremely strong opposition and this is why they asked me to ... present these arguments" that the proposed construction, with the variance, will be adverse to the use and enjoyment of abutting and confronting properties.

I. Mr. Arking stated that residents of the neighborhood "have one thing in common. We love our neighborhood, its trees and vegetation ... we love the way the homes blend in with the landscape, and we do not want two tall houses suddenly to appear as if they popped out of the ground and mar the aesthetics of the

neighborhood. And if you could make the corrections here, this will be an absolute elevation. This point here will be higher than just about any house in the entire neighborhood and so it's not something that oh, well, nobody will notice it. They will. It will be the highest." [Transcript, page 159].

J. Mr. Arking stated that he and the neighbors he represents recommend that the variance be denied "not only because they do not meet the requirements for approval but also they would do irreparable harm to our neighborhood. And the houses on the subject lots need to be redesigned to match the lots." [Transcript, page 160].

8. Rebuttal Testimony of David McKee

A. Mr. McKee stated that in contrast to Lot 23, the subject property does not contain a flat area on which to build, and that building is further constrained by Condition 9 of the Planning Board's Opinion.

B. Mr. McKee reiterated that the height of the proposed house on Lot 58 will be 29 feet from the finished grade at the front of the house, and the house on Lot 59 will be 30 feet.

9. Closing Argument by William Chen, Jr., Esquire

A. Mr. Chen stated that the owner of the subject property purchased it after it was platted, was not involved with the subdivision process, and had no prior knowledge of a need for a variance.

B. Mr. Chen argued that the imposition of Condition 9 by the Planning Board is evidence of environmentally sensitive features on the property.

C. Mr. Chen argued that "if the answer to a building height variance is just lower the height, take it to one story or whatever, you could never grant, ever grant a building height variance and respectfully, I don't think that's what the law contemplates. I think the evaluative context is the application that is sought when the building permit was filed." [Transcript, page 178].

D. Mr. Chen stated that the opponents to the variance had not given "one bit of activity that they are not going to be able to do on their property if these two lots are developed with the requested houses." [Transcript, page 180].

FINDINGS OF THE BOARD

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

1. *Section 59-7-3.2.E.1.a.i exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;*

The Board finds that the extremely low, pre-finished grade of the property, the 'hole' as Mr. McKee called it, is an exceptional topographic condition of the property. The Board notes that Condition 9 imposed by the Planning Board restricts construction on this property to the area of this 'hole.'

2. *Section 59-7-3.2.E.1.a.iii. the proposed development contains environmentally sensitive features or buffers;*

The Board finds that the property does contain environmentally sensitive features, as evidenced by the Planning Board's imposition of Condition 9.

3. *Section 59-7-3.2.E.1.b. the special circumstances or conditions are not the result of actions by the applicant;*

The Board finds that the extreme topographical condition on the property is not the result of any actions by the applicant. The lot was platted prior to their purchase of 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 agrees with Mr. Mark Arking, a neighbor, that "the reason they [the owners] need a variance is a direct result of the design that they've created for the house." The Board further accepts the testimony of Mr. Albert Arking that proposed house "will be higher than just about any house in the neighborhood, and so it's not something that, oh well, nobody will notice it. They will. It will be the highest." See Transcript, page 159. The Board finds that the photographs of the houses on the lots that flank and confront lots 58 and 59 corroborate Mr. Albert Arking's testimony. See Exhibit 14. Finally, the Board notes that Mr. McKee conceded in response to Board questioning that a house could be built on this lot without a variance. See paragraph 4 N, above. Thus the Board finds that the requested variance is not the minimum reasonably necessary to overcome the lot's topography and that while it may not be the house proposed by the Petitioner, a house can be built on the lot without a variance.

Because the application fails to meet the requirement of Section 59-7-3.2.E.1.c, the application must be denied.

On a motion to grant the variance by Edwin S. Rosado, seconded by David K. Perdue, Chair, with John H. Pentecost, Carolyn J. Shawaker, Vice-Chair and Stanley B. Boyd opposed, the variance is **denied**.

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 16th day of March, 2015.



Katherine Freeman
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 (See Section 59-A-4.63 of the County Code). 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.