

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**CASE NO. A-6551
PETITION OF ZAK ELYASI**

**OPINION OF THE BOARD
(Opinion Adopted March 7, 2018)
(Effective Date of Opinion: March 15, 2018)**

Case No. A-6551 is an application for four variances necessary to allow a pool and deck, as follows:

The proposed construction, a pool, requires a variance of three (3) feet as it is within two (2) feet of the side lot line. The required setback is five (5) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

The proposed construction, a pool, requires a variance of three (3) feet as it is within two (2) feet of the rear lot line. The required setback is five (5) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

The proposed construction, a deck, requires a variance of four (4) feet as it is within zero (0) feet of the side lot line. The required setback is seven (7) feet with a three (3) foot exemption, in accordance with Sections 59-4.4.9.B.2 and 59-4.1.7.B.5.a.1 of the Zoning Ordinance.

The proposed construction, a deck, requires a variance of eleven (11) feet as it is within zero (0) feet of the rear lot line. The required setback is eleven (11) feet, in accordance with Sections 59-4.4.9.B.2 and 59-4.1.7.B.5.a.1 of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on March 7, 2018. Petitioner Zak Elyasi, who owns the subject property, appeared pro se with his construction manager, Diego. Margaret Studt, whose property abuts the subject property to the west, appeared in opposition to the requested variances, and was represented by David Brown, Esquire. Neighbor Joan Wathen also appeared in opposition.

Decision of the Board: Variances **DENIED**.

EVIDENCE PRESENTED

1. The subject property is Lot 18, Block 3B, Bradley Hills Sec. 2 Subdivision, located at 6714 Fairfax Road, Chevy Chase, MD, 20815, in the R-60 Zone. Per SDAT, it is 5,274 square feet in area.
2. Mr. Elyasi states in his written statement that his lot "is extremely narrow and restricted by a huge tree that has been there for decades." He states that "[t]he narrowness of the lot does not allow for placement of both the pool and deck within the current regulations." Regarding the tree, his statement notes that "[a] huge tree in the rear of the property prevents original placement of fence. The fence could not be placed without damaging the existing tree and roots causing damage to the tree and/or property." He notes that he is not responsible for the narrowness of the lot or the presence of this tree, and that "[u]nfortunately, there is no other option for a layout." See Exhibit 3.
3. Mr. Elyasi indicates in his written statement that "[t]he entire project is based around the use of the lap/therapy pool by the applicant who has problems with his knees and the parents who suffers from debilitating arthritic and muscular issues. The applicant parents are moving into the residence soon and the deck at the pool will allow for their use of the pool." See Exhibit 3.
4. John and Sivalee Crowley, who live three doors down from the subject property, submitted a letter expressing their opposition to the requested variances. Among other things, the Crowleys ask that the Board deny the requested variances "in order to avoid establishing a precedent in [their] neighborhood," and note that these "structures, without the required variances, will impinge on neighbors' privacy and peace and quiet, damage house values, and create more community stress." See Exhibit 9.
5. John L. Moore, who lives behind and one property east of the subject property, submitted a letter asking that the Board deny the requested variances and require that the subject property be brought back into compliance. Mr. Moore indicates in his letter that his opposition is based on three considerations, including that allowing the offending structures to stand would set a precedent for others to follow, that the structures are "incompatible with the neighborhood and are an unwelcome visual intrusion," and that because the pool and deck are several feet above grade and on the property line, their use is "often intrusive to some semblance of privacy and neighborhood tranquility for adjacent property owners." See Exhibit 11.
6. Elizabeth Tordella, who lives a few doors down from the subject property, also submitted a letter stating that she is opposed to the grant of the requested variances. Ms. Tordella notes that the pool and deck were installed without a permit, and that the variances are requested retroactively. She questions the structural soundness and safety of the existing structures, given the lack of permits. She also states that "[t]he structures are far too close to property lines and exist in heights that compromise existing fence lines. [She] worr[ies] that individuals who stand on these structures may fall over the

fences harming them and leaving neighbors with liability that they did not and could not anticipate." See Exhibit 12.

With respect to the impact that the requested variances would have on the neighborhood, Ms. Tordella indicates that the required setbacks are "essential to the quality of [her] life in this neighborhood," and are established for safety and privacy reasons. She states that the variances, if granted, will reduce property values in her neighborhood. Finally, she indicates that if the variances are granted, the pool and deck "will leave no green space to capture water and will increase ground water flow into our waterways and harm them and ultimately our beloved Chesapeake Bay." See Exhibit 12.

7. Pierre Kacha, whose property abuts the subject property to the rear, submitted a letter voicing his opposition and urging the Board to deny the requested variances. Mr. Kacha sets forth numerous reasons for opposing the requested variances, including obstruction of his vista, loss of privacy due to the raised nature of the deck ("When children and adults are on the deck, they tower over the property line."), inconsistency with and fundamental change to the nature of the neighborhood, belief that the structures will lower property values, lack of historical significance, and possible health, safety, and wellness issues. See Exhibit 13.

8. Joan Wathen, who lives down the street from the subject property, submitted a letter urging that the requested variances be denied. Ms. Wathen's letter states that the property "is a plain rectangular lot with no challenging features," which she concludes does not qualify for a variance. In addition, her letter indicates that the subject property is covered by the Bethesda Chevy Chase Master Plan and the Bethesda Downtown Sector Plan, and is on the boundary of the Bethesda Overlay Zone. It cites policy and planning reasons in those plans for the denial of the requested variances. Her letter also states that the legislative history of ZTA 08-11, dealing with residential infill construction, indicates that it was intended to address the problem of "newly constructed homes in established neighborhoods that loom over their neighbors and invade their privacy." See Exhibit 14.

9. At the hearing, Mr. Elyasi testified that he and his wife built this home, that it was their dream home, and that they were very excited to move into the neighborhood. He testified that the home was designed with a first floor bedroom and bath to accommodate his parents, who were getting older and would be moving into the house. Mr. Elyasi testified that his father has difficulty climbing stairs, and that he wanted to install the therapeutic lap pool to help his parents when they move in.

Mr. Elyasi testified that his property narrows towards the rear, and that this shape has created some difficulties. He further testified that there is a 100-foot tall tree on his neighbor's property, at the rear fence line which borders his property, which caused him to have to relocate a planned retaining wall from the rear of his property to the middle of his back yard, closer to his house. He testified that he had consulted with an arborist, and if the retaining wall had been constructed at the back of the property, it would have harmed the roots of his neighbor's tree, and may have caused the tree to fall. He testified

that he had looked into having this tree removed, but the cost was prohibitive, and that since it was his neighbor's tree, he could not remove it on his own. He stated that he had tried to reach out to that neighbor a couple of times about the tree, but had no success.

In response to a Board question asking how his property was different from surrounding properties, Mr. Elyasi testified that similar to the property next door to the right (east), his property narrowed in the back, whereas other surrounding properties were rectangular in shape. See Exhibit 7(b). He further testified that the large tree just behind his rear lot line created an issue for his property. Mr. Elyasi agreed with a Board observation that he had constructed his house to the edge of his buildable envelope.

Mr. Elyasi testified that the pool is approximately four feet above ground, and that a deck is needed to provide safe ingress to the pool. See Exhibit 5(a). He estimated that the fence around his rear yard is five or six feet tall, noting that it steps up, and that the deck is approximately four feet above the ground. He testified that he can adjust the height of the fence to give the neighbors more privacy if needed.

Mr. Elyasi acknowledged that he had made a mistake by not getting permits for his deck and pool, and testified that he is trying to fix that with this variance request.

On cross-examination, Mr. Brown asked Mr. Elyasi to look at the photographs included with Exhibit 10. Mr. Elyasi agreed that the first photograph showed the original house (now removed) and large trees on the subject property, later testifying that he had removed those trees in connection with the construction of his new house. He testified that in the second photograph, which his construction manager Diego stated was taken around June 2017, the large tree behind his rear property line is visible. He testified that some of the roots of that tree had been cut during the construction, as shown in the second and third photographs. He noted that the plywood in the third photograph is at the lot line, and that some dirt still protects the tree roots. Mr. Elyasi's construction manager testified that the top portion of the structure shown in the fourth photograph is a fence with a stucco finish, not a retaining wall. He testified that the retaining wall was nine feet, two and one-quarter inches (9' 2.25") from the rear lot line. See Exhibit 5(a). Mr. Elyasi testified that the ninth photograph is a partial view of his property from the street, and that the tenth shows outdoor furniture on the deck. He testified that the eleventh and twelfth photographs were taken from Ms. Studt's back yard, and show men standing on his deck in locations where they could stand today.

Still on cross-examination, Mr. Elyasi testified that he is self-employed and has two companies, one of which does real estate renovations. He testified that he has done three projects in Montgomery County. In response to a question asking if he had a professional license for building construction, architecture, or engineering, Mr. Elyasi testified that such licenses are not needed to do work on your own property, and that Landis (presumably referring to Landis Architects/Builders) had stamped the plans for his house. He testified that he had not asked Landis to approve plans for the deck and pool.

Mr. Elyasi testified on cross-examination that in looking at the Zoning Vicinity Map in the record at Exhibit 7(a), the Studt property appears narrower than his property. When asked if he was aware that under Maryland law, he could remove portions of trees that crossed onto his property, Mr. Elyasi testified that he was not.

Mr. Elyasi acknowledged that per Exhibit 4(a), the pool is 7.16 feet wide, and he agreed with Mr. Brown that if the pool were installed directly behind the rear of the house, with two feet of decking around it, the deck and pool would be approximately nine (9) feet from the rear lot line, and would only need a two (2) foot variance. When asked if that was less than the variance requested, Mr. Elyasi's construction manager testified that they had left nine (9) feet of undisturbed soil between the rear property line and the retaining wall to protect the tree. He went on to testify that locating the pool so close to the house, as proposed by Mr. Brown, carried with it potential water and electrical problems, and would block an egress window. Mr. Elyasi offered to replace the portion of the deck along the rear property line with pavers, which he indicated would not need a variance.

In response to a Board question asking why he needed the retaining wall, Mr. Elyasi testified that they had to dig down to build the house and excavate for the garage. His construction manager testified that the retaining wall was needed to accommodate the construction of the house, and that it was shown – albeit at the rear lot line – on the drawings that were approved in connection with the construction of the house.

10. Prior to putting on his witnesses, Mr. Brown moved that the Board deny the requested variances on grounds that Mr. Elyasi had not shown that his property was unique. He quoted the variance analysis in *Montgomery County v. Rotwein*, 169 Md. App. 716, 906 A.2d 959 (2006), for the proposition that:

The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is – in and of itself – unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property.

Mr. Brown argued that the subject property is a “run of the mill” lot, and that if this property could get a variance, any property could get a variance. He asserted that Mr. Elyasi had failed to demonstrate that his property was unique, and accordingly asserted that the requested variances must be denied.

FINDINGS OF THE BOARD

1. Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, “Necessary Findings,” provides that in order to grant a variance, the Board of Appeals must find that:

(1) denying the variance would result in no reasonable use of the property; or

(2) each of the following apply:

- a. one or more of the following unusual or extraordinary situations or conditions exist:
 - i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;
 - ii. the proposed development uses an existing legal nonconforming property or structure;
 - iii. the proposed development contains environmentally sensitive features or buffers;
 - iv. the proposed development contains a historically significant property or structure; or
 - v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;
- b. the special circumstances or conditions are not the result of actions by the applicant;
- 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;
- d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and
- e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.

A Petitioner can meet the variance standard in either Section 59-7.3.2.E.1 or Section 59-7.3.2.E.2 of the Zoning Ordinance and be granted a variance. The Board notes that Section 59-7.3.2.E.2 sets forth a multi-part, conjunctive test for the grant of a variance. For this reason, the Board cannot grant a variance if an applicant proceeding under that Section fails to meet any of the required elements. In addition, Section 59-7.1.1 of the Zoning Ordinance provides that the applicant has the burden of production and the burden of proof by a preponderance of the evidence on all questions of fact.

2. Based on the record in this case, the Board finds that there was no attempt to argue the standard in Section 59-7.3.2.E.1 of the Zoning Ordinance, and further finds that because the requested variances fail to meet Section 59-7.3.2.E.2.a, as explained in the ensuing paragraphs, the requested variances cannot be granted.

Section 59-7.3.2.E.2.a requires that 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;

While Mr. Elyasi has asserted that his property is unusual in that it narrows towards the rear, he testified that the abutting property to the east of his property shares this feature. Mr. Elyasi also agreed with Mr. Brown's statement that his property appears wider than the abutting property to the west. The Board finds, based on this testimony and after examining the Zoning Vicinity Map in the record at Exhibit 7(a), that Mr. Elyasi's property is not unusually narrow or unusually shaped for the block, and indeed appears wider than some properties, including the abutting property to the west (Studt property). Thus the Board finds that the requested variances cannot be granted on these grounds. In addition, the Board finds that while Mr. Elyasi has checked the boxes on the variance application form to indicate that the Zoning Ordinance requirements pose a practical difficulty for him because of his property's "shallowness," "topography," and "other extraordinary situations or conditions peculiar to this property," he has not provided any evidence to support these claims, and thus the Board finds that the requested variances cannot be granted on these grounds. To the extent that Mr. Elyasi claimed that his neighbor's large tree constitutes an extraordinary condition, the Board finds that the presence of trees is not considered an extraordinary condition, and notes that in general, it cannot consider trees, as further explained under Section 59-7.3.2.E.2.a.iii, below.

Section 59-7.3.2.E.2.a.ii. the proposed development uses an existing legal nonconforming property or structure;

The Board finds that Mr. Elyasi has not asserted or provided any evidence to indicate that the proposed development uses an existing legal nonconforming property or structure, and thus the requested variances cannot be granted on these grounds.

Section 59-7.3.2.E.2.a.iii. the proposed development contains environmentally sensitive features or buffers;

Mr. Elyasi has testified that there is a large tree on his neighbor's property, behind his rear property line, which constrains the placement of his retaining wall and fence because, according to his arborist, cutting the roots of that tree may cause it to fall. The Board appreciates Mr. Elyasi's desire to refrain from harming this tree, but notes that trees are generally not considered to make a property unique for purposes of meeting the variance standards because absent special protections, they are not considered inherent characteristics of the property. The Board finds that Mr. Elyasi has not presented any evidence to suggest that this tree is subject to the Montgomery County Forest Conservation Law or to any other tree protection or environmental ordinance such that it is legally protected. Accordingly, the Board finds that the existence of this tree is not an "extraordinary condition" peculiar to the property under Section 59-7.3.2.E.2.a.i of the Zoning Ordinance, and is not an "environmentally sensitive feature" such that the requested variances could be granted under Section 59-7.3.2.E.2.a.iii of that Ordinance.

Section 59-7.3.2.E.2.a.iv. the proposed development contains a historically significant property or structure; or

The Board finds that Mr. Elyasi has not asserted or provided any evidence to indicate that the proposed development contains a historically significant property or structure, and thus the requested variances cannot be granted on these grounds.

Section 59-7.3.2.E.2.a.v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;

The Board finds that Mr. Elyasi has not asserted or provided any evidence to indicate that the proposed development substantially conforms with the established historic or traditional development pattern of this street or neighborhood, and thus the requested variances cannot be granted on these grounds.

Having found that the variance application does not meet Section 59-7.3.2.E.2.a of the Zoning Ordinance, the Board finds that the variances cannot be granted pursuant to Section 59-7.3.2.E.2 because of the conjunctive nature of that Section's test for the grant of a variance. Accordingly, the Board does not need to address the remaining criteria in that Section. The Board notes at this juncture that even if it were to have found that this property was unique under Section 59-7.3.2.E.2.a, the Board would have denied the requested variances for failure to meet Section 59-7.3.2.E.2.b of the Zoning Ordinance, since the need for the requested variances stems from a self-created hardship arising out of Mr. Elyasi's construction of his new home. The Board notes that it was Mr. Elyasi's choice to construct a home that extended to the back of the buildable envelope and that required a retaining wall, both of which reduced the area available "behind the rear building line of the principal building" for the placement of the proposed pool (and the associated decking). Given the Board's findings that the variance application does not meet Section 59-7.3.2.E.1 or Section 59-7.3.2.E.2 of the Zoning Ordinance, the Board finds that the requested variances cannot be granted pursuant to Section 59-7.3.2.E, and must be denied.

With respect to any assertion that the requested variances should have been considered under the Americans with Disabilities Act, as amended by the ADA Amendments Act of 2008, and the Fair Housing Amendments Act of 1988, the Board finds that Mr. Elyasi has presented no evidence to show that he or his parents have a documented medical condition which constitutes a physical impairment and which substantially limits any of their abilities to participate in a major life activity, and has not provided any evidence to show that the pool and deck for which the variances are requested, in the locations proposed, are a necessary and reasonable accommodation to allow him and/or his parents to participate in that major life activity. Thus the Board finds that it cannot grant the requested variances pursuant to the Americans with Disabilities Act, as amended by the ADA Amendments Act of 2008, and the Fair Housing Amendments Act of 1988.

On a motion by Stanley B. Boyd, seconded by John H. Pentecost, Chair, with Edwin S. Rosado, Vice Chair, Bruce Goldensohn, and Katherine Freeman in agreement, the Board voted to deny the requested variances, and 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, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 15th day of March, 2018.



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.