

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
<http://www.montgomerycountymd.gov/boa/>

(240) 777-6600

Case No. A-6579

PETITION OF MARIA EMMA CRUZ

OPINION OF THE BOARD

(Hearings Held: September 26, 2018, and October 10, 2018)
(Effective Date of Opinion: October 25, 2018)

Case No. A-6579 is an application by Maria Emma Cruz (the "Petitioner") for a variance necessary for the construction of a roof that is 39.17 feet in height, thus requiring a variance of 4.17 feet from the thirty-five (35) foot height limit. The thirty-five (35) foot height limit, measured to the highest point of the roof surface, regardless of roof type, is imposed by Section 59-4.4.9.B.3 of the Montgomery County Zoning Ordinance (2014).

The Board of Appeals held a hearing on the application on Wednesday, September 26, 2018. Ms. Cruz appeared *pro se* at the hearing with her son, Robert Gonzalez. Matt Makowski, an Inspector with the Montgomery County Department of Permitting Services, also participated.

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

EVIDENCE PRESENTED

1. The subject property is Lot P19, Block 13, PT LT 20 Pinecrest Subdivision, located at 6602 Cockerille Avenue, Takoma Park, Maryland, 20912, in the R-60 Zone. It is a four-sided corner lot, roughly square in shape, bordered by Cockerille Avenue along its northeast side and by Highland Avenue along its southeast side. Per SDAT, it has an area of 8,308 square feet.

2. The Justification Statement submitted by the Petitioner with her variance application notes that she purchased the subject property in 1985, and that per SDAT, the house on the subject property was built in 1925. It notes that the subject property is a corner lot that:

... sits at the bottom of hills on both sides of the house that are facing the street. The property has irregular topography elevations in the front of the house and on both sides of the street on the Cockerille Ave. side and Highland Ave. side making it difficult to build a beautiful house that is even and fits the traditional suburban look of the neighborhood.

The Statement later explains that:

The property is in between two hills on the Cockerille Ave. side and Highland Ave. side which gives the property unusual or extraordinary topographical conditions and the property is also shallow which cause different elevations that makes it extremely difficult to construct the structure and keep it looking like a traditional suburban house that will not interfere with the general scheme of the neighborhood. The property is somewhat secluded surrounded by trees and cannot really be seen unless you are in front of the house.

It goes on to state that the Petitioner "would have to obtain a variance to reach her ultimate building goal for her home because of the extraordinary topographical conditions." See Exhibit 3.

3. The Justification Statement states that the proposed development "substantially conforms with the established traditional development pattern of the neighborhood," noting that "[r]ecently built beautiful million-dollar homes [are] only a couple of houses away and nice large dwelling housing are on every single street" around the Petitioner's house, "[m]ost" of which are "complemented with 2 levels." The Statement later notes that "[m]any of the houses on the street and in the neighborhood already have large dwelling structures. A variance for the 50 inches will make the property in Conformity with the general neighborhood." See Exhibit 3. The Petitioner submitted several photographs of nearby houses with her application. See Exhibit 5.

4. The Justification Statement notes that the Petitioner's house "will not have a detrimental effect on surrounding Properties or general neighborhood." It notes that the "shallowness and topographical conditions [of the property] have always been the same and the special circumstances or conditions of the land were not the result of actions by the petitioner," who purchased the property in 1985. Finally, the Justification Statement notes that the Petitioner "is following the Takoma Park master plan ... by reinvesting and enhancing the quality of life throughout Takoma Park Maryland by rehabilitation of her existing residential home and following the traditional development pattern of the street and neighborhood." See Exhibit 3.

5. The record contains letters both supporting and opposing the grant of the requested variance. See Exhibits 7 and 10 (inclusive).

6. At the September 26, 2018, hearing, the Petitioner's son, Robert Gonzalez, testified that the subject property has challenging topography in that it is located at the

bottom of two separate hills, one along Cockerille Avenue and the other on Highland Avenue. He testified that this results in a lot with multiple elevations and that this feature is unique when compared with neighboring properties, which he testified are flat or have one elevation. Mr. Gonzalez testified that the uneven topography of the subject property made construction difficult. Mr. Gonzalez testified that ramblers in the neighborhood were being converted into mansions, and that they had attempted to follow that pattern and to make their redesigned house even with neighboring houses.

Mr. Gonzalez testified that they had hired a licensed contractor who worked with a structural engineer to design the house. He testified that the front page of the plans submitted with the building permit application showed that the house was 35 feet in height, but that the side elevations showed that limit being exceeded. He testified that they could put a flat roof on the house and meet the height limit, but that they would prefer an eaved roof so that the house conformed with the traditional look of the neighborhood. He testified that the unusual elevations on the subject property caused the contractor and structural engineer to make a mistake on the plans with respect to the height of the structure.

7. Matt Makowski, an Inspector for the County's Department of Permitting Services, testified that a building permit was issued for the proposed construction, and that the plans submitted with the permit application showed that the height of the proposed structure was less than 35 feet, but "did not have the number at which the structure is currently built." He testified that in response to a complaint about the height of the construction, DPS investigated and discovered that the construction did not comply with the height limitations in the Zoning Ordinance. He testified that DPS instructed the Petitioner to cease construction or face a stop work order, and that they issued a citation. He stated that when the Petitioner's architect submitted the plans, they did not calculate the average grade across the front for the purpose of measuring height, as is required,¹ but rather measured the height from the right side grade of the proposed structure, where it was compliant with the height standards.

8. Mr. Gonzalez testified in response to Board questioning that the house sits lower than other houses on the block because of the topography, and that the peak of the roof "actually looks about the same [as that of other houses] when you're looking from the street." Mr. Gonzalez further testified, in response to additional Board questions, that this is a two-story house with a basement, and that the third story is an attic. Mr. Makowski testified that the house presents as a two and a half story house that also has a basement,

¹ Section 59-4.1.7.C.1 of the Zoning Ordinance provides the following with respect to the measurement of height in Residential zones:

- a. Building height is measured from the average grade either 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, regardless of roof type.
- 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. The weighted average of point grades for each wall length is calculated by multiplying each front facing wall section times the grade elevation adjacent to that section, summing all products, and dividing by the total length of the front wall.

but that due to the shallow nature of the roof trusses used, there is a full height ceiling on the third floor. He testified that because that floor is not finished, it is difficult to know how it will be used.

9. At the October 10, 2018, hearing, Mr. Gonzalez testified that the original house was built in 1925, and that there was no zoning ordinance at that time in Prince George's County, where the property was formerly located. He testified that the house is non-conforming in terms of the front and side setbacks imposed by the Montgomery County Zoning Ordinance.

Mr. Gonzalez testified that there are four storm sewer intakes located in front of the subject property because of its location at the bottom of two steep hills. He showed the Board photographs of these sewer intakes. He testified that the subject property is the only house in Takoma Park with four sewer intakes in front of it, and that this results in the subject property being shallow and lower than surrounding properties, making construction difficult. He reiterated his earlier testimony about the subject property having different elevations and neighboring properties having one; he showed the Board pictures of these neighboring properties.

Mr. Gonzalez showed the Board photographs of the house across the street and other houses in the neighborhood, and testified that he and his mother were seeking to follow the established pattern in the neighborhood of homes with beautiful roofs. He testified that if the variance were granted and they were allowed to proceed with their construction, their house would be the same height as others in the neighborhood; he presented pictures of tall Takoma Park houses, including several houses that he testified were taller than the house they were proposing. He presented a photograph that was taken looking down Cockerille Avenue towards Highland Avenue, and stated that the rooflines show that their proposed roof would not sit taller than neighboring homes because it was constructed in a shallow area at the bottom of two hills. He testified that it was the gables on his mother's roof that were causing the problems but acknowledged that the actual height measurement was to the peak of the roof, behind the gables. He testified that because the roof trusses were pre-engineered with the gables, the entire roof would have to be removed if the variance was denied.

Mr. Gonzalez gave the Board a list of other height variances that had been granted.² He testified that in 2002, the Board had granted a height variance to Redskins'

² One of these cases was a Takoma Park case, Case No. A-6381, in which side and rear lot line variances were granted for both an existing accessory structure, built in the 1940s or 1950s, and to permit the construction of a second story on top of that structure. The latter required additional setbacks beyond the standard side and rear lot line setbacks applicable to the existing accessory structure because the height of the structure with the proposed addition exceeded fifteen (15) feet. Section 59-C-1.326 of the Zoning Ordinance in effect at that time required that the side and rear yard setbacks for accessory structures in the R-60 Zone be increased by two (2) feet for every foot in height over fifteen (15) feet. With the proposed second story, the accessory structure at issue in this case was 18.07 feet in height. This was not a height variance case, and did not involve any variances for the principal structure (house).

owner Daniel Snyder due to the slope of his property. See BOA Case No. A-5691.³ Mr. Gonzalez testified that he had driven to Mr. Snyder's property and that it is flat. He presented a picture of the entrance to Mr. Snyder's property to the Board. He testified that the contractor he used had been granted five (5) variances for construction on a house a few blocks away, although in response to Board questioning, he acknowledged that none of those were height variances.

In response to a Board question asking how the differences in elevation on the subject property create the need for a variance, Mr. Gonzalez testified that if the variance is not granted, the proposed construction will not match the neighborhood. He then re-emphasized that the proposed roof would follow the traditional development pattern in the neighborhood, that the original house is nonconforming, and that the shallowness and different elevations on the subject property are not shared by surrounding properties. He testified that the grade of the property changes approximately four (4) feet across the front of the house and that the back yard slopes severely upwards, that they are preserving green space by going taller rather than increasing the footprint, that the requested variance is the minimum needed to meet the traditional pattern in the neighborhood, and that if they are allowed to proceed with the proposed roof, their home would be the same height as other houses in the neighborhood. He testified that he and his mother do not want an awkwardly shaped home that does not follow the traditional development pattern of the neighborhood.

FINDINGS OF THE BOARD

Based on the Petitioner's binding testimony and the evidence of record, the Board finds that the requested variance must be denied. The Board notes that Section 59-7.3.2.E.2 sets forth a conjunctive test for the grant of a variance. For this reason, the Board cannot grant a variance if an applicant fails to meet any of the required elements of that Section. In addition, Section 59-7.1.1 of the Montgomery County Zoning Ordinance provides that the applicant has the burden of production and has the burden of proof by a preponderance of the evidence on all questions of fact.

Based on the record in this case, the Board notes that there was no attempt to argue the standard in Section 59-7.3.2.E.1 of the Zoning Ordinance, and finds that because the requested variance does not comply with all of the applicable standards and requirements set forth in Section 59-7.3.2.E.2, as explained in the ensuing paragraphs, the requested variance cannot be granted.

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

³ This case involved height variances needed for fences/walls that exceeded the 6.5 foot height limit, not for the principal structure (house). One of the height variances, needed to allow an 11.1 foot tall "main gate" at the entry to the property, was granted; a second height variance, necessary to allow a 10-foot tall perimeter fence, was denied.

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, based on the Justification Statement and the testimony of the Petitioner's son, that unlike surrounding properties, the subject property sits at the bottom of two hills and has multiple elevations, making it unique for the purposes of satisfying this element of the variance test.

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 the proposed development substantially conforms with the established historic or traditional development pattern of this street or neighborhood, based on the assertions of the Petitioner's son and the photographs not only showing an eclectic mix of houses with pitched/eaved roofs, many of which are tall, but also showing that the proposed roof would not appear higher than that of neighboring homes because of the lower elevation of the subject property.

2. *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;*

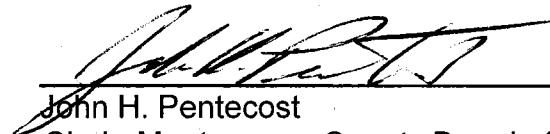
While the subject property has multiple elevations, the Board finds that this has not precluded construction on this property, which is clearly underway, and thus has not caused the Petitioner a practical difficulty. Because the topography has not precluded construction on this property, the Board finds that a house that meets the height restrictions of the Zoning Ordinance and that also comports with the development pattern in the neighborhood could have been (and still could be) constructed on this property. Indeed, the Board notes the testimony of record that while it would not be the Petitioner's preference, a flat roof that would meet the height restrictions of the Zoning Ordinance could be installed on this house.

The Board further finds that there is no evidence to suggest that the proposed additional height of the structure was needed to overcome the challenges posed by the property's topography. Rather, an argument was put forward saying that the extra height was needed to allow a roofline similar to surrounding properties. While unfortunate, the Board finds that it was a mistake made by the Petitioner's contractor, and therefore attributable to the Petitioner herself, and not any unusual characteristic of the property which resulted in the need for the requested variance relief. A shorter home could have been constructed with the desired eaved roof.

In light of the foregoing, the Board cannot find that the requested height variance is the minimum reasonably necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary condition of this property. Having made this finding, the Board finds that the variance must be denied, and that it need not address the remaining elements of the variance test.

On a motion by John H. Pentecost, Chair, seconded by Stanley B. Boyd, with Edwin S. Rosado, Vice Chair, and Katherine Freeman in agreement, and with Bruce Goldensohn necessarily absent, the Board voted to adopt 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 25th day of October, 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.