

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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CASE NO. A-6590

PETITION OF MARYAM HASHEMIAN AND JAFAR JAVAN, TRUSTEES

OPINION OF THE BOARD

(Opinion Adopted November 7, 2018)
(Effective Date of Opinion: November 16, 2018)

Case No. A-6590 is an application for a variance needed for an existing structure, an addition with a new kitchen. The existing structure requires a variance of ten (10) feet as it is within ten (10) feet of the rear lot line. The required setback is twenty (20) feet, in accordance with Section 59-4.4.8.B.2 of the Zoning Ordinance.

The Board held a hearing on the application on November 7, 2018. Petitioners Maryam Hashemian and Jafar Javan appeared at the hearing in support of the application with their attorney, Jody S. Kline, Esquire. David W. Brown, Esquire, also appeared at the hearing, in opposition to the requested variance, on behalf of the Town of Glen Echo, and on behalf of abutting property owners Aaron Hirsch and Blair Anderson. Mr. Hirsch and Mr. Anderson's wife Laetitia appeared at the hearing, along with Willem Polak, the Mayor of the Town of Glen Echo. All three testified in opposition to the grant of the requested variance.

Decision of the Board: Variance DENIED.

EVIDENCE PRESENTED

1. The subject property is Lot 14, Block 22, National Chatauqua Glen Echo Subdivision, located at 7315 University Avenue, Glen Echo, Maryland, 20812, in the R-60 Zone. It is a square lot, 5,241 square feet in area, and has existed in its present size and shape since 1987. See Exhibit 3.
2. The Petitioners purchased the subject property in 2015 and, per SDAT, it contains a house constructed in 1988. As noted in the Applicants' Statement ("Statement"), at the time they purchased the property, there was "an elevated deck across the back of the house

which was roofed and screened." The Petitioners enclosed part of this deck "in order to make their kitchen more efficient, more spacious and more in keeping with the physical needs of the residents." The Applicants' Statement further notes that when they enclosed this covered rear porch, the Zoning Ordinance "allowed a nine (9) foot encroachment of an uncovered or roofed '...porch, deck, terrace, steps or stoop ...' into a rear yard." See Exhibit 3. The Statement goes on to indicate that the Petitioners did not realize that by closing in part of their porch, that exemption would no longer apply.¹ It notes that as a result of the reconstruction, the rear of the house now sits ten (10) feet from the rear property line in a zone where a twenty (20) foot rear setback is required.

3. The Statement states that the subject property is "relatively shallow in depth," approximately seventy-five (75) feet deep with a front setback of twenty-five (25) feet and a rear setback of twenty (20) feet, leaving an effective buildable envelope that is only thirty (30) feet deep. The Statement further observes that "lots in the 'National Chataugua of Glen Echo' are typically 6,000 square feet in area *if not less.*" (emphasis added) See Exhibits 3 and 4.

4. With respect to the impact of the requested variance on neighboring properties, the Statement states that:

In this instance, the enclosure of an existing covered and screen porch does not have the effect of bringing the mass of the structure closer to the rear of another house situated behind 7315 University Avenue. In actuality, there is no confronting residence immediately behind the subject property. The two lots directly behind the Applicants' lot are improved with residences fronting on Harvard Avenue and are "through lots" that extend from Harvard Avenue to Yale Avenue. The new improvement on the subject property therefore does not encroach towards the rear of a confronting house but, instead overlooks open lawn that is rather generous in this neighborhood and for the general development pattern of lots in the Glen Echo "Chataugua" community.

See Exhibit 3. In addition, the Statement notes that "[d]ue to a set of circumstances unique to this setting, the enclosure of an existing elevated deck, which previously overlooked the backyard patio activities of the abutting residence at 6101 Harvard Avenue, actually reduced the exterior activity level on the subject property, thus contributing to the use and enjoyment of the property at 6101 Harvard Avenue."

5. The Statement states that although Mr. Javan is "not disabled," he suffers from a condition which necessitates his use of a walker from time to time to avoid falls. The Statement asserts that "enclosing the already existing deck was viewed as a way to create a kitchen/living area with adequate space for Mr. Javan to better maneuver without risk of falling and injuring himself upon hitting some furniture, a wall or the floor." See Exhibit 3.

¹ The applicability of this exemption was the subject of discussion at the hearing, with counsel for the Petitioners indicating his belief that it applied to screened porches, and opposing counsel disagreeing. The Board found that whether or not the former screened porch was covered by this exemption is not relevant to the variance proceeding.

At the hearing, the Petitioners produced medical records from 2016 and 2018 to corroborate the existence of this condition. In response to a Board question asking counsel for the Petitioners whether the Petitioners were pursuing this variance as a reasonable accommodation under the Fair Housing Amendments Act, counsel answered in the negative, stating that the condition was only raised to help explain the Petitioners' desire for a larger kitchen.

6. At the hearing, Petitioner Maryam Hashemian testified that she and her husband had purchased this property in 2015 with the intent to move there because it was walking distance to the park. She testified that their current house has a small kitchen, and that they wanted to renovate the kitchen at the subject property before moving in to provide safe and adequate space to accommodate the use of a walker. Ms. Hashemian testified that they decided to enclose an existing screened porch for this purpose, and that they did not know they needed a building permit to do this. She testified that they received a stop work order from the Town of Glen Echo. She stated that after they learned of the violation, they went to the County's Department of Permitting Services, and were told that they would need to apply for a variance, which they did. In response to a question asking her what hardship she would suffer if the variance were not granted, Ms. Hashemian testified that if they were not able to retain the kitchen addition, they would not be able to move into the house.

On cross-examination, Ms. Hashemian testified that she and her husband own other properties, including one other property in Glen Echo, which they rent out and for which they have a rental license. She testified that while the house on the subject property has been rented out since 2015, they had not procured a rental license for that home because they intended to live there. Ms. Hashemian testified that they finished renovating the kitchen at the subject property in July of 2018, and planned to rent the property out until they could sell the property in which they are currently living. She testified that after listing the subject property as a rental in August of this year, they pulled the listing.

Still on cross-examination, in response to a question asking about the truck that was parked in front of the subject property during the time when the porch was enclosed and the kitchen expanded, Ms. Hashemian testified that the truck belonged to their company, which she testified was in the business of installing countertops. She testified that a friend of theirs had done the actual construction work at the subject property.

7. In response to questions from counsel for the opposition asking if the depth of the subject property appeared to be the same as that of the abutting properties along University Avenue, Petitioner Jafar Javan testified that the property at 7317 University Avenue (the Hirsch property) was deeper than the subject property. In response to further questioning, Mr. Javan testified that he is a licensed Maryland home improvement contractor.

8. Counsel for the Petitioners presented an exhibit showing other variances related to setback issues that had been granted in Glen Echo, and indicated that these variances were primarily for rear lot line setbacks. See Exhibit 14. Counsel also introduced an enlargement of the Zoning Vicinity Map showing the immediate area around the subject

property. See Exhibit 15(a). He stated that this exhibit shows the unusual development pattern in the neighborhood, with houses located in close proximity to one another. In addition, he stated that Exhibit 15(a) shows that there is no house immediately north of (i.e. behind) the subject property. Counsel then stated that it was not until you got to the north end of the block that there was a house behind the house on the subject property, estimating that distance to be between 75 and 90 feet. He stated that because of the orientation of these other properties, they do not look directly into the house on the subject property. Counsel also presented an aerial photograph showing the same area. See Exhibit 15(b).

9. Mr. Willem Polak, the Mayor of Glen Echo, testified in opposition to the grant of the requested variance. Mr. Polak testified that he was out of town when the construction began at the subject property (enclosure of the screened porch), and that upon his return, he was told by neighbors that there was no permit for the work. He testified that the Town of Glen Echo issued a stop work order that was taken down by the owners.

10. In response to the assertion by the Mayor of Glen Echo that he or his wife had removed the stop work order issued by the Town, Mr. Javan testified that they had not removed the stop work order, but rather that one of the workers did, and that when he had found out, they put it back up.

In addition, Mr. Javan testified that he was at the job site on the first day of construction, and that while he had not seen Mr. Hirsch, he had been told that Mr. Hirsch had come by and had taken measurements. He testified that he did see the Mayor, and that the Mayor did not mention the need for a building permit. Mr. Javan testified that after receiving the stop work order, they started the permitting process, receiving a building permit denial and applying for this variance.

11. Mr. Aaron Hirsch testified in opposition to the grant of the requested variance. He testified that he lives at 7317 University Avenue, and that he is a real estate developer and agent. Mr. Hirsch testified that the house on the subject property had adequate space to maneuver, even with a walker, without the enclosure of the porch, and presented photographs to support his position. He testified that the Petitioners own several other properties and operate a kitchen and bathroom remodeling company. He asserted that the Petitioners did not purchase this property for their own use but rather as an investment, testifying that they have rented the property out since acquiring it.

Regarding the construction that enclosed the porch, Mr. Hirsch testified that the work started without notifying the then-tenants, and that the Town of Glen Echo issued a stop work order, which was removed. Mr. Hirsch testified that the contractor on site told him that no building permit was needed for the enclosure of the screened porch, and that they would get the necessary permits for the interior work. Mr. Hirsch testified that the construction was done very quickly, over a weekend, and hypothesized that this was done to avoid inspectors. He testified that the Petitioners tried to get the surrounding neighbors to sign a paper stating that the addition had always been there. He estimated that the

Petitioners' 219 square foot kitchen expansion and renovation added between \$100,000 and \$150,000 to the value of the home.

Regarding the 75 foot depth of the subject property, Mr. Hirsch testified that lots of that depth are common in Glen Echo, and that his lot, which abuts the subject property, is also 75 feet deep. He read a statement from Kelly Cole and William Dobson, who reside at 7311 University Avenue and could not attend the hearing, into the record. That statement indicated support for Mr. Hirsch's timeline and testimony. He asked that the variance be denied.

On cross-examination, in response to a question asking how he was adversely impacted by the Petitioners' enclosure of their screened porch, Mr. Hirsch testified that he can see it over the fence from his family room and that it offends him because it is illegal.

12. Ms. Laetitia Anderson testified that she lives at 6101 Harvard Avenue, and that her property, which she testified is actually two lots, abuts the subject property to the rear. She testified that she grew up locally, and that it had always been her dream to live in Glen Echo. She testified that she and her husband selected their home because of its yard.

Ms. Anderson testified that the subject property is not unique. She testified that the Petitioners' home is larger than hers, and has a garage. She testified that the original owner of that home said that he built the screened porch without permits. Ms. Anderson testified that the Petitioners began their enclosure of that porch on the morning of June 30, 2018, and that it was enclosed by the end of that day. She testified that there were no inspections, and that having this uninspected kitchen so close to her house frightens her. In addition, she testified that she was not sure that the porch foundation was strong enough to properly support the addition.

Ms. Anderson testified that the Petitioners have encroached on her property, and that while the old porch blended into the trees, the new kitchen addition dominates her backyard space. In addition, she testified that her family cannot do anything without seeing directly into the expanded home, and that their sightlines have been dramatically impacted. Ms. Anderson testified that she is concerned that the kitchen addition will hurt the value of her property and her family's ability to expand their own home. She testified that they are building a new fence along the property line that they share with the subject property, and that the existing fence, shown in many of the pictures, may actually be on their property and not on the subject property, perhaps installed in that location to avoid the need to remove trees. She stated that the photographs may therefore misrepresent the amount of space between the subject property and her property. She testified that the Petitioners had cut her house out of all of their photographs.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board of Appeals finds that the requested variance must be denied. Section 59-7.3.2.E of the Montgomery

County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board 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.

Section 59-7.1.1 of the 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.

The Board notes that in this case, there was no attempt to argue the standard in Section 59-7.3.2.E.1 of the Zoning Ordinance. For this reason, the Board must analyze the instant case under Section 59-7.3.2.E.2 of the Zoning Ordinance. Section 59-7.3.2.E.2 sets forth a five-part, conjunctive ("and") test for the grant of a variance, and thus the Board cannot grant a variance if an applicant fails to meet any of the five elements required by this Section.

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;

While the Petitioners have asserted that the subject property is shallow in depth, resulting in an unusually constrained buildable envelope, the Board notes that it is regular in shape, and finds that the Zoning Vicinity Map shows several lots of similar depth, including the abutting properties on either side of the subject property. See Exhibits 3 and 7(a). The Board's finding that the depth of the subject property is not unusually shallow is further buttressed by the testimony of Mr. Hirsch, who stated that like the subject property, his (abutting) property also has a depth of 75 feet, and that such a lot depth is common in Glen Echo. In addition, although the subject property is less than 6,000 square feet in size, making it substandard for the R-60 Zone, the Petitioners did not argue that the size of their property was unique when compared with other properties in the neighborhood, and indeed acknowledged in their Statement that lots in the neighborhood of the subject property "are typically 6,000 square feet in area if not less." See Exhibit 3. As the Petitioners have asserted no other physical conditions which would render this property unique, the Board cannot find that the subject property meets Section 59-7.3.2.E.2.a.i.

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

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

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

The Petitioners did not attempt to argue that the proposed development used an existing legal nonconforming property or structure, contained environmentally sensitive features or buffers, or contained a historically significant property or structure, and thus the Board cannot find that the subject property satisfies Sections 59-7.3.2.E.2.a.ii-iv.

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 Petitioners have argued that the Town of Glen Echo has an unusual development pattern in which houses are located in close proximity to one another, and that numerous variances, including rear variances, have been granted in this community. See Exhibits 14 and 15(a)-(b). The Board notes that it reviews all variance applications individually, based on the specific characteristics of each property, and thus the fact that it has granted variances for other properties in Glen Echo does not constitute a "pattern," and does not mean that the Board can or must grant a variance for this property. The Board is not persuaded that the evidence presented, namely the map suggesting that houses in Glen Echo are often located in close proximity to one another, and the fact that some other properties in Glen Echo have received variances, shows an historic or traditional development pattern that the kitchen addition at issue in this case would substantially conform to, or that would be thwarted if the variance were denied and the kitchen addition were disallowed. Thus the Board cannot find, based on the evidence of record, that the

proposed development would substantially conform with the established historic or traditional development pattern of this neighborhood, in satisfaction of this Section.

Having found that the proposed variance fails to meet Section 59-7.3.2.E.2.a, the Board finds that the variance must be denied, and that it need not address the remaining elements of the variance test. As noted above, the variance test is conjunctive, and all parts must be satisfied in order for the Board to grant a variance.

In light of the foregoing, on a motion by John H. Pentecost, Chair, seconded by Edwin S. Rosado, Vice Chair, with Stanley B. Boyd, Bruce Goldensohn, and Katherine Freeman in agreement, 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 16th day of November, 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.