

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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<http://www.montgomerycountymd.gov/boa/>

CASE NO. A-6594

PETITION OF JOSEPH CHOLKA

OPINION OF THE BOARD

(Opinion Adopted December 5, 2018)
(Effective Date of Opinion: December 21, 2018)

Case No. A-6594 is an application for a variance needed to allow construction of a new second-story area and changes to the roof. The proposed construction 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 59-4.4.9.B.2 of the Zoning Ordinance.

The Board held a hearing on the application on December 6, 2018. Petitioner Joseph Cholka was present at the hearing, assisted by David Vogt of CASE Architects/Remodelers.

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

EVIDENCE PRESENTED

1. The subject property is Lot 44, Block D, McNeills Addition Subdivision, located at 707 Bonifant Street, Silver Spring, Maryland, 20910, in the R-60 Zone. The primary structure on this 5,242 square foot property was built in 1933, and the property was purchased by the Petitioner in 1998. The property is aptly described in the Statement of Justification ("Statement") as small and shallow, with an angled rear building line. See Exhibits 3, 4 and 7(b).

2. The Statement at Exhibit 3 describes the reason for the variance request:

We are seeking relief from the standard setbacks as defined by the Department of Permitting Services R-60 zoning to an existing non-conforming structure. Our

requests do not change the existing footprint on the house, and is an unobtrusive request to change the size/volume of the existing non-conforming structure, see submitted plat and elevations that show the area of change needing relief compared to the existing non-conforming structure.

3. The Statement notes that the “left rear corner of the original primary structure was set 10’ into the rear yard setback, while the right corner is also set into the rear yard setback approx. 2’-1” +/- as well, due to the ‘clipped’ rear corner on the right side of the rear yard.” The Statement describes the extent of the proposed additional encroachment relative to the existing encroachment as follows:

- 1) Increase the second floor foot print approx. 1’ x 10’ or 10 square feet of space at the rear left corning, expand the existing dormer by 1’ to create a full width second floor. No increase to the lot coverage.
- 2) Increase the second floor foot print approx. 1’ x 2.5’ or 2.5 square feet of space at rear right (shown in yellow on the proposed plat) corning, expand the existing dormer by 1’ to create a full width second floor. No increase to the lot coverage.
- 3) Increase the roof pitch across the rear elevation to create better roof drainage – requested change in area shown purple on the plat, rear elevation, and the two side elevations.

See Exhibits 3, 4, 5(d), 5(f), and 5(h). The Statement further notes that the subject property has a relatively small buildable area, with approximately 24 percent of the lot available for building in a zone which allows 35% lot coverage.

4. In discussing the impact of the variance requested on abutting and confronting neighbors, the Statement declares that granting the requested variance will not adversely impact the use and enjoyment of these properties, noting that the majority of what appears to be a large variance request is already built as an existing non-conforming structure, that the building footprint and existing lot coverage are not changing, and that while the proposal “does increase the total height of the overall house to approx.. 30’-6” +/- this overall height falls with-in the Primary Building Envelope where a 35’ height is allowed.” See Exhibit 3. The record contains several letters of support for the proposed project. See Exhibits 11(a)-(h).

5. David Vogt testified at the hearing on behalf of the Petitioner. He stated that the subject property is shallow and uniquely shaped relative to surrounding properties, and that the buildable envelope that would otherwise result from the application of the setbacks to the property is unusually small. He testified that the current house is nonconforming. He explained that the proposed construction would not increase the footprint of the existing house, but would change the roof pitch and rear dormer (among other things) to add second floor space. He testified that with the proposed construction, the house would still comply with the height restrictions for the zone. Mr. Vogt noted for the record that if the variance is granted and construction is allowed to proceed, there may be changes to the windows located on the front of this house that are shown in the

submitted plans, but that these changes would be in an area where the proposed construction is allowed by right.

CONCLUSIONS OF LAW

Based on 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.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;

The Board finds that the subject property is substandard for the zone and shallow in depth, with an angled rear lot line and an unusually small buildable envelope. The Board finds that these circumstances constitute an extraordinary condition that is peculiar to this property. See Exhibits 3 and 4.

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

The Board finds that the existing house, which was built in 1933 and is set into the rear setback, is nonconforming. The proposed second story and roof construction is intended to expand the existing, nonconforming house without expanding its footprint. The Board thus finds that the proposed development uses an existing legal nonconforming property or structure.

2. *Section 59-7.3.2.E.2.b. the special circumstances or conditions are not the result of actions by the applicant;*

As noted above, the subject property contains a nonconforming house constructed in 1933. The Petitioner purchased this property in 1998. Thus the Board finds that the Petitioner is not responsible for the nonconforming nature of the existing house, and furthermore finds that the Petitioner is not responsible for the unusual size or shape of this lot, including its angled rear lot line and small buildable envelope.

3. *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;*

The Board finds that the requested ten (10) foot variance is the minimum necessary to overcome the practical difficulty that full compliance with the setbacks imposed by Zoning Ordinance would cause because of the constrained nature of the buildable envelope which results from the application of the setbacks to the property, on account of its unusual shape, angled rear lot line, and small size. The Board further finds that the requested variance is the minimum necessary to allow the proposed expansion

of this home in the area of its existing nonconformity without increasing its footprint. Thus the Board finds that this element of the variance test is satisfied.

4. *Section 59-7.3.2.E.2.d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and*

The Board finds that the granting of this variance will continue the residential use of the home, consistent with the applicable master plan.

5. *Section 59-7.3.2.E.2.e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

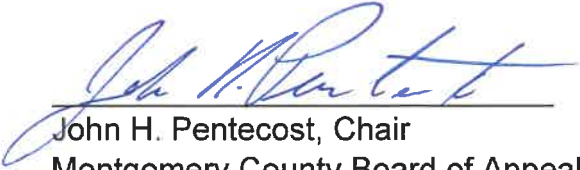
The Board finds that the grant of this variance will not change the footprint of this nonconforming home, and that the resultant construction will comport with the height limits in the Zoning Ordinance. The Board notes that most of the proposed construction is either in the area of the existing nonconformity or is permitted by right. The Board further notes that the record contains numerous letters of support for the grant of this variance from neighbors. See Exhibits 11(a)-(h). Thus the Board finds that granting this variance will not be adverse to the use and enjoyment of abutting or confronting properties.

Accordingly, the requested variance of ten (10) feet from the rear lot line setback is **granted**, subject to the following conditions:

1. Petitioner shall be bound by the testimony and exhibits of record, to the extent that such testimony and evidence are mentioned in this opinion; and
2. Construction shall be in accordance with Exhibits 4 and 5 (inclusive), except that the windows and related details on the front of the house can deviate from those shown on Exhibit 5(b).

Therefore, based upon the foregoing, on a motion by Edwin S. Rosado, Vice Chair, seconded by Stanley B. Boyd, with John H. Pentecost, Chair, and Bruce Goldensohn in agreement, and with Katherine Freeman necessarily recused, 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.


John H. Pentecost, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for

Montgomery County, Maryland
this 21st day of December, 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.

See Section 59-7.3.2.G.1 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.