

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case No. A-6650
PETITION OF 2930 UNIVERSITY BLVD W, LLC**

OPINION OF THE BOARD
(Hearing Date: April 8, 2020)
(Effective Date of Opinion: April 17, 2020)

Case No. A-6650 is an application by Petitioner 2930 University Blvd W, LLC, for a variance from the requirements of Section 59-4.4.9.B.2 of the Zoning Ordinance, needed to construct a new house. The Petitioner is seeking a variance to locate the new house within 5.95 feet of the right side lot line, necessitating a variance of 1.05 feet. The required setback is seven (7) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on April 8, 2020. All participation was done through Microsoft Teams. Anurag Gupta, who owns 2930 University Blvd W, LLC, participated in the hearing in support of the requested variance. Mr. Gupta and his company were represented at the hearing by Françoise M. Carrier, Esquire. In addition to Mr. Gupta, Ms. Carrier also called Curt Schreffler, P.E., as a witness. Andrew Rollo, whose property is located to the rear of the subject property, also participated.

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

EVIDENCE PRESENTED

1. The subject property is Lot 32-A, Kensington Heights Subdivision, located at 2930 W. University Boulevard, Kensington, Maryland, 20895, in the R-60 Zone. Per the Statement of Justification ("Statement"), the subject property was recorded in 1946, and the property's current configuration resulted from a 1960 public taking for the widening and realignment of University Boulevard. See Exhibit 3. The Site Plan reveals that this is a four-sided property, roughly twice as deep as it is wide and rectangular in shape, with a substandard area of 4,801 square feet. See Exhibit 4(a).

2. The Statement explains that construction of this house was undertaken pursuant to proper County permits that were based on a survey which was later discovered to be

incorrect. The Statement notes that once the error was discovered, all work on the house, which was approximately 70% complete, was halted. The Statement indicates that whereas the plans approved in connection with the building permit show the house being 8.4 feet from the west (right) side property line, as a result of the surveying error, it was built only 5.95 feet from that property line at its closest point. See Exhibit 3.

3. The Statement states that the unfinished house cannot be moved to comply with the required seven (7) foot setback. The Statement further states that the cost to the Petitioner to demolish, relocate, and rebuild this house would be approximately \$800,000, and that to date, the Petitioner has invested approximately \$700,000 in the property. The Statement notes that if the Petitioner does not get a variance, he would need to "take a total loss on the Subject Property," because a single-family house is the "only building type permitted on the Subject Property," and "if a single-family house cannot be built in a manner that is financially viable, the property cannot be used." The Statement further indicates that the Petitioner would not be able to pass on the substantial costs of demolition and reconstruction to a potential buyer, and "could be forced to abandon the project, leaving the unfinished and uninhabitable house to become a neighborhood eyesore." See Exhibit 3.

4. The Statement indicates that there are several homes in the neighborhood that are constructed less than seven (7) feet from the side lot line. The Petitioner's variance application includes a map showing the locations of these homes, as well as photographs of the homes. With this map and these photographs as evidence, the Statement concludes that the grant of the requested variance would continue the existing pattern of reduced side setbacks. See Exhibits 3, 5, and 5(a)-(e).

5. The Statement states that the special circumstances necessitating a variance were not the result of any action taken by the Petitioner, but rather were the result of an erroneous survey performed by a subcontractor to the general contractor. See Exhibit 3. At the hearing, Ms. Carrier clarified that this surveying error took place prior to Petitioner's ownership of the subject property, explaining that the Petitioner purchased this property from the entity currently serving as the general contractor for the project after the permits based on the erroneous survey had been pulled and construction was approximately 50% complete. She stated that the surveying error was discovered when foundation work on the abutting property to the west was begun, at which time it became apparent that the two houses would be closer together than was shown on the plans.

In response to Board questions asking if there was any identity of interest between the current owner and general contractor, Mr. Gupta testified that the companies are under separate ownership, and that while he knew the general contractor prior to purchasing the subject property, this was the first project on which they had collaborated.¹

6. The Statement indicates that the variance requested is the minimum needed to allow completion of this house. See Exhibit 3. The Statement further indicates that the

¹ Ms. Carrier indicated that there is a profit-sharing agreement in place between the current owner and the general contractor, but that there is no identity of interest.

variance can be granted without substantial impairment to the applicable Master Plan, as follows:

The variance would support the goals of the general plan and the Wheaton CBD and Vicinity Sector Plan, Approved and Adopted 2012 (the "Wheaton Master Plan"), which identify the Subject Property as part of an existing residential neighborhood and support its use for a single-family home. As noted above, the requested variance is necessary to allow the unfinished single-family dwelling on the Subject Property to be completed, contributing to a residential neighborhood that the Wheaton Master Plan sought to protect.

7. With respect to the impact of the grant of the requested variance on neighboring properties, the Statement at Exhibit 3 offers the following:

The requested variance will not be adverse to the use and enjoyment of abutting or confronting properties. The Subject Property fronts on University Boulevard, a six-lane divided State highway. Confronting properties across University Boulevard would likely find the one-foot variance from the standard setback imperceptible. Properties adjoining to the rear, which front on either Drumm Avenue or Findley Road, are unlikely to perceive any impact from the requested side-setback variance, as the variance is not related to any common property lines. The impact on neighboring properties of having the house on the Subject Property 1.05-feet closer to the on the Adjoining Property than normally permitted would be negligible. The requested 1.05-foot side setback variance will only directly impact the Adjoining Property, which is owned by an LLC that is related to the Applicant. Moreover, any future purchaser of either the Subject Property or the Adjoining Property will be able to observe the distance between the houses on the two properties before making a purchase.

8. At the hearing, Mr. Gupta testified that he owns 2930 University Blvd W, LLC, and that he formed this entity to purchase an unfinished house, to complete the project, and to sell the house once it was finished. He testified that at the time of purchase by his LLC, the building permits for the house had been issued and significant construction had been completed. He testified that a surveying error caused the house to be built too close to the right side lot line, and that construction was halted when the error was discovered. Mr. Gupta testified that if the variance is denied, he would walk away from the project and consider it a total loss, noting that with the money he had already spent, the market could not absorb the additional cost of demolition and reconstruction. He testified that the hole on the property adjoining the subject property to the west is for a second house, and that the variance, if granted, will not impact the future purchasers of that house because they could choose to either purchase that property, or not.

9. In response to a Board question asking if it was feasible to move a wall of the house to comply with the setbacks, Ms. Carrier stated that this was not feasible from a technical perspective. Mr. Schreffler then testified that moving the wall would be impractical because of the foundation wall underneath, and that it would involve

excavating, repouring, and moving the exterior wall, and then moving all interior framing and stairways. He concluded that the process was not simple or practical. When asked if this would cost as much as demolishing the partially finished house and rebuilding it, Mr. Schreffler testified that he did not know, but that he thought it probably would.

10. In response to a Board question asking if the lot line could be adjusted to eliminate the need for the variance, Ms. Carrier stated that they had looked into that, but that because both the subject property and the abutting lot to the west are substandard due to the public taking for University Boulevard, if the properties were to go through a minor subdivision, they would lose the exemption that currently allows them to be built and would likely have to be combined into a single lot. Mr. Schreffler confirmed in his testimony that he had investigated moving the lot line, and that it was not possible.

11. Mr. Schreffler testified that he was hired by the general contractor to do the surveying and get building permits for this project. He testified that the original survey showed that the house was in compliance with the setbacks. He testified that this was typical infill development, that his firm prepared the drawings and a stake-out sketch, and that they staked the house. He testified that when they staked the property abutting the subject property to the west, they realized there was a problem. Mr. Schreffler testified that at that point, they re-surveyed both properties and realized their mistake.

Mr. Schreffler stepped the Board through Exhibit 16, which shows in green the lot lines depicted on the permit drawings, and in red the actual lot lines. He explained that his firm had originally surveyed the subject property and the abutting property to the west in 2006, in conjunction with the large townhouse development that is located east of the subject property. While the townhouses were eventually constructed, Mr. Schreffler testified that the subject property and the abutting property to the west remained vacant. He testified that in doing the survey work for the current single-family construction on these properties, his firm inserted the 2006 survey into the current version of auto-CAD, which he stated had gone through numerous updates since 2006. Mr. Schreffler testified that the mistake occurred because the earlier version was set to imperial feet, and the current version is set to U.S. feet. He testified that the auto-CAD system does not warn the user about this change in units of measurement, and that while this normally would not make a difference, in the instant case, the result of this discrepancy was a two and one-half foot shift to the west, which in turn caused an incorrect staking of the property.

Mr. Schreffler testified that this mistake was not the fault of the variance applicant, and that the requested 1.05 foot variance from the right side lot line is the minimum needed to allow this house to be completed. He testified that the grant of the variance would not have an impact on neighboring properties, using the Zoning Vicinity Map in the record at Exhibit 7(a) to show the Board that the property fronts on University Boulevard, which he described as a busy 6-lane road. He testified that across University Boulevard from the subject property, there is a mix of residential and commercial development. Mr. Schreffler testified that to the east of the subject property is a storm water management parcel for the neighboring townhouse development, and that residential properties abut the subject property to the rear. Finally, he testified that the abutting property to the west

is also owned by Mr. Gupta, and that this property shares the lot line from which the variance relief is sought.

Mr. Schreffler testified that his firm prepared the neighborhood map showing other properties with substandard side setbacks. He explained that his team had canvassed the neighborhood to visually identify these properties, and had then come back with surveying equipment to verify their visual observations. He testified that these are the properties that they were able to visually identify without trespassing, and that there likely were others. See Exhibits 5 and 5(a)-(e).

12. Mr. Rollo testified that he did not receive notice of the original hearing date despite being an abutting property owner. He stated that he wanted to see this house completed. Mr. Rollo asked Mr. Schreffler why the surveying error was not uncovered until the excavation was done on the abutting property, to which Mr. Schreffler responded that in doing things like a wall check survey, a measuring tape is not used, and that the visual confirmation of measurements by reference to fixtures such as retaining walls can be complicated by the presence of vegetation and the fact that such fixtures may not be located on the property line.

Mr. Rollo noted that the house under construction is a large house, and asked if the house on the abutting property would be that large, to which Ms. Carrier responded that the size of the houses was dictated by the size and shape of the properties, and that the second (unbuilt) house would not be as large as the house on the subject property. Finally, Mr. Rollo questioned whether the abutting property could be used as a yard to the first house, to which Ms. Carrier replied that even if nothing were built on the abutting property, a variance would still be needed to complete the house on the subject property.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the requested variances can be granted. The variances comply 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 exceptional due to its small size (4,801 square feet), which the Board finds is significantly substandard for the R-60 Zone, and to its relative narrowness as compared to its depth. See Exhibit 3 and 4(a). The Board finds that viewed together, these conditions constrain the buildable envelope available for the Petitioner to locate the proposed construction in compliance with the development standards of the Zoning Ordinance, and constitute unusual or extraordinary circumstances peculiar to the subject property.

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, based on the Statement, the Neighborhood Map, and the testimony of Mr. Schreffler, that the surrounding neighborhood contains several other homes that were constructed less than seven (7) feet from the side lot line, and that with the grant of the requested variance, this home would be consistent with this established pattern of reduced side lot line setbacks. See Exhibits 3, 5, and 5(a)-(e). Based on this testimony and evidence, the Board finds that the grant of the requested variances would substantially conform with the established historic or traditional development pattern of this street or neighborhood.

2. Section 59.7.3.2.E.2.b the special circumstances or conditions are not the result of actions by the applicant;

The record indicates that construction of the unfinished house on subject property began prior to the Petitioner's ownership of the subject property, and was undertaken based on erroneous survey information that also preceded Petitioner's ownership. Furthermore, the record indicates that property's substandard size was the result of a public taking that occurred in 1960, prior to the Petitioner's ownership. See Exhibit 3. Finally, there is no evidence to suggest that the Petitioner is responsible for the established development pattern in the neighborhood. Thus the Board finds that the special circumstances or conditions pertaining to this property are not the result of actions by the Petitioner.

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, based on the Statement, the testimony of Mr. Gupta, the testimony of Mr. Schreffler, and the representations of counsel, as recounted above, that as a practical matter, the existing construction cannot be relocated or reworked to eliminate the need for this variance, and that the requested 1.05-foot variance is the minimum necessary to allow for the completion of this construction. Accordingly, the Board finds that the requested variance is the minimum needed to allow for the completion of the on-going construction on this substandard property, in a position relative to the side lot line that is consistent with the development pattern in this neighborhood, and thus to overcome the practical difficulty that would be imposed by full compliance with the Zoning Ordinance.

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;

For the reasons set forth in the Statement at Exhibit 3 and recounted in paragraph number 6 under "Evidence Presented," the Board finds that the requested variance can be granted without substantial impairment to the intent and integrity of the Wheaton CBD and Vicinity Sector Plan, Approved and Adopted 2012 (the "Wheaton 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, for the reasons set forth in the Statement and by Mr. Schreffler in his testimony, that the proposed construction will not be adverse to the use and enjoyment of abutting or confronting properties. The Board notes that the abutting property to the west, which is currently being developed and is arguably the property that would be most affected by the grant of this variance, is also owned by Mr. Gupta (through a second LLC). Any future purchaser of the abutting property would take ownership of that property with knowledge of the proximity of the house on the subject property.

Accordingly, the requested variance of 1.05 feet from the right side lot line, to allow the proposed construction of a new house, is **granted**, subject to the following conditions:

1. Petitioner shall be bound by the testimony and exhibits of record; and
2. Construction shall be in accordance with Exhibits 4(a)-(b) and 9(a)-(b).

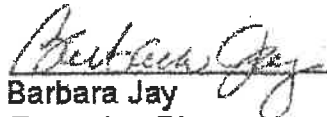
Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Bruce Goldensohn, Vice Chair, with Katherine Freeman and Mary Gonzales in agreement, the Board adopted the following Resolution:

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 17th day of April, 2020.



 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.