

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. A-6657  
PETITION OF JOHN W. COKINOS**

OPINION OF THE BOARD  
(Hearing Date: June 17, 2020)  
(Effective Date of Opinion: July 17, 2020)

Case No. A-6657 is an application by Petitioner John W. Cokinos for four variances from the requirements of the Zoning Ordinance, needed for the construction of a second story addition, eave, and porch, as follows:

(1) The proposed construction, a porch, requires a variance of two (2) feet as it is within fourteen (14) feet of the front lot line. With the nine (9) foot exemption, the required setback is sixteen (16) feet, in accordance with Section 59-4.1.7.B.5.a.i of the Zoning Ordinance.

(2) The proposed construction, a porch eave, requires a variance of 2.5 feet as it is within eleven (11) feet of the front lot line. With a 2.5 foot exemption, the required setback is 13.5 feet, in accordance with Section 59-4.1.7.B.5.a.vii of the Zoning Ordinance.

(3) The proposed construction, a second floor addition, requires a variance of 0.8 feet as it is within 24.2 feet of the front lot line. The required setback is twenty-five (25) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

(4) The proposed construction, a second floor eave, requires a variance of 1.3 feet as it is within 21.2 feet of the front lot line. With the 2.5 foot exemption, the required setback is 22.5 feet, in accordance with Section 59-4.1.7.B.5.a.vii of the Zoning Ordinance.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on June 17, 2020. All participation was done through Microsoft Teams. Petitioner John W. Cokinos, who owns the subject property, participated in the hearing in support of the requested variances. He was represented at the hearing by Nancy Regelin, Esquire. In addition, the Petitioner's daughter, Elaina Simpson, and her husband, Brian Simpson, who are the contract purchasers of the subject property, and Eric Hart, Principal and

Construction Manager with Hartland Development, also participated in support of the requested variances. Abutting neighbors Steve Hubert and Janet Fix participated in opposition to the requested variances, as did Karen Possner, who lives diagonally across Westpath Way from the subject property.

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

## **EVIDENCE PRESENTED**

1. The subject property is Lot 24, Block B, Fort Sumner Subdivision, located at 5337 Westpath Way, Bethesda, Maryland, 20816 in the R-90 (formerly R-60) Zone. The subject property is rectangular in shape, 80 feet wide and 120 feet deep, with an area of 9,600 square feet. See Exhibits 3, 3(j), and 4.
2. The Statement of Justification ("Statement") at Exhibit 3 describes the neighborhood in which the subject property is located, and states that the subject property is small for the neighborhood and encumbered with challenging topography, making it unique, as follows:

The Fort Sumner subdivision is a large residential, single family neighborhood in a hilly area above McArthur Boulevard. The Subject Property was created by Plat no. 5258 as part of a record plat of thirty-eight lots. See Plat no. 5258 attached as Attachment 2 [BOA Exhibit 3(b)]. At the time of subdivision Fort Sumner was zoned R-60 which allowed minimum 6,000 sf lots. However, due to the hilly topography and winding roads, almost all of the lots created by Plat No. 5258 in the Fort Sumner neighborhood are in the 12,000 gsf range. The Subject Property, plus three lots to the north, are substantially smaller (9,600 sf) and of substantially less depth, due to the very steep slopes behind the smaller lots. As a result, the houses on the smaller lots were built forward on their lots. See MNCPPC GIS Map and MNCPPC Topo Map both attached as Attachment 3 [BOA Exhibit 3(c)].

The Subject Property is particularly impacted compared to its neighboring similar small-sized lots as the section of hillside falls off precipitously down to MacArthur Boulevard right at the rear lot line of the Subject Property compared to the other lots to the north. To the north the grade extends level farther to the rear on the other small lots before falling off. The Subject Property is only 120 feet deep compared to the average depth of 150-180 feet in the neighborhood. The other similarly sized small lots are fairly flat.

However, Westpath Way begins a steeper slope downhill at the Subject Property at the same time Westpath Way begins curving away along the front Property line. Westpath Way falls in elevation 20 feet across the frontage of the four smaller lots with an approximate 10 feet drop across the front of the Subject Property. This

results in a unique topography on the Subject Property with a significant slope both across the property from the north to the south (side to side), as well as a significant slope from the house which is built on a "terrace", down to the street. This significant slope from side to side and from the house to the street fully exposes the basement level on the southern side of the house and allows for a fully exposed garage below the house with a driveway that meets the street. See photos of the house from 2018 prior to renovation attached as Attachment 4 [BOA Exhibit 3(d)].

Westpath Way has no sidewalks or swales for storm drainage so the front lawns of the houses are graded to, and have grass out to, the paved area within the right of way. Pathways from front doors from most houses are extended over the right of way to the paved street. There is no demarcation to identify where the right of way begins (except for the edge of the public driveway apron where one would expect the right of way to begin). The extended lawn area in the right of way widens along the Subject Property as the paved portion of Westpath Way curves away.

3. In addition to describing the subject property, the Statement at Exhibit 3 also describes the neighborhood, and some of the properties in the immediate vicinity of the subject property, as follows:

The Westpath Way homes and lots in the immediate neighborhood of the Subject Property vary widely. See aerial Photo attached as Attachment 5 [BOA Exhibit 3(e)]. The neighborhood is a mix of the original homes built in the late 1950s and 1960s and renovated homes from the intervening decades in a variety of design styles.

Adjacent to the south of the Subject Property is a vacant 11,695 sf lot, Lot 25. Lot 25 is owned by the same owner of the next two lots further south, Lot 26 and Pt of Lot 27, which two lots 26 and 27 have been combined into a 43,365 sf parcel improved with a large house set far back from the street with address of 5345 Westpath Way ("Hubert Property"). See Photo of Hubert properties (Lots 25 and 26/27) attached as Attachment 6 [BOA Exhibit 3(f)].

Confronting the Subject Property across Westpath Way is Lot 17, a 17,150 sf lot improved with a house with address of 5340 Westpath Way ("Hunter Property"). See Photo of Hunter Property attached as Attachment 7 [BOA Exhibit 3(g)].

Adjacent to the north of the Subject Property is Lot 23, a 9,600 sf lot with address of 5333 Westpath Way ("Anderson Property"). The Subject Property is built on a terrace that is level with the elevation of the Anderson Property. The Anderson Property is fairly level from the street to the front door. See Photo of the Anderson Property attached as Attachment 8 [BOA Exhibit 3(h)].

To the rear of the Subject Property are the steep slopes down to MacArthur Boulevard on land publicly owned by the United States of America.

4. The Petitioner purchased the subject property in 2018. In connection with this transaction, the Petitioner's lender required the settlement company to secure a number of documents, including a survey of the subject property. Per the Statement, the settlement company contracted with Capitol Surveys, Inc., who "prepared a survey of the Subject Property and located the house on the lot ('Capitol Survey')." The Capitol Survey was certified by a licensed Maryland surveyor, and a copy of the Capitol Survey was provided to the Petitioner at settlement. The Capitol Survey "showed that the existing house was setback 29+/- feet from the front Property line and 12 +/- ft from the north side Property line with adjacent Lot 23." In addition, the Capitol Survey "indicated the double driveway/parking spaces and the angled driveway connection to the narrower driveway apron lay within the Subject Property." See Exhibits 3 and 3(j).

5. The Petitioner renovated the existing house for his daughter and her husband to purchase and occupy as their residence. He hired Hartland Development ("Hartland") to act as project manager to oversee the renovation. Using the Capitol Survey, Hartland worked with an architect and engineer to "produce a design that retained the existing house's first floor and basement and added a second floor." The front walls of the two front-facing second floor rooms were "bumped out" by two feet to accommodate a "wider, ADA accessible hallway" on the second floor. Per the Statement, "[t]his wider hallway is part of the 'design for life' of the house which includes an elevator to the second floor to make the house fully accessible throughout an owner's life. Based on the Capitol Survey, these small bump-outs were well within the building line and would not violate the front yard setback line." See Exhibits 3 and 3(m). The design also added a "nine-foot deep open porch" across the front of the house which "extended just beyond the southern front corner of the existing house." Per the Statement, "[b]ased on the Capitol Survey, the porch met all zoning setbacks with a few feet of setback to spare." See Exhibits 3 and 3(l).

6. The Statement indicates that "[f]or a residential renovation, it is standard practice, accepted by Montgomery County, to mark up a survey to use as the building permit site plan." The Statement further indicates that "[b]ased on the Capitol Survey, which was used/submitted as part of the building permit plan submission, Montgomery County Department of Permitting Services issued Building Permit #859815 in 2019 for the renovations." See Exhibit 3.

7. Per the Statement, "[n]o wall check was required because the existing house remained-in-place and the work was a renovation to add a second floor and porch." See Exhibit 3. The Statement indicates that construction was "substantially complete" when the Petitioner learned of a potential error with the Capitol Survey, as follows:

At the request of a neighbor, DPS requested confirmation of the side yard setback on the southern side Property line where the new front porch extended beyond the corner of the existing house. Applicant contracted with Potomac Valley Surveys to

provide a new survey noting side yard and front yard setbacks to the house as renovated ("Potomac Survey"). The new Potomac Survey confirmed that the side yard setbacks to the renovation were in compliance with Montgomery County Zoning Ordinance 59.7.7.1.D.5.d. See Potomac Survey attached as Attachment 16 [BOA Exhibit 3(p)].

Unexpectedly, the front yard setback to the existing house noted on the new Potomac Survey was inconsistent with the Capitol Survey. The new Potomac Survey indicated that the front setback to the existing house was 26.2 feet not the 29 feet shown on the Capitol Survey. Applicant reached out to Capitol Surveys to discuss the potential survey error in the original Capitol Survey and the company has been non-responsive. Applicant has not been able to confirm if Capital Surveys is still open for business and so must proceed using the new Potomac Survey.

See Exhibit 3. The Statement indicates that the County's Department of Permitting Services "issued a building permit denial on February 21, 2020 with instructions to seek variances for the completed improvements. See attached Building Permit Denial attached as Attachment 15 [BOA Exhibit 3(o)]. Since then, only interior finishes and landscaping work has continued."

8. The Statement indicates that Eric Hart, the principal of Hartland Development, who has over 25-years' experience in residential and commercial renovation and development, would testify at the hearing that there were no "red flags" to indicate that the Capitol Survey was incorrect. The Statement further states that "[c]ertain improvements and facilities that one would expect to define where the Subject Property ended and the public right of way began are all located in front of the Subject Property at a distance that indicated the Capitol Survey was correct," and provides details to support this assertion, ultimately concluding that:

The unique peculiarities of the Subject Property – sloping topography in two directions, limited lot depth compared to properties in the neighborhood, the house location on a terrace, the rotation of the driveway apron, and the lot's orientation along a curving, sloping Westpath Way – have created a situation where an experienced licensed surveyor made an error on a certified survey. The Applicant obtained a building permit, and contracted with a consultant and various contractors who substantially completed the renovations prior to discovery of the survey inconsistency. Specifically, the porch entry and eaves and the second-floor bump-outs and second floor roof eaves which are the subject of the requested variances were completed prior to discovery of the survey error.

See Exhibit 3. The Statement goes on to state that:

It was the Applicant's intent to comply with the zoning ordinance and [he] had no reason to believe that the renovations to the house did not. A professional licensed surveyor's work not performed to the appropriate level of professional care and

standards on a residential lot with complex topography and skewed existing improvements resulted in an error that was not the result of Applicant's actions. The Capitol Survey errors were not observable to experienced real estate professionals nor any of the County inspectors who were on-site from time to time during construction.

9. The Statement details the practical difficulties that the Petitioner would suffer if the variances are not granted. With respect to the second floor bump-outs and eaves, the Statement notes that "demolishing the second floor bump-outs would destroy the structural integrity of the second floor of the home, as well as the roof structure," and that as a result, "the complex roof and a portion of the perimeter structural walls, as well as the porch roof structure, would need to be removed, reengineered, and rebuilt." See Exhibit 3. The Statement then proceeds to note that such construction would be "risky to the integrity of the whole watertight system," and that strict compliance with the Zoning Ordinance would not only result in a practical difficulty "by causing the demolition, re-engineering, and reconstruction of the second floor face, house roof, and porch roof, and structural elements which is a one-time cost," but would also result in potential future costs "by significantly increasing the risk of water leaks from a patched reconstruction which can cause significant damage to a home over time." See Exhibit 3. The Statement estimates that the upfront costs of making these corrections would be "in the range of \$350,000," and states that "the risk of potential damage to other existing portions of the house from the increased risk of structural issues, leaks, subsequent internal finish damage is very high, rendering conformity burdensome to the owner. In addition, compliance would render the house unusable, and make financing and sale impossible, for a period of 6 months or longer." In light of this, the Statement concludes that "[t]he 0.8 ft variance for the second-floor bump-outs and 1.3 ft for the roof eaves is the minimum necessary to maintain the integrity of the house and roof. The bump-outs are integrated into the porch roof which extends 7 ft. beyond the bump-outs and eaves." See Exhibit 3.

With respect to the encroachments by the porch and porch eaves, the Statement notes that the "craftsman style front porch has a 12.2 ft. wide entry in the middle of the porch that extends slightly by 3 feet to protect the landing before the first step down the entry steps to get to the driveway and street," and notes that it is not the whole length of the porch that requires the requested variances, but only the entry extension: "[o]nly the porch entry extension over the landing requires the 2 ft. variance, and the porch roof eave over the porch entry extension requires a 2.5 ft. variance." See Exhibit 3. The Statement describes the practical difficulty posed by strict compliance with the Zoning Ordinance as follows:

The extension of the entry roof is an integrated part of the whole porch roof slope. The trusses of the porch roof are different in the section of the porch entry and would need to be removed back to the connection to the house in order to provide the proper slope out to the end of the eaves.

Craftsman style construction has very wide eaves that are pitched in such a way to send rainwater to certain corners where "rain-chains" gently send the rainwater

into the ground. Cutting off 2 ft above the landing is not practical and would result in rainwater sheeting off the porch roof right onto the entry point of the house and down the front steps without a major reconstruction. Requiring strict compliance for removal of the small porch entry extension and the roof eave that extend beyond the porch edge, will result in practical difficulties for the Applicant by requiring significant re-construction work to parts of the remainder of the porch which are in compliance. This work would include removing a large section of the structural elements of the porch including the roof trusses, roof membrane, columns and beams and rebuilding the middle section of the porch and then refinishing the whole porch roof again. These elements would have to all be redesigned, and reengineered and would be a significant cost to the homeowner, in the range of \$100,000.00.

See Exhibit 3. The Statement concludes that the requested variances for the porch entry and roof eaves are "the minimum necessary to maintain the integrity of the porch roof slope and pitch for the purposes for which they were intended."

10. Per the Statement, the subject property is covered by the Bethesda-Chevy Chase Master Plan, which recognizes this area "as a neighborhood of steep slopes and high quality residential communities," and has as one of its goals the protection and preservation of these residential communities. The Statement asserts that the "renovation and upgrade of existing housing in these neighborhoods retains the vitality of these communities for future generations," and notes that the requested variances "are not observable by eye and were identified only by survey." It concludes that "[d]ue to the variable lots sizes and house styles in this neighborhood, the variances will be indistinguishable from the other variations in houses and setbacks from lot to lot. The requested variances will not have an adverse impact on the residential character or impair the livability, health or safety of others in the neighborhood." See Exhibit 3.

11. Per the Statement, the requested variances will not be adverse to the use and enjoyment of abutting and confronting properties. The Statement notes that the adjoining property to the south of the subject property is vacant, and that the side-yard setback for the house adjoining to the north "exceeds the minimum setback and is buffered by a fence and landscaping." The Statement further notes that "[t]he house confronting the Subject Property across Westpath Way has a large front yard setback on a lot twice the size as the Subject Property." See Exhibit 3.

12. The record contains three (3) letters of opposition, two of which are from the owners of the properties adjoining the subject property on either side, and one of which is from the owners of property diagonally across Westpath Way from the subject property. See Exhibits 8(a)-(c). The record also contains twelve (12) letters of support, and one (1) letter from the confronting neighbor which does not take a position on the request. See Exhibits 9(a)-(l) and 10.

Of note, the letter of support at Exhibit 9(a), which is from Brian Maury, a real estate agent and broker with over 28 years of experience who lives in the Fort Sumner

neighborhood, includes photographs of other homes in the neighborhood, and states the following regarding the varied nature of those homes:

The Fort Sumner neighborhood is filled with a variety of housing styles from classic brick colonial, to modern and contemporary. There have been substantial renovations (see pictures attached) and new home development as well. There is no one style in the neighborhood so the Prairie Style home that has been developed, while unique in expression, is no more or less appealing as a matter of "fact" than other significantly renovated or new homes built in the neighborhood. **Architectural appeal is a subjective opinion.** Some neighbors might object to the variance based on underlying feelings related to architectural harmony, but that's a hard argument to make when there are so many different styles of homes already present.

With respect to the effect of the construction on the values of surrounding properties, that letter states:

Again, I am in support of the variance because the zoning infraction was unintentional on the part of the owners (a result of a mistake by a professional land surveying company) and the impact of that error would, in my professional opinion, have no negative effect on the surrounding property resale values. In fact, a "rising tide lifts all ships" as they say and the presence of major development within a neighborhood leads to increasing home values for all residents.

These sentiments were echoed by GERALYN O'MARRA, who is also a long-time real estate professional and neighborhood resident, in her letter of support. See Exhibit 9(h). The remaining letters of support for the grant of the requested variances note, among other things, the beautiful design of the new home, that the writers are not "offended" by the home or its walkway, that the plans for the home were approved by Montgomery County, that the construction was undertaken in good faith based on the survey received at settlement, that the renovation is an improvement over the previously existing house and enhances property values, and that the requested variances should be granted and the need for remedial construction avoided. See Exhibits 9(a)-(l).

13. Steven Hubert and his wife, Isabella, who own the property that adjoins the subject property to the south, submitted a letter with attachments opposing the grant of the requested variances. See Exhibit 8(a). The Huberts state in their letter that the Capitol Survey states on its face that "[t]he plat does not provide for the accurate identification of property boundary lines," and assert that the Petitioner should have not have relied on this document to locate the house and improvements. The Huberts' letter states that they had the property corners between their property and the subject property staked, and as a result, they "discovered several discrepancies in the Applicants permit drawings." Their letter states that they tried to work with the Petitioner's contractor and daughter in July and August of 2019 to resolve their concerns, and when that was unsuccessful, they turned to the County's Department of Permitting Services for assistance. This led to the

discovery of a Certified Improvements Survey, dated June 8, 1959, that conflicted with the Capitol Survey that was used to get the building permit.

Regarding the criteria for the grant of a variance, the Huberts' letter disagrees with the Petitioner's assertion that the subject property is unique. The letter sets forth the reason for that assertion, including that the subject property is rectangular and only falls between four (4) and (7) feet across the front, depending on where the measurement is taken, and that all but 10 feet of the subject property's frontage is along a straight section of Westpath Way. See Exhibit 8(a). In addition, the Huberts' letter asserts that the special circumstances or conditions facing the Petitioner are a result of the Petitioner's own actions, and thus do not satisfy Section 59.7.3.2.E.2.b of the Zoning Ordinance, as set forth below:

In fact, all of the Applicant's problems are self-created hardships.

1. The Applicant expanded the footprint of the Subject Property's existing structure without proper evaluation of the setbacks and improperly relied on Capital Survey's location drawing that was not a boundary survey that stated: THE PLAT DOES NOT PROVIDE FOR THE ACCURATE IDENTIFICATION OF PROPERTY BOUNDARY LINES.
2. The Applicant did not follow the permitted building plans and expanded the limits of the porch from 11 foot to 12 foot, further increasing the encroachment into the front yard setback.
3. The additional 1-foot encroachment also extended the Applicant's stairs, landing and railing into the road Right of Way.
4. The Applicant erroneously stated: *There is no demarcation to identify where the right of way begins (except for the edge of the public driveway apron where one would expect the right of way to begin)*. A house and the improvements should not be located based on driveways or sidewalk locations; they should be based on certified boundary surveys.
5. Applicant continued construction for more than 6 months after the confirmation of their error see October 12, 2019 Potomac Survey **See Applicant's Attachment 16** [BOA Exhibit 3(p)] and then moved into the property before filing for a Petition for Variance. The Applicant took no action to mitigate or to address the encroachment during this period.

See Exhibit 8(a). Finally, the Huberts' letter at Exhibit 8(a) disagrees with the Petitioner's conclusion that the grant of the requested variances will not be adverse to the use and enjoyment of abutting or confronting properties, as is required by Section 59.7.3.2.E.2.e of the Zoning Ordinance, as follows:

In fact, granting of the variance will significantly and adversely affect the use and value of our property.

1. We are the owner of the adjoining lot 25 and we want to preserve the value of the property as a buildable lot. We are holding this lot as an investment. We will

- be required to have larger setback than the Subject Property and the encroachment further infringes the views and aesthetics and value of our property.
2. Respondents disagree with the Applicant's following statement that somehow our vacant lot gives them rights to violate the zoning laws: *Adjoining to the south is a vacant lot which provides an expanded side-yard setback for the house built two lots to the south.*
  3. Respondents disagree with the Applicant's following statement. The Applicant has no landscaping unless you consider that sod along the property line. *The side-yard setback to the house adjoining to the north exceeds the minimum setback and is buffered by a fence and landscaping.*
  4. Subject Property is substantial closer to street compared to other house on Westpath Way and will significantly and adversely affect the value of our lot and our house. See Neighborhood Photos Westpath Way June 10, 2020 **Attachment D**

14. Paul Anderson and Janet Fix, who own the property that adjoins the subject property to the north, submitted an email letter opposing the grant of the requested variances. See Exhibit 8(c). Their letter states that they contacted the County's Department of Permitting Services ("DPS") on March 22, 2019, to verify that the proposed construction comported with the height limitations in the Zoning Ordinance, and were told that it did. Their letter indicates that they again contacted DPS on July 30, 2019, to seek verification that the front porch, roof projections, and stairs to the driveway complied with setback requirements, noting that "[t]his porch and stairway jut closer to the street than any other house on our block." The letter asserts that it is "ludicrous" that the County did not take action at that time, and asserts that if the Board were to grant the requested variances, it would be setting a precedent that would encourage other developers to violate the Zoning Ordinance first and then seek forgiveness. See Exhibit 8(c). Finally, Mr. Anderson's and Ms. Fix's letter expresses support for the points made by the Huberts in their submission, highlighting the limitation set out on the Capitol Survey, and emphasizing that neighbors have repeatedly expressed concerns about this project.

15. Stan Wiggins and Karen Possner, who own property diagonally across Westpath Way from the subject property, also submitted an email letter opposing the grant of the requested variances. See Exhibit 8(b). Mr. Anderson and Ms. Possner seem to dispute Petitioner's contention that the lot configuration and orientation of the house justify the grant of a variance, stating that those factors were known to the Petitioner at the time of purchase, and that houses have been successfully built and rebuilt in other neighborhoods that have hilly terrain. In addition, they state in their letter that the fact that "nearby lots may be larger than average is not a justification for violating regulations on a smaller lot." See Exhibit 8(b).

Mr. Wiggins' and Ms. Possner's letter asserts that the Petitioner's house is "larger" than permitted by the Zoning Ordinance, and that this "compromises the visual separation observed in the general neighborhood." Their letter further states that "[t]he contention that none of the violations were the result of applicant's actions (or inactions) is simply

insupportable.” They request that the Board decide the matter based on an impartial review of the facts. See Exhibit 8(b).

16. At the hearing, Petitioner John Cokinos testified that he purchased the subject property for his daughter and son-in-law with intent to renovate the existing home to their specifications before selling them the property. He testified that he did not order a survey prior to closing on the property, and that at closing, Paragon Title provided him with a copy of a survey that Paragon had contracted with Capitol Surveys to perform. He emphasized that it was Paragon that had contracted with Capitol Surveys to have this survey done, later testifying that because he did not contract with Capitol for this survey, he has no recourse against them.

The Petitioner testified that he works in the financial services industry and not in real estate development. The Petitioner testified that he knows Eric Hart of Hartland Development (“Hartland”) from the gym, but has no relationship to the company. He testified that Mr. Hart had previously renovated two other homes for him, and brought the subject property to his attention. The Petitioner testified that he purchased the subject property “as is” for \$850,000. He testified that he hired Hartland on a straight fee basis to provide construction management services, work with the architects, and manage all trade services in connection with the renovation of this house. The Petitioner testified that his involvement was to fund the project, and that he had a \$700,000 budget for the renovation. He testified that he asked his daughter to work with Hartland as his representative, and to be on site as much as possible to watch the work. The Petitioner stated that he gave Hartland all of the documents that he received at settlement, including the Capitol Survey. He testified that none of the architects, contractors, or other consultants working on the renovation asked him for a different survey, and that Montgomery County had accepted the Capitol Survey that Paragon had provided to him.

The Petitioner testified that in time, the County’s Department of Permitting Services asked for a survey showing the side lot line setbacks, and that he hired Potomac Valley Surveys to perform that survey. He testified that this is when he first learned that the Capitol Survey had significant problems. He testified that it took the County several months following receipt of the Potomac Valley Survey to ascertain the exact issues with the construction. The Petitioner testified that the house was complete by that time. He testified that at present, his daughter and son-in-law cannot purchase it from him because they cannot get a loan or title insurance, and that as owner of the property, he continues to carry all costs.

The Petitioner testified that fixing the non-compliant areas of the house will require removal of most of the main roof and porch roof, which are compliant except as noted in the variance request. He testified that remedying the identified infractions will cost hundreds of thousands of dollars, will cause a significant delay in his ability to sell the house, and is a financial hardship, noting that he will end up spending \$2,000,000 on a house that is worth \$1,500,000. He testified that the cost of compliance is out of scale with the extent of the infractions.

The Petitioner testified that he purchased the subject property with the intent to comply with the Zoning Ordinance, and that he did not intend to need variances. He testified that he relied on professionals to design and complete the renovations on the subject property in compliance with the Zoning Ordinance, and that he had acted as any homeowner would have acted.

17. The Petitioner's daughter, Elaina Simpson, testified in support of the requested variances. Ms. Simpson testified that she and her husband, Brian Simpson, are the contract purchasers of the subject property, and that they are currently living in the renovated house after DPS gave them a "partial final" so that they could move in during the COVID crisis.

Ms. Simpson testified that she is not a real estate professional, and that this will be her first house. She testified that the house on the subject property at the time of purchase was a one-story house, to which they have added a second story and porch, and new roofs over those structures. She testified about other improvements that have been made, including upgrading the retaining walls along the driveway and re-doing the stairs to the driveway. She stated that the renovated home has an elevator, and will be accessible for persons such as their parents and grandparents, who visit and stay with them from time to time.<sup>1</sup>

Referring to the aerial map in the record at Exhibit 3(e), Ms. Simpson testified that the subject property is located in a hilly, residential neighborhood overlooking MacArthur Boulevard, adding that they had to fence their backyard because of the steep drop-off behind their property. She testified that Westpath Way falls in front of their house, and then makes a U-turn. Ms. Simpson stated that Exhibit 3(n) shows their home. She testified that it sits on a terrace that is high enough to require 12 steps down to the driveway and fully exposed garage. Ms. Simpson noted that retaining walls are needed on the driveway to address the hills. She testified that there are no sidewalks, and that the paths from most houses extend to the curb. Ms. Simpson testified that the stairs meet the driveway behind the driveway apron, and that the builder had told her that that is where the County right-of-way usually starts.

Ms. Simpson testified that her neighborhood has a wide variety of lots and houses. She testified that the subject property is small because of the steep slope behind it, and that the lots on either side have grass behind them before they fall. Ms. Simpson testified that the abutting property to the north (5333 Westpath) is flatter than the subject property, and does not have as steep a drop from the house to the street. She testified that the property confronting the subject property (5340 Westpath) is also fairly flat, as are the three properties north of 5333 Westpath Way. Ms. Simpson testified that the subject property is different, with multi-directional slopes and a house on a terrace that slopes down to the street. She testified that Westpath Way is also sloping down and starts to

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<sup>1</sup> The Petitioner's son-in-law, Brian Simpson, testified that he and his wife have planned to be able to have four generations living in this home at the same time. He testified that they are very grateful to be living where they live, and that it has been lovely getting to know their neighbors.

curve in front of the subject property, and that the subject property also slopes front to back such that they have a walkout basement.

Ms. Simpson testified that they spoke with the owners of 5333 and 5340 Westpath Way when they filed for the variances.<sup>2</sup> In addition, she testified that they have had a lot of people stop to talk with them about the construction since they posted the variance sign, that most didn't understand why variances were needed, and that none objected. She noted that the record contains 12 letters of support for the grant of the requested variances. See Exhibits 9(a) through (l). Ms. Simpson testified that in response to a request from her neighbor to the north, she had moved the variance sign closer to the park entrance (downhill and to the left).

Ms. Simpson testified that Mr. Hubert, who owns the abutting property to the south, questioned whether the Petitioner's construction met the setback required from the shared side lot line. She testified that in October 2019, they had a new survey done that shows that the construction on the subject property complies with the side yard setback. Ms. Simpson testified that they were surprised to learn, as a result of the new survey, that whereas the Capitol Survey showed that the existing house was 29 feet from the front lot line, the new survey showed that it was 26.2 feet from the front lot line. She testified that it took until February 2020 for the County to figure out what aspects of the construction infringed on the setback and issue a building permit denial. Ms. Simpson testified that interior work, work on the façade, and landscaping work continued during this time. She testified that she and her husband moved into the house in March, and filed for the necessary variances as soon as they were able. She testified that this took time because of COVID. She stated that Mr. Hubert filed a complaint about the height of the renovated house last week.

Ms. Simpson testified about the difficulties that she and her husband will encounter if the requested variances are not approved. She testified that she and her husband will not be able to finance or purchase the subject property. She testified that the costs of repairs are an unknown, and that the corrections are disproportionate to the harm. Finally, she testified that if the variances are not granted, they will have to move out while the corrections are made because the roof would have to be removed. Ms. Simpson testified that this concerns her, noting that she and her husband both work out of their house. Ms. Simpson testified that while the house was vacant and being renovated, people were using it to buy and sell drugs, and that a burglary had occurred more recently, while the house was livable.

Ms. Simpson testified that the neighborhood includes houses of all styles, and that some have been renovated and some have not. She testified that in undertaking their renovation, they kept the original footprint and breadth of the existing house, building up and adding a porch. Ms. Simpson testified that the variances now needed are for a small entry extension to the porch and for the second floor bumpouts. She stated that if the

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<sup>2</sup> The record contains a letter of opposition from the owners of 5333 Westpath Way (Anderson/Fix), and a letter that neither supports nor opposes the requested variances from the owner of 5340 Westpath Way (Hunter). See Exhibits 8(c) and 10.

variances are approved, the renovated house would fit the neighborhood and boost property values.

Ms. Simpson testified that they regret any challenges to their renovation, that their intentions were good, that they did not intend to have to request variances, and that they were sorry. She testified that they were blind-sided by the surveyor's error, and that they believe that their property meets the requirements for the grant of a variance. Ms. Simpson stated that she understands that this is a serious matter. She testified that the repairs that would be needed to correct the setback incursions are disproportionate to the size of the variances requested, and would be a major hardship.

18. Eric Hart, who owns Hartland Development, described his 38 years of experience in development and construction (both commercial and residential), and was accepted by the Board as an expert in construction and development. Mr. Hart testified that he was familiar with the subject property, and that he had brought it to the Petitioner's attention a year and a half ago. He testified that the subject property is currently zoned R-90, but was previously zoned R-60, and is covered by a transition provision in Section 59.7.7.1.D.5.d of the Zoning Ordinance which allows additions to homes like the house on the subject property to use the R-60 development standards. As a result, he testified that construction on the subject property is required to have a 25 foot setback from the front lot line, and a seven or eight foot setback on the side. He testified that the Capitol Survey showed that the existing house was 29 feet from the front lot line, and eleven or twelve feet from the side lot lines. Mr. Hart testified that Section 59.4.1.7 of the Zoning Ordinance has exemptions from the setback requirements for unenclosed porches and for eaves, stating that unenclosed porches are allowed to extend nine (9) feet into the front lot line setback and three (3) feet into the side lot line setback, and that roof eaves can extend an additional 2.5 feet.

Mr. Hart testified that all of the renovations to the subject property were designed to comply with the setbacks. He testified that they did not attempt to "push the envelope," and that per the Capitol Survey, they had an additional four (4) feet with which to work. He then proceeded to explain the various encroachments that were identified as a result of the new survey, and that necessitated the current variance request. Mr. Hart testified that the architect wanted to bring a couple of sections of the house forward to keep the rhythm of the house, and that they believed that was possible because of the available four (4) feet shown on the Capitol Survey. He testified that the main part of the porch complies with the front and side setbacks, and that as designed, the stoop was also compliant (based on the Capitol Survey), but that unfortunately, the stoop is now part of the variance request. Mr. Hart explained that the porch entry was expanded during construction, stating that the main porch is nine (9) feet deep, and that the front stoop was originally supposed to be ten (10) feet deep, to accept the steps at the front of the house. Mr. Hart testified that the architects and engineers determined that if the stoop was extended an additional foot, the steps would work better, and the stoop would still comply with the setbacks based on the Capitol Survey. With respect to the main roof eave, Mr. Hart testified that it is allowed to extend 2.5 feet into the front lot line setback, and was designed and approved to comply. He testified that part of it complies, but that

two sections of the second floor eave are now out of compliance, and need a variance of 15.6 inches. Finally, Mr. Hart testified that the second floor "bumpouts" were conservatively designed to be in compliance, two (2) feet forward, but that per the new survey, they now need variances of nine (9) to ten (10) inches. Mr. Hart testified that the house is otherwise in compliance. He testified that the neighbors have called the County on several occasions to check the compliance of the construction with the side lot line setbacks and height limitations, and that all are in compliance.

Mr. Hart showed the Board the pre-renovation photographs of the home on the subject property. See Exhibit 3(d). He described the house as a one-story home on a hilly lot with steep steps. He testified that the driveway has retaining walls on both sides, and that the topography of the property is higher on the right than on the left. See Exhibit 3(d). Mr. Hart testified that the original structure and footprint were left intact, and that the renovation did not change the original grade other than in the course of construction.

Mr. Hart testified that at 9,600 square feet, the subject property is one of the smaller lots in the subdivision, noting that this property and the three uphill on Westpath Way are significantly smaller than most of the neighborhood because the topography behind them falls sharply. He testified that this also explains why the houses on those properties were built closer to the street, noting that the Hubert and Hunter properties are much deeper and the houses on those properties can be set back farther. Mr. Hart testified that the topography of the subject property differentiates it from the three lots uphill on that side of Westpath Way because the subject property slopes downward from right to left and from the front of the house to the street, while the photographs show that the others have flatter yards. See Exhibit 12. Mr. Hart further testified that Westpath Way in front of these properties falls in elevation, and that the original builder had stepped terraces down so that the houses would meet the street on level. He testified that the subject property was built on the same terrace as the Anderson/Fix property (abutting to the north), but that the two properties have a different relationship to the street. Mr. Hart testified that the lawns of the properties along Westpath way go all the way to the street, and that in front of the subject property, the street starts moving to the opposite side of the right of way and curving away such that the street line is no longer parallel to the front property line. He testified that the other houses that are uphill from the subject property sit parallel to the property line. Mr. Hart hypothesized that the complex slopes on the subject property and the lack of parallel orientation to the street may have affected the original (Capitol) survey, but indicated that he did not know if that was the case.

Mr. Hart testified that the survey that the Petitioner received at closing (i.e. the Capitol Survey) was prepared by a licensed surveyor who worked for an experienced surveying company. He testified that it is a house location survey, not a boundary survey, and that the information on it is taken to be "deemed reliable." Mr. Hart testified that on every renovation that he has done, this is what he has used, and that it meets the County Department of Permitting Services' requirements for obtaining a building permit; he later stated that he has used this same type of survey on the past seven or eight renovations he has done. Mr. Hart testified that while this document may not show the exact corners of the property, when a builder is dealing with an existing structure that is not being

changed, this information is deemed reliable, is used by architects and engineers, and is accepted by DPS. Mr. Hart testified that the Capitol Survey says that the existing house is 29 feet plus or minus from the front property line, and that the plus or minus means inches, not feet. Based on his experience, he testified that this tells him that this measurement is accurate within inches, and at worst is off by a foot, and that you should avoid getting close so there are no issues.

In response to a Board question asking which "line" on the driveway in the photograph at Exhibit 3(q) was the front lot line, Mr. Hart testified that in his experience, the front lot line is located along the non-street edge of the four foot wide "sidewalk" section of the driveway. He testified that using the Capitol Survey, he had pulled a tape measure from the garage wall to that line on the driveway, and that it showed a distance of 29 feet. He further testified that the original retaining wall came out to the non-street edge of the four foot sidewalk section of the driveway, and that this, too, indicates that that is where the front lot line is. See Exhibit 3(d). Mr. Hart then testified that the actual front lot line is closer to the house than the referenced sidewalk line, and referring to Exhibit 3(q), testified that it is in the middle of the stairs shown on that photograph. He testified that the difference between the Capitol Survey and the new Potomac Valley Survey is almost three (3) feet (29 feet versus 26.2 feet).

In response to a question from counsel asking about the note on the Capitol Survey, Mr. Hart testified that the Capitol Survey was stamped by a registered engineer. He testified that if this survey was going to be used to identify property corners, there are sometimes additional requirements, but that when you have an existing structure whose footprint is not being moved, a building location survey is deemed to accurately identify the placement of the structure within a foot. See Exhibit 3(j). He testified that no dimensions of this survey were modified by him or the design team. Mr. Hart testified that he met with the architects and engineers to use this site plan for the building permit application. He testified that they added information to it to show improvements such as the front porch, rear deck, and second floor bumpouts. He testified that the architects and engineers had added some additional markings to the Capitol Survey in order to obtain the building permit, such as nine (9) foot dimension for the porch, the 27 foot dimension from the front lot line to the new second floor bumpouts, and some spot elevations. He testified that the marked-up survey was stamped by the County. See Exhibit 3(l).

In response to a question from counsel asking how he found out that the Capitol Survey was not accurate, Mr. Hart testified that in the summer of 2019, after the foundation for the porch had been poured, Mr. Hubert had reached out to make sure that it complied with the setbacks. Mr. Hart testified that he asked the architect and engineers working on the project if the construction met the required setbacks, and they said that it complied. Mr. Hart testified that he also tried numerous (20-30) times to contact Capitol Survey with no success, and that he is not sure if they are still in business. He testified that after a formal complaint was filed questioning compliance with the side lot line setback, the County eventually reached out to him and asked that an additional survey be done so that the corners of the porch addition could be marked, and Mr. Hubert could

be satisfied that the setback was met. Mr. Hart testified that they hired Potomac Valley Surveys, and that the new survey was completed and received in mid- to late October, 2019. He testified that by that time, the house was basically complete. Mr. Hart testified that the new survey showed that the construction complied with the side yard setback, but that the new survey company told him they got a different measurement than Capitol Surveys for the front lot line setback (26.2 feet versus 29 feet). Mr. Hart later testified that this was the first time he saw that the front dimension was not correct. He testified that in his opinion, a three foot error is not within the standard of error for a licensed surveyor, and that the Capitol Survey indicates that at most, the front lot line measurement is off by one (1) foot. See Exhibit 3(j). He stated that he had tried to contact Capitol Surveys to ascertain the reason for the discrepancy, and that he can only conclude that the slope of the subject property made it harder to measure. Mr. Hart reiterated that everything on the Capitol Survey seemed normal to him, and testified that he has never seen an error close to the error made on this survey from a licensed surveyor. He testified that he has had information from Capitol Surveys used in other projects, and has had no problems. He testified that he used the Capitol Survey in connection with the construction on the subject property because that is standard practice, testifying that where the main structure is not being moved, building location surveys provide enough information for the construction of an addition, and that DPS accepts this information as a site plan. He then explained that if they had been tearing down the existing house and replacing it, DPS would have required a different type of survey (boundary survey). Mr. Hart testified no one, including a licensed surveyor, engineers, contractors, and County inspectors, noticed anything about the Capitol Survey that would have indicated that there were problems with it. When asked by counsel if it would have been normal to pull up a 1959 wall check, Mr. Hart testified that it was not normal practice to go back and look at old records, and that the latest information is used to locate structures.

Mr. Hart testified that he has never worked on another project where they had to ask for variances after the fact. In response to questions from counsel regarding the steps that would be needed to fix the encroachments and the difficulties associated with that, Mr. Hart testified that the entire roof would need to be removed. He testified that the roofs of prairie style homes are complex structures, designed with unique overhangs involving pitch and slope, and that removal is not as easy as one might think. Mr. Hart testified that the bumpouts are bathrooms, and that moving them would involve significant construction. Mr. Hart estimated that it would cost \$350,000 or more to bring this house into compliance, and would take six to eight months, during which time the residents would be displaced. In response to a Board question asking about the difficulty of reducing the porch eave over the front steps, Mr. Hart testified that the eave is used to protect the steps coming up to the home, and that it is made with engineered trusses which cannot simply be sawed off. He testified that the entire porch roof would have to be removed and re-engineered, and that this would cost more than \$100,000. He noted that this construction also ties into the steps.

In response to a Board question asking why they had not stopped construction when they learned the Capitol Survey had issues, Mr. Hart testified that when they received the new survey in October, 2019, the entire house was already under roof, and

that the work done from that point was interior and finish work. He testified that there was no directive from DPS for them to halt work. Mr. Hart testified that they had submitted the new survey to DPS, and waited for DPS to tell them what to do. He testified that it was not until February, 2020, that DPS told them they needed to get variances.

On re-direct, Mr. Hart testified that the house on the subject property does not impact the view from the abutting vacant lot owned by Mr. Hubert. He further testified that Mr. Hubert uses the vacant lot to access his property. Mr. Hart testified that the vacant lot is a welcome buffer between the subject property and the property on which Mr. Hubert's house is located. He testified that contrary to the assertion made by Mr. Hubert that the construction on the subject property will diminish the value of the vacant lot, he believed that the significant investment made by the Petitioner to the old, dilapidated home on the subject property would increase property values. He testified that the Cokinis family did not knowingly undertake construction in violation of the setbacks and have tried to address the matter, concluding that the situation is very unfortunate.

19. Steven Hubert, who owns the property abutting the subject property to the south, and who submitted the letter of opposition in the record at Exhibit 8(a), testified in opposition to the grant of the requested variances. Mr. Hubert testified that most of the controversy in this case surrounds the use of the Capitol Survey. He testified that this type of survey costs about \$200 and is used by lenders to prove there is an improvement on a property when the property is sold. Mr. Hubert stated that the Capitol Survey clearly states that it was not to be used for the accurate identification of property boundary lines or the location of improvements, and asserted that it was an error to use and certify this location survey in a building permit application. See Exhibit 3(j). He testified that the error was not by the original surveyor, who he stated did not certify the property lines, but rather was the fault of the architect, who adopted and certified the stated dimensions when he or she used the Capitol Survey to apply for the building permit.

Mr. Hubert testified that there are inaccuracies on the Capitol Survey as marked up for the permit application, including the spot elevations which indicate a fall across the subject property of four feet, the removal of the "+/-1" after the 29 foot measurement to the front lot line, and the characterization of the second floor bumpouts as "bays." He then testified that "bay" is a defined term, and that the bumpouts are boxes, not bays. Mr. Hubert stated that the architect or whoever used this boundary survey and certified it, with its inaccuracies, should be part of this proceeding. He testified that the marked up survey does not show how the front porch extension relates to the setbacks. See Exhibit 3(j). Mr. Hubert testified that per the Maryland Department of Labor, Licensing and Regulation, location drawings cannot be used to show where property boundaries are.

Mr. Hubert testified that he had the subject property surveyed by Snider & Associates in 2018. He testified that the corners of the subject property were located by that survey, and that if the Petitioner's contractors had used their corners, they would have realized there was a problem with the Capitol Survey. Mr. Hubert testified that he discussed this with Mr. Hart, starting in early July, 2019, but felt as though Mr. Hart did

not give him a straight answer. He noted that Mr. Hart had stated a couple of times that they built what was shown on the permitted plans, but that he (Mr. Hubert) knew that was not the case because Mr. Hart said that he built the porch out one foot further than was shown on the plans. Mr. Hubert testified that as he questioned more things, he found more inaccuracies with the building plans, and that on July 31, 2019, he gave up on working with the Petitioner's representatives, and contacted Mark Beall with the County's Department of Permitting Services. He stated that the DPS building records contained a 1959 plan which shows that the distance from the original house to the front property line was 26.5 feet. See Exhibit 8(a), Attachment C. Mr. Hubert testified that this was a certified survey, and is equivalent to a boundary survey. He testified that he provided the 1959 survey to DPS, and that that is what started the process of DPS asking Mr. Hart about the survey discrepancies. Mr. Hubert testified that he worked with Mr. Beall for the next three or four months to get an accurate survey from the Petitioner. He testified that there appeared to be a mistake on the Capitol Survey, and that he could see, by using a laser surveying tool, that the existing house was 25 to 26 feet from the front property line. In response to a Board question asking if he was only concerned about the side setback, Mr. Hubert testified that he was concerned about both the side and front setbacks, as shown on the text chain submitted with his letter of opposition, noting that a nine (9) foot porch is shown, but a 12 foot porch was constructed. See Exhibit 8(a), Attachment A. Mr. Hubert noted that the rest of his concerns were set out in his letter of opposition. See Exhibit 8(a).

In response to a question on cross-examination asking if he had any plans to build on the abutting property to the south of the subject property, Mr. Hubert testified that any construction on the abutting property will have to comport with the R-90 development standards because the lot is currently vacant, so any protrusion into the setbacks on the subject property will affect views down the street from his property. He testified that he holds this property as an investment, and that if the house on the subject property sticks out, it will impact the value of his property.

Mr. Hubert stated in closing that saying that the issue in this case is a surveying error is not a correct statement because the surveyor made no error—he made it very clear that the survey could not be used for setback purposes. Mr. Hubert asserted that the error is on the part of the people who changed the Capitol Survey and relied on it instead of having a boundary survey done. Finally, he stated that the slope of the property does not require building a large porch or building beyond what was allowed.

20. Janet Fix testified that she and her husband Paul Anderson live north of the subject property at 5333 Westpath Way. She testified that as abutting neighbors, they are justified in their frustration. Ms. Fix testified that they first asked the developer and the Petitioner's daughter and her husband to show them their renovation plans in February of 2019, but they did not. She testified that they ultimately obtained the plans from the County, and she asserted that errors were made by the County as much as anyone else. Ms. Fix testified that she is concerned about the process, noting that neighbors have raised concerns about this construction since the beginning, and that she does not know whether the fault lies with the builder or the County. She stated that the developer had

the ability to modify the porch in 2019 to show good faith, and that she doesn't know why the Petitioner is asking for variances now, post-construction. Finally, Ms. Fix stated that it is up to the developer to get an accurate survey of the property, and that he could and should have done that.

Later in the hearing, Ms. Fix testified that she and her husband began raising concerns about the proposed construction early in the process, and that the County dismissed those concerns. She asserted that there is a problem here, and stated that she does not know why people are allowed to build despite concerns having been voiced, concluding that this should not have happened. Ms. Fix testified that the County came out to the subject property last week to verify the height of the construction. She asked that the Board consider the precedent that will be set by approving construction after the fact, and questioned the role of the County in enforcing its codes.

21. Karen Possner and Stan Wiggins, who live diagonally across Westpath Way from the subject property, submitted a letter of opposition. See Exhibit 8(b). At the hearing, Ms. Possner made two points. First, she noted that Ms. Hunter's letter, in the record at Exhibit 10, neither supports nor opposes the requested variances. Second, she noted that although GERALYN O'MARRA's letter of support is on Fort Sumner Citizens Association letterhead, it conveys her position as an individual. See Exhibit 9(h). She asked that the record reflect that the Association takes no position on this matter.

## **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, based on the testimony of Mr. Hart, the Statement at Exhibit 3, and the photographs in Exhibit 12, that the subject property is exceptional due to the combined constraints imposed by its relatively small size and depth for the neighborhood, and its multi-directional slopes. With respect to size and depth, the Board notes that the subject property is 9,600 square feet in size, with a depth of 120 feet, in a neighborhood where most lots are about 12,000 square feet in area with a depth of between 150 and 180 feet. The Board finds that the shallow nature of the property causes the house to be set farther forward on the property than would be the case on a deeper lot. The Board acknowledges that there are three lots of a size and depth similar to that of the subject property immediately north of the subject property, but finds that the subject property is distinguishable from its northern neighbors because those properties are relatively level, whereas the subject property is encumbered with a multi-directional slope that runs

downhill from north to south across the front of the subject property, and that also runs downhill from the front of the house to the street (west to east). The Board finds that viewed together, these conditions constitute unusual or extraordinary circumstances peculiar to the subject property, in satisfaction of this element of the variance test.

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

The Board finds, based on the Statement in the record at Exhibit 3 and the testimony of the Petitioner, that it was the title company and not the Petitioner that contracted with Capitol Surveys to have the original house location survey ("Capitol Survey") performed. The Board further finds, based on the expert testimony of Mr. Hart and the Statement at Exhibit 3, that this type of survey is accepted by the County's Department of Permitting Services in connection with the issuance of building permits for additions/renovations to existing structures; the Board notes that Mr. Hart testified that DPS has accepted similar surveys in connection with seven or eight other renovations on which he has worked. Finally, the Board finds that there is nothing in the record to suggest that the Petitioner is responsible for the size, depth, or multi-directional slope on the subject property, which he purchased in 2018 and which was originally developed decades earlier. See Exhibit 3. Thus the Board finds that the special circumstances or conditions pertaining to this property are not the result of actions by the Petitioner, in satisfaction of this element of the variance test.

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 at Exhibit 3 and the testimony of the Petitioner and Mr. Hart, that the need for the requested variances arose because the Capitol Survey used to procure the building permit for the renovation of the existing home on the subject property, which survey was sealed by a professional engineer, was later discovered to contain an erroneous front setback measurement for the original house, a mistake that resulted in certain parts of the new construction that were thought to be compliant being noncompliant. The Board further finds that the siting of the original house on the subject property was constrained because of the property's relatively small size, shallow depth, and complex slopes, and that per the testimony of Mr. Hart, this may have caused the surveying error. In addition, based on the Statement and the testimony of the Petitioner, his daughter, and Mr. Hart, the Board finds that the existing construction cannot be undone to eliminate the need for the requested variances without removal of the roof, prolonged displacement of the Petitioner's daughter and son-in-law, and while not determinative on its own, extreme expense. The Board further finds that in its present state, the Petitioner is unable to sell the subject property because financing is not available for this house in its noncompliant condition. The Board finds that the totality of these circumstances constitutes a practical difficulty, and that the requested variances are the minimum necessary to allow the completed construction and thus to overcome the practical difficulty that would be imposed by full compliance with the Zoning Ordinance, in satisfaction of this element of the variance test.

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 10 under "Evidence Presented," the Board finds that the requested variance can be granted without substantial impairment to the intent and integrity of the Bethesda-Chevy Chase Master Plan, in satisfaction of this element of the variance test.

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.*

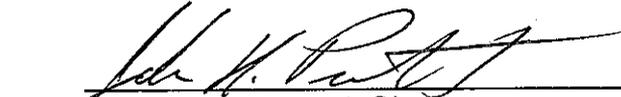
The Board finds, for the reasons set forth in the Statement at Exhibit 3 and recounted in paragraph 11 under "Evidence Presented," that granting the requested variances will not be adverse to the use and enjoyment of abutting or confronting properties. The Board acknowledges the conflicting testimony of Mr. Hart and Mr. Hubert regarding the effect that the construction on the subject property will have on the value of the abutting lot owned by Mr. Hubert, but agrees with Mr. Hart that improvements to older housing stock generally increase value for surrounding properties, a sentiment echoed in several letters of support, including letters submitted by experienced real estate professionals. See Exhibits 9(a) and (h). Finally, the Board finds, based on the testimony and evidence of record, that the existing construction comports with the requisite side lot line setbacks, and that this is a neighborhood with a variety of housing styles and setbacks from the street, including a confronting home that is set back considerably more than the subject property from the street, such that the incursions allowed by the grant of these variances will not be adverse to neighboring properties. Accordingly, the Board finds that the grant of the requested variances, to allow improvements to this older home, will not be adverse to the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test.

Accordingly, the requested variances are **granted**, subject to the following condition:

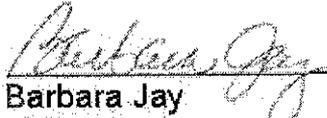
1. Petitioner shall be bound by the testimony and exhibits of record.

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Bruce Goldensohn, Vice Chair, with Katherine Freeman, Mary Gonzales, and Richard Melnick 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 July, 2020.



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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.