

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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CASE NO. A-6659

PETITION OF RICHARD AND PAVITRA BACON

**OPINION OF THE BOARD
(Opinion Adopted July 15, 2020)
(Effective Date of Opinion: July 29, 2020)**

Case No. A-6659 is an application for three variances needed in connection with the proposed conversion of an existing detached garage into a first floor accessory dwelling unit (ADU) and second floor storage space. The proposed construction requires the following variances:

The existing detached garage is five (5) feet from the right side lot line. Per Section 59.3.3.3.C.2.d of the Zoning Ordinance,¹ the required setback is 17 feet. Thus a variance of 12 feet is needed.

The proposed construction of a second floor window on the side of the structure needing the side lot line variance requires an additional variance. As noted on the building permit denial, per Section 59.3.3.3.C.2.b of the Zoning Ordinance,² there can be no new windows on a side facing the neighbor on an existing structure not meeting the required setback.

Finally, a variance is needed for the size of the ADU. The area of the existing first floor that is to be converted into the ADU is 808 square feet, which is 61% of the footprint of the principal dwelling (1,331 square feet). Per Section 59.3.3.3.C.2.e.i of the Zoning

¹ Section 59.3.3.3.C.2.d of the Zoning Ordinance, pertaining to the use standards for detached accessory dwelling units, states that "[f]or any Detached Accessory Dwelling Unit with a length along a rear or side lot line that is longer than 24 feet, the minimum side or rear setback must be increased at a ratio of 1 foot for every 1 foot that the dimension exceeds 24 linear feet. The additional rear setback is from a 12-foot setback as its starting point."

² Section 59.3.3.3.C.2.b of the Zoning Ordinance reads as follows: "Any structure constructed legally before May 31, 2012 that is not increased in size or building height and does not have new windows on a wall nearest an abutting property may be used for a Detached Accessory Dwelling Unit without regard to setbacks or floor area."

Ordinance,³ an ADU cannot be bigger than 50% of the footprint of the principal dwelling (665.5 square feet). This is a difference of 142.5 square feet, or 11%. Accordingly, a variance of 142.5 square feet or 11% is needed for the proposed construction.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on Wednesday, July 15, 2020. All participation was done via Microsoft Teams. Petitioners Richard and Pavitra Bacon appeared in support of the requested variances, assisted by their architect, Eric C. Saul. Abutting property owners William and Bruna Chernicoff, whose property shares Petitioners' left side lot line, and Ozan and Serpil Koknar, whose property shares a portion of Petitioners' rear lot line, appeared in opposition.

Decision of the Board:

Variations for the right side lot line and size of the ADU:	GRANTED.
Variance for the new window:	DENIED.

EVIDENCE PRESENTED

1. The subject property is Lot 64, Block 64, B F G Takoma Park Subdivision, located at 612 Potomac Avenue, Silver Spring, Maryland, 20910, in the R-60 Zone. The property is rectangular in shape, much deeper than it is wide (approximately 50 feet wide and 235 feet deep), with an area of 11,738 square feet. It is an interior lot with an east side (northeast) that fronts on Potomac Avenue. See Exhibits 3 and 4.

2. The Justification Statement ("Statement"), in the record at Exhibit 3, states "[t]he new ADU law, ZTA 19-01, allows existing garages to be converted into ADUs, provided there is no exterior change made to the original structure." The Statement further states that the detached garage that Petitioners seek to convert to an ADU was on the property at the time of their purchase in 2011, and that DPS has determined that the structure is a legal, nonconforming structure. See Exhibits 3 and 6. The Statement at Exhibit 3 states that the Petitioners are not proposing to increase the footprint of the existing garage, that they are proposing to "construct the attic addition entirely above the original footprint of the existing structure," and that "[i]f the proposed conversion were designed to fit entirely within the existing structure with no exterior modifications, the project would be approved. However, exterior modifications are required to meet current building codes," going on to explain that:

In order to meet building codes, the roof structure needs to be rebuilt to code. Since the roof is being replaced, Owner has proposed a slightly steeper pitched roof with dormers less than 50% of the total roof area to add an attic for storage. This additional height does

³ Section 59.3.3.3.C.2.e of the Zoning Ordinance provides that "[t]he maximum gross floor area for a Detached Accessory Dwelling Unit must be the least of: (i) 50% of the footprint of the principal dwelling; (ii) 10% of the lot area; or (iii) 1,200 square feet of gross floor area."

not exceed the maximum allowable height of 20', nor the allowable average height of 15' to require additional setback.

3. The Statement states that the existing detached garage is 32 feet, 8 inches in length, and sits approximately five (5) feet from the property's right side lot line (northern lot line). The Statement indicates that "[p]er section 59-3.3.3.C.2.d of the Montgomery County Zoning Ordinance, the existing building is already too close to the right side setback, and needs to be 17' away from the side lot line," and notes that the side of the "closest to the proposed project" borders "Outlot A." See Exhibits 3 and 7.

4. With respect to the variance needed for the proposed second floor window, the Statement states that the Petitioners are proposing "a new window on the new dormer to bring natural light into the new attic." The Statement notes that "[t]here are already windows on the first floor of the existing structure which face this same neighbor," and that "[t]he fire code allows windows up to 3 feet from a property line." See Exhibit 3.

5. With respect to the variance needed for the size of the proposed ADU, the Statement at Exhibit 3 states the following:

Per section 59.3.3.3.C.2.b the Montgomery County Zoning Ordinance, an ADU must be no larger than 50% of the principle dwelling. The proposed ADU is 142.5 square feet larger. ZTA 19-01 allows unlimited square footage for an ADU if being proposed in an existing structure without exterior modifications. The proposed taller roof structure is the sole reason for this variance.

6. In explaining the practical difficulty occasioned by the strict application of the Zoning Ordinance, and why the variances requested are the minimum necessary to overcome those difficulties, the Statement notes that in order to convert a garage to an ADU, "building codes must be met and the structure must be upgraded." The Statement states that the roof structure on this detached garage is "too thin to allow for proper insulation and HVAC equipment," and that the Petitioners are requesting "a moderately sized attic space to accompany these needs," noting that "[i]t would be impracticable to tear down the structure and rebuild it 12' further from the lot line for this proposal." See Exhibit 3.

7. The record contains an email and letters of opposition from two of the Petitioners' abutting neighbors. The letters both assert, among other things, that the proposed second floor space will be used for living or office space rather than storage, and that the proposed second floor windows will allow for a view into their homes and thus will impact their privacy. In addition, both letters assert that the proposed construction would constitute a second home on the subject property as opposed to an ADU, and further explain why the authors do not think the variances should be granted. Finally, both letters assert that the Petitioners were not forthcoming with their plans, and that the grant of the requested variances will be adverse to their use and enjoyment of their properties. See Exhibits 10(a), (b) and (c).

8. At the hearing, Petitioner Pavitra Bacon testified that she and her husband are seeking to convert their existing detached garage into an ADU for her parents to live in. She

testified that the footprint of the garage would remain unchanged, and that they are seeking to add non-livable attic space above the ADU, along with insulation and an HVAC system for the ADU. She testified that this attic space would only be used for storage, noting that they will have no storage space if they use the garage as an ADU, and that the garage is currently full of items that she hopes to store in the new attic space.

Ms. Bacon testified that the garage is set far back on the subject property, and is not adjacent to any houses. She testified that there is a house behind the garage, and that there is a shed on the right side (Outlot A). She testified that the garage appears to be higher in the front than in the back because of the slope of the property, and that if the variances are granted, the resultant structure would be approximately three feet higher than the existing structure. She testified that the back of the garage has windows, and that there is a door on the side of the garage that faces the Chernicoff's back yard (south side).

Ms. Bacon testified that she understands the privacy concerns expressed by her neighbors, and testified that while it will be difficult to make everyone happy, they are fully committed to working with their neighbors to try to alleviate their concerns, possibly through landscaping or fencing, stating that they are simply trying to make an existing structure usable. She testified that they could move the garage, but that that would bring it closer to other neighbors.

Ms. Bacon testified that while some of the neighbors have asserted that the presence of an ADU would depress real estate values, the County had found, in enacting the ADU law, that the benefits outweighed the negatives; she indicated that she did not wish to relitigate that decision.

In response to a Board question asking about the need for windows in the proposed attic, Ms. Bacon testified that windows would allow for ventilation and natural light, and would make the proposed second floor space look more like the first floor for the sake of uniformity and aesthetic appeal. In response to a Board question regarding the adequacy of parking, Ms. Bacon testified that her parents do not drive and do not have a car, that the property has a long driveway which could accommodate additional vehicles if needed, and that the property is well-served by public transportation. In response to Board questions asking about the height of the attic space and asking what assurances she could provide that the space would not be used as a dwelling unit, Ms. Bacon testified that the second floor would be barely tall enough to stand in despite the dormers and therefore unappealing as livable space. She further testified that in addition to the verbal assurances she has given that the second floor would not be used as habitable space, the second floor would not be up to code for habitable space, and it would be illegal to have another rental unit on the property.

9. Eric Saul, the Petitioners' architect, testified that the Zoning Ordinance allows an existing detached accessory structure to be used as an ADU without regard to size or setback limitations unless modifications to the structure are needed, in which case those seeking to use such a structure as an ADU need to go through the variance process. Mr. Saul testified that the Petitioners in the instant case are seeking to replace storage that will be lost to them by using their garage as an ADU, since they are not able to add a shed to

their property.⁴ He testified that since the Petitioners were going to have to raise the roof of the existing garage by about a foot to accommodate required insulation, they decided that they may as well increase the pitch of the roof to add storage. Mr. Saul testified that it was really just the location of the existing structure on the property that was causing problems, and that the Petitioners could build an accessory structure as tall as the structure they are proposing by right if it were centered on the property. He noted that a by right structure could be located seven (7) feet from the side lot line,⁵ about 12 feet closer to the neighboring property to the south (Chernicoff property), and that it could also be located farther back on the property than the existing structure, twelve feet from the rear lot line. He clarified that such a structure would have to comport with applicable footprint limitations. Mr. Saul testified that because the detached garage already existed on the property, the Petitioners decided to try to make that work, and he asserted that the two (2) foot difference between the five (5) foot setback provided from the right lot line and the seven (7) foot setback that would be required for construction of a new two-story accessory structure did not create a situation where an abutting property owner would or would not enjoy their property.

Mr. Saul testified that the second story windows are intended to make the construction appear more residential and less "barn-like." He stated that the requested variance for windows only affects the north side of the proposed construction, and that the windows on the other three sides are legal. Mr. Saul estimated that the proposed windows are between 50 and 60, possibly as much as 100, feet away from neighboring houses, concluding that this is fairly removed from any neighbor's bedroom windows. He testified that the Petitioners' house is much closer to neighboring houses than the garage.

In response to a Board question asking about the interior height of the second story, Mr. Saul testified that it would be 8 feet, 7 inches at the peak, sloping down to zero feet at the eaves. He testified that the interior height at the top of the dormer is 7 feet, 5 inches. Mr. Saul testified that the drawings at Exhibit 5(a) show that the proposed construction is under the 20 foot height limit, explaining that the eaves are 10 feet off the ground and the peak is 20 feet, for an average of 15 feet, which he testified does not necessitate any additional setbacks. He testified that the new insulation will be in the ceiling of the ADU, and that the proposed second floor would not be habitable because it would not be insulated. He testified that the roofing of the existing garage is thin and needs insulation, and that the existing roof has a tight system of trusses, which makes the addition of the new HVAC system difficult. Mr. Saul testified that the roof has to be removed and replaced to address these deficiencies, and that because they were going to have to remove and replace the roof, they decided to make it taller in order to make the attic space usable.

In response to a Board question asking about the elevation of the existing garage relative to the front of the property, Mr. Saul estimated that the existing garage is about level with the second floor of the Petitioners' house.

⁴ The Zoning Ordinance restricts the total square footage of accessory structures, and because of the existing garage, Petitioners could not build a shed without a variance from that limitation.

⁵ Mr. Saul later testified that an accessory structure with a length of 24 feet can be constructed seven (7) feet from a side lot line, and that it was the additional length of the existing garage that resulted in its being required to have a 17 foot setback.

In response to a question from a neighbor regarding inconsistencies in the number of windows shown on Exhibits 5(a) and (b) on the first floor of the north side of the garage, Mr. Saul confirmed that there are two first floor windows missing on proposed side elevation 4, as depicted on Exhibit 5(a), and that those windows should be shown towards the rear of the structure, where there is no dormer. He testified that these two windows are shown on Exhibit 5(b), on either side of the bed. Mr. Saul testified that fencing should block the view of the first floor bedroom windows.

10. Petitioner Richard Bacon testified that the distance from the garage door to the Chernicoffs' house is approximately 56 feet, and that the distance from the house on the subject property to the Chernicoffs' house is approximately 28 feet. He shared a photograph showing how close the Petitioners' house is to their neighbors' home, and later testified that the Chernicoffs had built an addition several years ago which brought their property closer to the subject property. Mr. Bacon testified that there is a shed on Outlot A.

Mr. Bacon testified that the Petitioners were willing to build a fence if needed to address their neighbors' privacy concerns. He testified that if the Chernicoffs were really concerned about privacy, they would have built their fence after completing their addition, and not at a later date for the purpose of containing their dog(s). Mr. Bacon testified that the second story of the proposed structure would not be livable space, and that you are not allowed to have two ADUs on one property. Mr. Bacon testified that the windows on the proposed structure would not look into neighbors' houses beyond what is there now on the south side of the proposed structure, and that the north side faced the Outlot. He noted that his in-laws have privacy concerns too.

Mr. Bacon testified that they did not want to have to get variances, and that they were trying to be reasonable and fair to their neighbors. He acknowledged that they may be partly to blame for the opposition because they were not as forthcoming as they could have been. He stated that few of the objections applied to the square footage of the ADU or the setback from the north side lot line, and that if the size of the ADU were really a problem, they could add onto their house and that would no longer be an issue.

11. Therese Langer, who owns one of the two properties abutting the subject property to the rear, as well as Outlot A, testified in opposition to the requested variances. Ms. Langer testified that after reviewing the Petitioners' plans, she believes the proposed building will be more intrusive than she had anticipated. She testified that Outlot A is her back yard, and that contrary to the Statement in the record at Exhibit 3, it is not vacant, but rather contains a shed which she testified is "workspace." Ms. Langer also took issue with the assertion in the Statement that the proposed construction would not be adverse to the use and enjoyment of abutting properties, testifying that the presence of a second floor will prevent a fence from shielding the structure. Ms. Langer testified that she wanted assurance that the drawings in the record at Exhibits 5(a) and (b) were accurate, and noted a discrepancy between the windows shown on those Exhibits on the north side of the building. (This discrepancy was addressed by Mr. Saul, as recounted above.)

12. William Chernicoff, who owns the property abutting the subject property to the south, testified in opposition to the requested variances. Mr. Chernicoff testified that when he purchased this property, he found the deeper setback of the house on that property appealing because it meant that the house was not directly next to the neighboring houses, later noting that on such narrow lots, they have an ideal situation due to this staggering of structures.

Mr. Chernicoff testified that his concerns were largely expressed by Ms. Langer in her testimony and in his written statement. See Exhibit 10(a). He testified that the biggest concern he and his wife, Bruna, have is the impact of the proposed construction on the character of their own property. Referring to the proposed construction as a second unit, Mr. Chernicoff testified that while the windows have been addressed by others, there are also stairs and a landing on the south side of the proposed structure that would look into their property, particularly their back yard, and that this would impact their use of that space. Mr. Chernicoff testified that the distance from the side of the Petitioners' existing garage to the shared fenceline is approximately 20 feet. He asserted that the proposed stairs would be wider than three (3) feet, and testified that they would look down directly to their property and bedroom, noting that the south side of the proposed second floor would have a window, door, and landing. He testified that if constructed, nothing would prevent the Petitioners from using their proposed second floor space at all hours, which he testified would be intrusive in terms of light. Mr. Chernicoff noted that because of the topography, the Petitioners' garage sits up higher, almost a story higher, and that adding more height to the existing garage would exacerbate privacy problems. He testified that it appears that the height of the proposed structure will be close to 20 feet, and that it seems as though the Petitioners are raising the current roof six (6) feet rather than three (3). He noted that one does not need such a tall roof to add insulation. Mr. Chernicoff argued that the existing garage could not be moved to the center of the subject property because of the additional setbacks occasioned by its length, stating that it would have to be narrower. Finally, he testified that he and his wife believe the proposed development would have a negative impact in terms of noise and traffic.

13. Bruna Chernicoff testified in opposition to the requested variances. Ms. Chernicoff shared photographs taken from the middle of their back yard and from the edge of their deck, showing the visibility of the Petitioners' garage. She testified that she and her husband had renovated their deck and built a privacy wall, that privacy was a huge concern, and that they did not want to feel that they were being watched. Ms. Chernicoff testified that the ADU itself would impact how they use their space, and that the proposed second floor and stairs would also impact this.

14. Ozan and Serpil Koknar, who own one of the two properties abutting the subject property to the rear, also testified in opposition to the requested variances. The Koknars submitted a letter of opposition, in the record at Exhibit 10(c). Mr. Koknar testified that he and his wife share similar concerns to those already voiced. He testified that the existing garage is largely below their eye level, and that the open space behind their property was a selling point. Mr. Koknar testified that they have concerns about their property and their privacy. He testified that they would be able to see six feet more of the Petitioners' structure

if it were modified as proposed, and that it will be at eye level with their deck and master bedroom. Mr. Koknar testified that he did not have any concerns about the use of the first floor of the garage, and that the increase in height was really their focus. He testified that if the structure were moved to the center of Petitioners' property, he believed it would impact them less because of the property's slope.

Ms. Koknar testified that when they purchased the house, she fell in love with the large windows on the second floor, and that if the Petitioners are permitted to increase the height of their garage, she will see the new roof. She attempted to show the Board their current view using her computer camera, and stated that when the leaves are not on the trees, the view is different. Ms. Koknar testified that there was no way to tell what future purchasers of the subject property might do with the proposed second floor, and that in her opinion, the proposed construction would have a tremendous effect on them.

FINDINGS OF THE BOARD

Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board must find that:

- (1) denying the variance would result in no reasonable use of the property; or
- (2) each of the following apply:
 - a. one or more of the following unusual or extraordinary situations or conditions exist:
 - i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;
 - ii. the proposed development uses an existing legal nonconforming property or structure;
 - iii. the proposed development contains environmentally sensitive features or buffers;
 - iv. the proposed development contains a historically significant property or structure; or
 - v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;
 - b. the special circumstances or conditions are not the result of actions by the applicant;
 - c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;
 - d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and

- e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.

Section 59-7.1.1 of the Zoning Ordinance provides that the applicant has the burden of production and has the burden of proof by a preponderance of the evidence on all questions of fact.

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

Based on the binding testimony of the Petitioners and their architect, and the evidence of record, the Board finds that the requested variance relief from the right side lot line setback and from the ADU size limitation can be granted. The requested variances comply with the applicable standards and requirements set forth in Section 59-7.3.2.E.2 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.ii the proposed development uses an existing legal nonconforming property or structure;

The Board finds, based on the Statement and the building permit denial, that the existing detached garage does not meet the development standards in the Zoning Ordinance, and is a legal nonconforming use. The Board further finds that the Petitioners are proposing construction that will use this existing structure. Thus the Board finds that the proposed development uses an existing legal nonconforming structure, in satisfaction of this element of the variance test. See Exhibits 3 and 6.

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 that the Petitioners purchased the subject property in 2011, and that the legal, nonconforming detached garage that they seek to convert to an ADU and otherwise modify was present on the property, in its current location, at that time. Thus the Board finds that the special circumstances or conditions are not the result of actions by the applicant, 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 observes at the outset that in accordance with Section 59.3.3.3.C.2.b of the Zoning Ordinance, “[a]ny structure constructed legally before May 31, 2012 that is not increased in size or building height and does not have new windows on a wall nearest an abutting property may be used for a Detached Accessory Dwelling Unit without regard to setbacks or floor area.” Thus the Board finds, based on the Statement in the record at Exhibit 3 and consistent with the testimony of Mr. Saul, that pursuant to this Section of the Zoning Ordinance, the existing garage could have been converted to an ADU without the need for size or setback variances but for the need to replace the roof to accommodate an HVAC system and insulation, both of which were required to make the ADU code compliant. Accordingly, the Board finds that these variances are the minimum needed to overcome the practical difficulty caused by the Zoning Ordinance in adapting the existing structure for use as an ADU, 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; and*

The Board finds that the variances from the ADU size limitation and right side lot line, needed to allow the proposed ADU to occupy the entirety of the existing garage footprint, can be granted without substantial impairment to the intent and integrity of the East Silver Spring Master Plan, which seeks to preserve existing residential character, encourage neighborhood reinvestment, provide a greater range of housing types, and enhance the quality of life throughout East Silver Spring.

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

The Board finds that granting the variances requested for the size of the ADU and setback from the right side lot line, which were triggered by the need for improvements to the roof of the existing detached garage so as to make that structure compliant with applicable building codes and thus habitable as a ADU, will not be adverse to the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test. The Board notes in support of this finding that the footprint of the existing garage is not being expanded and the structure is not being moved any closer to the right side lot line. See Exhibit 3. The Board further notes that these variances relate to the construction of the proposed ADU, and that while the opponents assert (among other things) that the proposed construction, and in particular the proposed second floor space, will be used as living or office space and thus will intrude on their privacy, the Board finds, based on the sworn testimony of the Petitioners and their architect, the Statement in the record at Exhibit 3, and the floor plan in the record at Exhibit 5(b), that the second floor space will be used for storage and will not be habitable. Finally, the Board notes that two-story accessory structures are allowed in the R-60 Zone, and that the height of the proposed structure will not exceed the maximum allowable height for accessory structures in the R-60 Zone (20 feet), and will not exceed the allowable average height over which additional setbacks are required (15 feet).

Accordingly, the requested variances from the ADU size limitation and the right side lot line setback are **granted**, subject to the following conditions:

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

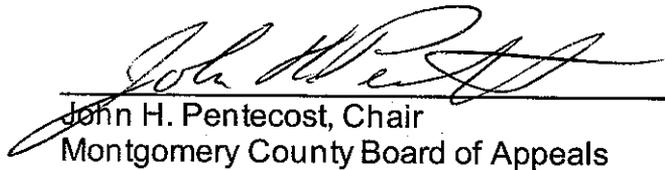
2. Construction shall be in accordance with Exhibits 4 and 5(a)-(b), except as noted herein with respect to windows on the north side of the structure. The Petitioner shall submit as-built plans to the Board once the structure is finished.

Based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Richard Melnick, with Bruce Goldensohn, Vice Chair, Katherine Freeman, and Mary Gonzales in agreement, the Board approved the 12 foot variance from the right side lot line setback, and adopted the Resolution below.

In addition, 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 approved the variance of 142.5 square feet or 11% from the ADU size limitation, and adopted the Resolution below.

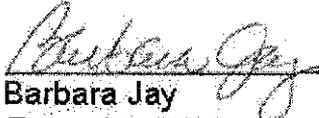
Finally, with respect to the requested variance from the requirement in Section 59.3.3.3.C.2.b of the Zoning Ordinance that there can be no new windows on a side facing the neighbor on an existing structure that does not meet the required setback, for the reasons that follow, based on a motion to deny made by John H. Pentecost, Chair, seconded by Richard Melnick, with Katherine Freeman and Mary Gonzales in agreement, and with Bruce Goldensohn, Vice Chair, not in agreement, the Board finds that this variance must be denied, and adopted the Resolution below. The Board finds in support of this denial that the Petitioners have not demonstrated any practical difficulty that would be caused by their inability to locate new windows on the north side of this structure, and thus the Board cannot find that the requested variance is the minimum reasonably necessary to overcome that practical difficulty, as is required by Section 59.7.3.2.E.2.c of the Zoning Ordinance. Furthermore, the Board finds that the Petitioners have not shown that the proposed windows on the north side of the structure will not be adverse to the use and enjoyment of neighboring properties. The Board notes that Outlot A is not vacant, as had been represented in Petitioners' Statement, and that per the testimony of Ms. Langer, the shed on the Outlot is used as workspace. Accordingly, the Board finds that the requested variance also fails to meet Section 59.7.3.2.E.2.e. Having found that the requested variance does not meet two of the required five elements of the variance test, the Board finds that this variance cannot be granted and must be denied.

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 29th day of July, 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.