

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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CASE NO. A-6687

PETITION OF JACOBO O. SERPAS

OPINION OF THE BOARD

(Opinion Adopted March 31, 2021)
(Effective Date of Opinion: April 14, 2021)

Case No. A-6687 is an application for a variance necessary for the proposed construction of a second floor addition and porch extension on an existing house. The proposed construction requires a variance of 5.40 feet as it is within 14.60 feet of the rear lot line. The required setback is twenty (20) feet, in accordance with Section 59-4.4.8.B of the Zoning Ordinance.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on Wednesday, March 31, 2021. All participation was done via Microsoft Teams. Petitioner Jacobo Serpas participated in support of the requested variance.

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

EVIDENCE PRESENTED

1. The subject property is Block 31, Lot 1, Wheaton Woods Subdivision, located at 4513 Aspen Hill Road in Rockville, Maryland, 20853, in the R-90 Zone. The Justification Statement ("Statement") submitted with the variance application indicates that the subject property is a corner lot, approximately 9,420 square feet in size. See Exhibit 3. The Site Plan shows that the property's lot line along Kemper Street is curved, that the lot line along Aspen Hill Road is straight, and that the two meet an acute angle with a rounded "corner," giving the property a peninsula shape. The Site Plan further shows that the remaining two property lines are set perpendicular to their respective street frontages and meet at an obtuse angle, resulting in a relatively shallow yard behind the existing home. See Exhibit 4.

2. The Justification Statement ("Statement") indicates that the Petitioner has owned the subject property since 1996. It indicates that the subject property was platted in 1952 and contains an existing home that is set back 14.8 feet from the rear lot line. The Statement states that the existing house was legally built in 1953 and conformed to the setback at that time of its construction, concluding as a result that the proposed construction uses an existing legal nonconforming structure. See Exhibit 3. The Statement further indicates that the Petitioner is proposing to add a second story on top of this existing structure, and that the proposed addition will maintain the footprint of the original structure. See Exhibit 3.
3. The Statement at Exhibit 3 states that the grant of the proposed variance will not be adverse to neighboring property owners, as follows:

My second floor addition will not have adverse affect to the side of the neighbor's property located at 4515 Aspen Hill Road. The neighbor's house structure is currently set at about +/- 15 feet from their property line. That would give us a separation distance of about 29.8 feet. The neighbor located on 4602 Kemper Street is locate [sic] at a greater distance and should not have any adverse affect on them.

4. The Statement states that the requested variance is the minimum needed to allow the Petitioner to add a second story over the original single story portion of the house, stating that "[t]he existing location of the house and the shape of the corner lot will make it impossible to comply with the 20 feet rear setback." See Exhibit 3. The Statement further elaborates on this, as follows:

If I follow the 20 feet setback, per denial letter, it would cut my second-floor addition and make it structurally infeasible to build on the existing building structure. It would not be possible to have a functional second floor and aesthetically it would not look good. I am doing all I can to make everyone happy and also stay on budget.

5. At the hearing, the Petitioner testified that he has lived in his house since 1996. He testified that while the variance sign is posted in his front yard, he has not spoken with any of his neighbors about his proposed construction. The Petitioner testified that he is planning to construct a second story on top of the original single story portion of his home, and accordingly that the distance between his home and the rear lot line will not be changing.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the requested rear lot line variance can be granted. The requested variance complies with the applicable standards and requirements set forth in Section 59-7.3.2.E as follows:

1. *Section 59.7.3.2.E.2.a. one or more of the following unusual or extraordinary situations or conditions exist:*

Section 59.7.3.2.E.2.a.ii the proposed development uses an existing legal nonconforming property or structure;

The Board finds, based on the representations of the Petitioner included in his Statement, that the original portion of the existing house on this property was built in 1953, that it complied with the setbacks in effect at the time of its construction, and that it is a legal nonconforming structure. See Exhibit 3. The Board further finds that the Petitioner is proposing to add a second story to 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.

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 Petitioner, who purchased this property in 1996, did not construct or have control over the placement of the existing house, which was built in 1953. See Exhibit 3. Thus the Board finds that the special circumstances or conditions applicable to this property were 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, that without the grant of the requested variance, the Petitioner will be unable to construct a second floor addition on top of the existing, original single story portion of his house, and that stepping the addition in to meet the required setback would be structurally infeasible and would result in an addition that was not functional. The Board further finds that the requested variance is the minimum necessary to allow the proposed second story addition to use the footprint of the existing legal nonconforming house, which has been in place for nearly 70 years, and thus the Board finds that the requested variance is the minimum needed to overcome the practical difficulty that full compliance with the Zoning Ordinance would otherwise impose. Accordingly, the Board finds that this element of the variance test is satisfied.

4. Section 59.7.3.2.E.2.d the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan;

The Board finds that the construction of a second story addition continues the residential use of the home, and thus can be granted without substantial impairment to the intent and integrity of the Aspen Hill Master Plan (1994), which seeks, among other things, to "protect and reinforce the integrity of existing residential neighborhoods," and to "encourage the protection, enhancement and continuation of current land use patterns."

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 allowing the construction of a second story on top of this existing home will not infringe on the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test, since it will not increase the

existing rear lot line setback encroachment. The Board notes, per the Statement, that because the closest home is also about 15 feet from the shared lot line, maintaining the current separation would result in the home on the subject property being approximately thirty feet from its closest neighbor. See Exhibit 3. The Board further notes that the Petitioner has testified that he has not been approached by his neighbors to inquire about the construction despite having the variance sign posted.

Accordingly, the requested rear lot line variance to allow the construction of a second story addition on this existing home is **granted**, subject to the following conditions:

1. The Petitioner shall be bound by the testimony and exhibits of record; and
2. Construction shall be in accordance with Exhibits 4 and 5.

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Bruce Goldensohn, Vice Chair, with Mary Gonzales, Richard Melnick, and Caryn Hines in agreement:

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 14th day of April, 2021.



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.