

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6699

PETITION OF JOHN AND KARIN FLYNN

OPINION OF THE BOARD

(Opinion Adopted May 19, 2021)
(Effective Date of Opinion: May 28, 2021)

Case No. A-6699 is an application for a variance needed to allow construction of a deck with a hot tub. The construction of the proposed accessory structure requires a variance of three (3) feet as it is within seven (7) feet of the rear lot line. The required setback is ten (10) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.¹

Due to COVID-19, the Board of Appeals held a remote hearing on the application on May 19, 2021. All participation was done through Microsoft Teams. Petitioner John Flynn participated in support of the requested variance, along with his designer, Kathryn Everett.

Decision of the Board: Variance GRANTED, subject to conditions below.

EVIDENCE PRESENTED

1. The subject property is Lot 23, Block 45, Chevy Chase Section 2 Subdivision, located at 6134 Nevada Avenue, Chevy Chase, Maryland, 20815, in the R-60 Zone. It is a four-sided corner property, roughly rectangular in shape, located on the southwest corner of the intersection of E. Melrose Street and Nevada Avenue. The northeast corner of the property is rounded where the two streets meet. The property has an area of 9,289 square feet, with a width of approximately 125 feet and a depth of approximately 75 feet (discounting its rounded corner). See Exhibits 3, 4, and 7(a).

¹ In accordance with Section 59.4.4.9.B.2 of the Zoning Ordinance, the required setback for an accessory structure from a rear lot line is generally five (5) feet, except in a case such as the instant case, where the property is a corner lot where the abutting lot fronts on the side street and is in a residential detached zone, in which case the required setback is ten (10) feet. In addition, Section 59.4.4.9.B.2.a requires that accessory structures be located "behind the rear building line of the principal building."

2. The Petitioners are seeking to construct an accessory structure (deck with hot tub) behind the rear building line of their home, seven (7) feet from their rear lot line, in an area near the left rear (southwest) corner of their property.

3. The Petitioners' Statement of Justification ("Statement") states that the area between their home and their rear (western) lot line is small and shallow, as follows:

Our back yard is small for the area and quite shallow--the distance from the house to the property line is 20 feet along the entire length of the house. The only viable place to install the therapeutic bath is the southernmost end of the backyard, past the house structure, in what is considered the rear corner of the lot.

See Exhibit 3. The Statement further indicates that construction in this area is complicated by the presence of a large Sycamore tree, 54 inches in diameter, which is located eight (8) feet from the property's (side) southern property line and 27 feet from its (rear) western property line. The Statement states that because the Petitioners do not want to damage this tree, "the footings for the bath/deck must be set at a sufficient distance from the trunk's base." The Statement indicates that "[t]he Chevy Chase Village arborist evaluated and approved our design, suggesting the location of the spa/deck in accordance with a tree preservation plan." The Statement explains that the Petitioners "have created a design that provides sufficient distance from the tree while also keeping the edges of the deck housing the bath the minimum distance from the property lines," and notes that "the small amount of decking other than that necessary to enclose the bath extends in the direction of the house and/or along the setback line, *not* further into the setback." See Exhibit 3.

4. The Petitioners have received a variance for their proposed construction from the Chevy Chase Village Board of Managers. See Exhibit 7. In connection with seeking that variance, the Village received letters of support from several of the Petitioners' neighbors, and no opposition. See Exhibits 7 and 8(a)-(d). The construction for which the Petitioners received a variance from the Chevy Chase Village is the same construction for which they are now seeking a variance from the Montgomery County Board of Appeals.

5. The Statement indicates that the grant of the requested variance will not be adverse to the use or enjoyment of neighboring properties, as follows:

The proposed design would have no negative impact on the abutting neighbors. There is an existing privacy fence along the property line. The neighbors to the southeast are screened with evergreen trees on our property, and there are existing trees and shrubs heavily planted on the neighbors' side of the fence. On the western side, the neighbors installed a large retaining wall supporting an elevated pool that abuts our property; there are two rows of trees between this wall and our privacy fence.

The northern side of the property is fenced, and we have received Montgomery County and Village permits to construct a compliant cedar fence that is 6 feet high

on the southeast corner of the property. This will provide a fully fenced in yard and screen the therapeutic bath from the street.

See Exhibit 3. In addition, the Statement states that the Chevy Chase Village consulting engineer "reviewed the proposed plan and determined that the project does not negatively impact adjacent properties with regard to drainage," and further states that the Village arborist "determined that the outdoor therapeutic bath and deck could be installed in accordance with a tree preservation plan that would protect the existing sycamore tree." See Exhibit 3.

6. At the hearing, Petitioner John Flynn testified that he owns the subject property with his wife. He testified that their property is a long and narrow corner lot, with a long and narrow house on it and a shallow back yard that he estimated is between 15 and 20 feet deep. Mr. Flynn testified that the only space in the back yard to locate the proposed accessory structure, which he referred to as a therapeutic bath, is in the southwest corner. Mr. Flynn explained that that corner of the property is small and that on the street side, there is an old, large, beautiful tree. He testified that he and his wife had the arborist from the Village of Chevy Chase come out to discuss their plans and see the tree, and that the arborist suggested the proposed location for the deck and therapeutic bath. Mr. Flynn testified that the neighbors would not be able to easily see the proposed improvements due to the presence of trees on the property.

7. Mr. Flynn and Ms. Everett testified that they had not received the required variance sign, and accordingly had not posted it. Ms. Everett testified that they had posted a sign for the variance they received from Chevy Chase Village, and that they had consent from all the affected neighbors to seek that variance. Mr. Flynn testified that his neighbors had not changed since the grant of that variance in December, 2020. He further testified that he had received the written Notice of the May 19, 2021, hearing that the Board of Appeals mailed in connection with this case.

CONCLUSIONS OF LAW

Based on the evidence of record, the Board finds that the requested variance can be granted, contingent upon satisfaction of the condition set forth below the Board's analysis of this request against the standards set forth in Section 59.7.3.2.E of the Zoning Ordinance. The Board finds that the requested variance complies with the applicable standards and requirements set forth in Section 59.7.3.2.E of the Zoning Ordinance, 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 Statement, the depiction of nearby properties on the Zoning Vicinity Map, and the testimony of Mr. Flynn, that the subject property is shallow relative to neighboring properties. See Exhibits 3 and 9. The Board further finds, based on the Site Plan, that the existing house is located as far forward on the subject

property as it can be, given the required setback along Nevada Avenue. See Exhibit 4(b). Finally, the Board finds, based on the Statement and the testimony of Mr. Flynn, that in addition to the subject property being shallow overall, with a depth of no more than 20 feet, the subject property has an unusually shallow rear yard. See Exhibit 3. The Board finds that the shallowness of this property and its rear yard constitutes an extraordinary condition, 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, per SDAT, that the Petitioners purchased the subject property in 2018, and are therefore not responsible for the shallow nature of the subject property, 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 that because of the shallowness of the Petitioners' rear yard, the application of the 10-foot rear lot line setback for accessory structures to their property instead of the otherwise applicable 5-foot setback, the larger setback made applicable because the subject property is a corner lot where the abutting lot fronts on the side street and is in a residential detached zone, creates a practical difficulty for the Petitioners by severely constraining the area available for the construction of an accessory structure without variance relief. The Board further finds, based on the Statement and Site Plan, that the requested three (3) foot variance from the rear lot line is the minimum necessary to overcome this practical difficulty and allow the proposed construction while staying behind the rear building line of the Petitioners' house. The Board notes, based on the Site Plan, that moving the proposed construction forward to comply with the required rear lot line setback would place the proposed construction forward of the rear building line, necessitating a different variance, and, per the Statement, would harm the large Sycamore tree that exists in that area of the property. Accordingly, the Board finds that the requested variance is the minimum necessary to overcome the practical difficulty that full compliance with the Zoning Ordinance would cause due to the shallowness of the property, 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 granting of this variance will continue the residential use of the home, and thus can be granted without substantial impairment to the intent and integrity of the applicable Bethesda-Chevy Chase Master Plan (1990).

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, based on the Statement and the testimony of Mr. Flynn, that the proposed construction will be well-screened by trees, fencing, and other features, and will not be easily visible to neighboring property owners. See Exhibit 3. The Board further

finds, based on the testimony of Ms. Everett and the letters of support submitted by several of the Petitioners' neighbors in connection with the Petitioners' variance proceedings for this same construction before the Board of Managers for Chevy Chase Village, including the neighbor who shares the Petitioners' rear lot line, and the lack of opposition to that variance, that the Petitioners' neighbors do not object to the proposed construction. See Exhibits 7 and 8(a)-(d). Thus the Board finds that granting this variance, which would allow the same improvements permitted by the variance granted to the Petitioners by the Board of Managers for Chevy Chase Village in December 2020, will not be adverse to the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test.

Because of the failure to post the required sign, the Board finds that while the Petitioners' abutting and confronting neighbors should have received mailed Notice of the Board's proceedings, it is possible that others in the community were unaware of the proceedings and would have liked to participate. Thus the Board makes its grant of the Petitioners' variance contingent on satisfaction of the following condition:

The Petitioners shall post the required variance sign for a period of 30 days. Time shall be computed in accordance with Rule 14.0 of the Board's Rules of Procedure, and thus the 30-day period shall begin the day after the sign is posted. The Board acknowledges that the posting of the required sign may, and likely will, occur prior to the issuance of this Opinion. The record in the matter shall remain open for the duration of the 30-day posting period to receive any concerns from the community about the Petitioners' variance request. If no such concerns are received, this condition will be deemed satisfied, and this Opinion will take effect on the day following the conclusion of the 30-day time period. If the Board does receive concerns about this variance request during the 30-day time frame, those concerns will be added to the record for this case, and the Board will publicly address them, either at a Worksession or in a hearing, depending on their nature, and will issue a second written decision which shall constitute the Board's final decision in this matter.

Accordingly, the requested variance of three (3) feet from the rear lot line setback is **granted**, subject to satisfaction of afore-mentioned condition of approval, and the following additional conditions:

1. Petitioners shall be bound by the testimony and exhibits of record; and
2. Construction shall be in accordance with Exhibits 4(a)-(b) and 5(a)-(b).

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Richard Melnick, with Bruce Goldensohn, Vice Chair, Mary Gonzales, and Caryn Hines 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 28th day of May, 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.