

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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<http://www.montgomerycountymd.gov/boal/>

CASE NO. A-6825

**PETITION OF 6433 79th STREET, LLC
by SEAN RUPPERT, PRINCIPAL**

OPINION OF THE BOARD

(Hearing Held: September 20, 2023)

(Effective Date of Opinion: October 4, 2023)

Case No. A-6825 is the application of Petitioner 6433 79th Street, LLC, by Sean Ruppert, Principal, for variances necessary for the proposed construction of a new single family detached house. The proposed construction requires a variance of 1.92 feet as it is within 5.08 feet of the right lot line. The required setback is seven (7) feet, in accordance with Sections 59.4.4.8.B.2 and 59.7.7.1.D.2.c of the Zoning Ordinance. In addition, the proposed construction requires a variance of 10.13 feet as it is within 19.87 feet of the front lot line. The required setback is thirty (30) feet, in accordance with Section 59.4.4.8.B.2 of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on Wednesday, September 20, 2023. Mr. Ruppert appeared at the hearing on behalf of the Petitioner, in support of the application. The Petitioner was represented by Nancy Regelin, Esquire.

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

EVIDENCE PRESENTED

1. The subject property is Block 5, Lot P59, Cabin John Park Section 4 6846/053 Subdivision, located at 6433 79th Street in Cabin John, Maryland, 20818, in the R-90 Zone. It is a rectangular property located on the east side of 79th Street. The subject

property has an area of 5,000 square feet, with a width of 50 feet and a depth of 100 feet. See Exhibit 3.

2. Per the Petitioner's Statement of Justification ("Statement"), the subject property "is Part of Lot 59, Block 5, Cabin John Park Section 4 per Plat 156 recorded July 3, 1913." The property contains an existing house that was built in 1922 and that has since been condemned by the County. The Statement indicates that "[t]he 5000 square foot parcel improved with the existing house was severed from the rear yard of Lot 59 in April 1952 by deed recorded in Liber 1649 at folio 240." The Statement states that "[t]he original Lot 59 from which the Property was created was 19,987 square feet before the 5,000 square foot Property was divided by deed." It states that the "deed parcel has remained unchanged since 1952." See Exhibit 3.

3. The Statement states that with an area of 5,000 square feet, the subject property is "exceptionally small." The Statement states that "[t]he lots on 79th Street generally range from 10,000 to 20,000 square feet in size, with smaller lots having evolved over time on the east side and the largest lots located on the west side of 79th Street." It further states that because of this, the subject property is "very different from its neighbors," stating that the subject property is not only "the smallest lot on 79th Street" but it is also the smallest lot in the neighborhood. The Statement notes that the abutting properties to the north (left) and south (right) of the subject property have areas of 13,614 square feet and 20,000 square feet respectively. See Exhibit 3. The Zoning Vicinity Map shows just how small and shallow the subject property is in comparison with neighboring properties. See Exhibit 3(d).

4. The Petitioner purchased the subject property earlier this year, and is seeking to construct a new single family detached home on the property in lieu of the existing home, which the Statement notes is "closer to the street than the current 30-foot setback established after the Property was rezoned to R-90 in 1990." The Statement states that the requested front lot line variance "will allow the new house and porch to be built to the original front building line of the existing 1922 home and front porch," and will allow for alignment of the new home with the neighboring homes on the east side of 79th Street. The Statement states that the existing home on the subject property was built before the County's first Zoning Ordinance was enacted and is set back 18.6 feet from the front lot line. The Statement indicates that the adjacent houses are set back 14.8 feet and 19.8 feet, respectively, and that "[t]he properties in line with the subject Property on the east side [of 79th Street] are mostly updated original houses, built close together with front porches setback an average of 12 feet from the 79th Street right of way." The Statement states that the requested front lot line variance "will place the house 19.87 feet from the front property line and the porch 11.87 feet from the front property line." See Exhibits 3 and 3(m)(ii).

5. The Statement states that the requested front lot line variance is necessary to match the historical development pattern along 79th Street and to overcome the practical difficulties posed by the small size and shallowness of the subject property, as follows:

The variance is necessary on this unusually narrow and shallow building site to match the historic pattern of development along 79th Street of houses built before Montgomery County had a zoning ordinance. The variance will in addition, overcome the practical difficulties of building a home on a shallow lot for a modern household with a front porch like its predecessor and neighboring houses, on a street that provides pedestrian and bicycle access to the C&O Canal Trail, and allow siting of the house to create sufficient space behind the house for a private, functional rear yard.

See Exhibit 3. The Statement further states that location of the proposed house in accordance with the required front lot line setback would be contrary to the existing development pattern:

In contrast, siting the new house at the R-90 setback of 30 feet would place the house 41'-8" feet back from the curb edge of the 79th Street pavement and be totally out of character with the traditional development pattern of the east side of 79th Street. Setting the house out of line with the other houses on the street will fracture the character of the existing neighborhood and either focus attention to it as a new build or demote it to the appearance of an accessory building.

6. The Statement states that adherence to the required front lot line setback "creates a practical difficulty in that it would severely limit the rear yard on this shallow parcel," noting that "[p]erimeter landscaping in the rear yard is requisite because the lot is shallow and completely surrounded by adjoining homes' rear yards," that the "rear yard is the only private outdoor space for a family to use on this parcel," and that "[g]ranteeing the front-yard variance will allow a rear yard of 30 feet depth to be created to accommodate both privacy landscaping on the rear and side perimeters as well as usable rear yard." See Exhibit 3.

7. The Statement states that the requested right side lot line variance is needed "to permit a bay-windowed landing area with bench." See Exhibit 3. The Statement indicates that there is a question regarding the classification of this proposed projection, and asserts that the projection is needed to maintain "maneuverability and flow" around the staircase, as follows:

The second variance requested is a 1.92 foot reduction in the 7 foot side-yard setback under 59-7.7.1.D.2.c (1952 setback standards) to permit a bay-windowed landing area with bench of a staircase that runs from the living room/foyer to the upper-story bedrooms to project as a bay into the side-yard setback. Bay windows are permitted to project into a side yard setback by 3 feet, however, DPS had included this as a required variance because the bay may or may not fit the "room alcove" definition of a bay. Given the constraints of the site that create a small building footprint for the house, the design requires an open concept interior that incorporates the open staircase as part of the rooms on each floor. The bay window of the landing area overcomes the practical difficulties of maintaining flow and maneuverability around a necessary staircase on each floor of the narrow, shallow house while providing light and air to the interior.

See Exhibit 3. The Statement explains that difference of opinion between the Petitioner and DPS regarding the classification of the proposed projection turns on “whether the bay window for the landing area of the interior staircase meets the code definition of ‘bay window’.” The Statement states that “Bay window is defined in the Zoning Ordinance as: A window, primarily made of glass, that projects from the wall of a building and forms an alcove of a room. It may have its foundation in the ground or be supported on corbels or otherwise. An oriel window is a type of bay window that is cantilevered (does not have its foundation in the ground).” See Exhibit 3. The Statement notes that “room” is not defined.

8. In closing, the Statement states that the requested variances satisfy the variance test set forth in Section 59.7.3.2.E.2 of the Zoning Ordinance, as follows:

Section 59.7.3.2.E 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;

The Property is unique in this neighborhood because of its small size – 5,000 square feet in a neighborhood of lots of 10,000 to 20,000 square feet, and its exceptional narrowness of 50 feet wide and shallowness of 100 feet wide.

ii. the proposed development uses an existing legal nonconforming property or structure;

The proposed development will replace an existing legal nonconforming structure on a sub-standard building site that, like its neighboring houses, sits forward of the current front yard setback due to its original 1920s construction before Montgomery County’s first zoning ordinance. The existing structure has been condemned. The Property is a buildable pre-1958 deed lot that per the Zoning Ordinance allows construction of a new house under the pre-1952 side and rear yards standards and compatibility with its neighborhood through the application of an “Established Building Line”. Because the established building line is forward of the current 30 foot R-90 front yard setback, a variance is required for the new house to be built consistent with the traditional development pattern of the neighborhood of much shallower front setbacks.

iii. the proposed development contains environmentally sensitive features or buffers;

Not applicable.

iv. the proposed development contains a historically significant property or structure; or

Not applicable.

v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;

The proposed development with the requested variances substantially conforms to the established historic and traditional development pattern of the east side of 79th Street, including the existing home, each of which is built close to the right-of-way. The existing house on the Property is setback 18.6 feet, and the adjacent houses are respectively, setback 14.8 feet and 19.8 feet per the engineer's EBL exhibit attached as Attachment 12b. The proposed development requires the requested variance to the front yard setback to allow the house to be brought forward to the established building line for neighborhood cohesiveness despite the established building line not being applicable where it is forward of the current Code standard. The houses on the east side of 79th Street also have front porches which project into the shallow front setbacks. The requested front yard setback variance will also allow the proposed siting of the house to create a functional rear yard as a private outdoor space which is enjoyed by all other houses and families in the neighborhood as compared to their front porches which are very public outdoor spaces on a well-travelled street that provides well-used pedestrian and bicycle access to the C&O Canal towpath trail.

The side yard setback variance mitigates the practical difficulty locating the interior staircase for flow and maneuverability within a narrow, shallow house and provides light and air to the open concept rooms adjoining as well as the stair landing seating area in the bay window.

b. the special circumstances or conditions are not the result of actions by the applicant;

The special circumstances and conditions are created by the historic pattern of development of the neighborhood that was originally built before Montgomery County adopted its first zoning ordinance in 1928 as well as the creation of a deed parcel in 1952 (which was permitted prior to the adoption of the 1958 zoning ordinance and subdivision regulations). Applicant purchased the Property in May 2023 with the intention of replacing the condemned structure with a home that was compatible with the neighborhood and in the character of the existing homes. The requested variances will permit Applicant to meet the compatibility intent of the zoning ordinance and master plan.

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 requested variances are the minimum necessary to overcome the practical difficulties that complying with the current R-90 30-foot front yard setback or prohibiting the encroachment of a bay window for a stair landing would impose on this exceptionally small, narrow and shallow parcel. Granting the variances allows the house to be brought forward to the established building line for good urban design, compatibility with the traditional development pattern, and a cohesive neighborhood feel. The front yard setback variance as well allows the siting of the proposed house forward enough to create a functional rear yard like the outdoor private space enjoyed by all the other homes in the neighborhood along a street where the Canal towpath trail access use of 79th Street causes the front yards and these homes' porches to feel like very public spaces.

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

Granting the requested variances will not cause impairment, substantial or otherwise, to the intent and integrity of the general plan and applicable Bethesda-Chevy Chase master plan. In fact, the approval of the variances will reinforce the strength and character of an existing residential neighborhood by permitting a compatible new house to fit seamlessly into the traditional development pattern of 79th Street.

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

Granting the variances will enhance the use and enjoyment of abutting and confronting properties by allowing a new home to be constructed close to 79th Street right-of-way according to the traditional development pattern of 79th Street to replace a long vacant, neglected and uninhabitable house that is a nuisance in the community.

See Exhibit 3. Thus the Statement concludes that the requested variances can be granted.

9. At the hearing, Ms. Regelin reviewed the history of the property and existing house, stating that the existing house was built in 1922, before enactment of the County's first Zoning Ordinance. Thus she stated that the front and side setbacks for the existing house were determined by the developer; she noted that most of the homes on 79th Street were built close to the street and close to each other. Ms. Regelin stated that the County's first Zoning Ordinance, enacted in 1928, required a twenty (20) foot front setback, a seven (7) foot side setback, and a 5,000 square foot minimum lot size for this property. Ms. Regelin explained that in 1952, the existing 5000 square foot parcel was severed by deed from Lot 59. She stated that the property was eventually placed in the R-60 Zone, which required a front setback of 25 feet, a side setback of eight (8) feet, and a minimum lot size of 6,000 square feet. Finally, in 1990, Ms. Regelin stated that the zoning for the property was changed from R-60 to R-90, which has larger setbacks and a larger minimum lot size, to protect the larger lots that comprised most of the area from being broken up. She concluded that the subject property was a unique property in an older neighborhood with lots of character.

Ms. Regelin stated that the front yard setback is measured to the façade of the house, and not to the front porch. She stated that porches are allowed to protrude nine (9) feet into the front setback. Ms. Regelin noted that the proposed new home would have a front porch which would protrude into the setback but would be within the nine foot allowance. She stated that with the exception of the front of the house and the bay window, all other aspects of the house would comply with the required development standards.

10. Mr. Ruppert testified that he is the President of homebuilding company OPaL, and the managing member of Petitioner 6433 79th Street LLC. He testified regarding his homebuilding experience, notably on historic properties, and the numerous accolades he has received, both locally and nationally. The Board accepted Mr. Ruppert as an expert in homebuilding with a focus on historic architectural styles in the DMV (District-Maryland-Virginia region).

Mr. Ruppert testified that he is very familiar with the subject property because it is located across the street from his home. He testified that he knew the former owner of the property, and that he knows most of the people who live on his street. Mr. Ruppert testified that the houses on either side of the subject property are Sears Catalog homes, as are many of the other houses on that side of the street. He testified that the existing house on the subject property is the only brick Sears Catalog home on the street.

Mr. Ruppert testified that the subject property is fifty (50) feet wide and one hundred (100) feet deep, giving it an area of 5,000 square feet. He testified that it is "by far" the smallest property in the neighborhood. Mr. Ruppert testified that the subject property used to part of the abutting corner property. He testified that according to the Planning Department, the subject property is a "pre-1958 buildable lot." Mr. Ruppert testified that the subject property satisfies the "uniqueness" element of the variance test because it is half the size of the next smallest lots on 79th Street, which have an area of 10,000 square feet, and because most of the neighboring lots are wider than 50 feet and deeper than 100 feet.

Mr. Ruppert testified that he had an engineer examine the established building line along the east side of 79th Street. See Exhibits 3(m)(i) and (ii). He testified that the building line is less than the normal front setback required in the R-90 Zone, and that the proposed house would have to be set farther back than the others on the street in order to meet that setback. Referring to Exhibit 3(o), Mr. Ruppert testified that the heavy dashed line represents the footprint of the existing (condemned) house, and that the outline with windows shows the proposed house. He testified that porch of the proposed house will be exactly as close to the front lot line as the existing house.

Mr. Ruppert testified that the proposed bay window in the stairwell lets in a lot of needed light. He testified that while the planned three foot projection of the bay window in the kitchen does not require a variance, the County told them that the proposed two foot projection of the bay window for the stairwell does need a variance because it is not

clear that that bay window is in a "room." Mr. Ruppert testified that with the proposed open floor plan, there is no wall around the stairwell, and that in his opinion it could be considered part of the great room or the foyer, and thus allowed. He testified that failure to grant this variance would cause him a practical difficulty given the already compact footprint of the proposed new house on this small and narrow lot. Mr. Ruppert testified that this bay does not extend as far into the side setback as the kitchen bay, which is allowed, and that it adds character to the side of the house.

Mr. Ruppert testified that the proposed new house is inspired by the Sears Catalog homes, and is consistent with the others on the east side of 79th Street. He testified that all of the homes on the east side of the street are similar, with front porches extending into the setback, and with the right of way area landscaped as a front yard. Mr. Ruppert noted again that all of these homes are on much bigger lots than the subject property. He testified that compliance with the front lot line setback would cause him a hardship because it would force him to locate the proposed new house 30 feet from the front lot line and 41 feet from the pavement that is 79th Street. He testified that allowing the proposed house to be set forward of the required front lot line setback, in line with the other houses and consistent with the placement of the existing (to be demolished) house, would not only allow for back yard space behind the proposed house, but would also be less impactful to the abutting property at 7906 MacArthur Boulevard. In addition to benefitting that property, Mr. Ruppert testified that granting the front lot line variance would benefit all of the properties on 79th Street by allowing a front porch in line with others on the street. He testified that the front porch on the proposed house has been designed to be in line with the setback of the existing house and with the porch of his neighbor to the right, and to be within two feet of the porch of his neighbor to the left. Thus Mr. Ruppert testified that the proposed construction would substantially conform with the established historic or traditional development pattern of the street.

Mr. Ruppert testified that the small size, narrowness, and shallowness of the subject property are not the fault of the Petitioner, which just purchased the property this year. He testified that the requested variances are the minimum needed to overcome the practical difficulty of constructing a house that is consistent with the neighborhood on the subject property. Mr. Ruppert testified that the proposed construction is in keeping with the Master Plan for the Cabin John area, and that it will not be adverse to abutting or confronting property owners. Mr. Ruppert testified that he has spoken to many of his neighbors about the proposed construction, and that he has letters of support from four of them. See Exhibits 6(a)-(d).

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the variances can be granted. The requested variances comply 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 Zoning Vicinity Map, and the testimony of Mr. Ruppert, that at 5,000 square feet, the subject property is significantly substandard for the R-90 Zone, which has a 9,000 square foot minimum, and in fact is the smallest lot in this neighborhood. See Exhibits 3 and 3(d). In addition to being exceptionally small, the Board finds, again based on the Statement, the Zoning Vicinity Map, and the testimony of Mr. Ruppert, that the subject property is narrower and shallower than surrounding properties. The Board finds that these unusual or extraordinary situations or conditions combine to limit the useable area of this property for the proposed construction, in satisfaction of this element of the variance test.

Section 59.7.3.2.E.2.a.v the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;

The Board finds, based on the Statement, Established Building Line exhibits, and the testimony of Mr. Ruppert, that the proposed new home is inspired by the Sears Catalog style of existing homes on this street, and will be placed on the property in a location that is consistent with the placement of the existing (condemned, to be demolished) house and the other existing homes on the east side of 79th Street. See Exhibits 3 and 3(m)(i)-(ii). Thus the Board finds that the proposed construction substantially conforms with the established historic or traditional development pattern on this street, 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 the Statement, that the subject property is part of a lot that was recorded in 1913, and contains a house that was built in 1922, both before the enactment of the County's first Zoning Ordinance in 1928. The Board further finds that the subject property, in its current configuration, was created by deed in 1952, and was purchased by the Petitioner in its current condition earlier this year. See Exhibit 3. In addition, the Board finds that there is nothing in the record to suggest that the development pattern on this street is in any way due to actions of the Petitioner. Thus the Board finds that the special circumstances or conditions peculiar to this property are not the result of any 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 and the testimony of Mr. Ruppert, that full compliance with the Zoning Ordinance would pose a practical difficulty for the Petitioner on account of the narrowness, shallowness, and significantly substandard size of the subject property, and because full compliance would not allow development that is consistent with the existing development pattern on this street. The Board finds that the property's narrowness, shallowness, and small size combine to leave a buildable envelope that is not only set much farther back on the property than the setback of other homes on the east side of 79th Street, but that is also very constrained in terms of its width and depth. The Board finds that this prevents the Petitioner from being able to redevelop this property with a single family home of a style and in a manner that is consistent with other development on the street and with the placement of the condemned house that currently exists on the subject property. See Exhibit 3. The Board further finds, based on the Statement and the testimony of Mr. Ruppert, that the requested variances are the minimum needed to overcome this practical difficulty and to allow the proposed construction. Thus the Board finds that the requested variances are the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual characteristics of this 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, based on the Statement and the testimony of Mr. Ruppert, that granting the requested variances will not cause substantial impairment to the Bethesda-Chevy Chase Master Plan, and will "reinforce the strength and character of an existing residential neighborhood by permitting a compatible new house to fit seamlessly into the traditional development pattern of 79th Street." See Exhibit 3. Thus the Board finds that this element of the variance test is satisfied.

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, the letters of support, and the testimony of Mr. Ruppert, that granting the requested variances will not be adverse to the use and enjoyment of abutting or confronting properties. In support of this, the Board notes that the proposed new house has been designed to align and fit with the current development pattern in this neighborhood, and that the projection of the bay for which the variance is needed is less than the projection of the kitchen bay which is located on the same side of the house, and forward of, the bay in question. In addition, the Board notes that the record contains four letters of support and no letters of opposition, and that despite being properly posted, no one appeared at the hearing in opposition to the grant of the requested variances. See Exhibits 3 and 6(a)-(d). Thus the Board finds that this element of the variance test is satisfied.

Accordingly, the requested variances, needed for the construction of a new single family detached house, are **granted**, subject to the following conditions:

1. Petitioner shall be bound by the testimony and exhibits of record; and
2. Construction shall be in accordance with Exhibits 3(f) and (o).

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Caryn Hines, Laura Seminario-Thornton, and Alan Stemstein 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 4th day of October, 2023.


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.