

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. A-6837  
PETITION OF JULIA HART AND BETH PELLOWITZ**

OPINION OF THE BOARD

(Hearing Date: December 13, 2023)  
(Effective Date of Opinion: December 22, 2023)

Case No. A-6937 is an application by Petitioners Julia Hart and Beth Pellowitz for two variances needed for the proposed construction of a new detached accessory dwelling unit (“ADU”) with a maximum height of 17.25 feet. The proposed construction requires a variance of 8.50 feet as it is within 8.00 feet of the rear lot line. The required setback is 16.50 feet, in accordance with Sections 59.4.4.9.B.2.c and 59.3.3.3.C.2.c of the Zoning Ordinance. In addition, the proposed construction requires a variance of 3.50 feet as it is within eight (8) feet of the side property line. The required setback is 11.50 feet, in accordance with Sections 59.4.4.9.B.2.c and 59.3.3.3.C.2.c of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on December 13, 2023. Petitioner Beth Pellowitz both participated in the proceedings in support of the requested variances, assisted by architect Eric Saul.

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

**EVIDENCE PRESENTED**

1.     The subject property is Lot 10, Block 3, Bannockburn Coop Subdivision, located at 7012 Braeburn Place in Bethesda, Maryland, 20817, in the R-60 Zone. It is a four-sided property located on the east side of Braeburn Place. The property’s front (west) property line borders Braeburn Place and its rear (east) property line abuts the unbuilt Braeburn Parkway. The property is “very steep,” with a “20% slope from front to back.” The property contains a house that was built in 1951. Per SDAT, it was purchased by Petitioner Julia Hart in 2019. See Exhibits 1, 3, 4, and 8, and SDAT Printout.

2.     The Petitioner’s variance Application cites the subject property’s topography and other extraordinary conditions, namely “very large trees,” as factors that make the subject

property unique. See Exhibit 1. With respect to the property's topography, the Petitioner's Site Plan contains contour lines, elevation information, and calculations that show the severity of the property's downward slope from front to rear. See Exhibit 4. In addition, the Petitioner's Statement of Justification ("Statement") contains a narrative description of the property's slope, stating that "[t]he site is very steep from front to back – a drop of almost 26 feet over a length of 130 feet, or a 20% slope." See Exhibit 3.

With respect to the trees, the Statement describes the Petitioners' rear yard as "forested," and notes that there is one exceptionally large tree on the subject property that, with a diameter of over 36 inches, provides a "large canopy" over the property, and is "viewed as a great asset for the property and the neighborhood." The Statement states that the Petitioners had informally consulted an arborist who advised that any construction should be "at least 15-16 feet away from the trunk of this tree to avoid damaging its root system." See Exhibit 3. The Site Plan shows the location of this tree and indicates that the proposed ADU would be located 16.5 feet away from this tree at its closest point. See Exhibit 4. The Statement states that this tree and the other large trees on the property constitute an environmentally sensitive feature that makes the subject property unique for the purpose of granting a variance. See Exhibit 3.

3. The Statement states that the Petitioners are seeking to construct a two-level, detached accessory dwelling unit ("ADU") in their backyard, and asserts that "[a] two-story ADU with a small footprint design is the best possible solution" for this property in order to "avoid impact on existing trees." The Statement explains the setback rules that pertain to the height of an ADU in the R-60 Zone, stating that "[a]n ADU has a 20' peak height limit, and for every foot the average roof height exceeds 15', two additional feet of rear and side setback are required." It then states that the roof of the proposed ADU has a peak height of 17 feet, three inches above grade (17'-3"), and that "the overall height proposed is the minimum necessary to meet building code minimums on each floor." The Statement proceeds to explain that because the Department of Permitting Services ("DPS") "doesn't recognize a one-direction sloped roof style as qualifying to use the average height," DPS has required that the Petitioners' proposed ADU be set back an additional 4.5 feet beyond the minimum setbacks from the side and rear property lines. See Exhibit 3.

4. The Statement at Exhibit 3 states that compliance with the required side and rear setbacks (including the additional setbacks) would make construction of the proposed ADU impractical, as follows:

The bonus setback now required on the side and rear because of the peak calculation instead of average height calculation has caused this ADU to become impractical to build based on the site setting, landscape, and other extraordinary factors. Petitioner proposes locating the ADU 8 feet from the rear lot line, and 8' from the side lot line to situate it in an area that has the least amount of impact to the existing forest setting. Having to meet the required setbacks would encroach the root system of a very large tree that is viewed as a great asset for the property and the neighborhood. The diameter of this tree is over 36" and [it] provides a large canopy over this property. Informal discussions with a local arborist have

informed us to aim to be at least 15-16 feet away from the trunk of this tree to avoid damaging its root system.

5. The Statement states that the Petitioners are not responsible for the slope of the property or for the planting of the "large tree." See Exhibit 3.

6. The Statement states that the unique features of this property (i.e. its slope and trees) cause full compliance with the Zoning Ordinance to "disproportionately impact the reasonable use and enjoyment of this property, thus creating a practical difficulty" for the Petitioners. The Statement states that the Petitioners are proposing "a practical sized ADU that meets all other zoning regulations except for the two in question," and that "[i]t would be a practical difficulty to build an appropriately sized ADU on this property that meets the increased setback requirements, and to not consider some allowance for the steep slope when calculating building height." See Exhibit 3.

7. The Statement states that the right of property owners in the R-60 Zone to construct ADUs on their properties was established by ZTA 19-01. The Statement thus states that granting the requested variances "does not affect the integrity or intent of the general plan or applicable master plans," noting in further support of this that because of the property's slope, "the proposed ADU will be well hidden from the main road of Braeburn Place, thus preserving the residential character of the neighborhood." See Exhibit 3.

8. Finally, the Statement states that granting the requested variances to allow construction of the proposed ADU will not be adverse to the use and enjoyment of neighboring properties, stating that "[t]he proposed ADU will not negatively impact the use, enjoyment, character, health, safety, welfare, or security of the neighboring residents." The Statement further states that because of the property's steep slope, the view of the proposed ADU will be "well hidden" from the road and from other neighbors. In addition, the Statement states that the "Petitioner has proposed the ADU in a location that has the least impact on the natural surroundings...." Finally, the Statement notes that "[t]here is no abutting rear neighbor as planned, but an unbuilt parkway exists there with a creek and many trees," and that "[t]he backyard is very private from all the adjacent houses in a wooded setting, far below the street level in the front of the property." See Exhibit 3.

9. The Petitioners' abutting neighbors to the north (left) submitted a letter of support for the proposed construction. See Exhibit 7. Their letter states that they have been consulted and engaged throughout the planning process. It states that the proposed ADU "is being situated such that it would scarcely be visible from homes on either side." The letter further states that "given the slope of the property down towards the Bannockburn swimming pool located across the creek at the rear, one would not see the new ADU even across the street from 7012 [Braeburn Place]." See Exhibit 7.

10. At the hearing, Mr. Saul testified that the subject property is a difficult site, with a 20% slope, which he testified is considered "extreme" for building purposes. Mr. Saul testified that the presence of numerous trees, one of which is extremely large, makes construction on the property even more difficult. Mr. Saul testified that the proposed ADU

cannot be moved any closer to the house because of the steep slope in that area and because of the large tree. He testified that the proposed ADU cannot be moved to the opposite side of the property because it would block that neighbor's view and because that area is also sloped and densely forested. Mr. Saul testified that the closest residential property behind the subject property is hundreds of feet away, on the opposite side of the unbuilt "parkway" and the pool property. Because of this, he testified that the requested variance from the rear lot line would not adversely impact those neighbors. He further testified that he cannot reduce the depth of the proposed ADU by four (4) feet and have it remain workable.

Mr. Saul testified that the average height of the proposed ADU is fifteen (15) feet. He testified that because DPS does not allow the use of an average height for the proposed single slope roof style, DPS required additional rear and side setbacks for the proposed ADU. He testified that if DPS had allowed the use of the average roof height, the proposed ADU would not have required a variance from the right side lot line. Thus Mr. Saul testified that the proposed ADU meets the intent of the Zoning Ordinance.

Mr. Saul testified that the Petitioners have received a letter of support from their neighbors on the left, and that trees will obscure the view of the proposed ADU from the property to the right. Mr. Saul confirmed in response to a Board question that the slope of the property causes the Petitioners a practical difficulty, and that the proposed location is the only location available on the property to locate an ADU of reasonable size. Finally, in response to a Board question asking if there is a tree protection ordinance that would apply to the Petitioners' large tree, Mr. Saul testified that there is not.

## **FINDINGS OF THE BOARD**

Based on the binding testimony and the evidence of record, the Board finds that the variances needed for the construction of the proposed ADU can be granted. The Board finds that the requested variances comply with the applicable standards and requirements set forth in Section 59.7.3.2.E as follows:

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

*Section 59.7.3.2.E.2.a.i. - exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;*

The Board finds, based on the Statement and Site Plan, that the subject property has a 20% slope, dropping 26 feet from front to rear. See Exhibits 3 and 4. The Board further finds, based on the testimony of Mr. Saul, that a 20% slope is considered "extreme" for building purposes. Thus the Board finds that the slope of the property constitutes an exceptional topographical condition, in satisfaction of this element of the variance test.

*Section 59.7.3.2.E.2.a.iii. - the proposed development contains environmentally sensitive features or buffers;*

The Board finds that the Petitioner's rear yard contains numerous large trees, one of which has a trunk that exceeds 36 inches in diameter. The Board notes that trees are generally not considered to make a property "unique" for variance purposes absent some form of legal protection because trees can die or be removed, but notes that there are some outlier cases in which trees have been considered in the absence of a tree protection ordinance. See, e.g., *McLean v. Soley*, 270 Md. 208, 210, 310 A.2d 783 (1973). Based on the testimony of Mr. Saul, the Board finds that the Petitioners' tree is not protected as a legal matter. Because the Board has already found that the topography of the subject property makes it unique, the Board need not make a finding as to whether the Petitioners' very large tree constitutes an environmentally sensitive feature for the purposes of satisfying this element of the variance test, and will refrain from doing so.

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

The Board finds, based on the SDAT Printout, that Petitioner Hart purchased the subject property in 2019, and that there is nothing in the record to indicate that she or Petitioner Pellowitz is responsible for the steep slope of the subject property. Thus the Board finds that the special circumstances or conditions pertaining to this property are not the result of actions by the Petitioners, and that this element of the variance test is satisfied.

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 Site Plan, and the testimony of Mr. Saul, that the "extreme" slope of the Petitioners' property complicates construction and severely constrains the area available on the subject property for construction of the proposed ADU, causing the Petitioners a practical difficulty. See Exhibits 3 and 4. The Board further finds, based on the testimony of Mr. Saul, that the requested variances are the minimum necessary to permit the proposed construction in light of the property's slope, and that if the Petitioners' could have used the average height of the structure, as is allowed with other roof styles, the side lot line variance would not have been needed, and the extent of the rear lot line variance would have been reduced. Accordingly, the Board finds that the variances requested are the minimum needed to overcome this practical difficulty that full compliance with the Zoning Ordinance would entail, 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;*

The Board finds that the requested variances, needed to allow construction of the proposed ADU, can be granted without substantial impairment to the intent and integrity of the Bethesda-Chevy Chase Master Plan, which generally seeks to "[p]rotect the high quality residential communities throughout the Planning Area." Accordingly, 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, per the Statement and Site Plan, and based on the testimony of Mr. Saul, that because of the slope of the subject property and existing trees, the ADU will be barely visible, if at all, from the street. See Exhibits 3 and 4. The Board further finds, based on the letter of support and the testimony of Mr. Saul, that the proposed ADU will “scarcely be visible from homes on either side.” See Exhibit 7. Finally, the Board notes that despite being properly noticed and posted, the record contains no written opposition to the requested variances, and no one appeared in opposition to the variances at the hearing. On the basis of the foregoing, the Board finds that granting the requested variances will not be adverse to the use and enjoyment of neighboring properties, in satisfaction of this element of the variance test.

Accordingly, the requested variances from the side and rear lot lines, needed for construction of the proposed ADU, 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) (exterior only).

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 Sternstein 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.



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John H. Pentecost  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 22nd day of December, 2023.

  
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Barbara Jay  
Executive Director

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59.7.3.2.G.1 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.