

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6856

PETITION OF AVI AND LEOR BALDINGER

**OPINION OF THE BOARD
(Opinion Adopted April 3, 2024)
(Effective Date of Opinion: April 10, 2024)**

Case No. A-6856 is an application for variances needed to allow construction of a side addition. The proposed construction requires a variance of 3.70 feet as it is within 4.30 feet of the side lot line. The required setback is eight (8) feet, in accordance with Section 59.4.4.8.B.2 of the Zoning Ordinance. In addition, the proposed construction also reduces the sum of both side yard setbacks to fourteen (14) feet, necessitating a variance of eleven (11) feet. The required sum of both sides is twenty-five (25) feet, in accordance with Section 59.4.4.8.B.2 of the Zoning Ordinance.

The Board held a hearing on the application on April 3, 2024. Petitioner Avi Baldinger appeared at the hearing in support of the application.

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

EVIDENCE PRESENTED

1. The subject property is Lot 3, Block 47, Kemp Mill Estates Subdivision, located at 809 Kersey Road in Silver Spring, Maryland, 20902, in the R-90 Zone. The subject property is located on the north side of Kersey Road. It is a four-sided lot with an area of 9,399 square feet. The right side of the property is deeper than its left side; as a result, the property has an angled rear lot line. The property contains a house that was built in 1964. It was purchased by the Petitioners in 2009. See Exhibits 3, 4, and 8(a), and SDAT Printout.

2. The Petitioners are seeking to construct a one-story addition (with basement) on the left side of their house. The proposed addition will have the same footprint and general design as a single story garage for which the Board had previously granted variance relief.¹ That garage was never built. See Exhibit 3 and BOA Case No. A-6258.

3. The Petitioners' Statement of Justification ("Statement") states that the proposed addition is intended to allow the Petitioners to "age in place and to support [their] aging parents," indicating that their parents' use of the new space would hopefully be "on a temporary basis when they visit, but it may be on a more permanent basis should the need arise." See Exhibit 3.

4. The Statement states that the Petitioners' rear yard slopes up, away from the house towards the rear lot line, referring to the property's topography as "unusual." The Statement states that the previous owner "installed a retaining wall in the backyard to address a significant slope toward the home," and that this retaining wall "now bifurcates the backyard in a way that makes it infeasible to build a main level bedroom without a variance." The Statement goes on to explain that "[t]he alternative would require removing the paver wall installed by the prior owner across the length of most of the backyard, completely readjusting the topography, removing a large white oak behind the retaining wall, *and* removing many of the plantings [the Petitioners] installed as part of Montgomery County's Rainscapes program," noting that this would not only be "cost prohibitive" but would also "require extraordinary effort." See Exhibit 3.

5. The Statement states that the subject property contains environmentally sensitive features or buffers, the protection of which necessitates variance relief. The Statement highlights the presence of a "large mature white oak" in the back yard, beyond the retaining wall. The Statement further states that the property "qualified for Montgomery County's Rainscapes program, because even with the retaining wall, a slope remained...." The Statement indicates that the Petitioners have added "mostly native plantings" to "reduce[] runoff that would ultimately end up in the Chesapeake Bay." The Statement states that granting the requested variance "is the only way for this addition to

¹ The Petitioners' Statement of Justification at Exhibit 3 states that the Petitioners had their property re-surveyed, and as a result, that they are asking for slightly larger variances than had been granted before, not because the size of the proposed addition had changed, but because the new survey shows that slightly larger variances are needed for the addition, as follows:

The width of the structure will mirror the 14' that the Board previously granted to the prior owners. The previous owners indicated that this would leave 5.3' between the structure and the property line, thereby requiring a 2.7' and 15' setback on that side and combined respectively. This is included as Application 8 - Prior Site Plan and DPS Building Permit Denial. We believe this is correct at one point along the addition. However, the side lot is at a slight angle. Accordingly, to ensure all points of the addition are within the parameters of the variance, we believe the prior owners should have, and we do so now, identify the same 14' structure as within 4.3' of the side setback. This is the closest that any portion of the addition, using the same dimensions as the previous owner, will come to the side of the property. Accordingly, we anticipate that this will therefore require a variance of 3.7' and 16' respectively, even though the structure will be the same 14' width as the prior structure. This is reflected in the current DPS denial letter and site plan that is included as Application 9.

avoid undermining the environmental protections created through [the Petitioners'] participation in the County's Rainscapes program." See Exhibit 3.

6. The Statement states that the proposed addition would "substantially conform[] with the traditional development pattern of the street and neighborhood." In support of this, the Statement highlights the findings made by the Board in granting Case No. A-6258 that the proposed addition "does not undermine the intent of the zoning ordinance," that "additions to existing homes are commonly found in residential areas such as this one," and that the proposed addition is "consistent with the zoning ordinance intent of promoting residential scale." The Statement further states that the Petitioners' home is a 1960's split level, and that "[m]any of the surrounding homes are larger colonial homes, several with carports on the side, some enclosed as garages." The Statement states that there is a new development "just three houses down the street" that was built "decades" after their home, and that the homes in this development "are considerably larger and all have two car garages." Finally, the Statement states that "[a]round the corner from [the Petitioners'] home is a particularly large home that the owner built about a decade ago after tearing down the sixties-built colonial home." In light of the foregoing, the Statement concludes that even with the proposed addition, "many surrounding homes will continue to have a far larger presence on the street." See Exhibit 3.

7. The Statement states that the extraordinary conditions that make the Petitioners' property unique are not due to any actions by them. The Statement states that "the previous owner installed a retaining wall in the backyard to address a significant slope toward the home," and that this retaining wall "now bifurcates the backyard in a way that makes infeasible to build a main level bedroom without a variance, unless the wall is removed, the topography is completely readjusted, a large white oak behind the retaining wall is harmed or removed, *and* the plantings we installed as part of Montgomery County's Rainscapes program are removed." See Exhibit 3.

8. The Statement states that "there is no other location where [the Petitioners] can build with the necessary dimensions to have a main level master bedroom," thus concluding 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 or extraordinary situations or conditions on the property." See Exhibit 3.

9. The Statement states that the Board had previously found, in granting the variances requested in 2009, that the requested variances could be granted without substantial impairment to the intent and integrity of the applicable master plan, as follows:

The Board finds that the proposed one-story addition/garage will not undermine the intent of the zoning ordinance. Additions/garages added to existing homes are commonly found in residential areas such as the R-60 Zone in which the subject property is located, and are consistent with the intent of the zoning ordinance to promote a residential scale in residential zones. Accordingly, the proposed construction will not impair the intent, purpose, and integrity of the general plan affecting the subject property.

See Exhibit 3. The Petitioners ask that this Board re-adopt those findings in this case.

10. The Statement states that granting the requested variances will not be adverse to the use and enjoyment of neighboring properties. The Statement states that the Petitioners have notified their abutting and confronting neighbors about their proposed addition, and that their neighbors support the proposed construction. See Exhibit 3. The Petitioners have included letters of support from the abutting neighbors who would be most impacted by the grant of the requested variances and the resultant construction, and from the confronting neighbor who would be able to see the proposed addition. See Exhibits 7(a)-(b). The Statement notes that the Petitioners' abutting neighbors to the left "will be unable to see much of the addition either due to site lines, fences, maturing trees, and the fact that the side of their home next to the addition is a large brick wall with only two small basement windows just above ground level that look directly at the bottom of their fence." Finally, the Statement states that "[t]he view of abutting neighbors behind [the Petitioners' property] is obscured by a privacy fence and tree line," and that the Petitioners' existing house would block the view of the proposed addition from the abutting property to the right. See Exhibit 3.

11. At the hearing, Mr. Baldinger testified that he and his wife are seeking the requested variances so that they can construct a modest addition that will allow for one-story living, explaining that this will eventually permit them to age in place, and will also provide one-level living space that their parents could occupy, should the need arise. Mr. Baldinger testified that the proposed addition would be the exact same width as the garage addition that the previous homeowners had been granted a variance to build.

Mr. Baldinger testified the rear of the subject property slopes downwards towards his house. He testified that a previous owner installed a retaining wall across the property's backyard to try to address this slope, "bifurcating" the backyard. Mr. Baldinger testified that the retaining wall is located about ten (10) to fifteen (15) feet behind the house, and that it runs parallel to the back of the house. He testified that the retaining wall would have to be removed if the addition were to be constructed behind the house, and that the property's topography and shallowness otherwise make constructing an addition on the rear of their home impossible. Mr. Baldinger testified that the property's side yard is the only place where construction of an addition is feasible because of the severity of the property's slope and the retaining wall's bifurcation of the property's rear yard. He noted that the rear yard also contains mature trees, as well as plantings installed to control runoff as part of the County's RainScapes program. Mr. Baldinger testified that he did not cause or create the slope on his property, and that he did not install the retaining wall.

CONCLUSIONS OF LAW

Based on 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, 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 that the subject property is encumbered by a significant slope that caused the previous owner to install a retaining wall across the property's back yard, effectively precluding construction to the rear of the house without significant re-grading, and severely constraining the area behind the house that is available for construction. See Exhibit 3. The Board finds that this constitutes an unusual or extraordinary situation or condition specific to this 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 that the existing house was built in 1964, and that Petitioners purchased the property in 2009. The Board further finds, based on the Statement and the testimony of Mr. Baldinger, that the Petitioners are not responsible for the slope of their rear yard or for the construction of the retaining wall intended to help control that slope, which was built by the previous owner. See Exhibit 3 and SDAT Printout. Thus the Board finds that the Petitioners took no action to create the unusual characteristics of this property or its severe topography, 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. Baldinger, that the Petitioners' rear yard is unavailable for construction due to its slope and retaining wall. The Board further finds, per the Statement, that these conditions limit the usable buildable area on the property and make it "infeasible" for the Petitioners to construct an addition without variance relief, causing them a practical difficulty. See Exhibit 3. Finally, the Board finds that requested variances are the minimum necessary to allow construction of the proposed addition to proceed. Thus the Board finds that the grant of the requested variances is the minimum necessary to overcome the practical difficulties that full compliance with the Zoning Ordinance would impose, 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 granting the variance to allow the Petitioners to proceed with their proposed addition will continue the residential use of the property and will not substantially impair the intent and integrity of the Kemp Mill Master Plan, in satisfaction of this element of the variance test.

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, that granting the requested variances will not be adverse to the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test. In support of this, the Board finds, based on the Statement, that the view of the proposed addition from the abutting properties will be obscured by site lines, fencing, trees, and existing buildings. In addition, the Board finds, again based on the Statement, that while zoning is not a plebiscite, the Petitioners have spoken with their abutting and confronting neighbors, and that none object to the proposed construction. See Exhibit 3. The Board notes in this regard that the record contains letters of support from the abutting neighbor who would be most affected by the proposed construction, as well as from the confronting neighbor who would be able to view the proposed addition. See Exhibits 7(a)-(b). Finally, the Board finds that the property was properly posted, and that the record contains no letters of opposition to the grant of the request variances and the proposed construction.

Accordingly, the requested variances from the side lot line setback and from the sum of both side yards setback are **granted**, subject to the following conditions:

1. Petitioners shall be bound by the testimony and exhibits of record, except as noted below; and

2. Construction shall be in accordance with Exhibit 4 and shall be generally consistent with the elevations marked as Exhibits 5(a)-(b) with respect to the overall size and shape of the proposed addition. The Board notes in this regard that the plans submitted with this variance request were developed for a garage, and that the Petitioners are seeking to construct a room addition (with basement) that has the same footprint and overall bulk as the garage. As a result, the Board expects that modest changes to the submitted plans, including to the doors and windows of the proposed addition, but possibly to other aspects of the addition, may be needed and should be allowed, provided the footprint of the proposed addition does not change, and the addition remains a single story addition/single story addition with basement.

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Alan Sternstein, with Richard Melnick, Vice Chair, Caryn Hines, and Amit Sharma 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 10th day of April, 2024.



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.