

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6244

PETITION OF ROBERT NICHOLS

(Hearings held March 19 and April 9, 2008)

OPINION OF THE BOARD

(Effective date of Opinion, May 29, 2008)

This proceeding is a petition pursuant to Section 59-A-4.11(b) of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for a variance from Section 59-C-1.323(a). The petitioner proposes the construction of a new single-family dwelling that requires a variance of twenty and four tenths (20.4) feet as it is within forty-three and five tenths (40.5) feet of the established front building line. The required front lot line setback is sixty-three and nine tenths (63.9) feet.

David Gardner, Esquire, represented the petitioner at the public hearings. Allen Fetter, a neighbor, provided testimony in support of the variance request at the public hearing held on March 19, 2008. Deborah Magano, of DMI Development Group, provided testimony in support of the variance request at both of the public hearings.

Steven Phan, a sign language interpreter, appeared at the public hearing held on March 19, 2008 and Susan Heney and Jessica Kentworthy, of Sign Language Associates, appeared at the public hearing on April 9, 2008.

The subject property is Lot 41, Block 58, B. F. Gilberts Addition to Takoma Park Subdivision, located at 206 Domer Avenue, Takoma Park, Maryland, 20910, in the R-60 Zone (Tax Account No. 01081318).

Decision of the Board: Requested variance **granted**.

EVIDENCE PRESENTED TO THE BOARD

1. The petitioner proposes the construction of a new single-family dwelling.
2. Mr. Gardner stated that a unique characteristic of the subject property is that the lot is under a tree protection plan for the City of Takoma Park and that the

- petitioner has been issued a tree protection permit. Mr. Gardner stated that the City is requiring that two trees be preserved, one on the petitioner's lot and another on adjoining Lot 42. Mr. Gardner stated that the two trees to be preserved are a 32-inch oak on the subject property and a 32-inch tree on adjoining Lot 42. See Exhibit Nos. 6(a) [buildable area with required setbacks] and 10 [tree protection permit].
3. The City of Takoma Park's tree ordinance states "Takoma Park requires residents to have a permit prior to removing any tree in the city. The trees affected by this law are those with a circumference of 24 inches or 7 5/8" in diameter. The City also requires trees to be protected during construction. Tree protection must be approved by the City Arborist." See Exhibit No. 22 [Takoma Park tree ordinance].
 4. Mr. Gardner stated that another unique characteristic of the subject property is its steeply sloped topography, which at its lowest point is 222 feet and at its highest point is 247 feet. Mr. Gardner stated that the neighboring lots are of a greater depth than the subject property and that the size of the subject property is 8,491 square feet. Mr. Gardner stated that the lot's buildable envelope is 1,938 square feet and that the proposed design of the new house will reduce the soil disruption on the site. Mr. Gardner stated that the application of the required setbacks combined with the required tree protection area results in a buildable area of approximately 1,138-1,238 square feet. See Exhibit Nos. 13 [zoning vicinity map] and 29 [buildable footprint calculations made during hearing].
 5. Mr. Fetter testified he has had an opportunity to review the petitioner's plans for the proposed construction and that he supports the variance request. Mr. Fetter testified that the placement of houses on the lots in the immediate neighborhood are extremely random and as a result are visually very pleasant. See Exhibit No. 21(a) [letter of support from Allen Fetter and Danielle Hermey].
 6. The petitioner testified that his lot is steeply sloped and that the slope on his lot is steeper than on the neighboring lots. The petitioner testified that his lot is shallower than the four lots used in the calculation of the established building line. The petitioner testified that his lot is 140 feet in depth; 210 Domer Avenue is 218 feet in depth; 212 Domer Avenue is 200 feet in depth; 214 Domer Avenue is 182 feet in depth; and 216 Domer Avenue is 164 feet in depth. Exhibit Nos. 7 [site and tree protection plan] 25 [topographic worksheet and established building line] 26 [same as Exhibit No. 6(a) with trees labeled as 'A' on site and 'B' on property line].
 7. The petitioner testified that he received a tree protection permit from the City of Takoma Park and that the lot is located in a national park area very close to Sligo Creek Park. The petitioner testified that the root spread area for the tree on his lot is 700-800 feet. The petitioner testified that the proposed construction is a "green" design and that the goals of "green" design are to

make sustainable family housing, which preserves the earth and saves energy. The petitioner testified that the building area of the proposed house is 1,210 square feet. The petitioner testified that the new house has been designed to fit in with the neighborhood's environment, conserve the property and create an open and less obstructive structure. The petitioner testified that he was requested by an official of the City of Takoma Park to preserve a tree on his lot and a tree on adjoining Lot 42 by building about 50 feet back from center of the trees to protect their root systems.

8. Ms. Magano testified that the two challenging aspects of the subject property are its topography and the requirement to adhere to the tree protection plan. Ms. Magano testified the tree protection plan preserves trees of a certain size because they impact a lot's erosion and the water runoff. Ms. Magano testified that the root systems of the large trees prevent flooding and that their removal may cause issues with landslides. Ms. Magano testified that a tree's shading canopy also impacts the trees below it and everything that's around it.

FINDINGS OF THE BOARD

Based on the petitioner's binding testimony and the evidence of record, the Board finds that the variance can be granted. The requested variance complies with the applicable standards and requirements set forth in Section 59-G-3.1 as follows:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property.*

The Board finds that the depth of the subject property is approximately half as deep as the four lots that were used in the calculation of the established building line and that the petitioner's lot is significantly shallower than those lots. The Board finds that application of the established building line to the subject property disproportionately impacts the subject property, which results in a very small buildable envelope, and that the application of the zoning regulations will result in practical difficulties to and undue hardship upon the property owner.

The Board notes that the City of Takoma Park's tree protection requirements have no immediate impact on the subject property because at the time of the variance hearing the City had issued a tree protection permit to the applicant but had not denied any aspect of the proposal based on tree save requirements.

- (b) Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions.*

The Board finds that the variance requested for the construction of a new single-family dwelling is minimum reasonably necessary.

(c) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property.

The Board finds that the proposed construction will establish and continue the residential use of the subject property and that the variance will not impair the intent, purpose, or integrity of the general plan or approved area master plan.

(d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties.

The Board finds the variance will not be detrimental to the use and enjoyment of the adjoining and neighboring properties.

Accordingly, the requested variance of twenty and four tenths (20.4) feet from the required sixty-three and nine tenths (60.9) feet established front building line for the construction of a new single-family dwelling is granted subject to the following conditions:

1. The petitioner shall be bound by all of his testimony and exhibits of record, and the testimony of his witness and the representations of his attorney, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 4 and 5(a) through 5(l).

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

On a motion by Wendell M. Holloway, seconded by Caryn L. Hines, with Catherine G. Titus, David K. Perdue and Allison Ishihara Fultz, Chair, in agreement, the Board adopted the foregoing Resolution.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 29th day of May, 2008.

Katherine Freeman
Executive Director

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). 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.