

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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www.montgomerycountymd.gov/content/council/boa/index.asp

Case No. A-6255

PETITION OF MICHAEL GUERRERO

(Hearing held April 30, 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-323(a) and 59-A-533. The petitioner proposes the construction of a new single-family dwelling that requires a variance of seventeen and fifty-four hundredths (17.54) feet as it is with twenty-five and fifty-four hundredths (25.54) feet of the established front building line. The required front lot line setback is forty-two and ninety-four hundredths (42.94) feet.

The petitioner was represented by Anne Marie Vassallo, Esquire, at the public hearing. Tatal Shipley, a consultant, also appeared in support of the variance request.

The subject property is Lot 26, Block 10, Glen Echo Heights Section 1 Subdivision, located at 6208 Wiscasset Road, Bethesda, Maryland, 20816, in the R-90 Zone (Tax Account No. 02865522).

Decision of the Board: Requested established front building line variance **not required.**

EVIDENCE PRESENTED TO THE BOARD

1. The petitioner proposes to repair and reconstruct an existing single-family dwelling that was damaged by fire.
2. The record reflects that on November 28, 2006, there was a house fire and petitioner's home sustained damage to the upstairs bedrooms, attic area, the front façade and lower front portions of the home. Record plat No. 17695 for the subject property was approved by the Maryland-National Capital Park and Planning Commission (M-NCPPC) on September 28, 1989. See Exhibit 4(d) [record plat 17695]. The petitioner received a variance from the Board of

Appeals (BOA) to construct a new single-family dwelling on May 17, 1989. The petitioner has resided in the home since 1990.

3. A review of the Department of Permitting Services' (DPS) records did not locate a copy of the applicant's 1989 building permit, however a copy of the applicant's DPS Construction Code Enforcement Wall Check approval dated February 28, 1990 was located within DPS's records. See Exhibit No. 11 [DPS wall check dated 2/28/90]. The record also reflects that pursuant to a Sectional Map Amendment G-666, which was adopted on June 26, 1990 in conjunction with the Bethesda-Chevy Chase Master Plan adopted in 1990, the subject property was rezoned from R-60 to R-90 and a zoning text amendment was adopted as §59-G-4.27 to enable newly rezoned R-90 lots to be developed under the R-60 standards.
4. In February 2007, the petitioner filed application No. 445966 supplemented with the home's late-1988 original site plan and a current Boundary Survey. See Exhibit Nos. 12 [copy of building permit application no. 445966], 4(b) [original site plan 1988], 4(c) [boundary survey]. The application was reviewed by Department of Permitting Services Specialist Ms. Robin Ferro who then denied the application by letter dated September 26, 2007 because the original site plan lacked sufficient information. See Exhibit No. 6(c) [DPS denial letter dated 9/26/07]. In January 2008, the applicant refiled his application for a building permit and a more detailed site plan including the required calculation of the established building. See Exhibit Nos. 4(a) [site plan] and 7 [EBL calculations]. Ms. Ferro denied the building permit application in a letter dated January 23, 2008. See Exhibit No. 6(c) [DPS denial letter dated 1/23/08],
5. The petitioner was informed by Ms. Ferro that the §59-G-4.26(b) of the Zoning Ordinance which would normally provide relief for fire-damaged homes would not apply to his property and that he must obtain a variance from the established front building line in order to repair and reconstruct the existing house. Ms. Ferro stated that §59-G-4.26(b) did not apply because DPS did not have any record of what the established building line had been in 1989 when the petitioner's house was built and that therefore, DPS could not allow the petitioner to reconstruct and restore the home to the exact footprint where it presently stands in damaged condition. The only indicium among DPS's records is an approved DPS Construction Code Enforcement Wall Check dated 2/28/90. See Exhibit No. 11 [DPS wall check dated 2/28/90]. In the absence of any DPS records indicating the established building line, DPS has mandated that the applicant must obtain a front yard variance before he can reconstruct his home on the exact footprint at which it currently stands.
6. Ms. Vassallo stated that the petitioner was under the belief that the reconstruction of his home was covered under provisions of the zoning ordinance which provides for reconstruction following a fire and that DPS made a different determination. Section 59-G-4.26 of the Montgomery County Zoning Ordinance states:

“59-G-4.26. Alteration, renovation, enlargement, and reconstruction of a nonconforming one-family dwelling.

A one-family dwelling built on a lot recorded on or after June 1, 1958, that is a nonconforming building, may be:

- (a) altered, renovated, or enlarged under the zoning development standards in effect for the zone when the dwelling was originally constructed; or
- (b) reconstructed after a fire, flood, or similar event, under the zoning development standards in effect for the zone when the dwelling was originally constructed, except that the maximum building height for the zone in effect when the dwelling is reconstructed applies to the reconstruction.”

4. Ms. Vassallo stated that DPS determined that §59-G-4.26 and also §59-G-4.27 of the County’s Zoning Ordinance did not apply to the subject property. Section 59-G-4.27 states:

“59-G-4.27. Residential lots reclassified from R-60 to R-90 zone.

A lot in the R-90 zoned that was recorded by deed or subdivision plat in the R-60 zone before June 26, 1990, may be developed with a one-family dwelling and accessory structure in accordance with the development standard of the R-60 zone that were in effect when the lot was recorded.”

FINDINGS OF THE BOARD

Based on the petitioner's binding testimony and the evidence of record, the Board finds that a variance is not required. The evidence of record indicates that DPS undertook and approved a wall check on February 28, 1990. The Board notes that the purpose of a wall check is to confirm that the exterior walls of a structure are located in accordance with approved plans, and that a wall check would not have been performed and approved in the absence of a valid building permit. The Board thus concludes (a) that, notwithstanding, DPS’ inability to locate the original building permit for this Property, such a permit must have existed because a wall check was conducted pursuant to it, (b) that the issuance and approval of this permit would have taken into account any established building line restrictions applicable at the time, (c) that the approval of the wall check indicates that the front wall of the house was located in accordance with the plans approved in connection with the issuance of this permit, and (d) that because of the interaction of §59-G-4.26 and §59-G-4.27 of the of the Montgomery County Zoning Ordinance, the petitioner can restore and reconstruct the single-family dwelling on its original footprint without the need for a variance from the established front building line.

On a motion by David K. Perdue, seconded by Catherine G. Titus, with Wendell M. Holloway 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.

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.