

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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

Case No. A-6283

PETITION OF KRIS A. AND RHEBA A. KELLEY

(Hearing held March 4, 2009)

OPINION OF THE BOARD

(Effective date of Opinion, April 2, 2009)

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-1.32(2)(a). The petitioners propose the use of an accessory apartment special exception which requires a variance of 1,810 square feet as the subject property is 85,310 square feet. The required minimum lot size is 87,120 square feet.

The subject property is Lot 29, Parcel P152, Bedfords Rest Subdivision, located at 16004 Mt. Everest Lane, Silver Spring, Maryland, 20904, in the RE-2 Zone (Tax Account No. 00709881).

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

EVIDENCE PRESENTED TO THE BOARD

1. The petitioners propose the use of an accessory apartment special exception on the subject property. The subject property is located in the RE-2 Zone which requires a minimum lot size of 87,120 square feet. The petitioners' lot is 85,310 square feet.
2. The petitioners testified that they applied for a special exception for an accessory and that prior to the public hearing it was determined that their lot did not meet the required minimum lot size for the RE-2 Zone. The petitioners testified that upon researching the history of their deed, they determined that their lot is .04 acres (1,810 square feet) below the required lot size for the zone. The petitioners testified that the reduction in the land of their lot is the result of a street dedication that occurred in 1961 and that the street dedication occurred prior to their ownership of the property. The petitioners

testified that the lot is unrecorded and that possible remedies to purchase additional land from their neighbors or to receive an exception to the platting requirements to correct the lot's size are not available to them. See Exhibit Nos. 3(c) [site plan], 3(d) [plat showing area lost due to street widening], 4 [street dedication] and 7(a) [deed history].

3. The petitioners testified that their street, Mount Everest Lane, is 15 feet in width and a half-mile dead end road. The petitioners testified that the dedication widened the road from 40 to 60 feet at the right-of-way. The petitioners testified that as a result of the street dedication only their lot dropped below the required two acres for their zone and that the other substandard lots on their street are not as result of the street dedication. The petitioners testified that upon consultation with County officials they learned the exceptional circumstances of their property and these circumstances are peculiar to their lot. *Alviani v. Dixon* (775 A.2d 1231, 365 MD 95. See Exhibit No. 9 [zoning vicinity map].

FINDINGS OF THE BOARD

Based on the petitioners' 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 subject property does not meet the County's required minimum lot size for the RE-2 Zone. The Board finds that the petitioners' substandard lot resulted from the taking of a portion of the property to widen a public road, Mount Everest Lane, by government agencies. The Board finds that the petitioners were not the owners of the subject property when the street dedication occurred and that they were unaware when they purchased the property that the lot did not meet the County's minimum lot size for the RE-2 Zone. The Board finds that these are exceptional circumstances peculiar to the subject property and that the strict application of zoning regulations will result in practical difficulties to and an undue hardship upon the property owners.

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

The Board finds that the variance requested to permit the use of a special exception accessory apartment is the 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 variance will continue the residential use of the 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 that variance will not be detrimental to the use and enjoyment of adjoining and confronting properties.

Accordingly, the requested variance to the required minimum lot size to permit the special exception use of an accessory apartment is granted subject to the following conditions:

1. The petitioners shall be bound by all of their testimony and exhibits of record, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.
2. The construction and use must be completed according to plans entered in the record as Exhibit Nos. 3(a) through 3(d), 4, and 5(a) through 5(d).

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.

Board member Walter S. Booth was necessarily absent and did not participate in this Resolution. On a motion by Stanley B. Boyd, seconded by Carolyn J. Shawaker, and with Catherine G. Titus, Chairman, in agreement, and with David K. Perdue, in opposition, the Board adopted the foregoing Resolution.

Catherine G. Titus
Chairman, 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 2nd day of April, 2009.

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.