

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
<http://www.montgomerycountymd.gov/boa/>
(240) 777-6600

Case No. A-6854

PETITION OF ALAN BRODY, M.D.

OPINION OF THE BOARD
(Hearing Date: April 10, 2024)
(Effective Date of Opinion: April 17, 2024)

Case No. A-6854 is an application by Alan Brody, M.D. (the "Petitioner") for a variance from the requirement in Section 59.4.4.6.B.2.c of the Zoning Ordinance that accessory structures be located behind the rear building line of the principal building. The Petitioner wishes to locate an accessory structure (swimming pool pavilion) forward of the rear building line.

The Board of Appeals held a hearing on the application on April 10, 2024. The Petitioner participated in the proceedings, in support of the variance. He was assisted by his contractor, Michael Arneson.

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

EVIDENCE PRESENTED

1. The subject property is Parcel P068, Clagetts Folly Subdivision, located at 11451 S. Glen Road in Potomac, Maryland, 20854, in the RE-1 Zone. It is a six-sided, 2.9 acre pipestem lot, located on the east side of South Glen Road. The Site Plan contains contour lines showing that the elevation of the property drops steadily to the east of the Petitioner's garage towards his rear lot line, falling approximately 65 feet to the property's left rear (northeast) corner, and approximately 35 feet to the property's right rear (southeast) corner. See Exhibits 4 and 9.

2. The Petitioner's variance Application ("Application") states that the "majority of rear of dwelling is severely sloped & covered in forest," and that "[w]ithin the forest are many champion trees." The Application states that construction of the proposed pool pavilion behind the rear building line of the Petitioner's house would lead to an "[e]xponentially

increased cost for building structure due to slope & elevation,” and would cause a “loss of forest & champion trees.” See Exhibit 1. The Petitioner’s Justification Statement (“Statement”) also makes these assertions, stating that “[t]he slope of the terrain to the rear of the property makes constructing any structure a physical challenge” and that “the majority of the rear of the property is heavily wooded and contains many specimen and champion trees.” See Exhibit 3.

3. The Statement states that the subject property “exhibits exceptional narrowness, shape, and topographical conditions that severely limit its development potential,” and that the property’s “irregular shape and topographical features make it challenging to adhere strictly to the zoning requirements.” The Statement further states that “[w]ithout the variance, the property owner would be unable to utilize the land for any meaningful purpose due to these inherent constraints.” See Exhibit 3.

4. The Statement includes excerpts from email correspondence with the County’s Department of Permitting Services (“DPS”). These emails also substantiate the heavy forestation and significant slope of the property, stating, amongst other things, that locating the proposed construction behind the rear building line of the existing house “would require extensive clearing of trees to not only accommodate the pool and pool house but also extensive retaining walls,” and that this “[b]asically[,] render[s] this option not feasible.” The DPS emails, as recounted in the Statement, further state that the location proposed for the swimming pool and pavilion was “predominantly cleared except for a few trees having to be removed and while sloping is much flatter than the slopes at the rear of the property.” The emails states that “[d]ue to the environmental and topographical constraints [DPS] would support the location as provided as the only option for these accessory structures,” concluding that “this property has unique issues that otherwise would not permit it to be developed per the standards for the zone as it pertains to accessory structure location.” Finally, the DPS emails state that DPS “recognize[s] the location as proposed is the correct location and due to removal of only a few trees and much flatter slope than the rear of the property and the environmental and topographical constraints [DPS] would support the location as provided as the only option for these accessory structures.” See Exhibits 3 and 7.

5. The Statement states that extraordinary circumstances peculiar to this property are not due to any actions of the Petitioner, noting that “[t]he unique topographical and shape-related challenges faced by the property are inherent and pre-existing conditions that are beyond the control of the applicant,” and that “[t]he applicant did not contribute to or create these conditions but is instead seeking a variance to navigate them in compliance with zoning requirements.” See Exhibit 3.

6. The Statement states that the requested variance is the minimum needed to overcome the practical difficulty posed by locating the proposed construction behind the rear building line of the house, on account of the property’s topography (among other things), as follows:

The variance sought represents the minimum deviation from zoning regulations required to address the extraordinary conditions present on the property. It is essential for overcoming the practical difficulties that full compliance with the

zoning chapter would impose, considering the unique shape, topography, and existing legal nonconformity of the property. The amount of deviation which we are requesting is for the structure to sit approximately 30' forward of the rear of the dwelling while remaining to the rear of the front of the dwelling.

See Exhibit 3. In addition, the Petitioner has submitted an email that he wrote to DPS which thanks that Department for their assistance, details the challenges the Petitioner has experienced to date with respect to the necessary County approvals for this project, notes the substantial amount of money that he has already spent on this project, and describes the hardship that he will experience if the project cannot be completed. See Exhibit 7.

7. The Statement states that granting the requested variance will not be adverse to the use and enjoyment of neighboring properties. The Statement states that the proposed pavilion "will only be visible to one neighbor and will be landscaped to camouflage its presence." The Statement further states that the "proposed development will be in harmony with the surrounding area and will not introduce any significant adverse effects on neighboring properties' use or enjoyment." See Exhibit 3.

8. The Petitioner submitted a letter from his neighbor whose property is adjacent to the site of the proposed pavilion. The letter states that the neighbor has reviewed the "site and specifications of the pool house project," that he does not foresee any negative impact to his property, and that he consents to and supports the proposed construction. See Exhibit 8.

9. At the hearing, the Petitioner testified that the area to the back of his house is all woods, and that he would have had to take down 20 to 30 trees and level the terrain in order to construct a swimming pool in that area. He testified that his house really doesn't have a backyard, but that it does have a side yard, which is where the newly constructed pool was built. In response to a Board inquiry, the Petitioner testified that construction of the pool and proposed pavilion has been a lengthy, difficult, and frustrating process. He stated that he would receive approvals from the County and make some progress, only to be told later that there were problems with those approvals that needed to be corrected before he could proceed. The Petitioner testified that if he had been told up front that there was a chance that he might not be able to construct the proposed pool pavilion, he would never have had the swimming pool built.

10. Mr. Arneson testified that the portion of the property located to the rear of the Petitioner's house has an excessive and steep downward slope that eventually leads to a creek that is not located on the subject property. He estimated the grade to be about 15%. Mr. Arneson testified that it would be difficult to locate a pool and pavilion on that type of slope, and that this hillside area is covered with "deep forest," further complicating construction. He testified that the swimming pool was pulled forward on the property so that it could be located in an area that was relatively level and largely cleared. Mr. Arneson testified that this was also done to avoid harming champion trees, and he described for the Board where four such trees are located. Mr. Arneson testified that as the property is used, the area where the pool is located, and where the Petitioner is seeking to locate the proposed pavilion, functions as the property's "back yard." Finally,

Mr. Arneson testified that the record contains a letter of support for the proposed construction from the Petitioner's only neighbor who would have a view of the pavilion.

FINDINGS OF THE BOARD

Based on the 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 59.7.3.2.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, the Site Plan, and the testimony of Mr. Arneson, that the subject property has an unusual, six-sided shape, and that the rear of the property is encumbered by a steep slope and dense forest, including at least one champion tree. See Exhibits 3 and 4. The Board finds that these conditions constrain the ability of the Petitioner to locate the proposed swimming pool pavilion behind the rear building line of his home, and constitute an unusual or extraordinary circumstance peculiar 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 there is nothing in the record to indicate that the Petitioner is responsible for the shape or slope of his property, or for its "deep forest" and the presence of a champion tree, and that the Statement also states that these circumstances are not the result of any actions taken by the Petitioner. See Exhibit 3. Based on this, the Board finds that the Petitioner did not cause or create the special circumstances pertaining to this property, 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 that the unusual shape of the subject property and its steep topography foreclose the ability of the Petitioner to locate the proposed swimming pool pavilion behind the rear building line of his house, causing him a practical difficulty. The Board finds that the requested variance, to allow construction of the proposed pavilion in the Petitioner's side yard, in an area that is not only flatter than the area behind the rear building line of his house, but also serves as his functional back yard and minimizes the need for tree removal and the "extensive" retaining walls that would be needed to address the property's slope, is the minimum necessary to overcome the practical difficulties imposed by compliance with the locational restrictions of the Zoning Ordinance, 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 proposed pavilion will continue the residential use of the property and accordingly can be granted without substantial impairment to the intent and integrity of the Potomac Subregion Master Plan (2002). 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.*

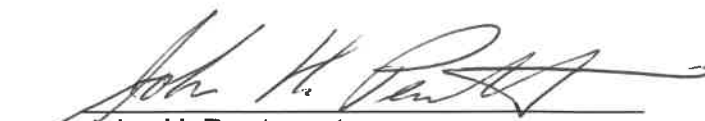
The Board finds, in accordance with the Statement and the testimony of Mr. Arneson, that the proposed pavilion “will only be visible to one neighbor and will be landscaped to camouflage its presence.” See Exhibit 3. In addition, the Board finds that the record contains a letter of support from this neighbor. See Exhibit 8. Finally, the Board finds that the property was properly posted, and that the record contains no letters of opposition to the grant of the requested variance. In light of the foregoing, the Board finds that the grant of the requested variance will not be adverse to the use and enjoyment of neighboring properties, in satisfaction of this element of the variance test.

Accordingly, the requested variance to allow the construction of the proposed swimming pool pavilion forward of the rear building line is **granted**, subject to the following conditions:

1. Petitioner shall be bound by the testimony and exhibits of record; and
2. Construction shall be in accordance with Exhibits 4 and 5(a)-(h) (internal layout excluded).

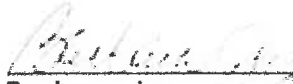
Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Caryn Hines, Alan Sternstein, and Amit Sharma in agreement, the Board adopted the following Resolution:

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 17th 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.