

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6588

PETITION OF MICHAEL D. AND DIANE M. MAIZEL

OPINION OF THE BOARD

(Hearing Dates: November 7, 2018, and November 28, 2018)
(Effective Date of Opinion: December 6, 2018)

Case No. A-6588 is an application by Michael D. and Diane M. Maizel (the "Petitioners") for variance relief needed in connection with the proposed construction of an accessory structure. Originally, the Petitioners requested three variances: (1) a variance of 30.1 feet to allow the proposed accessory structure within 5.9 feet of the right side lot line, (2) a variance of 4.4 feet to permit the proposed construction within 6.6 feet of the rear lot line, and (3) a variance to permit a total accessory structure footprint that is greater than 50% of the footprint of the main building. The required side lot line setback for the accessory structure that was initially proposed was 36 feet, in accordance with Section 59-4.4.8.B.2.c of the Zoning Ordinance. The required rear lot line setback for the structure that was initially proposed was 11 feet, in accordance with Section 59-4.4.8.B.2.c of the Zoning Ordinance. Finally, accessory structures cannot exceed 50% of the footprint of the main building, in accordance with Section 59-4.4.8.B.2.c of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on November 7, 2018. Petitioner Michael D. Maizel appeared at the hearing, and was represented by Jody S. Kline, Esquire. In response to Board questions and analysis, Mr. Maizel requested permission to make changes to the proposed accessory structure in order to eliminate the need for variance relief from both the rear lot line setback and the footprint limitation, and in order to reduce the amount of setback relief needed from the right side lot line. The revised plans, which reduced the length of the proposed accessory structure from 48.3 feet to 36.2 feet, and moved it to a distance of 18.7 feet from the rear lot line, were considered by the Board at a hearing held on November 28, 2018. As revised, the only variance required for the proposed accessory structure is an 11.3 foot variance from the right side lot line, since the proposed construction will still be within 5.9 feet of that lot line. The required side lot line setback for the proposed construction, as revised, is 17.2 feet, in accordance with Section 59-4.4.8.B.2.c of the Zoning Ordinance (36.2 foot length proposed – 24 foot length allowed = 12.2 feet in additional setback needed; 12.2 feet + 5.0 feet (standard side lot line setback) = 17.2 foot side lot line setback required). The revisions brought

the footprint of the proposed building within the 50% footprint limitation, and eliminated the need for variance relief from the rear lot line setback. Both Mr. Maizel and Mr. Kline were also present at the Board's November 28, 2018, hearing.

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

EVIDENCE PRESENTED

1. The subject property is Lot 5, Block D, East Springbrook Subdivision, located at 12311 Lima Drive, Silver Spring, MD, 20904, in the R-90 Zone. It is "rectangular in shape with approximately 96 feet of frontage on Lima Drive with side lot lines that stretch 180.05 feet (northern common property line) and 189.21 feet (southern common property line) from the front to the back of the lot." The property is 15,535 square feet in size, and contains a residence with a footprint of approximately 1,747 square feet. See Exhibits 3 and 12.

2. The Statement of Justification submitted with the original variance application ("Statement") indicates that the Petitioners were seeking to construct a 1,160 square foot accessory structure in their rear yard, intended to be used as a "garage/workshop/storage building." See Exhibit 3. The Statement explains that because the length and width of the proposed accessory structure exceed 24 feet, additional setbacks beyond the five (5) foot setbacks that would otherwise apply were required from both the side and rear lot lines. See Exhibit 3.

As previously noted, following the November 7, 2018, hearing, the Petitioners made revisions to their proposed accessory structure, decreasing its length to 36.2 feet by moving the rear of the proposed structure farther away from the rear lot line. In addition to eliminating the need for variance relief from the rear lot line setback, this change reduced the footprint of the proposed building to an extent that a variance from the footprint limitation is no longer needed. The proposed changes did not move the proposed structure any farther from the right side lot line than was shown on the original plans. Thus because the proposed structure still exceeds 24 feet in length, it still requires variance relief from the right side lot line. See Exhibit 12.

3. The Statement makes clear that the Petitioners are seeking this variance due to the "unusual topographic features of the land and the existing natural vegetation which allow a nonconforming structure of the type proposed that will have no adverse impact on surrounding properties." The Statement at Exhibit 3 describes the topography, and its effect on the proposed construction and the visibility of that construction, as follows:

The site plan attached to this variance application shows that the lowest elevation of Lot 5, Lima Drive (356') is 13 feet lower than the high point of the property (369') located in the northeast corner of the property. There is a graveled parking area behind the existing Maizel residence surrounded by brick and block retaining walls. That parking area is level at 359 or 360 which is 9 to 10 feet below the high point of the lot. Accordingly, the Maizels propose to construct the accessory structure by building into the hillside above the block retaining walls with the intent of "burying" the accessory structure so that the exposed

area of the building will be *de minimis* in terms of visibility and impact notwithstanding its proximity to the side and rear property lines. In other words, the back of the accessory building will only be exposed up to "shoulder height" level (6 feet) along the rear of the building and only modestly exposed along the grade of the north side of the building (6' – 9').

4. The Statement states that the Petitioners "have taken advantage of the existing topography of the site ... and have 'buried' the accessory building into the existing hillside..." and that "existing, mature vegetation will substantially screen all views of the accessory building from off-site locations." It notes that "there are substantial grade changes" on the subject property, and that the proposed construction "works with that topography in a manner to achieve the Applicant's desired use without creating any adverse effects as a result of the reduced rear and side yard setbacks." See Exhibit 3.

5. With respect to master plan compliance, the Statement at Exhibit 3 notes the following:

One of the objectives of the White Oak Master Plan is to "[m]aintain housing for people of varying incomes, ages, and lifestyles and continue to provide a variety of housing types that will permit households with changing needs to find suitable accommodations within the White Oak Master Plan Area" (Plan, page 18). The addition of a garage on this site will allow the property to keep up with the changing needs of residents.

6. With respect to the impact of the proposed construction on neighboring properties, the Statement notes that the "limited exposed height of the building and topography of the site will essentially 'bury' the proposed garage and make the building as benign as possible in terms of impact." It goes on to indicate that "in addition to 'hiding' the mass of the building, existing mature vegetation will make the accessory structure invisible" from properties along the common property lines where the variances are sought. See Exhibit 3.

7. At the November 7, 2018, hearing, Mr. Kline oriented the Board members to the property in question, and indicated that the property's length is exaggerated relative to its width, resulting in an unusually long and narrow property. He stated that there is a 13- to 14-foot height differential across the property, noting that the property falls from an elevation of 370 feet at the left rear corner to an elevation of 356 feet. Mr. Kline indicated that the idea was to build the accessory structure into this grade so that more than half of the structure would be buried. Regarding visibility of the proposed structure, he noted that the neighbor to the Petitioners' right has a board-on-board fence, and that there is dense bamboo across the rear of the subject property, concluding that the structure would only be visible from Lima Drive.

In discussing the accessory structure as originally proposed, Mr. Kline noted that the required lot line setbacks are unusual because of the length and width of the proposed structure, and that the square footage of the proposed structure is approximately 560 square feet over the 50% footprint limitation. In response to a Board question asking if a standard garage would fit in the proposed location without the need for variances, Mr. Kline stated that it would. In response to a question inquiring about the narrowness of the subject property, Mr. Kline stated that a carport would not fit on the side of the house.

8. At the November 7, 2018, hearing, Mr. Maizel testified that when he purchased the property, he obtained a permit to construct a detached garage, but did not do so before the permit expired. When he went back to DPS to get a new permit, he testified that he was told that the rules had changed. Thus he testified that he obtained a retaining wall permit instead, and built the reinforced concrete foundation and block walls which exist today. He testified that the foundation is low because he uses it as a platform for sea containers. He testified that the proposed structure would be mostly below the fenceline, except at the back right. He testified that its roof was intentionally designed to be low so that the structure would "disappear" visually.

Mr. Maizel testified that the topography of the subject property makes it extremely difficult for him to get in and out of the property, particularly when maneuvering a trailer. He testified that he needs the accessory structure to be located on the right side of the property so that he can back a trailer in, testifying that if the location were shifted to the left, he would have to use a crane and dolly to access items stored in the structure. He testified that he had talked with all of his neighbors about the proposed structure, and that he has a letter of support from his neighbor across the street.

9. At the November 28, 2018, hearing, Mr. Kline explained the changes that had been made to the proposed accessory structure, and the impact of those changes on the variances needed. He stated that as a result of these changes, the Petitioners now only need an 11.3 foot variance from the setback for the right side lot line. He reiterated that the subject property has challenging topography and is much deeper than it is wide, rendering it narrower than some of the other properties in the neighborhood. He stated that the Petitioners have located the proposed accessory structure in the location where it will be least visible, and that shifting it farther away from the right side lot line would require a lot more excavation and would make it difficult to access, a sentiment echoed by Mr. Maizel.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the requested variance can be granted. The variance complies with the applicable standards and requirements set forth in Section 59-7.3.2.E.2, as noted below:

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 has unusually challenging topography, dropping from an elevation of 370 feet at the left rear corner to an elevation of 356 feet. The Board finds that the severity of this topography renders the left rear corner of the property unusable, forcing the Petitioners to locate their proposed accessory structure on the right-hand side of their rear yard, and that the topography of the property in general is an extraordinary condition that satisfies Section 59-7.3.2.E.2.a.i of the Zoning Ordinance.

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 Petitioners are not responsible for the challenging topography of the subject property.

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 grant of the requested variance is the minimum necessary to allow the construction of the proposed accessory building, as revised, and thus to overcome the practical difficulties that full compliance with the Zoning Ordinance would impose. The Board finds that the Petitioners have reworked the plans for their accessory building to reduce its size and revise its location, thereby eliminating the need for two of the three variances they originally sought and significantly reducing the amount of the third variance needed. See Exhibit 12. With these changes, the Board finds that the grant of the remaining variance is the minimum needed to overcome the topographical challenges of this property.

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 this variance can be granted without substantial impairment to the applicable master plan, since the construction of the proposed accessory structure would continue the residential use of the property.

5. *Section 59-7.3.2.E.e: granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

The Board finds that granting the variance needed to allow construction of the proposed accessory structure will not be adverse to the use and enjoyment of abutting or confronting properties. The Board notes in support of this finding that the structure is deliberately low in height to minimize its visibility, and is built into the slope. The Board further notes that Mr. Maizel testified that he has discussed this project with his neighbors, and that he has a letter of support from the owner of the confronting property, which the record indicates would have the best view of the proposed structure. See Exhibit 9.

Accordingly, the requested variance of 11.3 feet from the required right side lot line setback is granted, subject to the following conditions:

1. The Petitioners shall be bound by the testimony and exhibits of record, to the extent that such evidence and representations are identified in this Opinion.
2. Construction shall be in accordance with Exhibit 5(a), with modifications as needed to meet the revised site plan included with Exhibit 12.

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Bruce Goldensohn, with Edwin S. Rosado, Vice Chair, and Stanley B. Boyd in agreement, and with Katherine Freeman not 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 6th day of December, 2018.



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.