

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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<http://www.montgomerycountymd.gov/boa/>**

CASE NO. A-6630

PETITION OF HUNG NGOC NGUYEN

OPINION OF THE BOARD

(Opinion Adopted October 2, 2019)
(Effective Date of Opinion: October 17, 2019)

Case No. A-6630 is an application for a variance to allow additional surfaced parking in the front yard of the subject property, such that the 75% of the front yard would be surfaced, requiring a variance of 25%. In accordance with Section 59.6.2.5.M.3.b of the Zoning Ordinance, a surfaced parking area may exceed the otherwise applicable size limits in Section 59.6.2.5.M.2 if "the property has primary access from a primary residential street, minor arterial road, major highway, arterial, or any state road, and [the surfaced parking area] is equal to or less than 50% of the area between the lot line and the front or side street building line."

The Board of Appeals held a hearing on the application on October 2, 2019. Petitioner Hung Ngoc Nguyen appeared and testified in support of the request. Inspector Sergio Hurtado with the County's Department of Permitting Services ("DPS") was also present and testified.

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

EVIDENCE PRESENTED

1. The subject property is Lot 13, Block C, Silver Spring East Subdivision, located at 226 University Boulevard East, Silver Spring, Maryland, 20901, in the R-60 Zone. The subject property is rectangular in shape. See Exhibits 4 and 7(a)-(b). Per SDAT, the property is 6,000 square feet in size.

2. By stating that variance relief is needed from Section 59-6.2.5.M.3.b of the Zoning Ordinance, the building permit denial evidences a determination by DPS that the subject property "has primary access from a primary residential street, minor arterial road, major highway, arterial, or any state road" (*i.e.* University Boulevard East). See Exhibit 6.

3. The Petitioner's variance application cites narrowness as an extraordinary condition that differentiates his property from neighboring properties, and further states that he cannot access the rear of his property for parking. The application states that this condition will cause him a practical difficulty if the variance is not granted because he "can't access anyway to the rear" of the subject property. See Exhibit 1.

4. The Statement of Justification ("Statement") submitted by the Petitioner asserts that the subject property is unique because it lacks access to the rear of the property for additional parking. The Petitioner asserts that this condition makes the property unique under Sections 59-7.3.2.E.2.a.i and ii of the Zoning Ordinance. See Exhibit 3. The Petitioner includes photographs with his submission of six properties along University Boulevard East, near the subject property, which he states have pavement covering more than 50%, and as much as 100%, of their front yards, and which also have access for parking to their respective rear yards. These photographs are presumably intended to buttress Petitioner's argument that his property is unique because it lacks access for parking to the rear, and also to support an argument that granting the requested variance, to allow paving in excess of 50% in the front yard of the subject property, would substantially conform with the established historic or traditional development pattern of the street on which the subject property is located, in satisfaction of Section 59-7.3.2.E.2.a.v of the Zoning Ordinance. See Exhibits 5(c)–(f), (h).

The Statement asserts with respect to Section 59-7.3.2.E.2.c of the Zoning Ordinance that the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with the Zoning Ordinance would entail because "[p]re-existing parking spaces do not have access to the rear of the single family home or street parking." It notes that the Petitioner acquired the subject property in March of 2018, and thus states that he did not cause the special circumstances pertaining to this property, in satisfaction of Section 59-7.3.2.E.2.b. Finally, the Statement goes on to state that the requested variance can be granted without substantial impairment to the intent and integrity of the general plan and applicable master plans, in satisfaction of Sections 59-7.3.2.E.2.d, and to assert that the additional parking would not create an "undue burden" on neighboring residences, that the proposed style and structure of the house is "in step" with the existing neighborhood, and that the proposed project would be an improvement to the neighborhood and result in increased property values, in satisfaction of Section 59-7.3.2.E.2.e. See Exhibit 3.

5. At the hearing, the Petitioner testified that he purchased the subject property last year. He testified that the graveled parking area for which he is seeking a variance was installed by a prior owner, and existed when he purchased the home. The Petitioner testified that the rear of the subject property cannot be accessed for parking without asking a neighbor to open their fence. He testified that the graveled parking area is necessary to allow his family to park the cars they currently own, since they cannot park on the street or behind their house. He testified that the existing driveway is not deep enough to "stack" cars.

6. In response to a Board question asking, based on the photographs of other houses that were submitted by the Petitioner, if violations of the surfaced parking area limitations for front yards were a frequently occurring issue along this portion of University Boulevard East, Inspector Hurtado testified that they were not. He then testified by way of explanation that the Zoning Ordinance was changed in 2010 to limit the amount of surfaced parking area permitted in a front yard, and that surfaced parking that predated that change was not subject to the limitation. Inspector Hurtado testified with respect to the subject property that he used Google street view to determine that the subject property looked different now than it previously had. He testified that the property previously had landscaping where it now has gravel, which caused him to conclude that the graveled area was not in place prior to the change in law, and that it violated the surfaced parking area limitation. He testified that he knew when the images he viewed on Google street view were taken because when one views a property using Google street view, it displays the image date.

CONCLUSIONS OF LAW

1. Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board of Appeals must find that:

(1) denying the variance would result in no reasonable use of the property; or

(2) each of the following apply:

a. one or more of the following unusual or extraordinary situations or conditions exist:

i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;

ii. the proposed development uses an existing legal nonconforming property or structure;

iii. the proposed development contains environmentally sensitive features or buffers;

iv. the proposed development contains a historically significant property or structure; or

v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;

b. the special circumstances or conditions are not the result of actions by the applicant;

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;

d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and

- e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.

Section 59-7.1.1 of the Montgomery County Zoning Ordinance provides that the applicant has the burden of production and has the burden of proof by a preponderance of the evidence on all questions of fact.

2. Based on the record in this case, the Board notes that there was no attempt to argue the standard in Section 59-7.3.2.E.1 of the Zoning Ordinance. For this reason, the Board must analyze the instant case under Section 59-7.3.2.E.2 of the Zoning Ordinance. Section 59-7.3.2.E.2 sets forth a five-part, conjunctive ("and") test for the grant of a variance, and thus the Board cannot grant a variance if an applicant fails to meet any of the five elements required by this Section. In the instant case, the Board finds that the requested variance fails to meet Section 59-7.3.2.E.2.a of the Zoning Ordinance, as follows:

With respect to Section 59-7.3.2.E.2.a.i, the Petitioner has argued that his property is unusually narrow, with no access to the rear yard, but the Zoning Vicinity Map, in the record at Exhibits 7(a) and (b), reveals that the size and shape of the Petitioner's property, and in particular its width, are consistent with that of abutting properties and other properties on the block. The Board further notes that at 6,000 square feet, the Petitioner's property is not substandard for the R-60 Zone. Thus the Board finds that subject property is not unique as contemplated by this Section, and that the Petitioner has failed to satisfy Section 59-7.3.2.E.2.a.i of the Zoning Ordinance. Next, although the Petitioner's Statement refers to his property or the structures on his property as nonconforming, he does not explain why he believes this is the case, and the Board finds no evidence in the record to support such a finding. Accordingly, the Board cannot find that the subject property satisfies Section 59-7.3.2.E.2.a.ii. The Petitioner makes no attempt to argue that the subject property is unique due to environmentally sensitive features or buffers, or that it contains a historically significant property or structure, and so the Board cannot find that the subject property satisfies Sections 59-7.3.2.E.2.a.iii or iv of the Zoning Ordinance.

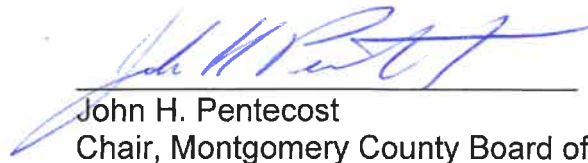
With respect to Section 59-7.3.2.E.2.a.v of the Zoning Ordinance, the Petitioner has asserted that the grant of the requested variance would allow a surfaced parking area on his property that is consistent with the pattern of properties on this street having surfaced parking areas that exceed 50% of their front yards. While the Petitioner has presented photographs of six other properties with large surfaced parking areas along this stretch of University Boulevard East, the Board finds, based on the testimony of Inspector Hurtado, that the parking areas on these other properties may have been legally created prior to a 2010 change to the Zoning Ordinance which limited the amount of surfaced parking area permitted in a front yard. The Board cannot find that Council intended for Section 59-7.3.2.E.2.a.v of the Zoning Ordinance to be used to permit the grant of a variance that would permit adherence to a development pattern that, while once legal, has since been outlawed by the Council. Accordingly, the Board finds that even if it were to conclude that the overly-large surfaced parking areas in the front yards of six of the 27 residential properties on University Boulevard East that are shown on the Zoning

Vicinity Map submitted by the Petitioner constitute an established historic or traditional development pattern, the Board cannot find that compliance with a now-illegal development pattern is justification for the grant of a variance under Section 59-7.3.2.E.2.a.v.

Having found that the Petitioner's request fails to meet Section 59-7.3.2.E.2.a of the Zoning Ordinance, the Board finds that the requested variance cannot be granted under Section 59-7.3.2.E.2, and therefore does not address the remaining elements of the variance test in that Section.

Therefore, based upon the foregoing, on a motion by Stanley B. Boyd, Vice Chair, seconded by Jon W. Cook, with John H. Pentecost, Chair, Bruce Goldensohn, and Katherine Freeman 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 October, 2019.



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.