

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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

CASE NO. A-6661

PETITION OF CONGRESSIONAL MARYLAND HOMES, LLC

**OPINION OF THE BOARD
(Opinion Adopted July 29, 2020)
(Effective Date of Opinion: August 14, 2020)**

Case No. A-6661 is an application for two variances needed for an existing house. The existing house requires a variance of 3.1 feet as it is within 4.9 feet of the left lot line. The required setback is eight (8) feet, in accordance with Section 59-4.4.8.B.2 of the Zoning Ordinance. In addition, the existing house requires a variance of 9.5 feet as it is within 15.5 feet of the rear lot line. The required setback is twenty-five (25) feet, in accordance with Section 59-4.4.8.B.2 of the Zoning Ordinance.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on Wednesday, July 29, 2020. All participation was done via Microsoft Teams. Petitioner Congressional Maryland Homes, LLC, was represented by Christopher Ruhlen, Esquire, and Laura Tallerico, Esquire. Brian Athey, President of Congressional Maryland Homes, and Andrew Norman, Member, participated in support of the requested variances, as did Jeff Robertson and Jared Pantella of CAS Engineering. Abutting property owner Andrew Hatleberg participated in opposition, and was represented by David Brown, Esquire.

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

EVIDENCE PRESENTED

1. The subject property is Lot 4, Block Q, Section 2 Bradley Hills Grove Subdivision, located at 8516 Meadowlark Lane, Bethesda, Maryland, 20817, in the R-90 Zone. The subject property is a large, four-sided lot, located on the south side of Meadowlark Lane at its intersection with Burning Tree Road, with an area of approximately 38,634 square feet. The "immediately abutting properties on the block and the confronting properties across Meadowlark Lane are within the R-90 zone. The confronting properties across Burning Tree Road to the west are zoned R-200. All of these surrounding properties are developed with single family houses." See Exhibit 3.

2. Per the Statement of Justification ("Statement"), the subject property is developed with an existing house that was built in 1960 and has a footprint of approximately 4,000 square feet. The existing house, while slightly angled towards the intersection, "primarily" fronts on Meadowlark Lane. The Statement at Exhibit 3 indicates the following with respect to the setbacks of the existing house:

The existing house is amply set back from both roads on which it fronts. The house is set back +/- 49 feet from Burning Tree Road (i.e., the side street) and +/- 36 feet from Meadowlark Lane (i.e., the front street). The minimum setbacks from the Property's current rear and side lot lines are as follows: 1) +/- 15.5 feet from the southern (rear) lot line; and 2) +/- 79.9 feet from the eastern (side) lot line. To the extent that the southern lot line is interpreted as a rear lot line, the +/- 15.5 setback is currently substandard for the R-90 zone¹, which requires that structures be setback a minimum of 25 feet from the rear lot line. However, the Zoning Ordinance permits the current encroachment into the rear setback as a legally conforming structure and site design that existed on October 30, 2014, but that did not meet the zoning standards on or after October 30, 2014. Zoning Ordinance Sec. 59.7.7.1.A.1.

3. The Petitioner plans to file an Administrative Subdivision Application to subdivide the subject property into two lots, one of which ("Lot B," containing the existing house) will be approximately 26,384 square feet in area, and the other of which ("Lot A," containing a new house) will be approximately 12,286 square feet in area. Once the subdivision is approved and the record plat is recorded, the Petitioner intends to construct a new single family house on Lot A. The Petitioner intends to retain the existing house on Lot B in order to minimize the impact on the family currently leasing the property, avoid further disruption to the neighborhood, and reduce the waste and inefficiency that would be caused by a partial demolition. See Exhibits 3, 3(a)(ii), and 3(f).

While both of the lots resulting from the subdivision will meet the dimensional requirements of the R-90 Zone, per the Statement, "DPS has indicated that, following the subdivision, both the side and rear setbacks will be inadequate for the existing house on Lot B." With respect to the rear setback, the Statement states that as a result of the subdivision and recordation of a new record plat, the existing house "would become nonconforming without variance relief, alteration, or removal," whereas "to the extent that the southern lot line is interpreted as a rear lot line, the Zoning Ordinance currently permits this encroachment into the rear setback as a legally conforming structure and site design." With respect to the side lot line encroachment, the Statement indicates that while most of the existing house would "remain located within the buildable area ... the easternmost corner of the building will encroach into the side setback area by +/- 3.1 feet, such that the house would be set back a minimum of +/- 4.9 feet from the proposed side lot line," and notes the following:

¹ It is also possible that the southern lot line could have been interpreted as a side lot line at the time of building permit review for the existing building in which case the +/- 15.5 setback would be adequate.

Importantly, the Petitioner cannot move the proposed lot line between Lot A and Lot B further east to eliminate or reduce this side setback nonconformity, as doing so would render Lot A narrower than the 75 feet required by the Zoning Ordinance. Zoning Ordinance Sec. 59.4.4.8.B. Thus the Petitioner is requesting a variance of +/- 3.1 feet to allow the existing building to remain in place and thus not have to remove this portion of the building thereby causing unnecessary waste and community impact.

See Exhibit 3. Accordingly, the Statement indicates that the Petitioner must either obtain variances from these setbacks, alter the existing house to remove the encroachments, or demolish the existing house and build a new house that conforms with the required setbacks.

4. In describing the uniqueness of the subject property, the Statement indicates that it is a "corner lot that is approximately three times the minimum lot size required in the R-90 Zone." The Statement further indicates that the placement of the existing house, "such that it has an exaggerated set back from both Meadowlark Lane and Burning Tree Road, and is oriented at an angle towards the intersection" of these streets, "responds" to this condition. See Exhibit 3. The Statement proceeds to state that:

Even though the proposed Administrative Subdivision Application will create two lots that will be more in keeping with the size of others on Meadowlark Lane and in the surrounding R-90 zoned area, the current size of the Property and the resulting placement of existing building create an extraordinary situation or condition that is peculiar to the Property itself. This placement currently results in the southwestern-most corner of the existing house encroaching into the rear setback area by +/- 9.5 feet, which the Zoning Ordinance permits as a conforming structure and site design. After approval of the Administrative Subdivision Application and recordation of a new record plat, it will also result in the encroachment of +/- 3.1 feet into the side setback that will be required for Lot B.

See Exhibit 3. In addition, the Statement states that granting the requested variances to allow the existing house to remain in its current location would conform to the established development pattern in the neighborhood and on Meadowlark Lane, noting that it would "allow the existing residence to be retained after subdivision of the Property without the need for alteration or demolition, avoiding changes to a building that has existed in this neighborhood for 60 years." See Exhibit 3.

5. The Statement at Exhibit 3 states that the Petitioner is not responsible for the special circumstances or conditions pertaining to this property, as follows:

The placement and angled orientation of the existing house vis-à-vis the remainder of the Property is not the result of any action by the Petitioner. Rather, as explained above, the existing house was constructed in 1960, several decades before the subject Petition. The existing building already encroaches into the required rear

setback by +/-9.5 feet, and is permitted to do so under the Zoning Ordinance as a legally conforming building and site design.

Similarly, based solely on the requirements of the Zoning Ordinance and the placement of the existing house, and not the actions of the Petitioner, the new side lot line proposed by the Administrative Subdivision Application cannot be located so as to meet both the minimum lot width required for new Lot A and the side setback that would be required for the existing building on Lot B after subdivision. As discussed in detail above, when the proposed lot line is placed to meet the minimum lot width for the R-90 Zone of 75 feet, it results in an encroachment of +/- 3.1 feet into the side setback that will be required for the existing building on Lot B.

6. The Statement states that the rear lot line encroachment already exists and is permitted as a conforming structure and site design; and that "[n]o changes are proposed that would exacerbate this existing condition." The Statement further states that the lot line arising from the proposed subdivision has been placed to "achieve the minimum lot width requirements of the R-90 zone and cannot be placed any further from the side of the existing building." Thus the Statement states that the requested variances are the minimum necessary to overcome the practical difficulties that full compliance with the Zoning Ordinance would entail, noting that full compliance would require "substantial efforts," and that "[t]he Petitioner would have to either alter the existing house by removing both the southwestern-most corner and the easternmost corner in the areas of encroachment, or would need to demolish and reconstruct the residence." See Exhibit 3. The Statement concludes that:

Requiring the Petitioner to remove these corners of the existing house, which has existed in its present location for approximately 60 years, in lieu of the minimal encroachments that will be permitted with the Variances would render compliance with the Zoning Ordinance practically difficult and unnecessarily burdensome. In the event that the Variances are not granted and Petitioner would be required to alter the existing house, Petitioner may elect to proceed with a three lot subdivision given the costs and effort involved with the potential alterations.

7. The Statement asserts that the requested variances can be granted without substantial impairment to the intent and integrity of the applicable Bethesda-Chevy Chase Master Plan, and "will actually further key goals of the Master Plan," which "endeavors to 'perpetuate and enhance the high quality of life which exists in the Bethesda-Chevy Chase Planning Area' and to 'protect the high quality residential communities throughout the Planning Area.'" It states that the Master Plan "notes that this area is a 'mature, stable area' predominantly developed with single-family detached homes," and that allowing the existing home to remain without alteration or demolition minimizes disturbance to this "mature, stable single-family neighborhood," "'perpetuate[s] [...] the high quality of life' within the Planning Area and 'protects the high quality residential commun[ity]' in which the Property is located." See Exhibit 3.

8. The Statement states that granting the requested variances will not be adverse to the use and enjoyment of abutting or confronting property owners. It notes that the new house on Lot A would not be any closer to the property line than a house could be built on the subject property without a variance if the existing house were to be demolished and rebuilt. The Statement further notes that no changes are proposed to the existing house that would affect the use and enjoyment of neighboring property owners. Finally, the Statement notes that "there are also many mature trees along the rear lot line between the Property and the rear-abutting property, such that views into the Property are well screened." See Exhibits 3 and 3(e).

9. The record contains three letters of conditional support for the grant of the requested variances from one abutting and two confronting neighbors. Each of the letters expresses support for the variances on the condition that the Petitioner place a restrictive covenant on "Lot B," to be recorded in the land records, that prohibits further subdivision of that property. The record contains a letter from Petitioner's counsel agreeing to this in concept, and asking the Board, if the variances are granted, to include the following as a condition of the grant:

Prior to the approval of any Record Plats that are necessary to implement the proposed Administrative Subdivision, the Petitioner must covenant that Lot B (*i.e.*, the lot on which the existing house will remain located) shall not be further subdivided. The covenant must be recorded in the Land Records of Montgomery County, Maryland, and noted on the Record Plat for the said lot. The covenant shall run with the land and be enforceable by the abutting and confronting property owners.

See Exhibits 6(a), 6(b), 9, and 10.

10. In addition to the letters of conditional support, the record contains a letter of opposition submitted by David Brown, Esquire, on behalf of the Petitioner's abutting neighbor to the south, Andrew Hatleberg. Mr. Brown asserts in his letter that "there is nothing extraordinary about the fact that the lot is a corner lot or is the largest lot in the neighborhood in which it is located," and that the subject property "is not exceptionally narrow or shallow, and has no exceptional shape compared to nearby lots, and no extraordinary topographical or other condition peculiar to this particular lot." Citing *Montgomery County v. Rotwein*, 196 Md. App. 716, 728-29 (2006) (quoting *Cromwell v. Ward*, 102 Md. App. 691, 694-95 (1995)), Mr. Brown's letter states that it is the land, and not improvements to the land, that must be unique for a variance to be granted, and that if the property is not found to have a unique condition, the inquiry stops and the variance must be denied. His letter concludes, for the reasons set forth above, that the subject property is not unique, and does not satisfy Section 59.7.3.2.E.2.a.i of the Zoning Ordinance. See Exhibit 7.

Mr. Brown also disagrees with the Petitioner's contention that the proposed variances satisfy Section 59.7.3.2.E.2.a.v of the Zoning Ordinance. His letter asserts that this Section has no applicability in this case because "the development of all the surrounding lots, as is the case for this lot, lack any nonconforming attributes," and explains how he believes the Section was intended to be applied. His letter further states that if this Section were deemed

to apply, the proposed "development" needing the variances is the existing house that, following the proposed subdivision, would violate the setbacks, and that this is not a "result [that is] in substantial conformance with the existing development pattern of the street or neighborhood." See Exhibit 7.

Mr. Brown's letter states that the need for the requested variances is a direct result of the Petitioner's intent and actions to subdivide the subject property, and as such does not satisfy Section 59.7.3.2.E.2.b of the Zoning Ordinance. His letter asserts that a property-specific condition must be the reason the variance is needed, and that in the instant case, the variances are not intended to address a property-specific condition, but rather to address the Petitioner's desire to change the dimensions of the subject property. Accordingly, Mr. Brown concludes that the requested variances are not the minimum necessary to overcome a practical difficulty that full compliance with the Zoning Ordinance would cause due to an extraordinary condition peculiar to the subject property, and fails to meet Section 59.7.3.2.E.2.c of the Zoning Ordinance.

With respect to Master Plan compliance, Mr. Brown's letter states that the Bethesda-Chevy Chase Master Plan recognizes the existing pattern of development in this area as "exemplary and worth preserving as is," not as reconfigured by "opportunistic" subdivision. Accordingly, he concludes that the requested variances do not satisfy Section 59.7.3.2.E.2.d of the Zoning Ordinance. Finally, with respect to Section 59.7.3.2.E.2.e of the Zoning Ordinance, Mr. Brown's letter asserts that granting the requested variances will be adverse to the use and enjoyment of the abutting property to the east, and in addition, states that granting the requested variances will facilitate additional regulatory processes that have the potential to be "quite disruptive" of his client's quiet use and enjoyment of his property (i.e. the abutting property to the south).

11. At the outset of the hearing, Mr. Ruhlen stated that the Petitioner in this case is seeking variances to allow the house that currently exists on the subject property to remain in its current location following application for and approval of the contemplated subdivision. He stated that the subject property is a large corner lot that unlike others, has not previously been subdivided, and that the Petitioner is trying to accomplish a residential subdivision in a lower density fashion than is allowed under the Zoning Ordinance. He described the variances that would be needed to accomplish this, and stated that there would be no changes to the existing house except to remove the deck and an accessory building.

Mr. Ruhlen raised two issues with the letter of opposition submitted by Mr. Brown on behalf of the Petitioner's abutting neighbor to the south. First, he contended that in stating that the subject property does not have a unique physical condition and therefore must be denied, Mr. Brown's letter misstates the variance test that was adopted by Montgomery County in the 2014 Zoning Ordinance, which includes five different ways to meet the "uniqueness" test. Mr. Ruhlen asserted that not only is the subject property unique as that term is used in Section 59.7.3.2.E.2.a.i of the Zoning Ordinance (physically unique), but that it is also "unique" in terms of substantially conforming with the established historic or traditional development pattern of a street or neighborhood, in accordance with Section 59.7.3.2.E.2.a.v. He stated that the grant of the requested variances would allow the

retention of the existing house in its long-time location, and would let the Petitioner seek a subdivision of the property to a pattern that is more consistent with the surrounding neighborhood.

In addition, Mr. Ruhlen contended that the instant case is clearly distinguishable from *Chesley v. City of Annapolis*, 176 Md. 413, 933 A.2d 475 (2007), which was cited by Mr. Brown as support for his contention that the need for the requested variances is self-created and cannot be the basis for the grant of the variances. Mr. Ruhlen stated that in *Chesley*, the property owners proceeded with the construction of a house despite knowing that as designed, the proposed detached garage would require variance relief, and despite having options to redesign their entire program prior to starting construction in order to avoid the need for variances. Mr. Ruhlen stated that in the instant matter, the Petitioner does not have any choice regarding the placement of the proposed subdivision line if the existing house is to be retained and the lot that results from the subdivision is to meet the 75 foot minimum width required by the Zoning Ordinance. Mr. Ruhlen also noted that *Chesley* cites *Stansbury v. Jones* for the proposition that "[s]ubdividing property in accordance with all applicable statutes does not, generally, constitute a self-created hardship." 372 Md. 172 at 192, 198, 812 A.2d 312 (2002). He stated that when the County Council zoned the subject property R-90, they anticipated development in accordance with the R-90 standards.

12. Jeff Robertson testified that he has been with CAS Engineering for over 24 years, and is currently the Branch Manager in charge of Montgomery County projects. He testified that he performs zoning research and studies, among other things. He testified that he has inspected the subject property, that he is familiar with the requirements of the R-90 Zone, and that he is also familiar with the requirements for the grant of a variance. He used the Zoning Vicinity Map in the record at Exhibit 3(c) to describe Block Q, on which the subject property is located, testifying that the block is bordered by Meadowlark Lane on the north, Melody Lane to the south, and Burning Tree Road to the west. He testified that the properties on the west side of Burning Tree are zoned R-200, whereas the properties on the east side, shown in a darker shade of yellow, including Block Q, are zoned R-90. Mr. Robertson testified that the subject property is Lot 4 on Block Q, and that it has frontage on both Burning Tree Road and Meadowlark Lane, the latter being the longer of the two (over 278 feet) and considered to be the main "front." He testified that the subject property abuts the Cahill property to the east and the Hatleberg property to the south. He stated that the house on the subject property is oriented to the intersection.

Mr. Robertson testified that if the contemplated subdivision were approved that the new lot ("Lot A") would be 75 feet wide, which he testified is the minimum requirement for lots in the R-90 Zone. He testified that the resultant lot containing the existing house ("Lot B") would be required to meet an eight (8) foot side setback from the new lot line, and that to meet this setback, the existing house would require a 3.1 foot variance. He testified that there would be a 25 foot rear setback needed from the lot line shared with Mr. Hatleberg. Mr. Robertson testified that with a corner lot, the owner can choose which road to use as the "front" of the lot, and that the Petitioner selected Meadowlark Lane. He testified that in its present condition (i.e. without the contemplated subdivision), the rear setback from the lot line opposite Meadowlark Lane is 25 feet, and that the existing house encroaches on that

setback and would require a variance if the subdivision were approved. Mr. Robertson testified that if "Lot A" were wider than 75 feet, the side lot line variance needed for the existing house on "Lot B" would also be larger, or the house would have to be demolished. He testified that if Burning Tree Road were selected to be the front of new "Lot B," the existing house would not require a variance from the south lot line, but would require a much larger variance – approximately 20 feet – from the new lot line. Thus Mr. Robertson testified that by selecting Meadowlark Lane as the "front," the combined extent of the variances requested is minimized.

Mr. Robertson testified that the subject property currently has two driveways, one on Burning Tree Road and one on Meadowlark Lane. He testified that if the subdivision were approved, the Meadowlark Lane driveway and driveway apron would be removed. Mr. Robertson testified that if the variances were approved and the contemplated subdivision was approved, that there would be no changes to the house on the new "Lot B" other than removal of the deck and Meadowlark Lane driveway.

Mr. Robertson testified that based on his industry experience, the subject property is extraordinary in terms of its size. He described it as the largest property on the block, and stated that it is three to four times the size of a typical property in the R-90 Zone. Mr. Robertson testified that relative to neighboring properties, the subject property has exceptionally long frontage along Meadowlark Lane and when combined with the Burning Tree Road frontage. He testified that both of these conditions are extraordinary given the subject property's R-90 zoning. Mr. Robertson testified that the existing house on the subject property was placed prior to the Petitioner's purchase, and sits well back of the required setbacks from the abutting roadways, angled toward the intersection.

Mr. Robertson testified that in his opinion, the proposed development substantially conforms with the established pattern on Meadowlark Lane. He testified that the existing house is a long-standing fixture on the street and will be preserved. Mr. Robertson testified that the contemplated subdivision of the subject property into two lots would bring it more into compliance with the development pattern along Meadowlark Lane, citing the three properties confronting the subject property across Meadowlark Lane as exemplary of this pattern, and noting that the property's very long frontage along Meadowlark Lane would be reduced so as to better comport with these other properties.

Mr. Robertson testified that the subject property was platted in 1950, that the existing house was built in 1960, and that the Petitioner purchased it in 2020. Thus he stated that the unusual conditions pertaining to the subject property are not the result of actions by the Petitioner, testifying that the Petitioner is not responsible for the size or shape of the subject property, for the placement of the existing house on the property, or for the fact that the subject property is not subdivided in accordance with the established development pattern of the street or neighborhood.

Mr. Robertson testified that the requested variances are the minimum needed to allow for the required 75-foot width on "Lot A," and that without the grant of the variances, the existing home (on resultant "Lot B") would have to be altered or demolished. He further

testified that if Burning Tree Road were picked as the property's "front," while there would be no need for a variance from the south lot line setback, a much larger variance (approximately 20 feet) would be needed from the new lot line. Thus he concluded that the requested variances were the minimum needed to overcome the practical difficulty that full compliance with the Zoning Ordinance would entail.

Mr. Robertson testified that he had reviewed the applicable Master Plan and the General Plan, and that in his opinion, the requested variances could be granted without substantial impairment to those plans because they would allow the existing house to remain in its current location and because without the grant of the variances, the existing house would have to be altered or demolished. He testified that the 1990 Master Plan recommended R-90 zoning for the subject property, which he reiterated was three to four times the minimum size for the R-90 Zone, and he testified that the contemplated subdivision of the property would be more in line with the R-90 standards than the current situation.

Mr. Robertson testified that the grant of the requested variances would not be adverse to the use and enjoyment of neighboring properties because it would allow the existing house to remain, which he said would help to minimize any impacts to adjoining property owners.

In response to a Board question asking if the subject property could be subdivided into three lots, as had been suggested, Mr. Robertson testified that while a study produced by the Petitioner had indicated the potential for three lots, that had never been discussed with the Planning Department, and that because the Petitioner wanted to retain the existing house, discussions had been focused on the two lot proposal. In response to a question from a Board member regarding the size and dimensions of the subject property relative to others on the block, Mr. Robertson testified that the subject property has over 278 feet of frontage along Meadowlark Lane, and that the confronting lots on Meadowlark Lane have approximately 100 feet of frontage. He testified that the Cahill property, which abuts the subject property along Meadowlark Lane to the east has less than 278 feet of frontage, estimating that it is approximately 220 feet in length, and that as you proceed around the block, all of the lots have less frontage than the subject property. He testified in response to further Board questions that the record plat shows that Lots 1, 2, and 3, which are south of the subject property (i.e. Lot 4) and along the same side of Burning Tree Road, are 160 feet wide, 150 feet wide, and 150 feet wide respectively. See Exhibit 3(b). Mr. Robertson testified that if the contemplated subdivision were approved, new "Lot A" would be 75 feet wide, and new "Lot B" would have approximately 220 feet of frontage along Meadowlark Lane. He testified that the lot lines between Lots 3 and 4, Lots 2 and 3, and Lots 1 and 2 are 231 feet long, 211 feet long, and 233 feet long respectively. See Exhibit 3(b). He testified that he is comparing the frontage that the subject property has on Meadowlark Lane with the frontage of most lots on Meadowlark Lane and on Burning Tree Road.

On cross-examination, in response to a statement and question from Mr. Brown, who noted that the subject property is a little over 38,000 square feet in area and asked how many lots of the 12 lots shown on the record plat were 30,000 square feet or more, Mr. Robertson testified that seven lots fell in this category. See Exhibit 3(b). Mr. Brown then

noted that Lot 5 is 32,000 square feet, and asked if that is roughly 85% of the size of the subject property (Lot 4), which Mr. Robertson confirmed. Mr. Brown next asked if Lot 1 on Block R was over 90% of the size of the subject property, and Mr. Robertson accepted this representation. In response to a question asking why large frontage would justify a variance, Mr. Robertson testified that it is based on proximity with the existing house. When asked if the existing house was compliant with the standards of the R-90 Zone, Mr. Robertson testified that it was. When asked how one could claim that building a house with variances is consistent with the pattern in the neighborhood, if one doesn't know if the other houses have variances, Mr. Robertson testified that the development pattern is in respect to the lots themselves, and that the lots that have been created across Meadowlark Lane are significantly smaller. When asked if the current development on Blocks Q and R was consistent with the standards of the R-90 Zone, Mr. Robertson testified that it was. When asked if it was inconsistent with the Master Plan to have large lots, Mr. Robertson testified that it was not.

On re-direct, in response to questions from Mr. Ruhlen, Mr. Robertson testified that he was not introducing a house on new "Lot A" that would require variances, and confirmed that the requested variances were only for the existing house. In response to a question asking if it would be possible to demolish the existing house and build an even larger house, Mr. Robertson testified that that was possible. In response to a question asking if a lot line could be dropped in the middle of the subject property, Mr. Robertson answered in the affirmative. In response to a question asking if it was possible that the subject property could be subdivided into three lots, Mr. Robertson testified that that was possible; when asked if variances would be needed for such a subdivision, he testified that they would not. In response to a question asking if the requested variances were only necessary to preserve the existing house, Mr. Robertson again testified in the affirmative.

13. Brian Athey testified that he has worked in real estate development since 2005, and worked as an attorney prior to that. He testified that they had researched the subject property prior to purchasing it, and that while they thought that they could subdivide the property into three lots, they had decided to go forward with a two lot subdivision because they thought that would better align with the preference of neighboring property owners. Mr. Athey testified that they are proposing to retain the house that currently exists on the subject property, and to subdivide the property to create a new "Lot A" on which they will build a new house. He testified that the previous owner of the subject property continues to reside in the existing house, and that they thought this was the most logical way to proceed. Mr. Athey testified that they met with staff from the Planning Department about the proposed change to the configuration of the subject property, and that Planning Department staff suggested that they proceed with the variances first.

Mr. Athey testified that his company uses a data aggregator to analyze properties, and that their analysis shows that less than one percent (1%) of lots in the R-90 Zone are over 30,000 square feet in size. He testified that he is familiar with the area, and that he believes that the proposal conforms with the established development pattern. He testified that he has spoken multiple times to the owner of the abutting property to the east, and that that owner has been candid, responsive, and engaged. Mr. Athey testified that he had

emailed the abutting property owner to the south but received no response. He testified that his partner, Andrew Norman, had spoken to that abutting property owner. Mr. Athey testified that he had also spoken with several other neighbors, and that he was amenable to recording a covenant on the property which would preclude further subdivision of proposed "Lot B." Finally, Mr. Athey testified that if the variance was denied, the Petitioner would need to demolish small portions of the existing house, on multiple levels on one side, and that he believed this was wasteful and not good for the community or the current resident.

14. Andrew Hatleberg, whose property abuts the subject property to the south, testified in opposition to the requested variances. He stated that he had reviewed and approved the letter of opposition submitted by Mr. Brown, and that he stands by the views expressed in that letter. See Exhibit 7. Mr. Hatleberg stated that he opposes the grant of the requested variances, and testified that he has talked with many other neighbors who also oppose the request but believe it is futile to contest it. He stated that elements of Mr. Brown's letter need to be reviewed by the Board.

Mr. Hatleberg testified that the subject property is not exceptional or unique, and described it as a standard corner suburban lot in a large context. He testified that construction of a new house would entail the removal of a lot of trees. Mr. Hatleberg testified that in his opinion the grant of the variances would not comply with the Bethesda-Chevy Chase Master Plan.

In response to a Board question asking Mr. Hatleberg why the new "Lot A" would concern him, Mr. Hatleberg testified that Lot A would be a small lot with a large house, that construction would take down a lot of trees, and that this would constitute a significant change. He testified that the solution was to remove 15 or 20 feet of the existing house and reconfigure it, and that there was plenty of space to do that. In response to a follow up question asking Mr. Hatleberg if he was concerned about the existing house remaining as is, Mr. Hatleberg testified that if the subject property is subdivided, new setbacks are in force, and he wants them followed.

15. In response to a Board question asking him to explain the relationship between the extraordinary condition peculiar to the subject property and the practical difficulty for the Petitioner, Mr. Ruhlen stated that the size and configuration of the subject property constitute an extraordinary condition peculiar to it given its R-90 zoning. He stated that if the property is subdivided, the Zoning Ordinance requires that the lot line be placed so that the new lot meets the 75 foot width requirement. Mr. Ruhlen stated that this is not a situation where the Petitioner built a house knowing that variances would be needed, but rather a situation where the house for which the variances are sought was already on the property when the Petitioner purchased it. Mr. Ruhlen stated that the requested variances are only needed to retain the existing house, and that the hardship is that parts of that house will have to be demolished if the variances are denied.

In response to a Board question asking why the need for the requested variances should not be considered a self-created hardship, Mr. Ruhlen distinguished the case at hand from the fact pattern in *Chesley v. City of Annapolis*, 176 Md. 413, 933 A.2d 475 (2007). Mr.

Ruhlen stated that *Chesley* involved a situation where the property owners wanted to redevelop a property, and after studying the property and the applicable development standards, discovered they would need a variance for their proposed detached garage, but nevertheless decided to proceed with the construction without first seeking the variance. When that variance was ultimately sought and denied, no hardship was found because the property owners had options in redeveloping their property for the placement of their proposed structures. Mr. Ruhlen stated that the Petitioner's situation is the opposite of the situation in *Chesley*, because in the Petitioner's situation, it is the operation of the Zoning Ordinance on the subject property that gives rise to the need for variances for a house that already exists. In response to a clarifying question asking if, in *Chesley*, the Court found that the need for the requested variance(s) arose from a self-created hardship because the property owner built despite denial of a variance, Mr. Ruhlen explained that the property owner in *Chesley* built structures that were permissible on the property in advance of receiving a variance, but did not build the detached garage, which the owner knew would need a variance. He stated that the property owner was then frustrated by his inability to get the variance needed to construct the garage, because the Court found the need for the variance was a self-created hardship.

16. In closing, Mr. Ruhlen asserted that the Petitioner has demonstrated that the requested variances meet the standard for the grant of a variance set forth in the Zoning Ordinance. He noted that granting the requested variances will allow the existing house to be preserved and the status quo to be maintained. He stated that granting the requested variances would allow the Petitioner to proceed in a manner that is least impactful to the neighborhood, and that is the preference of the neighbors, assuming a restrictive covenant is placed on the new "Lot B" preventing its further subdivision.

17. In closing, Mr. Brown asserted that the Petitioner has not shown that the subject property is exceptional in its size or lot frontage, and that he does not believe the Petitioner has shown that such a condition would create a practical difficulty. Mr. Brown stated that there is no practical difficulty because the subject property has been developed in accordance with the Zoning Ordinance, and that any practical difficulty arises from the proposed changes to the property. Mr. Brown asserted that the request does not comport with the established development pattern, as would be required by Section 59.7.3.2.E.2.a.v of the Zoning Ordinance. He urged that that Section be interpreted as he indicated in his letter of opposition, and stated that a person could subdivide anywhere if they were able to get variances.

Mr. Brown asserted that by seeking to subdivide the subject property, which he stated has been in its current configuration for 70 or 80 years, the Petitioner has created the hardship for which he seeks relief. He stated that with respect to self-created hardship, the instant case should not be decided based on whether or not it can be distinguished from the *Chesley* case. Mr. Brown stated that it was "by no means a given" that the contemplated administrative subdivision would be approved, noting that it would create "by far" the smallest lot of Block Q, a block on which he stated all lots are large. Finally, Mr. Brown stated that if the Board is inclined to grant the variances, it should obtain a legal opinion from its counsel that it is not rendering an advisory opinion.

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. The Board notes, based on the record in this case, 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.

Based on the Petitioners' binding testimony and the evidence of record, the Board finds that the requested variances, necessary to permit the existing house to remain in its current location in the event that the contemplated administrative subdivision is approved, fail to meet Section 59-7.3.2.E.2.a, and accordingly must be denied.

In support of this denial, the Board finds, based on the exhibits of record and the testimony of Mr. Robertson in response to Board questions asking about other properties on Block Q, as well as his testimony on cross examination regarding other properties shown on the record plat, that the subject property is not exceptional or extraordinary in terms of its size, shape, or topography when viewed against other properties on Block Q. The Board further finds that having large frontage does not make this lot exceptional given that it is a corner lot, and notes that the frontage of abutting Lot 5, while less extensive, is also very large. Finally, the Board finds that as noted by Mr. Brown, it is the property itself that must be unique, not the location of the house on the property. See Exhibits 3(b), 3(c), and 7. For the foregoing reasons, the Board finds that the subject property does not satisfy Section 59.7.3.2.E.2.a.i of the Zoning Ordinance.

The Petitioner did not argue that the subject property was unique pursuant to Sections 59.7.3.2.e.2.a.ii-iv of the Zoning Ordinance, and so the Board next turns its analysis to Section 59.7.3.2.E.2.a.v. The Board disagrees with the Petitioner's assertion that the proposed development would substantially conform with the established historic or traditional development pattern of a street or neighborhood, in satisfaction of this Section, and so finds. In support of this, based on the testimony and exhibits of record, the Board finds that in its current state, the subject property is consistent with the development pattern of Block Q and with that portion of Block R that is shown on the record plat. See Exhibit 3(b). The Board further finds that while the subject property is large for the R-90 Zone, and larger than the three confronting properties across Meadowlark Lane, the Zoning Vicinity Map shows that the other properties on Meadowlark Lane that confront properties on Block Q are much larger and more consistent with the development pattern of Block Q than with the three properties confronting the subject property. See Exhibit 3(c). Finally, the Board finds that the contemplated reconfiguration of the subject property negates any argument that allowing the existing home to remain comports with the established development pattern. Thus the Board cannot find that the grant of the requested variances, which would only be needed if the contemplated subdivision of the subject property into two lots, one of which would be consistent with the three confronting properties, were approved, substantially conforms with the established or historic development pattern in satisfaction of Section 59.7.3.2.E.2.a.v of the Zoning Ordinance.

Having found, for the reasons set forth above, that the application fails to meet Section 59-7.3.2.E.2.a of the Zoning Ordinance, the Board need not address the remaining elements of the variance test which, as previously noted, is conjunctive. Accordingly, on a motion by John H. Pentecost, Chair, seconded by Mary Gonzales, with Katherine Freeman and Richard Melnick in agreement, and with Bruce Goldensohn, Vice Chair, not in

agreement, the Board voted to deny the requested variances, and 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 14th day of August, 2020.



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.

