

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
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Rockville, Maryland 20850
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(240) 777-6600

Case No. A-6670

PETITION OF LIVINGSTON EQUITY GROUP LLC

OPINION OF THE BOARD

(Hearing Date: October 21, 2020)

(Effective Date of Opinion: October 30, 2020)

Case No. A-6670 is an application by the Livingston Equity Group LLC (the "Petitioner") for variances needed for an addition to an existing house, as follows:

The existing structure, a noncomplying house, requires a variance of 0.17 feet as it is within 24.83 feet of the front lot line. The required setback is twenty-five (25) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

The existing structure, a noncomplying house, requires a variance of 0.28 feet as it is within 6.72 feet of the side lot line. The required setback is twenty-five (25) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

The proposed construction, a second story addition, requires a variance of 0.17 feet as it is within 24.83 feet of the front lot line. The required setback is twenty-five (25) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

The proposed construction, a two-story addition, requires a variance of 0.48 feet as it is within 6.52 feet of the side lot line. The required setback is seven (7) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on October 21, 2020. All participation was done via Microsoft Teams. Francoise Carrier, Esquire, appeared on behalf of the Petitioner. Robert Livingston, the owner of Petitioner Livingston Equity Group LLC, testified in support of the requested variances, as did Curt Schreffler, P.E., President of CAS Engineering.

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

EVIDENCE PRESENTED

1. The subject property is Lot 4, Block B, Forest Hills of Sligo Park Subdivision, located at 8705 Reading Road, Silver Spring, Maryland, 20901, in the R-60 Zone. As shown on the site plans and Zoning Vicinity Map submitted with the variance application, the subject property is a mid-block lot located on the east side of Reading Road. It is roughly rectangular in shape, and is 5,725 square feet in size. See Exhibits 3, 4(a), 4(b), and 8.

2. The Petitioner's Statement of Justification ("Statement") indicates that the subject property contains an existing single-story house that was constructed in 1934. The variance application indicates that the plat for the subdivision in which the subject property is located was recorded in 1937. See Exhibits 1 and 3.

3. The Statement states that the Petitioner purchased the subject property earlier this year. It indicates that the existing house on the subject property encroaches on the front and north (left) side setbacks by about two inches and three inches respectively, and that the setback encroachments are within construction tolerances and were likely not intentional. See Exhibit 3. The Statement details the existing encroachments, and explains the proposed construction, as follows:

The addition and second story are proposed to be on the same front and side planes as the existing house, except that new siding will result in the north wall of the house protruding farther into the side setback by about three inches. At the same time, an existing six-foot-wide chimney on the north side of the house, which projects approximately 12 inches farther into the side setback than the wall of the house, will be removed. On the front facade, only the existing bay window projects into the front setback; the bay window will not extend into the proposed second story, so the proposed renovation will not change the front setback. The exact setbacks from the front and north side property lines at the closest points, for the existing house and with the proposed addition, are set forth in the table below and on the submitted Building Permit Denials from the Department of Permitting Services.

Setback	Required	Existing House	Proposed Renovation/Addition
Front	25ft.	24.83feet	24.83 feet
North Side	7ft.	6.72 feet	6.52 feet

As noted in the table above, the existing front setback violation caused by the first-floor bay window will remain unchanged. To accommodate this existing condition, the Applicant requests a front setback variance of 0.17 feet (approximately 2.04 inches). Adding siding to the rest of the house will cause the north wall to project into the side setback by an additional 0.2 feet, or 2.4 inches. The proposed second floor and small two-story addition will be located on the same side plane as the new siding on the existing house. Accordingly, the Applicant requests a side setback variance of 0.48 feet (approximately 5.76 inches) on the north side of the house.

4. In describing the uniqueness of the subject property, the Statement at Exhibit 3 asserts that the property satisfies both Section 59-7.3.2.E.2.a.i and Section 59-7.3.2.E.2.a.v of the Zoning Ordinance, as follows:

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

Due to the vagaries of construction tolerances, the existing house on the Subject Property was built a few inches too close to the north side lot line and the bay window projects just slightly into the required front setback. The location of the existing house on the site relative to the front and north side property lines constitutes an extraordinary condition peculiar to the Subject Property.

?

* * *

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

The proposed project substantially conforms with the established development pattern of the neighborhood. As may be seen on the submitted zoning map, there are several other houses in the 8700 blocks of Reading Road and Geren Road that appear to be situated very close to a side lot line, similarly to the subject house. In addition, the location of the subject house relative to the front lot line is very much consistent with other houses on these two blocks, all of which have roughly the same front setback. If approved by this variance petition, a side setback of 6.52 feet and a front setback of 24.83 feet would continue an existing pattern of setbacks and would not be establishing precedent in the neighborhood. Moreover, the submitted neighborhood photos demonstrate that an attractive, renovated, two-story home on the Subject Property would be more compatible with other homes in the immediate vicinity and the general neighborhood than the existing house, which is run-down and no longer fits in well with the neighborhood.

5. With respect to the requested variances being the minimum necessary to overcome the practical difficulties posed by compliance with the Zoning Ordinance, the Statement at Exhibit 3 indicates that the proposed construction will not increase the existing setback incursion along the front lot line, and will only increase the existing incursion along the north side lot line by the amount needed for the new siding, which is necessary to unify the appearance of the house. The Statement further notes that the existing six-foot wide chimney, which projects approximately a foot beyond the northern plane of the existing house, will be removed. Finally, the Statement notes that the variances are needed to enable reuse of the existing foundation walls, which is necessary from an engineering standpoint. Thus, the Statement concludes that the requested variances are the minimum necessary to overcome the practical difficulties imposed on this property by the Zoning Ordinance, as follows:

As the applicant's engineer will testify, from a structural engineering standpoint, the only practical way to add a second story to the existing house is to build it on top of the existing foundation walls. It would be at best highly impractical (and at worst, impossible) to build a second story that is stepped back from the

side wall of the house to meet the setback requirement. This would require building a new foundation wall from the cellar up. Even if this is physically possible (which may not be the case), it would be cost prohibitive and would result in a house with unreasonably thick exterior walls and unreasonably deep windowsills, reducing light and air into the home as well as the usable living space.

Without the requested variances, the Applicant will not be able to renovate the house with new siding, which will generally improve appearance and will prevent the chimney removal from leaving the north facade looking disjointed; carry out a complete interior renovation to improve the livability of the house and bring it up to modern standards; add a second story, doubling the usable living space and bringing the house more in line with others in the neighborhood; remove a chimney that protrudes 12.5 inches farther into the side setback than the north wall of the house; enclose the unsightly, potentially dangerous exterior cellar staircase; remove the dilapidated sunroom; or extend the house in a smooth line to the rear. A 0.48-foot north side setback variance and a 0.17-foot front setback variance are the minimum necessary to comply with the required setbacks.

6. The Statement indicates that the grant of the requested variances "will support the goals of the general plan and the East Silver Spring Master Plan, Approved and Adopted December 2000 (the "Master Plan"), which identifies the Subject Property as part of an existing residential neighborhood and support its use for a single-family home." See Exhibit 3.

7. The record contains letters of support from the Petitioner's abutting and confronting neighbors along Reading Road, indicating that they understand the construction proposed, that they support the grant of the requested variances, and that they do not believe the proposed changes will adversely affect the neighborhood. See Exhibits 7(a)-(e). In addition, the Statement states that the house immediately to the north of the subject property, which has the greatest potential to be affected by the grant of the requested side lot line variances, "is separated from the Subject Property by a driveway and a landscaped border," and "is situated at least ten feet from the shared property line, and probably more." Finally, the Statement notes that "[t]he renovation and addition that will be made possible by the requested variances will enhance the appearance of the Subject Property and its compatibility with the well-kept homes that surround it." See Exhibit 3.

8. At the hearing, Mr. Livingston testified that he owns Petitioner Livingston Equity Group LLC, and that it is a real estate investment company that he formed to purchase, rehabilitate, and market properties. Mr. Livingston testified that when he purchased the subject property, he did not realize that the existing house did not conform to the required setbacks, noting that the house appeared to meet the seven (7) foot side setback, and was approximately 38 feet from the street. He testified that he first found out about the setback problems in May, when he received the CAS Engineering survey.

Mr. Livingston testified that the tenants who occupied the property prior to his purchase trashed it, and that at the time of his purchase, the property was in extreme disrepair. He testified that the foundation of the existing house was still strong, and that

he believed the property could be fixed up. Mr. Livingston testified that the property is in a great location, and that most of the houses in the neighborhood are well kept. Mr. Livingston testified that he has already invested considerable time and expense in the property, detailing several of those efforts, and that without the grant of the requested variances, he cannot proceed with the proposed rehabilitation and renovation.

Using Exhibit 5(d), Mr. Livingston explained his plans for the house to the Board, testifying that the existing sunroom will be removed, and that he plans to construct a bumpout on the rear of the house that will extend approximately six (6) feet past the existing back wall and that will be on plane with the home's north side wall. He testified that the existing open stairwell will be enclosed by the proposed construction, but that the entrance to those stairs will still be from the outside of the house. Mr. Livingston showed the Board the resultant elevations of the home following the proposed renovations and additions. See Exhibit 5(b). He stated that the existing chimney, which protrudes approximately a foot from the north side of the existing house, will be removed, and that as a result, if the chimney is taken into account, the renovated house will be further from the north side property line than the existing house.

Using the photographs in the record at Exhibits 5(g) through (k), Mr. Livingston testified that he intends to add a second story to the existing single-story house. He testified that he plans to replace the existing aluminum siding with hardiplank, and the existing chain link fence with a wood fence and gate. He stated that he intends to scrape and sod the rear of the property, and that the new wood fence will make the existing retaining wall at the property's rear look cleaner. He testified that Exhibit 5(k) shows the poor condition of the existing sunroom, and stated that it needs to be demolished.

Mr. Livingston testified that he has spoken with several of the immediate neighbors and has met with six of them. He testified that they are all happy that he has purchased the subject property with the intent to renovate it, and that they want a new house and new permanent neighbors. In response to a Board question asking if there were any neighbors whom he had not been able to reach, Mr. Livingston testified that there are two houses behind the subject property, and that as he understands it, both are tenant occupied. He testified that he had approached those houses three times to discuss his plans with no success, and that he had sent a letter to the owner of one of the houses but had not heard back. Mr. Livingston testified that he is unaware of any opposition to the variances or the proposed renovation.

In response to a Board question asking if all of the houses in the neighborhood around the subject property are two-story houses, Mr. Livingston testified that on some of the streets, all of the houses are two-story, while on other streets there is a mix. Ms. Carrier then called the Board's attention to the photographs at Exhibits 5(l) through (o), which she stated show a sampling of houses on this block and to the rear of the subject property, most of which are two-story homes.

9. Mr. Schreffler testified that he is a professional engineer and the President of CAS Engineering. He testified that he is a licensed civil engineer with 33 years of experience. He stated that he has been involved with between 5,000 and 6,000 buildings, and that his firm specializes in infill development.

Mr. Schreffler testified that his firm was hired to do a detailed survey of the subject property and to prepare a building permit site plan. He testified that it was in the course of doing this that he discovered that the existing house does not meet the required setbacks. Using Exhibit 4(b), the building permit site plan, Mr. Schreffler then explained that the projection on the front of the existing house is 24.83 feet from the front lot line instead of the required 25 feet, necessitating a variance of 0.17 feet (about two inches), as reflected on Exhibit 6(c).¹ He testified that the proposed second story addition will also be 24.83 feet from the front lot line after the existing siding is removed and replaced, and thus also needs a variance of 0.17 feet, as reflected on Exhibit 6(b). Mr. Schreffler testified that at its closest point, the north side of the existing house is 6.72 feet from the north side property line, and accordingly needs a variance of 0.28 feet, as reflected on Exhibit 6(d). He testified that once the chimney is removed and siding is added to the existing brick façade, the north side of the house will be 6.52 feet from the side lot line, and will need a variance of 0.48 feet (about six inches), as reflected on Exhibit 6(a). Thus, Mr. Schreffler summarized that there are four variances needed, two for the existing home and two for the proposed construction. He testified that the current 25 foot front lot line and 7 foot side lot line setbacks applied when the existing house was built, and that the placement of the house can be attributed to construction tolerance circa 1934.

Mr. Schreffler testified that the chimney on the existing house is approximately 6 feet, 4 inches wide, and projects a little over a foot from the north side of the house. He testified that after the chimney is removed and the house is renovated, it will be farther from the property line than the chimney is now. Mr. Schreffler testified that the Petitioner cannot renovate the north side of the house with new siding without receiving a variance, explaining that on the north side of the home, new siding will be added over the existing brick, whereas on the front of the home, existing siding will be removed and replaced with new siding. Mr. Schreffler further testified that it is not practical or feasible from a construction standpoint to step the proposed second floor back in order to meet the setbacks because then it would not bear on the bearing foundation walls.

Mr. Schreffler testified that the need for the requested variances is not the fault of the Petitioner, and that the variances requested are the minimum needed to allow the house to be renovated. He testified that the house on the abutting property to the north is approximately 23 feet from the house on the subject property, and that the houses are separated by a driveway and shed. Mr. Schreffler testified that in his professional opinion, the grant of the requested variances would not cause any harm to neighboring properties, noting that the largest variance requested is approximately six inches, which he stated would have no impact on the property to the north, on the confronting properties, or on the properties to the rear.

In response to a Board question asking if, after the second story is added, the square footage of the resultant house would substantially conform to that of other homes in the neighborhood, Mr. Schreffler answered in the affirmative, and testified that it would be comparable to other homes on the block.

¹ Mr. Schreffler testified that the projection allowance for bay windows does not apply to the existing projection because that projection is 10.1 feet wide, and the allowance only applies to bay window projections that are ten feet or less in width.

FINDINGS OF THE BOARD

Based on the binding testimony and evidence of record, the Board finds that the requested variances can be granted. The requested variances comply 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.v. - the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;

The Board finds, based on the assertion in the Statement, the testimony of Mr. Livingston and Mr. Schreffler, and photographs in the record at Exhibits 5(i) and 5(l)-(o), that the proposed construction of a second story on top of this existing single story house, utilizing the foundation of the existing house to bear its weight, and the modest addition proposed for the left rear corner of the house, would substantially conform with the established historic or traditional development pattern of this neighborhood, in satisfaction of this element of the variance test. In support of this, the Board finds that the photographs submitted by the Petitioners show that there are many two-story homes in the immediate neighborhood, a fact confirmed by Mr. Livingston in his testimony, and that the testimony of Mr. Schreffler indicates that the square footage of the home on the subject property following construction will be comparable to other homes on the block. In addition, the Board notes that the distance between the house and the front and north side lot lines, from which variance relief is requested, is not changing from the distance established in 1934, except as necessary to accommodate the new siding.

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 house on the subject property was built in its current location in 1934, and that the Petitioner did not purchase this property until this year. In addition, the Board finds that there is nothing in the record to suggest that the Petitioner is responsible for the development pattern of the street and neighborhood. Thus the Board finds that the Petitioner took no actions to create the special circumstances or conditions peculiar to this 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, based on the testimony of Mr. Schreffler and on the Statement in the record at Exhibit 3, that the requested variances are the minimum necessary to allow

the proposed construction to proceed. The Board finds that the requested variances are minimal in that they allow the construction of a second story and rear addition that will be on top of and on plane with an existing home that, while it will have new siding, has been in place since 1934. The Board further finds that without the grant of the requested variances, the Petitioner could not use the existing front and north side foundation walls as support for the proposed second floor addition, which per the Statement and the testimony of Mr. Schreffler, is the only practical way to undertake the proposed construction. In addition, the Board finds, per the Statement and the testimony of Mr. Schreffler, that the encroachment by the existing house is attributable to construction tolerance circa 1943. The Board notes that the extent of the existing front encroachment is not being increased, and that the extent of the existing north side encroachment is only being increased by the amount needed to accommodate the new siding. Accordingly, the Board concludes that compliance with the required setbacks, which are violated by an existing house and would be similarly violated by the proposed improvements, would pose a practical difficulty for the Petitioners, and that the grant of the requested variances is therefore the minimum necessary to overcome those difficulties and to allow the proposed construction to proceed.

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 the proposed construction will continue the residential use of this property, consistent with the recommendations of the East Silver Spring Master Plan, which seeks to "[s]ustain and enhance residential neighborhoods."

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.*

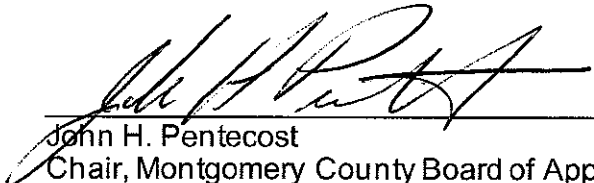
The Board finds that the proposed construction would improve this existing home, which per the Statement is in disrepair, and would continue its residential use. The Board further finds that the record contains letters of support from the Petitioner's abutting and confronting neighbors on Reading Road, and that these letters state that the grant of the requested variances will not have an adverse effect on the neighborhood. In addition, the Board notes, per the Statement, that the abutting property to the north of the subject property, which would arguably be most impacted by the proposed construction, is separated from the subject property by a driveway and landscaped border. The testimony of Mr. Schreffler confirmed this. Accordingly, the Board finds that the grant of the requested variances will not be adverse to the use and enjoyment of abutting or confronting properties.

Accordingly, the requested variances needed for the existing house and to allow the proposed construction are **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(a)-(b) and 5(a)-(f).

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Bruce Goldensohn, Vice Chair, with Katherine Freeman, Mary Gonzales, and Richard Melnick 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 30th day of October, 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.

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.