

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case No. A-6675
PETITION OF PAUL BAINES**

OPINION OF THE BOARD

(Hearing Date: December 9, 2020)

(Effective Date of Opinion: December 18, 2020)

Case No. A-6675 is an application by Petitioner Paul Baines for a variance of 2.3 feet from the right side lot line setback, needed for the construction of a new single-family dwelling. The required setback is twelve (12) feet, in accordance with Section 59-4.4.7.B.2 of the Zoning Ordinance.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on December 9, 2020. All participation was done via Microsoft Teams. Petitioner Paul Baines participated in the proceedings, in support of the application.

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

EVIDENCE PRESENTED

1. The subject property is Lot 5, Orchard View Subdivision, located at 15701 Quince Orchard Road, Gaithersburg, Maryland, 20878, in the R-200 Zone. The subject property has an area of 20,380 square feet, and is an irregularly shaped, six-sided flag lot, located on the east side of Quince Orchard Road. See Exhibits 3 and 4(a)-(b).
2. The subject property has approximately 50 feet of frontage on the east side of Quince Orchard Road. The left (north) side of the property is comprised of a single, straight lot line, approximately 229 feet in length, that intersects both the street and the rear lot line at approximately 90 degrees. The rear (east) lot line is roughly parallel to the street, and is also straight in nature. It is approximately 100 feet long. The right (south) side of the "flag" portion of the lot intersects the rear lot line at approximately 90 degrees, and extends approximately 154 feet in a westerly direction, towards the street. The "pole" portion of the property begins at that point, as the property begins to taper towards the left lot line and street at a 45 degree angle (approximate) for a distance of roughly 64 feet, and then at a lesser angle for a distance of approximately 34 feet. See Exhibits 4(a)-(b).

3. The Site Plan in the record at Exhibit 4(a) indicates that the Petitioner's new single-family dwelling is being constructed on the "flag" portion of the property, but that front right (southwest) corner of the proposed garage, while it is 13.9 feet from the 154 right side line, thus meeting the 12 foot setback from that lot line, is only 9.7 feet +/- at its closest point from the angled 64-foot right side line, encroaching 2.3 feet into the 12 foot setback required from that lot line. See Exhibit 4(a).

The Justification Statement ("Statement") states that on August 24, 2020, the County's Department of Permitting Services ("DPS" or the "Department") approved a building permit for the proposed construction (Building Permit No. 901028). The Statement states the following with respect to this approval:

Chapter 59 is not explicit regarding the diagonal or tapered lot lines as they apply for setbacks on flag lots, especially those with lot width requirements at the front BRL line. The architect drafted the approved plans showing the front BRL coming to a 90 degree corner with the side BRL of 12'. These plans did not interpret the 45% diagonal line as having a set back requirement.

See Exhibit 3. This point is echoed in Petitioner's letter to the Board, in the record at Exhibit 8, which explains that "[t]he lot is a flag lot and the diagonal lot line that makes the 'flag pole' part of the lot was not interpreted as a side lot line at [the time of permit approval] by any parties involved (architect, DPS, surveyor, foundation contractor)." The Statement indicates that after approval of the building permit, a concrete foundation (slab) was poured in accordance with the approved plans. The Statement states that when the Petitioner sent his Wall Check survey to DPS for approval on September 25, 2020, a different plan reviewer stated that the segment of the right side lot line that was at a 45 degree angle also required a 12 foot setback, and as a result, DPS then issued a building permit denial letter. The Statement notes that DPS waived their customary fee because they had originally approved the proposed location and building permit in error. See Exhibit 3.

4. The Statement states that the total area of the encroachment is minimal, noting that "[d]ensity would not be affected in that granting the variance only adds 5.5sf to the foot print, and that even if the corner was cut off, the roof would still be allowed to overhang into the setback per Section 4.1.7.B.5.a.vii of Chapter 59, giving the house the same exact impermeable area, and feel in terms of mass." See Exhibit 3.

5. The Statement at Exhibit 3 indicates that the subject property meets the uniqueness test for the grant of a variance, as follows:

Section E.2.a.i The Property contains unusual extraordinary conditions peculiar to this property

The lot is a flag lot and has diagonal tapering lot lines making the "flag pole" and a narrower than normal street frontage.

Section E.2.a.v The proposed development substantially conforms with the established historic or traditional development pattern of the street and neighborhood

The proposed house will be colonial in style and conforms perfectly with other houses on the street. The footprint of the house is more conservative than neighboring houses, measuring only 1900sf versus 3100sf and 2300sf. Also, the house does not max out the two other side BRL lines, staying 6.8ft off one and 1.8ft off the other.

6. The Statement states that "[t]he special circumstances [making this property unique] are a result of the physical layout of the land, the vagueness in the code regarding flag lots and the building permit being issued in error." In addition, the Statement states that "2.3ft is the minimum necessary to overcome the practical difficulties that cutting the corner off of the garage would impose, due to the unusual shape of the lot leading to an error in interpretation of the code and issuance of the permit." See Exhibit 3.

7. The Statement indicates that granting the requested variance, which in turn would allow the corner of the garage to be built, would improve the appearance of the house by allowing it to be "more normal and conforming." The Statement further indicates that the closest structure to the proposed encroachment is the "back of the neighbors' garage," and characterizes that space as "a utility space for trash cans, etc." The Statement thus concludes that granting the variance, which would allow the corner of the garage to be built, "will make little to no difference in the look and feel of the space for the neighbors." See Exhibit 3.

8. At the hearing, Petitioner Paul Baines testified that he is an architect and the developer of this property. He explained the series of events, recounted above, that led to the need for the requested variance. Mr. Baines testified that the subject property is a flag lot with frontage that is narrower than normal. He testified that the property itself and the vagueness of the Zoning Ordinance with respect to setbacks on flag lots caused his present situation.

Mr. Baines testified that structural problems would occur if the encroaching corner of the proposed garage were to be removed. He testified that these problems could be solved, but that it would be difficult. Mr. Baines reminded the Board that as noted in his Statement, even if the corner walls of the proposed garage were to be truncated and brought into conformance with the required setback, the roof over that portion of the garage would still be permitted to extend into the setback. Mr. Baines testified that his plans showed the building restriction lines meeting at a corner near the affected portion of the garage, and that this was accepted by the DPS plan reviewer and by the surveyor. He stated that multiple people missed this mistake. See Exhibit 4(b).

In response to a Board question asking if the proposed construction could have been pushed farther back on this property, Mr. Baines testified that it would have been difficult because of an existing koi pond and a large (40 inch) maple tree that are located

just behind the proposed house. See Exhibit 4(b). Mr. Baines testified that the foundation of the house is about six feet from the maple tree, and that he would not want it be any closer than that. He stated that they had pruned the tree's roots prior to commencing construction in order to protect them to the extent possible, and testified that the house could not be moved any farther back on the property without harming the tree. Mr. Baines testified that there is also a 24 inch popular tree just in front of the foundation that he was also able to preserve by locating the proposed construction in its current location.

In response to a Board question asking if there was any way to scale back the size of the garage in order to meet the setback, Mr. Baines testified that the garage was 20 feet deep and has a 16 foot double door. He testified that he could have made the garage smaller, but that most garages in the area have a double door similar to the door he has proposed. He testified that the garage has an extra four feet on each side of the door for sheer strength. See Exhibit 4(b).

FINDINGS OF THE BOARD

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

1. *Section 59.7.3.2.E.2.a. one or more of the following unusual or extraordinary situations or conditions exist:*

Section 59.7.3.2.E.2.a.i exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;

The Board finds, based on the testimony of the Petitioner and Exhibits 3 and 4(b), that the flag shape of the lot and the presence of the large maple tree and existing koi pond, which are located in the front half and center of the usable "flag" portion of this property, respectively, combine to constitute a unique condition peculiar to this property that constrains the area available for construction in accordance with the setbacks, in satisfaction of this element of the variance test.

2. *Section 59.7.3.2.E.2.b the special circumstances or conditions are not the result of actions by the applicant;*

The Board finds that the Petitioner is not responsible for the shape of the property or for the presence of the large maple tree or koi pond. Thus the Board finds that the special circumstances or conditions pertaining to this property are not the result of actions taken by the Petitioner, in satisfaction of this element of the variance test.

3. *Section 59.7.3.2.E.2.c the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;*

The Board finds, based on the testimony of the Petitioner and on the Statement, that the requested variance is the minimum needed to allow the proposed construction to proceed. The Board observes, per the Statement, that the square footage of the proposed house is conservative relative to other houses in the area, and that the total area of encroachment is only 5.5 square feet. The Board further notes that under the Zoning Ordinance, the encroaching area could be roofed even if it were not walled. In addition, the Board notes that the Petitioner has testified that the 24 foot width of the garage is needed for sheer strength. Finally, the Board finds, again per the testimony of the Petitioner, that allowing construction to proceed without a truncated corner will avoid structural problems that would be difficult to rectify, and further finds, per the Statement, that granting the variance to allow the construction as originally proposed would improve the appearance of the house by allowing it to be "more normal and conforming." See Exhibit 3. In light of the foregoing, the Board finds that the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose, and that this element of the variance test is satisfied.

4. *Section 59.7.3.2.E.2.d the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan;*

The Board finds that the proposed construction would allow residential construction in a residentially-zoned area, and thus finds that the requested variance can be granted without substantial impairment to the intent and integrity of the applicable master plan, in satisfaction of this element of the variance test.

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, per the testimony of the Petitioner and the Statement, that the grant of the requested variance will not be adverse to the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test. In support of this, the Board notes, per the Statement, that the proposed garage is located proximate to the abutting neighbor's garage, and that the incursion allowed, at 5.5 square feet, is minimal. In addition, the Board notes that the garage roof could extend into the setback area, and thus finds that the massing of the garage structure with the grant of the variance will not be significantly different from its massing if the variance were denied.

Accordingly, the requested variance of 2.3 feet from the right side lot line is **granted**, subject to the following conditions:

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

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Mary Gonzales, with Bruce Goldensohn, Vice Chair, Katherine Freeman, 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 18th day of December, 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.