

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

**Stella B. Werner Council Office Building
100 Maryland Avenue, Suite 217
Rockville, Maryland 20850
(240) 777-6600
www.montgomerycountymd.gov/boa/**

Case No. A-6719

PETITION OF DR. JONATHAN HODOR AND LEAH GREENSPAN

OPINION OF THE BOARD

(Public Hearing Date: November 10, 2021)
(Effective Date of Opinion: November 19, 2021)

Case No. A-6719 is an application by Petitioners Dr. Jonathan Hodor and Leah Greenspan for two variances needed for the construction of an accessory structure (shed). The construction requires a variance of 7.40 feet as it is within 4.60 feet of the right side lot line. The required setback is twelve (12) feet, in accordance with Section 59-4.4.7.B.2 of the Zoning Ordinance. In addition, the construction requires a variance to be located forward of the rear building line. Section 59-4.4.7.B.2.a of the Zoning Ordinance requires that accessory structures be located behind the rear building line of the principal building.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on Wednesday, November 10, 2021. All participation was done via Microsoft Teams. Petitioner Jonathan Hodor participated in support of the requested variances, and was represented by Peter Ciferri, Esquire. Abutting neighbor Iris Allard participated in opposition to the request.

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

EVIDENCE PRESENTED

1. The subject property is Lot 23, Flint Hill Community Subdivision, located 7400 Nevis Road, Bethesda, Maryland, 20817, in the R-200 Zone. The Property is an irregular, four-sided interior lot located on the west side of Nevis Road, with an area of 20,086 square feet. The property narrows from front to back, and has an angled rear lot line. The area behind the rear building line drops approximately 14 feet from left to right (south to north). See Exhibits 3, 3(a), 3(c), and 3(f).

2. The Justification Statement (“Statement”) submitted by the Petitioners states that they purchased the subject property in 2010, and that at that time, in addition to containing a home and other features such as a concrete driveway, stone walkways, a rear deck, and backyard improvements, the property also contained a “pre-existing storage shed.” See Exhibit 3. The Statement states that in 2020, Dr. Hodor “rebuilt the pre-existing storage shed with a comparable shed in the same location and substantially the same size and shape; however, he did so without seeking permits for the reconstruction under a mistaken impression that permits were obtained for the original shed [and] that additional permits to reconstruct it were not needed.” The Statement indicates that following a complaint and DPS inspection, the Petitioners were issued a Notice of Violation and then applied for a building permit, which was denied because variances were needed. See Exhibits 3 and 6(d).

3. The Statement cites the narrowness of the property, particularly behind the house, and its slope as conditions unique to the property that necessitate variance relief. See Exhibit 3. In addition, the Statement asserts that the constraints imposed by these conditions are exacerbated by the trees on the property, as follows:

The Variance is appropriate due to the unusual and extraordinary topographic conditions of the Property, which are further aggravated by further extraordinary conditions at the Property including the narrowness of the lot and existing environmental features. When the combination of unique limiting factors at this Property are taken together, strict application of the Zoning Ordinance requirements for accessory structure placement in the R-200 Zone would render a disproportionately negative impact on this Property and owner.

The Property suffers from exceptional topographic conditions. The Property is only 88-feet wide at the rear property line, while front lot line is 105 feet, creating an irregular quadrilateral shaped Lot that is narrower behind the rear building line. Further, the elevation of the rear yard drops from the southern property line to the northern property line by 14 feet.¹ As a result, the backyard has an unusually steep slope from side-to-side of approximately 15.5%. Enclosed as **Exhibit 3** [BOA Exhibit 3(c)] is a site plan from the original construction of the home, demonstrating the steep slopes and other features discussed below.

This significant sloping makes it impractical and unusually difficult to construct a shed in the rear yard, as required by 59-4.4.7.B.2.a., because doing so would require significant engineering, likely including adding a stepped foundation with deep footings in order to keep the shed level. Providing access from the front of the shed would then likely require significant regrading. Even assuming that the shed could be constructed in this manner, the digging and regrading necessary to install the foundation and access path would likely disturb existing roots and vegetation, even assuming any shed could be safely constructed in that manner.

¹ It is also noteworthy that the minimum lot size in the R-200 zone is 20,000 square feet and this Lot is 20,086. There is very little room to spare at this Property, especially when taken in consideration with the narrow rear lot line. [FOOTNOTE IN ORIGINAL]

In fact, a significant portion of the backyard and the southern side yard are noted on the original building plans as being subject to a "Tree Save Area" that encompasses nearly the entire rear yard, and additionally some portions of the southern side yard, which imposes an additional environmentally sensitive feature upon the Property. **Exhibit 3** [BOA Exhibit 3(c)]. It can be reasonably inferred that the original owner's intent in locating the shed along the northern side yard was to protect against the disturbance of the noted Tree Save Area, and that any replacement of the shed in the rear yard, particularly with a stepped foundation and footings, would cause a disturbance to the Tree Save Area. In order to avoid impinging on the Tree Save Area, the only other buildable area is along the northern side yard. For this reason, also, relief from 59-4.4.7.B.2.a. is appropriate. Additional photos demonstrating the unique conditions here are enclosed collectively as **Exhibit 4** [BOA Exhibits 3(d)(i)-(vii)].

Relief from the 12-foot side setback is also appropriate in this case. The building line is 20.3 feet from the northern property line; however, an existing walkway improvement covers the entire allowable setback area. **Exhibit 1** [BOA Exhibit 3(a)]. Further, a privacy fence is constructed approximately three-feet back from the actual property line, for the benefit of neighboring properties. When these factors are taken into consideration with the above-referenced limitations as to significant slopes and environmental features, the only remaining reasonable location for a shed to be constructed, without imposing practical difficulties unique to the property owner, is along the northern side in substantially the same location as the original shed was constructed and where the Applicant proposes to reconstruct this shed. **Exhibit 1 and 3** [BOA Exhibit 3(a) and (c)].

4. The Statement at Exhibit 3 goes on to state that the requested variances are the minimum reasonably needed to overcome the challenges posed by the topography and shape of the property, and by improvements to the property that existing when the Petitioners purchased it, and that the selected location minimizes the structure's visibility, as follows:

As demonstrated above, the potential locations for a shed are very limited on this Property and the present location is the most appropriate under the circumstances. The design proposed is the minimum necessary to overcome the practical difficulties imposed by the Zoning Ordinance because the shed is constructed in a location that makes it almost entirely obscured from the neighboring property by a pre-existing privacy fence. The fence, itself, is setback from the Property line as well. Further, the proposed shed is flush against the existing walkway improvements, meaning its placement is as close to the side building line as is practical. As a result, the shed placement is also more than four feet back from the property line and requires only a 7.4 foot variance rather than something greater. Replacing the existing shed with a new shed in the exact footprint and location is the minimum variance necessary to overcome the practical difficulties that full compliance would impose.

5. The Statement states that the “proposed reconstruction of the existing shed would be a continuation of the residential character and use of the Property,” and thus can be granted without substantial impairment to the Bethesda-Chevy Chase Master Plan (1990), which the Statement indicates “seeks to ensure continuation of the existing residential character and patterns of development in the area.” In addition, the Statement asserts that granting the requested variance would also avoid impacting the Tree Save Area, which “promotes the Master Plan’s goal of protecting natural resources and environmental qualities.” See Exhibit 3.

6. The Statement states that granting the requested variances will not be adverse to the use and enjoyment of abutting or confronting properties “because the neighborhood has survived for over a decade with the existing shed in the same location,” and that “[a]ny possible neighbor concerns are vastly ameliorated by the fact that this shed is entirely obscured by a fence along the side and rear property lines, as well as existing vegetation.” See Exhibits 3 and 3(d)(i)-(vii). The Statement further states that the new shed matches the aesthetics of the house, and is a “visual improvement” over the prior shed, “which was removed because it was made entirely of wood and was rotting and was beginning to deteriorate.” See Exhibit 3. Finally, the Statement acknowledges that one abutting property owner “has expressed concern about the shed,” and states that the shed “is barely visible without accessing the rear of the yard and is around 100 feet from the rear property line.” See Exhibit 3.

7. The record contains opposition to the grant of the requested variances from the Petitioners’ abutting neighbor to the north, Ms. Allard. See Exhibits 6 and 6(a)-(d). In her submission, Ms. Allard states that there was not a shed on the property when the Petitioners purchased it, and that the current shed could be relocated to the patio area of the backyard. Ms. Allard states in her submission that the shed sits against a tree and fence, and causes drainage and erosion issues for her property. Her submission states that the slope in the Petitioners’ side yard, where the shed is located, is steeper than the slope in the Petitioners’ rear yard. Ms. Allard asserts that the privacy fence is on the property line between her property and the Petitioners’ property, not stepped in from the property line, and that the Petitioners’ site plan inaccurately represents the location of the shed. Finally, Ms. Allard’s opposition describes the impact of the shed on her property:

...The shed sits above the privacy fence and is in place above on a steep, sloping landscape to the adjacent property. With the ADU [*sic*] adjoining the 6 foot tall privacy fence, it blocks sunlight onto the adjacent property. If the setback rule was respected, the crowding and sunlight blocking would not be an issue. Additionally, the environmental impact of erosion cannot be ignored, as erosion and run-off affect both the roadway and my home. It is clearly stated the ADU [*sic*] should have a 12 ft setback from the property line....

See Exhibit 6. Ms. Allard includes photographs of the subject property, including comparative photographs from 2009 and 2021, with her submission, as well as screenshots of a data search regarding the subject property from the DPS website, a timeline of events, an aerial photograph marked to show water flow, and an email exchange with DPS attaching the Notice of Violation. See Exhibits 6(a)-(d).

8. At the hearing, Mr. Ciferri, appearing on behalf of the Petitioners, stated that at 20,086 square feet, the subject property barely exceeds the 20,000 square foot minimum for the R-200 Zone. He stated that the Petitioners' contractor built the shed in question, and did not know that permits were needed. Mr. Ciferri then proceeded to explain for the Board why the subject property meets the criteria for the grant of a variance, expanding on the points made in the Justification Statement. He stated that the property's extreme narrowness, shape and topography, and its environmental features, meet the "uniqueness" test in Section 59.7.3.2.E.2.a.1, adding that the construction also comports with a neighborhood pattern of locating improvements close to the property line, as shown on Exhibit 3(e).

With respect to the topography of the subject property, Mr. Ciferri explained that Exhibit 3(c) shows the sloping nature of the property and illustrates the side-to-side drop across the backyard from south to north, stating that that area has a 15.5% slope. Mr. Ciferri stated that the photographs at Exhibit 3(d) also show this slope. He stated that the property's slope makes it difficult to construct a shed behind the rear building line of the house because engineered fixes or regrading would be required to make the structure level and stable, which he noted was not practical and would cause other problems. Mr. Ciferri stated that Exhibit 3(d)(vii) shows a flat "landing" area on the right side of the property. He asserted that this is the only appropriate place to locate the shed, calling the existing fence and pathway in that area to the Board's attention, and stated that a lot of little pieces combine to limit the available places on the subject property to put the shed.

Mr. Ciferri stated that the property narrows from front to back, giving it an irregular shape, and leaving only a small area to the rear that would not require a variance. With respect to the "tree save" areas marked with clouds on Exhibit 3(c), Mr. Ciferri indicated that the inclusion of these areas evidenced an intent to keep the trees in the marked areas, clarifying that the tree save areas did not indicate a County-imposed requirement that the trees be preserved.

Mr. Ciferri stated that the Petitioners are not responsible for the shape of their property or its severe slope, and that the improvements on the property were in place at the time of their purchase. He stated that the Petitioners are trying to replace a shed in substantially the same location as the previous shed, and that construction of a shed of equivalent size and shape to the previous shed, in the same location, is the minimum necessary to overcome the practical difficulties posed by the property, which he stated has very few places where a shed could be built.

Mr. Ciferri stated that the privacy fence and previously-existing shed were in place for several years without harm to the neighborhood, and that the fence is inside of the property line. He stated that the new shed is a rebuild of an old shed which had started to deteriorate, and is barely taller than the fence. Acknowledging that there would be opposition testimony, Mr. Ciferri asked the Board to use the reasonable person standard.

9. Dr. Hodor testified that there was a shed behind the wall when he purchased his home, and that because it was rotting, he decided to have it replaced. He testified that his contractors built the new shed in early 2020, and that it was screened by a six (6) foot

privacy fence that pre-existed his purchase of the subject property.² Dr. Hodor testified that the new shed is consistent with the aesthetics of his home. He testified that he would like it to remain in its current location because building it elsewhere would cause significant disruption to his backyard on account of its steep slope.

In response to Board questioning, Dr. Hodor testified that there is a brick walkway from the front of the property to the rear, and that the grade of the backyard beyond the patio is extremely steep. See Exhibits 3(d)(i), (ii), (iii), and (iv). In response to further Board questioning, he testified that the new shed has a footprint of approximately 80 square feet. See Exhibit 4. He testified that the new shed is in the same place and has the same width the old shed, but that it extends further back on his property because it is longer than its predecessor; he further testified that the new shed has a pitched roof. Dr. Hodor testified that the new shed has an air conditioner that runs for ten- to fifteen-minute increments during the summer to combat humidity and keep things in the shed from corroding. In response to a Board question asking if there was any place the shed could be located in the rear yard, Dr. Hodor testified that he had evaluated having the shed installed on the opposite (left) side of his house, but that there was a generator in that location, and that farther back on the property there is a steep slope such that the grade would require a lot of reconstruction.

Dr. Hodor testified that since posting the variance sign, he had spoken with several of his neighbors, including his neighbor to the left, his neighbor across the street, and his neighbor on the right side of Ms. Allard's house, all of whom support the Board's grant of the requested variances. He stated that his neighbor to the right (Ms. Allard) is the only person who has an issue with his request.

In response to Board questioning at the end of the hearing, Dr. Hodor testified that he has water issues from his uphill neighbor, and that he would be willing to work with Ms. Allard to try to address the runoff issues between his property and hers.

10. Ms. Allard testified that there was not a shed on the property in 2010, because there was a complete rebuild of the property at that time.³ She later testified, in response to Board questioning, that there was a shed on the property prior to construction of the current shed, but that the prior shed was not on the property when the Petitioners purchased the property. Ms. Allard testified that the prior (old) shed caused problems on her property, and that the rebuilt (new) shed had amplified these problems.

Ms. Allard testified that the Petitioners built the shed in question before seeking the necessary permits. She testified that the terrain between the subject property and her own property is steep and causes runoff onto her property and erosion, noting that the photographs she submitted show this. See Exhibit 6. Ms. Allard testified that she had the County's Rainscapes program come to her property to address the erosion issue, and that that is where she got the report showing water flow.

² Dr. Hodor testified in response to Board questioning that he had recently had two fence panels replaced because they had started to rot.

³ Dr. Hodor interjected at this point that he purchased the subject property in December, 2009, and moved into the house in January, 2010. He testified that the house was constructed one and a half years before he moved in, concluding that it was likely therefore completed in 2008 or 2009.

Ms. Allard testified that the privacy fence is on the property line, and that she knows this because there was a chain link fence there when she bought her house.⁴ She testified that the new shed is up against the fence and a tree, and that the Petitioners cannot service the fence or shed without coming onto her property. Ms. Allard testified that with half-acre properties, there should be room to locate this shed elsewhere.

11. Mr. Ciferri acknowledged that Ms. Allard does live downhill from the subject property. In response to her testimony about the topography of the subject property, Mr. Ciferri noted that Exhibits 3(a) and 3(c) were professionally prepared and speak for themselves. He noted that Ms. Allard has not provided any evidence that would contradict these Exhibits.

FINDINGS OF THE BOARD

Based on the binding testimony and the 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.i exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;

The Board finds, based on Exhibit 3, as recounted herein, and Exhibit 3(c), and based on the testimony of Dr. Hodor, that the subject property is encumbered with steep topography that limits construction behind the rear building line of the house. The Board further finds, based on Exhibit 3(c), that the subject property has a relatively shallow backyard owing to its shape, and that this, combined with the property's steep slope, constitutes a unique condition peculiar to this property, 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, based on the Statement, that the Petitioners purchased the subject property in 2010, and are not responsible for its topography, shape, or shallow backyard, 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;*

⁴ In response to a Board observation that the Existing Conditions Site Plan, in the record at Exhibit 3(a), clearly shows the property line outside of the fence line, Mr. Ciferri stated that the hatched line on the north side of the property is the privacy fence, and that the dotted line is the stucco wall; he noted that both are inside the property line.

The Board finds, based on Exhibits 3 and 3(c), and on the testimony of Dr. Hodor, that the property's steep slope and shallow backyard, and the existing pathway and fence on the right side of the house, limit the area available for the construction of a shed in accordance with the development standards set forth in the Zoning Ordinance, causing the Petitioners a practical difficulty. The Board further finds, in accordance with the Statement, that the requested variances are the minimum needed to overcome this practical difficulty and to allow the proposed location for the new shed. The Board notes, based on the Statement and testimony of Dr. Hodor, that the location of the new shed is the same as the location of the prior (old) shed, which was on the subject property when the Petitioners bought it. Accordingly, the Board finds 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 construction of the proposed shed will continue the residential use of the home, and thus finds that the requested variances can be granted without substantial impairment to the intent and integrity of the applicable Bethesda-Chevy Chase 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.*

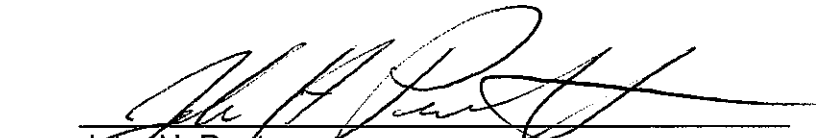
The Board finds, per the Statement, photographs, and the testimony of Dr. Hodor, that the proposed shed, while longer than its predecessor, will be in the same location as its predecessor, and will be largely screened by the existing privacy fence. The Board further finds, based on the testimony of Dr. Hodor, that he has spoken with several of his neighbors, and that they support the grant of the variances. Finally, the Board notes that Petitioners' abutting neighbor to the north, Ms. Allard, has asserted that the shed poses runoff and erosion problems for her property, and that Dr. Hodor has agreed to a Board suggestion, as noted below, intended to help alleviate this problem. In light of the foregoing, the Board finds that granting the requested variances will not be adverse to the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test.

Accordingly, the requested variances needed to allow construction of an accessory structure (shed) are **granted**, subject to the following conditions:

1. The Petitioners shall be bound by the testimony and exhibits of record; and
2. Construction shall be in accordance with Exhibits 3(a) and 4; and
3. The Petitioners shall engage the services of a third-party organization, acceptable to Ms. Allard, to prepare a plan to mitigate any runoff towards Ms. Allard's property that is created by the Petitioners' shed, and in accordance with this plan, shall be responsible for making the recommended adjustments to their property needed to address this runoff.

Based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Richard Melnick, with Mary Gonzales and Caryn Hines in agreement, and with Vice Chair Bruce Goldensohn opposed, 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 19th day of November, 2021.



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.