

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6721

PETITION OF HEATHER SCHMIDT AND ALEX MENENDEZ

OPINION OF THE BOARD

(Opinion Adopted November 17, 2021)
(Effective Date of Opinion: December 3, 2021)

Case No. A-6721 is an application for two variances needed for the proposed construction of an accessory structure (swimming pool). The proposed construction requires a variance of sixty (60) feet from the required front setback of sixty (60) feet imposed by Section 59-4.4.9.B.2 of the Zoning Ordinance. In addition, the proposed construction requires a variance to be located forward of the rear building line. Section 59-4.4.9.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 November 17, 2021, using Microsoft Teams. Petitioners Heather Schmidt and Alex Menendez (the "Petitioners") participated in support of the requested variances, and were represented by Soo Lee-Cho, Esquire.

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

EVIDENCE PRESENTED

1. The subject property is Lot 17, Block K, Woodside Park Section 5 Subdivision, located 9114 Fairview Road, Silver Spring, Maryland, 20910, in the R-60 Zone. It is a corner property, 14,116 square feet in size, situated on the west side of the intersection of Highland Drive and Fairview Road. Although the "point" where this property's front lot lines come together is arced, if these lot lines were extended to their natural intersection, they would form a severely acute angle. Unlike the front lot lines, the subject property's side and rear lot lines meet at a significantly obtuse angle. The result is that the subject property has an unusual diamond shape. See Exhibits 4 and 9(a).
2. The Justification Statement ("Statement") describes the property as "an unusual diamond shaped corner lot that has frontage along both Highland Drive and Fairview

Road as shown on Plat No. 771....” See Exhibit 3. The Statement states that despite the property’s size, “most of the lot area is unusable for construction of structural improvements due not only to the dual street frontages but the extreme angle at which the streets intersect at the property.” See Exhibit 3.

3. The Statement indicates that the subject property was subdivided in 1937, and is improved with a home built in 1948 that is oriented to the south, such that it faces Fairview Road. There is a six-foot board-on-board fence on the property that “encircles an area adjacent to the east side of the main house that functions as the property’s ‘rear’ yard.” This is where the Petitioners propose to locate their 20 foot by 40 foot in-ground pool. The Statement states that “the existing lot shape and angled intersection of the two streets along this corner property do not allow a traditional rear yard configuration where an in-ground pool and other common recreational amenities enjoyed by residences can be accommodated,” and further indicates that “[a]s reflected by Plat No. 771, this is a condition that uniquely afflicts the subject property like no other lot within the block and subdivision.” Finally, the Statement notes that “[t]he location of the in-ground pool within the fenced area is further constrained by existing mature tree(s) that the property owners seek to retain to maintain as much screening/privacy along the north side of the fenced area as possible.” See Exhibit 3.

4. The Statement states that the Petitioners are not responsible for the shape of their property, which was platted in 1937, and that construction of the proposed pool will not impair the intent and integrity of the applicable North and West Silver Spring Master Plan (2000). See Exhibit 3. Finally, the Statement states that granting the variances to allow construction of the proposed pool will not be adverse to the use and enjoyment of neighboring properties because “it is consistent with the established use of the fenced area as the enclosed rear yard of the subject property for over 13 years.” See Exhibit 3.

5. The record contains letters of support for the grant of the requested variances from the Petitioners’ abutting neighbors on Highland Drive, and from their abutting neighbors on Fairview Avenue. See Exhibits 7 and 11.

6. At the hearing, Ms. Lee-Cho oriented the Board to the location of the property, and described it as having a “diamond shape” caused by its frontage along the “V-shaped intersection” of Highland Drive and Fairview Road. She stated that this circumstance creates a constraint on the property, which she said does not have a rear yard. Ms. Lee-Cho stated that the proposed in-ground swimming pool is considered an accessory structure, and thus needs a variance from the 60 foot accessory structure setback from the front lot line, and in addition, needs a variance to be located forward of the home’s rear building line. She added that there is no place on this property where a traditional “rear yard” can be identified. Finally, Ms. Lee-Cho stated that Plat 771 shows that the subject property has a different shape and configuration than the surrounding lots.

7. Ms. Schmidt testified that she owns the subject property, and has lived there for 15 years. She testified that she and Mr. Menendez are proposing to locate a 20 foot by

40 foot rectangular pool in the property's fenced-in side yard because the property does not have a rear yard. She walked the Board through the photographs of the subject property from various angles. See Exhibits 5(a)-(d). Ms. Schmidt testified that they were issued a permit for the existing fence in 2008. She showed a site plan excerpt, contained in Exhibit 3, with the fence location marked in orange, and stated that there are two trees within the fenced area and shown on the Site Plan that they would like to keep.

Ms. Schmidt testified that the subject property has an extraordinary shape that is not similar to any other properties in their development. She testified that the subject property is a corner property with nothing but front yard, and that there are no other diamond-shaped properties with no back yard. Ms. Schmidt testified that there is no place on the subject property other than the site proposed to locate the proposed pool, and that the requested variances are the minimum necessary to overcome the practical difficulty posed by full compliance with the Zoning Ordinance due to the shape of the property.

Ms. Schmidt testified that she and Mr. Menendez have reached out to their neighbors, that the record contains letters of support from the abutting neighbors on either side of their property, and that they have talked with other neighbors, all of whom support the project.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the 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 the Statement, Site Plan, and testimony of record, that the subject property has an unusual diamond shape, with frontage on two streets that converge at a severely acute angle, and a rear and side lot line that converge at an obtuse angle leaving no rear yard. The Board further finds, based on the Statement and Plat 771, that "this is a condition that uniquely afflicts the subject property like no other lot within the block and subdivision." See Exhibits 3 and 4. Accordingly, the Board finds that this constitutes an unusual 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 and testimony of Ms. Schmidt, that the Petitioners purchased the subject property after its subdivision and subsequent construction of the existing house. See Exhibit 3. Thus the Board finds that the special circumstances or conditions applicable to this property are not the result of actions by the Petitioners, 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 that the unusual shape of the subject property causes the setback and locational requirements of the Zoning Ordinance to severely constrain the buildable area on this property, and preclude the location of the proposed accessory structure (swimming pool) in the rear yard, as required, creating a practical difficulty for the Petitioners. The Board further finds that the requested variances are the minimum needed to overcome this difficulty and to allow construction of the proposed swimming pool on the property in an area of the property which, due to the property's unusual shape, is the only area available and has historically been used as the property's rear yard. See Exhibit 3. Thus the Board finds that the requested variances are the minimum necessary to overcome the practical difficulties imposed by compliance with the locational and setback restrictions of the Zoning Ordinance, in satisfaction of the element of the variance test.

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 granting the requested variances to allow the Petitioners to construct an accessory structure (swimming pool) on the subject property would continue the residential use of the home, and thus the Board finds that the requested variances can be granted without substantial impairment to the intent and integrity of the applicable North and West Silver Spring Master Plan (2000), 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.*

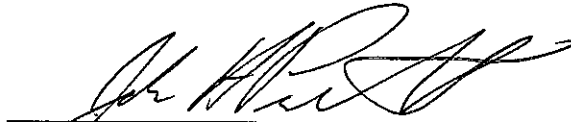
The Board finds, based on the Statement, that the proposed accessory structure (swimming pool) will be located behind an existing privacy fence in the area that has historically be used as the subject property's rear yard. See Exhibit 3. The Board further finds that the record contains letters of support from the Petitioners' abutting neighbors on both sides, and that per Ms. Schmidt, other neighbors are supportive. See Exhibits 7 and 11. In light of this, the Board finds that granting the requested variances will not be adverse to the use and enjoyment of neighboring properties, in satisfaction of this element of the variance test.

Accordingly, the requested variances, necessary to allow construction of the proposed accessory structure (swimming pool), are **granted**, subject to the following conditions:

1. Petitioners shall be bound by the testimony and exhibits of record; and
2. Construction shall be in accordance with Exhibit 4.

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Caryn Hines, with Bruce Goldensohn, Vice Chair, 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 3rd day of December, 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.