

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Rockville, Maryland 20850
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Case No. A-6745

PETITION OF SCOTT AND MARGARET KABAT

OPINION OF THE BOARD
(Hearing Held: May 11, 2022)
(Effective Date of Opinion: May 18, 2022)

Case No. A-6745 is an application by Scott and Margaret Kabat (the "Petitioners") for a variance needed in connection with the proposed construction of a shed. The proposed construction requires a variance to be located forward of the rear building line. Section 59.4.4.9.2.a of the Montgomery County Zoning Ordinance requires that accessory structures be located behind the rear building line of the principal building.

The Board of Appeals held a hearing on the application on Wednesday, May 11, 2022. Petitioner Scott Kabat appeared in support of the requested variance.

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

EVIDENCE PRESENTED

1. The subject property is Lot 23, Block 2, Capitol View Park Subdivision, located at 10245 Capitol View Avenue in Silver Spring, Maryland, 20910, in the R-60 Zone. It is approximately 21,683 square feet in size, and is described in the Petitioners' variance application as being "not close to rectangular" but rather "trapezoidal" in shape, with a significant setback from the street. The property has curved frontage along the north side of Capitol View Avenue, and as noted in the Petitioners' Statement of Justification ("Statement"), is "considerably wider at the street than at the back." See Exhibits 1, 3, 4(a), and 8.

2. The Statement states that the property "slopes down approximately 12 feet from the front of the house and continues its slope past the back to the Forest Conservation Easement line." It notes that this Category 1 Forest Conservation Easement precludes

the location of the proposed shed behind the house. In addition, the Statement indicates that the property's side yard "supports water runoff from Capitol View Avenue." See Exhibit 3. The Petitioners include photographs depicting their property's slope and the runoff from Capitol View Avenue with their submission. See Exhibits 5(a) and (b). They also include Site Plans showing (1) the location of the Category 1 Forest Conservation Easement; (2) the drainage area described in the Statement; and (3) the contour lines of the property. As clearly shown on the Site Plans, the Forest Conservation Easement traverses the rear portion of the Petitioners' property at a diagonal, occupying nearly all of the area behind their home and part of the area on the east side of their house. See Exhibits 4(a)-(c).

The Petitioners' variance application describes the limitations that the Forest Conservation Easement and drainage area place on the location of the proposed shed. The application states that "drainage from state road cuts through property along side further precluding usage" and that a "forest easement engulfs almost all of the back yard making rear placement of the shed impractical," concluding that the "shed does not fit in [the] back yard." See Exhibit 1.

The Statement asserts that the property's narrowing shape and slope make it unique for the purposes of satisfying Section 59.7.3.2.E.2.a.i of the Zoning Ordinance, and that the property's Category 1 Forest Conservation Easement constitutes an environmentally sensitive feature that makes the subject property unique for the purpose of satisfying Section 59.7.3.2.E.2.a.iii. See Exhibit 3.

3. The Statement states that the subject property is located in the Capitol View Historic District, and thus satisfies Section 59.7.3.2.E.2.a.iv of the Zoning Ordinance. The Statement states that the Historic Preservation Planner recommended that the shed be located as proposed instead of in the backyard. See Exhibit 3. The Petitioners included a copy of the Montgomery County Historic Preservation Commission Staff Report ("Staff Report") with their variance application. See Exhibit 7. The Staff Report recommends approval of the requested Historic Area Work Permit for installation of the proposed shed and other improvements, finding that the proposed improvements will "have a minimal impact on the character of the historic site and surrounding district." The Staff Report indicates that installing the proposed shed behind the house "is not feasible" because of the conservation easement, and concludes that the shed, as proposed, is acceptable, as follows:

While Staff does not want to make a habit of recommending approval of accessory buildings in the side yard of properties in historic districts, this is an instance where it appears to be appropriate. The lot to the east is undeveloped and based on the boundary of the conservation easement appears to be unbuildable. The shed will not detract from a sense of openness that is typical in the more suburban historic districts, and it will be far enough away from the house that the shed's appearance will not detract from the historic character. The applicant also selected the design of the proposed shed for its metal roof to tie the accessory structure to the historic porch roofing.

Staff finds design and materials of the shed are appropriate for the site and district. Staff additionally finds that the location of the shed is driven by a lack of other options and, finding that the preferred location is infeasible, the proposed location is acceptable. Staff recommends the HPC approve the shed under 24A-8(b)(1), (2) and (d), and Standards 2, 9, and 10.

See Exhibit 7. Finally, the Statement states that as discussed in the Staff Report, the proposed shed would substantially conform with the established historic development pattern of a street or neighborhood, in satisfaction of Section 59.7.3.2.E.2.a.v of the variance test, noting that the proposed shed "will be the same color as the historical house and will have a red metal roof which is the same as the historical house." See Exhibit 3.

4. The Statement states that the Petitioners purchased the subject property in 2019, and are not responsible for any of the factors that make it "unique" for the purposes of Section 59.7.3.2.E.2.a of the Zoning Ordinance. See Exhibit 3.

5. The Statement states that the Petitioners have located the proposed shed as far back on the property as they can without having to remove trees, and that the requested variance is thus the minimum needed to overcome the practical difficulties that the unique features of their property pose for them. See Exhibit 3.

6. The Statement states that the proposed shed will not be adverse to the use and enjoyment of neighboring property owners because the side of the house on which the shed is proposed abuts an outlot. See Exhibit 3.

7. At the hearing, Mr. Kabat testified that his and his wife purchased the subject property in 2019. He testified that it is located in the Capitol View Historic District, and was originally developed in the late 1890s. Mr. Kabat testified that when the original property was subdivided in the 1990s, an easement was put in the back yard, making that space "very tight." Mr. Kabat testified that after receiving permission from the County's Historic Preservation Commission to undertake the proposed construction, he and his wife went to the County's Department of Permitting Services to get their building permit, and were told that they would need to obtain a variance before the permit could be issued.

Mr. Kabat testified that the subject property is oddly shaped, with a "giant" front yard relative to its back yard. He testified that the yard slopes down about 12 feet from the front of the house to the back, and that this slope makes it difficult to locate a shed. Mr. Kabat testified that because of a channel that carries drainage through his yard from Capitol View Avenue, the proposed shed cannot be located any closer to the house. Mr. Kabat testified that the photograph at Exhibit 5(a) shows water in this channel, and is representative of the runoff that occurs with any "decent" storm.

Mr. Kabat testified that he has spoken with his neighbor to the west (left), and that that neighbor has no problem with the proposed construction. He testified that none of his other neighbors have expressed opposition to the proposed construction. Mr. Kabat testified that the abutting property to the east (right) of his house is an outlot that is currently not developable.

In response to a Board question asking where the proposed shed would be located relative to the two large trees shown on Exhibit 5(c), and whether those trees would be removed in connection with the construction, Mr. Kabat used the Site Plan in the record at Exhibit 4(b) to explain the location of the proposed shed, and testified that the trees would not be removed.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the requested variance can be granted. The variance complies with the applicable standards and requirements set forth in Section 59-7.3.2.E.2, 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, per the Statement and Site Plans, and as confirmed in testimony, that the subject property narrows front to rear, and that the area behind the rear building line of the Petitioners' house is encumbered with a Category 1 Forest Conservation Easement and a steep slope. The Board finds that these circumstances limit the area available behind the rear building line of the house for the construction of the proposed accessory structure, and constitute an extraordinary condition that is peculiar to this property, in satisfaction of this element of the variance test.

Section 59.7.3.2.E.2.a.iii. - the proposed development contains environmentally sensitive features or buffers;

As noted above, the subject property is encumbered with a Category 1 Forest Conservation Easement. See Exhibits 3 and 4(a). The Board finds that this easement constitutes an environmentally sensitive feature, 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 Statement and testimony of record indicate that the Petitioners purchased the subject property in 2019, and that they are not responsible for their property's shape or slope, or for the Category 1 Forest Conservation Easement across its rear. 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, based on the Statement, Site Plans, Montgomery County Historic Preservation Commission Staff Report, and testimony of record, that the proposed shed cannot be located behind the rear building line of the Petitioners' house because of the constraints placed on that area by the Category 1 Forest Conservation Easement and by the property's slope and narrowness. The Board further finds that allowing the Petitioners to locate their proposed shed in their side yard is the minimum necessary to overcome the practical difficulty that is posed for the Petitioners by these constraints. In addition, the Board notes that the proposed location has been approved by staff to the Historic Preservation Commission. See Exhibits 3, 4(a)-(b), and 7. Thus 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 the proposed construction will continue the residential use of the subject property. The Board further finds, based on the Statement, Staff Report, and testimony of record, that the location of the proposed shed has been reviewed and approved by the County's Historic Preservation Commission. See Exhibits 3 and 7. Accordingly, the Board finds that the requested variance can be granted without substantial impairment to the intent and integrity of the relevant plans, 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 that granting a variance to allow the proposed shed 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 finding, the Board notes that the Statement indicates that the side of the house on which the shed will be located abuts an undeveloped outlot that the Staff Report indicates is "unbuildable" because of the Forest Conservation Easement. The Board further finds, per the Statement and the Staff Report, that the materials to be used for the shed are appropriate for the historic district and are similar to those of the historic home. See Exhibits 3 and 7. Finally, the Board notes, per the testimony of record, that the Petitioners' neighbor to the west has no problem with the proposed construction, and that no other neighbors have voiced concerns.

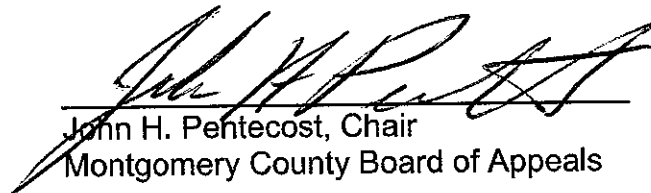
Accordingly, the requested variance to allow the proposed construction of a shed forward of the rear building line is **granted**, subject to the following conditions:

1. The Petitioners shall be bound by the testimony and exhibits of record.

2. Construction shall be in accordance with Exhibits 4(a)-(b) and 7.

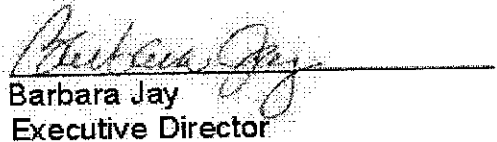
Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Caryn Hines and Roberto Pinero in agreement, the Board adopted the following Resolution:

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 May, 2022.



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.