



**EVIDENCE PRESENTED**

1. The subject property is Lot 6, Block F, Maplewood Subdivision, located at 5208 Danbury Road in Bethesda, Maryland, 20814, in the R-60 Zone. It is a 5,882 square foot interior lot, roughly rectangular in shape, located on the south side of Danbury Road. See Exhibits 3 and 7(a).
2. The property was previously improved with a single family house that was built in the 1940s. The original house has been razed, and the replacement house being constructed on the property is approximately 90 percent complete. See Exhibit 3.
3. The Petitioner's Statement of Justification ("Statement") states that the Petitioner owns the subject property. The Statement states that the Petitioner is the architect who "designed the new residence for himself and his family," and that he is also the "general contractor responsible for construction of the new house." See Exhibit 3.
4. The Petitioner needs the three variances he is requesting in order to be able to complete his home. The Statement at Exhibit 3 describes the Petitioner's predicament as follows:

Through an unfortunate series of misunderstandings and misinterpretations of the Montgomery County Zoning Ordinance, compounded by incomplete review of the building permit application for the proposed new structure by the Montgomery County Department of Permitting Services, it has been determined that the building under construction at 5208 Danbury Drive, Bethesda is not in complete compliance with all applicable provisions of the Montgomery County Zoning Ordinance. Because the new house is at a state of approximately 90% completion, corrective measures to bring the structure into compliance cannot be implemented without significant modifications to the design and to the structural aspects of the building and cannot be accomplished without severe hardship to the Applicant and his family. Therefore, this application for three distinct variances is intended to make the residence under construction a compliant structure.

5. The Statement describes the errors that lead to the need for each of the three variances, and the practical difficulties that correction of those errors would pose for the Petitioner.

With respect to lot coverage, the Statement notes the failure of both the Petitioner and the DPS reviewer to identify the applicability of the reduced lot coverage restrictions in Section 4.4.1.B of the Zoning Ordinance (Residential Infill Compatibility) to the subject property instead of the standard R-60 lot coverage restrictions.<sup>2</sup> The Statement states that this error was further compounded by the fact that "[t]he Applicant was not aware, and the MCDPS reviewer apparently overlooked, the fact that building coverage is based on the amount of area covered by any extension of the building protruding beyond the facades of

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<sup>2</sup> The Statement states that the Petitioner mistakenly believed he was allowed to have up to 35% lot coverage because his property was in the R-60 Zone, and so "designed his new residence to achieve a coverage ratio of 34.42% (5,882 square feet platted lot area; 2,025 square feet computed building footprint = 34.42%)..." See Exhibit 3.

the building. In other words, 'coverage' is measured from the 'drip line' rather than from the exterior of the foundation wall." The Statement states that the Petitioner's house "has a 'First Floor Overhang' that extends out four (4) feet beyond the rear foundation wall of the house under construction," and that "[t]his enclosed area increases the 'coverage' number from 2,025 square feet to 2,103 square feet or from 34.42% to 35.76%." The Statement describes the hardship that correction of this mistake would pose for the Petitioner, stating that "[i]t is virtually impossible to rectify the design of the building without major reconstruction to remove the enclosed overhang area or to 'shrink' the underlying footprint of the structure at the ground level." See Exhibit 3.

In addition, the Statement notes that the Petitioner mistakenly believed that property line setbacks were measured from the structure's foundation and not "from the face of the structure closest to the property line," and states that the DPS reviewer was either under the same misconception or "did not recognize that the 'Overhang 1<sup>st</sup> Floor' was an enclosed area that encroached into the twenty (20) feet rear yard setback by four (4) feet." The Statement states that because of the four (4) foot overhang, the house is located only 16 feet from the rear lot line, and further states that "[i]t is not technically or financially feasible to remove the constructed enclosed area in order to restore a twenty (20) foot rear yard setback." See Exhibit 3.

Finally, with respect to height, the Statement states that the home's 0.1 foot of excess height "is due to changes in average grade along the front of the proposed structure due to reconstruction of two wooden retaining walls located to the left (south) of the original structure which left the grade along the front of the proposed residence slightly different than what was expected when Mr. Tabriz designed his new home." The Statement goes on to assert that "[o]ften a differential of 0.1 foot would be considered a *de minimis* deviation from the standard of the County Zoning Ordinance," but that this deviation was "identified and reported in this case as a result of the intense scrutiny of the building plans for the proposed structure." The Statement concludes that "[a]s a practical matter, the minor deviation from allowable height is virtually undetectable when viewing the new residence from any vantage point," and states that because the structure has a flat roof, "there is no easy solution to reduce the height of the building by 1.2 inches." See Exhibit 3.

6. The Statement states that the property's small size makes it unique, describing the property as follows:

Lot 6, Block F is a regularly shaped rectangular lot with no unusual features in its shape. However, the lot, at 5,882 square feet in area, is the next to smallest lot in Block F (six lots total in Block F) and confronts two lots in Block E which are 6,469 square feet (Lot 11) and 8,548 square feet (Lot 12) in size respectively. Therefore, the subject property is small in size relative to its neighbors and thus has less flexibility in the siting of a structure or in implementing corrections to the problems described in this Statement.

See Exhibit 3. The Statement further notes that there is a "substantial topographic difference" between the rear of the subject property and the abutting properties to the south that face on Chandler Drive (Lots 14 and 15), later stating that the rear of the subject property has "steep slopes." See Exhibit 3.

7. The Statement states that the Petitioner's house "sit[s]' on its lot in the same general setting as the neighboring structures," and thus asserts that the Petitioner's home "substantially conforms with the established historic or traditional development pattern of [the] street or neighborhood," despite being different in style than the original surrounding houses, which the Statement indicates were constructed in the 1940s and 1950s. See Exhibit 3.

8. The Statement states that the special circumstances or conditions that make this property unique are not the result of actions by the Petitioner, stating that "[t]he need for the requested variances in this case [is] driven not by features of the lot shape or natural conditions. The problems are created by a joint misinterpretation of the applicable provisions of the Zoning Ordinance and an inability on the part of the Applicant due to the small lot size to be able to undertake any reasonable measures to correct the problems." See Exhibit 3.

9. The Statement asserts that the variances sought are the minimum reasonably necessary to overcome the practical difficulties that full compliance with the Zoning Ordinance would impose due to the unusual or extraordinary situations or conditions on the property, and states that the Petitioner is "simply request[ing] permission to leave the existing construction untouched." See Exhibit 3. The Statement then summarizes the practical difficulties that the Petitioner would suffer if he were made to bring the existing structure into compliance:

Mr. Tabriz cannot "shave off" the enclosed "First Floor Overhang" without significant expense including structural modifications to the framework of the building.

An even greater hardship would be suffered by Mr. Tabriz if he had to shrink the "footprint" of the foundation walls to fit the building within the 30% coverage limitation. It would be virtually impossible to move the basement walls without removing the structure above them. Such action would be an extreme hardship on the Applicant to accomplish.

10. With respect to Master Plan compliance, the Statement states that the Bethesda-Chevy Chase Master Plan "envisioned the 'Maplewood' area as a mature single family detached residential neighborhood and the Applicant's proposal maintains that character while 'updating' the 'look' of the neighborhood." Thus the Statement concludes that "[t]he granting of the requested variances is not inconsistent with the intent and the integrity of the Master Plan." See Exhibit 3.

11. The Statement asserts that granting the requested variances to allow the Petitioner's house to remain will not be adverse to the use and enjoyment of abutting or confronting properties, stating that the height and lot coverage variances are basically undetectable when viewing the house, and that "[t]he rear yard setback variance addresses the extension off part of the rear of the first floor of the house. But the basement level below, and the bedroom level (second floor) above, both meet the twenty (20) foot setback requirement, so the extension into the rear yard involves only 25%- 30% of the rear plane of the house

and, therefore does not significantly encroach into the 'open space' that the Zoning Ordinance intends to establish." See Exhibit 3.

12. Prior to the hearing, the Board received three email letters supporting the grant of the variances from neighbors of the Petitioner. See Exhibits 18, 19, and 20. The first letter, from Bruce Leshan, whose property (5209 Chandler Street) abuts the subject property to the rear, indicates that job obligations prevent him from testifying at the hearing. Mr. Leshan's letter states that if anyone should be concerned about the height, setback, and lot coverage of the Petitioner's house, he should be concerned, but his letter states that "none of those issues bother [him]." See Exhibit 18. With respect to height, Mr. Leshan's letter states that "Mr. Tabriz has set back the third floor of his home, leaving an open deck on top of the second floor for the portion backing on my property. I cannot see his third floor office from anywhere on my property." His letter states with respect to the rear setback of Petitioner's home that the basement and foundation meet the setback, and that "only the first and second floors that encroach, and most of those floors are balconies and windows." His letter states that it does not make sense to force the Petitioner to remove the portions of the first and second floor that violate the rear setback. Finally, Mr. Leshan states in his letter that the Petitioner has "quickly addressed" any issues he has had during the construction process, and that the Petitioner has removed a "blighted" and "derelict" property and is replacing it with an "architecturally pleasing" house that will be an "asset to the community." See Exhibit 18.

The remaining two letters, one from a neighbor who resides at 5205 Danbury Road and the other from a person who lives in the Maplewood-Alta Vista neighborhood, also remark about the unkempt and dilapidated state of the previous home on the subject property, and urge the Board to approve the requested variances so that the construction of the Petitioner's new house can be completed. See Exhibits 19 and 20.

13. At the hearing, Petitioner Reza Tabriz testified that he purchased the subject property in October, 2019, and that he is the owner, designer, engineer, and builder of 5208 Danbury Road. He testified that he is an architect and a licensed structural and civil engineer, and that he designed the house. The Petitioner testified that he owns Prime Solutions Group, which does residential and commercial projects in the area.

The Petitioner testified that when he purchased the subject property, he lived next door at 5210 Danbury Road, in a house owned by his cousin. He testified that at the time of his purchase, the house on the subject property was abandoned and not habitable, having been damaged by flooding. The Petitioner testified that he welcomed the challenge of constructing a new home on what he referred to as a "steep lot," testifying that the subject property drops about 25 feet from Danbury Road to its rear lot line (front to back), and also slopes downhill across the front from right to left. He noted that Danbury Road is almost the highest point of the Maplewood subdivision, and testified that property elevations change from lot to lot.

The Petitioner testified that when he purchased the property, there were two wooden retaining walls on the left side of the house, and stairs down along the right side. He stated that there was also a retaining wall in the back of the property. See Exhibit 23.

The Petitioner testified that he used the R-60 standards in the Zoning Ordinance and the guidance documents on the DPS website as a starting point for the design of his home. He testified that the standard allowable lot coverage in the R-60 Zone is 35 percent, and that nothing on these documents indicates that it might be less than 35 percent. See Exhibit 24. Accordingly, the Petitioner testified that he designed his new house to have 34 percent lot coverage. With respect to the setbacks, the Petitioner testified that he designed his new home to be 20 feet from the foundation wall to the rear property line, in order to meet the 20 foot rear setback. He testified that this was based on years of designing houses and using their footprints—not their cantilevered overhangs—to determine setback compliance; he stated that he had since learned that this is not how DPS calculates setbacks. The Petitioner testified that the four (4) foot overhang on the rear of his house was not included in the setback calculation from the rear lot line. The Petitioner testified that based on the R-60 standards, he applied an eight (8) foot minimum side setback and an 18 foot sum of both sides setback to the construction, as well as a 25 foot front setback. With respect to height, the Petitioner testified that the height of the new house was calculated using the existing grade at the front of the proposed building. He testified that he had surveyed the property, and had determined that the average elevation was 336.3 feet. He testified, based on this, that his new house has a height of 35.1 feet. See Exhibit 26.

The Petitioner testified that when he submitted his building permit application, he thought that it met the Zoning Ordinance standards. He testified that after he filed his application, he had no discussions with DPS, and on February 22, 2021, DPS issued a building permit for his house as he had designed it (Permit No. 916275). See Exhibit 27. The Petitioner testified that he did not know about any compliance issues until he received a telephone call from the County in March of 2022. On March 25, 2022, the Petitioner received an email about infill development, which has a 30 percent lot coverage limitation, from Greg Nichols at DPS. See Exhibit 28. The Petitioner testified that at this time, the house was 90 percent complete. He testified that this instigated a dialogue with DPS, and that he worked with DPS for a couple of months. The Petitioner testified that DPS ultimately issued him a building permit denial, and he applied for the variances that DPS had determined were necessary to permit his house to remain as constructed (0.1 foot height variance, 5.76 percent lot coverage variance, and four (4) foot variance from the rear lot line setback). See Exhibit 29.

The Petitioner testified that the grant of the requested variances would have no adverse impact on the use and enjoyment of neighboring properties. He testified that as shown on the photograph at Exhibit 30, his home is situated so that when viewed from Chandler Street, it sits "between" the homes on the two properties that abut his property to the rear. He testified that he designed the rear of his house with a balcony on the right side (as you face the rear of the house), four windows in the center, and white stucco on the left side, to avoid impact on the properties abutting the subject property to the rear (Teeters and Leshan properties). The Petitioner testified that he chose the stucco color because he did not want it to have an impact. He further testified that the balcony is allowed to project into the setback, and does not count towards lot coverage. In addition, the Petitioner testified that because of his property's steep slope and the resultant height difference between his property and the abutting properties to the rear, the linear distance between his house and the houses behind him is longer than it would otherwise be, reducing the impact of the requested variances to almost nothing. Finally, the Petitioner testified that

the top floor of his home is stepped back 14 feet from the rear of the house such that you cannot see the roofline, again minimizing its impact.

On cross examination, the Petitioner testified that he is an engineer and a registered builder with 22 years of experience. He testified that he is not a licensed architect, but is a licensed civil engineer, and that he is the general contractor for the construction on the subject property. The Petitioner testified that he owns Prime Solutions, which he testified has "substantial" experience in Montgomery County, citing at least eight (8) design/build projects.

Continuing on cross examination, the Petitioner testified that it is important for design/build contractors to know the Zoning Ordinance, and that he reviewed the Zoning Ordinance in designing his home. He testified that he violated the lot coverage, height, and rear setback established by the Zoning Ordinance with his construction.

The Petitioner testified on cross examination that the size of the subject property is roughly the same as other properties, that it has no environmentally sensitive features, that it is not historic, and that the need for the requested variances was not driven by the physical aspects of the property, but rather was occasioned by his own mistakes. The Petitioner testified that he stopped construction when he found out about the violations, but that with the permission of the County, he kept working to finish the rooftop to prevent damage. He acknowledged that DPS advised him that continuing to work on the house would be at his own risk.

14. Mostafa Pourkiani, P.E., was accepted as an expert in civil engineering and surveying, and testified in support of the requested variances. Referring to the contour map in the record at Exhibit 17(e), Mr. Pourkiani testified that you cannot rely on GIS contours, and that you cannot use GIS mapping for elevation calculations. He testified, by way of example, that retaining walls should show up as breaks on contour maps like Exhibit 17(e), but they don't. Mr. Pourkiani testified that a survey like the one at Exhibit 22 that shows the elevations and retaining walls is more accurate than the GIS contour map at Exhibit 17(e). He testified that since this property is steeply sloped, its elevations change rapidly.

15. Andrew Bradshaw, P.E., was accepted as an expert in professional engineering, and testified in opposition to the requested variances. Mr. Bradshaw testified that he was familiar with the property, and that he had been asked to review the pre-development grade that was used to establish the height of the Petitioner's new home.

Mr. Bradshaw testified that he prepared the contour map at Exhibit 17(e). He testified that GIS is an approximation of elevations, shown in two (2) foot contours; he testified that a contour is always an approximation, not a spot elevation. Mr. Bradshaw testified that when he was asked to look at the subject property, the original house had already been demolished, so he used the GIS map as a starting point for his analysis. Mr. Bradshaw testified that in looking at the available Google maps imagery, and in visiting the property, it was apparent that the front of the property had been raised from its original elevation. Referring to Google map street views of the original house from 2009 and 2014, he testified that these images show stairs going down to the house from Danbury Road, and that even with the two steps up from the walkway to the front of the original house,

there was a significant drop in elevation from the road to the front of the house. See Exhibits 31(a) and (b). Mr. Bradshaw testified that Petitioner's new house is at a higher elevation, as evidenced by its driveway, which slopes up from the street toward the new house. He testified that in his opinion, the existing average elevation in front of the new house is "multiple feet" higher than the pre-development grade. Mr. Bradshaw concluded, based on his analysis using various exhibits from the record, including Exhibits 4 and 22, that the pre-development grade at the front of the home was lower than was calculated by the Petitioner, and that as a result, the amount of the height variance that is needed has been understated.

Mr. Bradshaw testified that Exhibit 32 contains an expanded view of the GIS topographical information for surrounding properties, dating to November 2018. He testified that this Exhibit shows the entire block on the southwest side of Danbury Road. Mr. Bradshaw testified that this Exhibit shows that it is not unusual for properties on this side of Danbury Road to slope from front to back, noting that almost all of the properties share this characteristic. See Exhibit 32.

In response to a question on cross-examination observing that the Petitioner had actually surveyed the subject property and questioning why he would not rely on that survey to calculate the pre-development grade, Mr. Bradshaw testified that he would typically rely on that, but that in this case, the plans did not match up, citing the multiple risers from the street to the house. See Exhibits 31(a) and (b).

16. The Petitioner rebutted Mr. Bradshaw's testimony, and defended his calculation of the pre-development grade, explaining how he had done his calculations. Of note, in the course of discussing this, the Petitioner testified that the subject property drops about seven (7) feet across the front. On cross-examination, the Petitioner testified that he performed the survey in the record at Exhibit 22 with his team.

17. Scott Allen was accepted as an expert in architecture, and testified in opposition to the requested variances. Mr. Allen testified that he had reviewed the Petitioner's original building permit submission. See Exhibit 17(a). He testified that original photographs of the property show the grade sloping down from the street toward the house, whereas photographs of the new house show the property sloping upward towards the house. He testified that as a professional architect, he determines the height of a structure in accordance with the Zoning Ordinance based on the pre-development grade or the new grade, whichever is more restrictive. Mr. Allen testified that there appears to be about a three (3) foot difference between the two, but that in this case, the building height appears to have been calculated as if there was no difference.

Mr. Allen used a set of mylar overlays showing the various floors of the new home relative to the property lines to illustrate lot coverage, and concluded that the Petitioner's home has a lot coverage of 40.69 percent, based on the record plat lot size of 5,882 square feet. See Exhibit 33. He testified that balconies are counted towards lot coverage.

Mr. Allen testified that the original storm water management and sediment control plans were based on lot coverage numbers that are significantly smaller than what was actually constructed, and noted that dry well #2 is located less than 10 feet from the house, which he testified is not allowed. See Exhibit 17(b). Mr. Allen testified that the Grading



Note on Sheet SC-1 indicates that the existing topography is generally staying the same. He testified, based on these and other discrepancies, that he believed the information on the permit application was incomplete and misleading. Mr. Allen testified, based on the photographs at Exhibits 34(a)-(d), that the Petitioner's new house appears to have two (2) foot overhangs on the side and on the front that are not shown on the elevations, that appear to project into the setbacks, and that would add to lot coverage and imperviousness.

Referring to Exhibits 35, 36, and 37, Mr. Allen testified that the size, shape, and width of the other properties on the Petitioner's side of Danbury Road were basically the same as those of the subject property, noting that all of the properties were generally narrow and roughly rectangular in shape, and that three properties were slightly smaller than the subject property while a couple were slightly larger. Mr. Allen testified that there was nothing about the size or shape of the subject property that would necessitate variances from the restrictions in the Zoning Ordinance, as compared with neighboring properties. He testified that in his opinion, the need for the variances was a result of actions by the Petitioner. Mr. Allen further testified that the requested variances were not the minimum necessary, and that the variances could not be granted without substantial impairment to the Master Plan because the current house plan is larger than allowable under the Master Plan. Finally, Mr. Allen testified that in his opinion, the grant of the variances would be adverse to the use and enjoyment of neighbors, testifying that the existing house has an adverse impact because it is almost four stories tall in the rear. He stated that standing at Mr. Teeter's fence line, the Petitioner's retaining wall is taller than he is, and the Petitioner's house appears to be a five story structure.

18. The Petitioner rebutted Mr. Allen's testimony regarding storm water management, testifying that they had made revisions to Sheet SC-1. The Petitioner testified that he hired two civil engineers who did a hydrology study on the subject property and the abutting property at 5206 Danbury Road. He testified that the study showed that the construction does not impact drainage in the neighborhood, and will actually improve drainage once it is finished. The Petitioner testified that he spoke with DPS two or three times a week to make this right. In response to a Board question asking when the revised sediment control plan was completed, the Petitioner replied that it was done about a month ago.

19. Andrew Teeters, whose property (5207 Chandler Street) abuts the subject property to the rear, testified in opposition to the requested variances. Mr. Teeters testified that he has lived in his house for 12 years, and that he opposes the grant of the requested variances because the Petitioner's new house impacts his enjoyment of his home. Mr. Teeters testified that the Petitioner's house causes stormwater problems due to lot coverage, is too tall, encroaches on the setbacks, and looms over his property. He testified that the Petitioner's house is not similar to other houses on the block. See Exhibit 38.

Mr. Teeters testified that he holds no animosity towards the Petitioner. He testified that in 2020, the Petitioner came to his house and shared the plans for his new home. He stated that they had a conversation about the installation of a retaining wall, and the possible need to remove a portion of his [Mr. Teeter's] fence for that installation. Mr. Teeters testified that construction began in 2021, and that in late summer of 2021, he began to get muddy water in his basement and standing muddy water and sediment in his yard. He testified that the extensive damage to his basement is shown in the photographs at

Exhibits 39(a) and (b). Mr. Teeters testified that he contacted the Petitioner, who sent his workers to his house to clean the mud. Mr. Teeters testified that he reached out to DPS, and that DPS sent sediment control inspectors who put additional controls in place. Mr. Teeters testified that in early 2022, the Petitioner and his partner approached him about giving them a drainage easement through his property. He testified that he did not grant the easement.

Mr. Teeters testified that he asked the Petitioner and his partner for copies of the plans that they had submitted to the County in connection with their construction behind his home, and they refused. He testified that he then submitted a data request to the County to get the plans for 5206 Danbury Road, and that at that time, those plans showed a lot coverage violation, which impacted sediment control. Mr. Teeters testified that he reached out to the County to respond to the sediment control issue and to flag the lot coverage issue for the building permit review. He testified that he then requested that DPS provide all the plans for the subject property, and that he received all of the plans except for the retaining wall, for which he testified there was no record in the DPS system of a permit being issued. He testified that he reviewed the permit plans for the subject property. Mr. Teeters testified that he noticed a lot coverage violation and informed the County. He testified that the County issued a stop work order for the 10- to 12-foot retaining wall that the Petitioner had constructed behind his fence without a permit. Mr. Teeters testified that a permit was eventually issued for a six-foot, six-inch retaining wall, since anything taller would be considered an accessory structure. He testified that the Petitioner's workers cut the wall down. Mr. Teeters testified that the Petitioner sent him a text message on April 9, 2022, stating that they were cutting the retaining wall, and asking him to work with him rather than with the County on plan discrepancies. See Exhibit 40.

Mr. Teeters testified that he worked with the County to follow up on the violations through April and May. He testified that on May 16, 2022, Greg Nichols of DPS informed him that the Petitioner would be filing for variances after going back and forth with the County to ascertain the variances needed. Mr. Teeters testified that at the end of May or in early June, Mr. Nichols confirmed that the Petitioner also needed a variance from the rear lot line setback for the four (4) foot overhang. He testified that construction on the subject property continued throughout May.

Mr. Teeters testified that he received the variance application on June 10, 2022, and engaged counsel, an engineer, and an architect to evaluate it. He testified that he sent a letter asking the County to issue a stop work order, and that on June 28, 2022, they did. See Exhibits 42(a) and (b). Mr. Teeters testified that despite the stop work order, work on the Petitioner's house did not stop; he testified that he saw people working on the Petitioner's house on June 29, July 1, and one other day in early July. He submitted photographs taken on June 29, 2022, and July 1, 2022, showing workers on the scaffolding at the Petitioner's house. See Exhibits 43(a) and (b). He testified that he is aware that the Petitioner said they were taking down the scaffolding, but that to him, it appeared that they were painting and spackling, going in and out of the house.

Mr. Teeters testified that there was another significant rain event in July, 2022, and that he again had mud in his basement and a river of mud across his property. He testified that he filed a complaint with DPS, and that a Notice of Violation was issued for both 5206

Danbury and for the subject property on July 10, 2022. Mr. Teeters testified that he had lived in his house for decades and had never had mud. He showed a photograph taken on July 6, 2022, from the front of his property, looking towards 5205 Chandler Street, that shows a "river of mud." See Exhibit 44.

Mr. Teeters testified that the Petitioner's house was not consistent with the development pattern in the neighborhood, stating that the neighborhood was built in the 1940s and 1950s, that most of the homes are still intact, that some have additions, and that some have been torn down, but that there is nothing of the magnitude of the Petitioner's house in the neighborhood. Referring to a Google image of the neighborhood taken in 2022, on which he testified that the Petitioner's home can be identified by its tan roof, Mr. Teeters testified that the footprint of the Petitioner's house far exceeds the footprints of other homes in the neighborhood. See Exhibit 45.

Mr. Teeters testified that if the requested variances were granted, it would significantly impact his enjoyment of his property, citing the lot coverage of the Petitioner's house and its mass. He testified that the Petitioner's house looms over his backyard due to the setback and height violations, invading his privacy and blocking the late afternoon sunlight.

On cross-examination, in response to a question asking if he had complained to DPS about the work that occurred after issuance of the stop work order, Mr. Teeters testified that he had. At that point, counsel for the Petitioner indicated that he had written a letter to DPS indicating, per his conversation with the Petitioner, that Petitioner's workers were removing the scaffolding, which was attached to the house, fixing holes, and putting their equipment in the house. In response to a question asking if the Petitioner's new house "substantially" conformed with the neighborhood, Mr. Teeters testified that the Petitioner's house was not compatible with the neighborhood. He cited the house's excessive lot coverage and height, and its setback encroachment as reasons that the construction did not conform to the established pattern in the neighborhood. Mr. Teeters testified that he had no objection to the style of the house. In response to a question asking if he thought any new house on the subject property would loom over his house, Mr. Teeters testified that he did not believe a house that met the height restrictions would loom over his house.

20. Farindokht Vaghefi, whose property at 5210 Danbury Road abuts the subject property, testified in opposition to the requested variances. Ms. Vaghefi testified that the Petitioner's home has had a significant adverse impact on her property. She showed three pictures. See Exhibit 46. She testified that the first photo shows how the new house has enclosed one side of her property, blocking sunlight and a view of the sky. Ms. Vaghefi testified that the second photograph was taken from her dining room window, and shows how the Petitioner's home invades her home. Ms. Vaghefi testified that the third photograph, which was taken from the front of her property, shows the scale and height of the new house.

Ms. Vaghefi testified that on March 22, 2022, she noticed while working from home that the Petitioner had removed her side fence, claiming that his survey showed that it was on his property. She testified that he then brought in about 50 truckloads of dirt to fill the area between their properties. Ms. Vaghefi testified that whereas her property used to

slope downward towards the subject property, the opposite is now true. She provided the Board with a photograph of the silt fence between the two properties, and a screen shot of text messages that the Petitioner sent to her on April 10, 2022, regarding ownership of the disputed fence. See Exhibits 47(a) and (b).

21. Michelle Minich, who lives at 5205 Chandler Street, next door to Mr. Teeters, testified in opposition to the requested variances. Ms. Minich testified she has lived in her home for two years, and that she had no issues with flooding prior to the Petitioner's demolition of the original home on the subject property. She testified that by violating the Zoning Ordinance, the Petitioner's construction has had a tremendous negative impact on her property. Ms. Minich testified that she has spent more the \$30,000 to address water and flooding issues on her property, and that she has had to install a French drain and interior and exterior sump pumps. She testified that runoff is undermining the footings of her retaining wall, and that she has had to construct a moat around her house. See Exhibits 49(a)-(f). Ms. Minich testified that this has been very stressful for her, that she cannot enjoy her back yard, and that she cannot leave town because if there is rain and she is not home, her house may flood. She testified that she has had to re-grade her yard again, and that the Petitioner's construction is causing her to suffer crippling economic hardship. Ms. Minich testified that these problems are due to the amount of impervious surface at the subject property, exacerbated by a lack of sediment control.

22. Amir Tavakolian, who owns the property at 5206 Danbury Road, testified in support of the requested variances and urged the Board to grant them. Mr. Tavakolian testified that he is sympathetic to the erosion control issues that have been raised, and stated that they now have a silt fence in place for the construction on his property. He testified that they have tried to prevent the flow of mud, but that water is always going to run downhill. Mr. Tavakolian testified that they have just started construction on his property, and that his house will probably be finished in six or seven months. He testified that when they are done with construction, the amount of water going towards Chandler Street will be less than when they started because of the installation of dry wells, and because the water from his driveway will flow towards Danbury Road. Mr. Tavakolian testified that the original plans for his house had the same lot coverage issue that the Petitioner's house has, but that this issue has been corrected. He testified that his home will be similar to the Petitioner's home but will meet all of the Zoning Ordinance requirements.

23. Lisa Dunbar, who lives across the street from the subject property at 5211 Danbury Road, testified in opposition to the variances. Ms. Dunbar testified that she has lived in her home for almost 20 years. Ms. Dunbar testified that she does not oppose redevelopment, but that she expects it to fit the standards in the Zoning Ordinance, and that she expects there to be space between houses. She presented a six-part Exhibit to the Board, in the record as Exhibits 50(a)-(f). Ms. Dunbar testified that Exhibit 50(a) shows some examples of infill redevelopment in the neighborhood. She testified that these homes are large, but meet the Zoning Ordinance, noting that they are generally about 5,000 square feet and two to three stories in height. Ms. Dunbar used the aerial photograph at Exhibit 50(b) to show how large the Petitioner's house is relative to the subject property and other homes in the neighborhood. She testified that with over 7,500 square feet of living area, the Petitioner's house is larger than his property.

Using a contour map from MCAAtlas that shows the lots on the south side of Danbury Road in the vicinity of the subject property, Ms. Dunbar testified that the subject property is not unique with respect to its size, shape, or topography. She testified that she is concerned that if the requested variances are granted, that other properties with derelict houses will be re-developed in a similar fashion. See Exhibit 50(c). Ms. Dunbar testified, based on side-by-side pictures of the original house on the subject property and the new house, that it appears that the grade of the subject property has been raised. See Exhibit 50(d). She testified that the façade of the house as constructed does not match the plans. See Exhibit 50(e). Finally, Ms. Dunbar testified that the plans have inaccuracies and inconsistencies, mentioning erroneous numbers and retaining walls that were built without permits. See Exhibit 50(f).

24. Robert Howard, who lives at 5203 Chandler Street, testified in opposition to the requested variances. Mr. Howard testified that he, too, is having issues with water, and that the moat that Ms. Minich built is the only thing protecting his home. He testified that the Petitioner's house is huge, and does not fit in the neighborhood.

25. Sattar Tabriz, who is related to the Petitioner and lives in Salt Lake City, testified in support of the requested variances. Mr. Tabriz testified that he has been a civil engineer for 42 years. He testified that projects can go "sideways" for a variety of reasons, and that in the instant case, human error was involved. Mr. Tabriz stated that the Petitioner is asking for variance relief. He testified that the Petitioner is allowed to build up to the limits set forth in the Zoning Ordinance. Finally, he testified that the subject property is slanted at the front, and that Google Earth photographs could misrepresent this.

26. Cindy Luongo, who lives at 5205 Elsmere Avenue, one street up from Danbury Road, testified in opposition to the requested variances. Ms. Luongo testified that after living in the neighborhood for 18 years, last December she purchased her current house. She testified that she would not have purchased a home on Danbury Road because those homes have lost privacy and property value. She stated that she does not find the Petitioner's home unattractive, but she testified that it dominates and hangs over Danbury Road.

## **FINDINGS OF THE BOARD**

A variance permits a use of a structure that otherwise would not be permitted by the zoning ordinance, which has led the Maryland Court of Special Appeals to clarify that "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances." *Cromwell v. Ward*, 102 Md. App. 691, 703, 651 A.2d 424, 430 (1995) (citation omitted). *Cromwell* states that review of a variance application involves a two-step process to discern a unique characteristic of the property and then to determine whether a practical difficulty results from the uniqueness of the property:

The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is -- in and of itself -- unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning

provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, i.e. a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance caused by the property's uniqueness, exists.

*Cromwell*, 102 Md. App. at 694-695, 651 A.2d at 426. That the variance might allow an improvement to property that is "suitable or desirable or could do no harm or would be convenient or profitable to its owner" does not provide a basis for granting a variance. *Cromwell*, 102 Md. App. at 707, 651 A.2d at 432. The need for the variance must arise from the application of the zoning ordinance to the unique or peculiar characteristics of the property. See *Cromwell*, 102 Md. App. at 717-718, 651 A.2d at 437. The zoning ordinance must impact upon the land in a unique manner that does not exist where a restriction applies "equally to all lots of similar size." *Cromwell*, 102 Md. App. at 720, 651 A.2d at 438.

In *Salisbury Board of Zoning Appeals v. Bounds*, 240 Md. 547, 554-55, 214 A.2d 810, 814 (1965), the Maryland Court of Appeals enunciated the concept of a self-created hardship:

If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have been themselves caused by the property owner or his predecessor in title, the essential basis of the variance, i.e. that the hardship be caused solely through the manner of operation of the ordinance upon the particular property, is lacking. In such a case a variance will not be granted; the hardship, arising as a result of the act of the owner or his predecessor will be regarded as having been self-created, barring relief.

While the specific language of Montgomery County's Zoning Ordinance eliminates the attribution of circumstances created by predecessors in title to the current property owner, Section 59.7.3.2.E.2.b of the Zoning Ordinance retains the concept that the circumstances which make it impossible for a property to be developed in accordance with the restrictions of the Zoning Ordinance cannot be self-created ("the special circumstances or conditions are not the result of actions by the applicant").

Finally, in *Montgomery County v. Rotwein*, 169 Md. App. 716, 732-733; 906 A.2d 959 (2006), the Court of Special Appeals reiterated that financial hardship is not grounds for granting a variance and that economic loss alone does not constitute a practical difficulty:

Economic loss alone does not necessarily satisfy the "practical difficulties" test, because, as we have previously observed, "[e]very person requesting a variance can indicate some economic loss." *Cromwell*, 102 Md. App. at 715 (quoting *Xanthos v. Bd. of Adjustment*, 685 P.2d 1032, 1036-37 (Utah 1984)). Indeed, to grant an application for a variance any time economic loss is asserted, we have warned, "would make a mockery of the zoning program." *Cromwell*, 102 Md. App. at 715.

Based on the binding testimony and the evidence of record, the Board of Appeals finds that the requested variances must be denied. Section 59.7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board must find that:

- (1) denying the variance would result in no reasonable use of the property; or
- (2) each of the following apply:
  - a. one or more of the following unusual or extraordinary situations or conditions exist:
    - i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;
    - ii. the proposed development uses an existing legal nonconforming property or structure;
    - iii. the proposed development contains environmentally sensitive features or buffers;
    - iv. the proposed development contains a historically significant property or structure; or
    - v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;
  - b. the special circumstances or conditions are not the result of actions by the applicant;
  - 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;
  - d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and
  - e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.

Section 59.7.1.1 of the Zoning Ordinance provides that the applicant has the burden of production and has the burden of proof by a preponderance of the evidence on all questions of fact.

The Board notes that in this case, there was no attempt to argue the standard in Section 59.7.3.2.E.1 of the Zoning Ordinance. For this reason, the Board must analyze the instant case under Section 59.7.3.2.E.2 of the Zoning Ordinance. Section 59.7.3.2.E.2 sets forth a five-part, conjunctive ("and") test for the grant of a variance, and thus the Board cannot grant a variance if an applicant fails to meet any of the five elements required by this Section.

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;*

While the Petitioners have asserted that the subject property is unique because of its small size, and have indicated that the subject property is sloped, the Board finds, based on Exhibits 17(e), 37, and 50(c), and based on the testimony of Mr. Bradshaw, Mr. Allen, and Ms. Dunbar, that all of the interior lots on this side and stretch of Danbury Road have a similar shape and slope, and that the subject property, while smaller than some lots on this side and stretch of Danbury Road, is larger than several others.<sup>3</sup> See Exhibits 17(e), 32, 35, 36, 37, and 50(c). The Board's finding is supported by the Petitioner's Statement, which acknowledges that the subject property is "a regularly shaped rectangular lot with no unusual features in its shape," and by the testimony of the Petitioner on cross examination that the size of the subject property is roughly the same as other properties. See Exhibit 3. In addition, the Board notes that the Petitioner's Statement does not assert that the property's topography makes it unique in explaining why the subject property satisfies Section 59.7.3.2.E.2.a.i of the Zoning Ordinance. Accordingly, the Board finds that the subject property does not satisfy Section 59.7.3.2.E.2.a.i of the Zoning Ordinance.

*Section 59.7.3.2.E.2.a.ii: the proposed development uses an existing legal nonconforming property or structure;*

The Petitioner did not argue that the proposed development used an existing legal nonconforming property or structure, and thus the Board cannot find that the subject property satisfies Sections 59.7.3.2.E.2.a.ii of the Zoning Ordinance.

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

The Petitioner's Statement suggests that the property's topography may constitute an environmentally sensitive feature insofar as it drove the cantilevered aspect of the Petitioner's house so as to avoid disturbing the property's steep slopes. That said, the Statement also states that the Petitioner's property "is not designated in an area with defined environmentally sensitive features, such as the 'Potomac Palisades....'" See Exhibit 3. In addition, the Petitioner testified on cross examination that the property has no environmentally sensitive features, and there is nothing else in the record to suggest that the property contains environmentally sensitive features or buffers. Thus the Board cannot find, on the basis of the foregoing, that the subject property contains environmentally

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<sup>3</sup> Exhibit 37 indicates that the subject property has an area of 5,882 square feet, and that the three properties to the north along the same side of Danbury Road have areas of 5,767 square feet, 5,760 square feet, and 6,399 square feet, while the three properties to the south of the subject property along Danbury Road have areas of 5,923 square feet, 5,792 square feet, and 6,145 square feet. Exhibit 50(c) is similar, stating that the following properties have following sizes: 5202 Danbury: 6,399 square feet (larger); 5204 Danbury: 5,760 square feet; 5206 Danbury: 5,767 square feet; 5208 Danbury (subject property): 5,882 square feet; 5210 Danbury: 5,923 square feet; 5212 Danbury: 5,923 square feet; 5214 Danbury: 5,792 square feet; and 5216 Danbury: 6,146 square feet. Both Exhibits show that the properties are all generally rectangular in shape; Exhibits 17(e), 32, and 50(c) show that all are significantly sloped. See Exhibits 17(e), 32, 37, and 50(c).



sensitive features, and accordingly finds that the subject property does not satisfy Section 59.7.3.2.E.2.a.iii of the Zoning Ordinance.

*Section 59.7.3.2.E.2.a.iv: the proposed development contains a historically significant property or structure;*

The Petitioner did not argue that the proposed development contained a historically significant property or structure, and thus the Board cannot find that the subject property satisfies Sections 59.7.3.2.E.2.a.iv of the Zoning Ordinance.

*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 Petitioner's Statement asserts that since his house sits on its lot "in the same general setting as the neighboring structures," that his home "substantially conforms with the established historic or traditional development pattern of [the] street or neighborhood," despite having a different architectural style than the original surrounding houses. See Exhibit 3. Mr. Teeters, Mr. Howard, and Ms. Dunbar all testified that, because of its size and mass, the Petitioner's house does not conform with the established historic or traditional development pattern in their neighborhood.<sup>4</sup> Mr. Teeters and Ms. Dunbar both referred to aerial photographs showing the tan roof of the Petitioner's house to illustrate how large the footprint of the Petitioner's house is relative to the footprint of other homes in the neighborhood. See Exhibits 45 and 50(b). Mr. Teeters specifically cited the house's excessive lot coverage and height, and its setback encroachment, as reasons that he did not believe the construction conformed to the established pattern in the neighborhood. Ms. Dunbar testified how large the Petitioner's house is relative to the subject property and to other homes in the neighborhood. She provided examples of other infill redevelopment in the neighborhood, and testified that while those houses typically have about 5,000 square feet of living space, the Petitioner's home has about 7,500 square feet of space. See Exhibits 50(a) and (b). She testified that the Petitioner's house is larger than his property. On the basis of the foregoing, the Board finds that the proposed development is much larger than neighboring homes, larger than existing infill homes, and larger than allowed by the Zoning Ordinance, and that it does not substantially conform with the established historic or traditional development pattern of this neighborhood. Accordingly, the Board finds that the requested variances fail to meet Section 59.7.3.2.E.2.a.v of the Zoning Ordinance.

Having found that the requested variances fail to meet Section 59.7.3.2.E.2.a of the Zoning Ordinance, the Board finds that the requested variances must be denied. As noted above, the variance test is conjunctive, and all parts must be satisfied in order for the Board to grant a variance.

Nevertheless, the Board further finds that even if it were to have found that the subject property met one of the criteria in Section 59.7.3.2.E.2.a, the requested variances would still have to be denied because it was the actions of the Petitioner, and not any

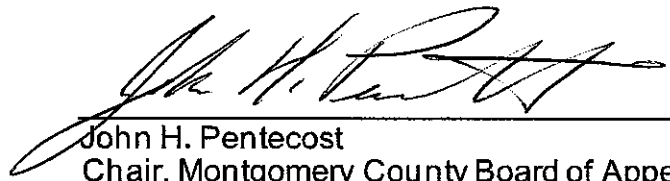
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<sup>4</sup> Mr. Teeters and Ms. Dunbar both testified that they do not object to the style of the Petitioner's house. Mr. Howard did not testify about the home's style.

unique physical aspect of the property, that necessitated the need for the variances. Section 59.7.3.2.E.2.b states that in order to grant a variance, the Board must find that “the special circumstances or conditions are not the result of actions by the applicant.” In the instant case, the Statement and the testimony of the Petitioner both indicate that the Petitioner designed the house at issue, and that he is the architect/designer, engineer, and general contractor responsible for its construction. See Exhibit 3. In addition, the Petitioner admitted on cross examination that the need for the variances was not driven by the physical aspects of the subject property, but rather was due to his mistakes. Finally, Mr. Allen testified that there was nothing about the size or shape of the subject property that would necessitate variances from the restrictions in the Zoning Ordinance, as compared with neighboring properties, and that in his opinion, the need for the variances was a result of actions by the Petitioner. In light of the foregoing, the Board finds that the need for the requested variances is self-created, and accordingly finds that the variance application fails to meet Section 59.7.3.2.E.2.b of the Zoning Ordinance, and cannot be granted.

On a motion by John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Caryn Hines in agreement, and with Roberto Pinero not in agreement, the Board voted to adopt 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.



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John H. Pentecost  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 17th day of August, 2022.



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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.