

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
<http://www.montgomerycountymd.gov/boa/>

(240) 777-6600

Case No. A-6777

PETITION OF MICHAEL AND KYNDALL MULLINGS

OPINION OF THE BOARD

(Hearing Held: October 19, 2022)

(Effective Date of Opinion: October 26, 2022)

Case No. A-6777 is an application by Michael and Kyndall Mullings (the "Petitioners") for two variances from the side setback requirements of the Zoning Ordinance, needed for the proposed construction of an addition. The proposed construction requires a variance of 2.77 feet as it is within 4.23 feet of the east side lot line. The required setback is seven (7) feet, in accordance with Section 59.7.7.1.D.2 of the Montgomery County Zoning Ordinance. In addition, the proposed construction requires a variance of seven (7) feet as it is within one (1) foot of the west side lot line. The required setback is eight (8) feet, in accordance with Section 59.4.4.8.B of the Montgomery County Zoning Ordinance.

The Board of Appeals held a hearing on the application on Wednesday, October 19, 2022. Petitioners Michael and Kyndall Mullings appeared at the hearing, represented by Patricia Harris, Esquire. The Petitioners' architect, Jeffery Kozero, was also present and participated.

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

EVIDENCE PRESENTED

1. The subject property is Block 34, SE Half of Lot 3 & Pt of NW Half of Lot Gilbert's Addition Subdivision, located at 813 Colby Avenue in Takoma Park, Maryland, 20912, in the R-60 Zone. It is an unusually narrow property, rectangular in shape, with a width of 31.4 feet and a depth of 200 feet. The subject property is located on the south side of Colby Avenue. See Exhibits 3, 4(a), and 10(a).

2. The property was purchased by the Petitioners in 2017. It contains an existing house that was built in 1935; the house is located 4.23 feet from the east side lot line and one (1) foot from the west side lot line. The Petitioners' existing house has a first floor with an area of 1,071 square feet, an attic space of 266 square feet, and a basement. The Petitioners are seeking to extend the rear of the house by 11.5 feet, and to construct a full story second floor over the extended footprint of the house (i.e. the existing house plus the rear addition), as well as a partial third floor with a rooftop deck. The proposed construction will not change the side yard setbacks of the existing house, and the resultant home will be no closer to the adjacent properties than the existing house is today. See Exhibits 3 and 4(a).

3. The Petitioners' Statement of Justification ("Statement") explains that the subject property is not only narrow for the R-60 Zone, but also for the neighborhood, as follows:

As indicated by the Boundary Survey (Exhibit D) [BOA Exhibit 4(b)], the Property is exceptionally narrow, with a consistent width of only 31.4 feet (the R-60 zone requires a 60 foot width at the front building line). As indicated by the Surrounding Property Comparison Table (Exhibit E) [BOA Exhibit 7], there are no sites along Colby Avenue (not including the pipestem lot at 708 Colby Avenue) that have a comparably narrow width; the site with the next most narrow width is the adjacent site at 811 Colby Avenue with a width of 43.6 feet and the average lot width along Colby Avenue is 60.84 feet. At the same time, the Property is 200 feet in length, creating an oddly configured Property that is very long and extremely narrow which severely restricts the ability to enlarge the existing structure into functional living space.

See Exhibit 3. As noted previously, the Petitioners have included a property comparison table with the lot widths and above grade living area for neighboring properties with their submission. See Exhibit 7.

4. The Statement states that the existing house and property are nonconforming. The Statement notes that when the house was built in 1935, the property was located in Prince George's County. It states that the property has a nonconforming width of 31.4 feet, and that the existing house encroaches on both side setbacks. See Exhibit 3. The building permit denial confirms that the existing structure is nonconforming. See Exhibit 6(a).

5. The Statement states that the proposed rear and second story additions "will conform with the established, traditional development patterns of the Colby Avenue neighborhood," which the Statement indicates is slightly "eclectic" in nature. See Exhibit 3. After acknowledging that the property to the west of the subject property (811 Colby Avenue) is somewhat similar to the subject property "both in the size and shape of the site and the size of the house,"¹ the Statement proceeds to note that the property to the east of the subject property, and the properties across Colby Avenue to the north, are

¹ As noted previously, with a width of 43.6 feet, the property at 811 Colby Avenue is significantly wider than the subject property, which has a width of 31.4 feet. See Exhibits 3 and 7.

"improved with two story homes of heights and sizes comparable to what the Applicant proposes, most of which appear to have been renovated relatively recently," and goes on to state that "[o]verall, the development pattern of the neighborhood is varied, with vestiges of the original structures – typically one story houses, combined with more recently renovated homes, all of which are two to three stories." Finally, the Statement states that "[t]he Surrounding Property Comparison Table indicates that the homes along Colby Avenue range in size, per the SDAT records, from 816 square feet to 4,467 square feet," and that "[a]s such, the Applicant's proposed addition that results in an overall living area of 4,024 square feet (including the area below the first floor) substantially conforms with the surrounding development pattern." See Exhibits 3 and 7.

6. The Statement explains the hardship that the narrow width of the property poses for the Petitioners, stating that "[g]iven the narrowness of the Property, strict compliance with the side setback requirements would significantly limit the amount of buildable area and the functionality of any addition to the existing house." The Statement further notes that "the Petitioners are unduly burdened by the extraordinary narrowness of the Property and the placement of the existing house," and that "[t]he proposed addition simply continues the pre-established setbacks and thus, importantly, does not further reduce the width of the setbacks." Accordingly, the Statement concludes that "[g]iven the narrowness of the Property, the requested variance is needed in order to allow for practical, functional expanded living space," and that the "relief requested is the minimum necessary to overcome the practical difficulties presented by the existing lot and house." See Exhibit 3.

7. Ms. Harris described the unusual history of this property to the Board. She stated that the property was originally platted in 1880 with a width of 50 feet; that the property was split in half in 1925, leaving it with a width of 25 feet; that a house that straddled the new (western side) lot line was built on the property in 1935; and that in 1981, when it was discovered that the existing house was built over this lot line, approximately six feet was deeded back to the subject property, giving the property its current 31.4 foot width and allowing the existing house to be wholly located on the subject property.

Ms. Harris stated that the proposed construction will respect the side setbacks of the existing house and that the grant of the requested variance is strongly supported by the Petitioners' neighbors. See Exhibits 9(a)-(c). She stated that without variance relief, the Petitioners' house could only be about 15 feet wide because their lot is so narrow.

8. Mr. Kozero testified in support of the requested variances. Mr. Kozero testified that the subject property is approximately 31 feet wide and 200 feet deep. He testified that the property contains a house that is about 1,000 square feet. Mr. Kozero testified that the existing house is 4.25 feet from the east side lot line and one (1) foot from the west side lot line. He testified that the proposed construction will maintain these setbacks if approved, and will use the existing foundation and walls. Mr. Kozero testified that a 15 foot wide house, which is what the Petitioners would be allowed after application of the setbacks, would not be functional.

FINDINGS OF THE BOARD

Based on the binding testimony and 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 the Statement, Site Plan, and testimony of Mr. Kozero, that the subject property, with a consistent width of 31.4 feet, is exceptionally narrow for the R-60 Zone, which has a minimum 60-foot lot width at the front building line. The Board further finds, based on the Statement and the Petitioners' property comparison table, that the subject property is the narrowest lot in the immediate neighborhood, with the closest comparator being 12 feet wider. See Exhibits 3, 4(a), and 7. The Board finds that the exceptional narrowness of the subject property constitutes an extraordinary condition peculiar to this property, in satisfaction of this element of the variance test.

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

The Board finds, based on the Statement, that the proposed development uses an existing structure that was built in 1935, when the property was located in Prince George's County. See Exhibit 3. The Board further finds that the Petitioners' existing home does not comply with the setbacks required by the Montgomery County Zoning Ordinance, and is nonconforming, as confirmed on the building permit denial. See Exhibits 4(a) and 6(a). Accordingly, the Board finds that the application satisfies this element of the variance test.

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

The Board finds that the house on the subject property was built in 1935, and that the width of the subject property, originally platted in 1880, was last changed in 1981. Thus the Board finds that the Petitioners, who purchased this property in 2017, took no actions to cause the narrowness of this property or the nonconforming placement of their existing home, 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 Site Plan and as confirmed by Mr. Kozero, that without the requested variances, the buildable envelope on the Petitioners' property would be about fifteen feet wide, on account of the extreme narrowness of this property. See Exhibit 4(a). The Board finds that this causes the Petitioners a practical difficulty in that they would be unable to put a second story over their existing non-conforming house,

or extend their house to the rear in a manner that maintains the side setbacks of the existing home. In addition, the Board finds, based on the Statement and the testimony of Mr. Kozero, that the requested variances are minimal in that they allow the construction of an addition over the existing non-conforming home, and a rear extension that maintains the side planes of the existing house and would not extend any further into the setbacks than the existing home already encroaches. Finally, the Board finds that if the Petitioners were to comply with the required setbacks, per the Statement and the testimony of Mr. Kozero, their addition would not be functional on account of its width. See Exhibit 3. Thus the Board concludes that compliance with the required setbacks, which are violated by the existing house, would pose a practical difficulty for the Petitioners, and that the grant of the requested variances is the minimum necessary to overcome the difficulties that full compliance with the Zoning Ordinance would impose, in satisfaction of this 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; and*

The Board finds that the proposed construction will continue the residential use of this property, consistent with the recommendations of the Takoma Park Master Plan, which seeks to “[p]reserve existing residential character, encourage neighborhood reinvestment, and enhance the quality of life throughout Takoma Park.”

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 and property comparison table, that the proposed construction will maintain the existing separation between the Petitioners' home and the homes on either side, and that the proposed addition will conform with the development in the neighborhood. See Exhibits 3 and 7. The Board further finds that the record contains letters of support from Petitioners' abutting and confronting neighbors. See Exhibits 9(a)-(c). Thus the Board finds that the grant of this variance will not be adverse to the use and enjoyment of abutting or confronting properties.

Accordingly, the requested variances needed to allow the proposed construction are **granted**, subject to the following condition:

1. Petitioners shall be bound by the testimony and exhibits of record; and
2. Construction shall be in accordance with Exhibits 4 and 5 (inclusive) (excluding interior floorplans/layouts).

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 26th day of October, 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.