

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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(240) 777-6600

Case No. A-6790

PETITION OF DEREK SHARP

OPINION OF THE BOARD

(Hearing Date: February 8, 2023)
(Effective Date of Opinion: February 17, 2023)

Case No. A-6790 is an application by Petitioner Derek Sharp for a variance needed for the proposed construction of an eight (8) foot fence. In accordance with Section 59.6.4.3.C.3.c.i of the Zoning Ordinance, the proposed construction of a fence on a residential property requires a variance to be taller than 6.5 feet.

The Board of Appeals held a hearing on the application on February 8, 2023. Petitioner Derek Sharp and his wife, Karen, appeared in support of the requested variance.

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

EVIDENCE PRESENTED

1. The subject property is Lot 14, Grace Church Rectory Subdivision, located west of Georgia Avenue at 9124 Georgia Avenue, Silver Spring, Maryland 20910, in the R-60 Zone. It is a six-sided lot, much deeper than it is wide, that is accessed via a shared driveway. See Exhibits 4 and 7.

2. The Petitioner's Statement of Justification ("Statement") states that the Petitioner's abutting neighbors to the east have constructed a swimming pool (and pool deck) on their property that is unfenced. The Statement indicates that because of the downward slope of the properties (east to west), there is a four (4) foot retaining wall for the neighbor's pool deck along the shared side property line between the subject property and the abutting neighbors' property. The photographs included in the Statement show that the neighbors' pool deck extends to and is flush with the top of this retaining wall. The Statement asserts that this condition poses a significant safety risk for the Petitioner and his family, most especially for his grandchildren. See Exhibit 3.

3. The Statement states that the Petitioner is seeking to install a 48-foot long section of eight (8) foot tall board-on-board fence on his property along this retaining wall, between the two properties. See Exhibit 3. The Site Plan depicts the location of the proposed segment of fence that would be eight (8) feet tall. See Exhibit 4. The Statement notes that while the proposed segment of fence is one and a half feet taller than would otherwise be allowed, the additional height is the minimum needed to prevent unsupervised access to the neighbors' pool from the subject property, given the elevation differences between the properties. The Statement notes that a fence of this height will also approximate the combined height of the neighbors' retaining wall and pool fence, if/when the latter is installed. See Exhibit 3.

4. The Statement states that the Petitioner purchased the subject property in 2005. It states that the "downward topology existed when the cul-de-sac was built in 2005." In addition, the Statement states that "[t]he fence cannot be seen from any other residence in the cul-de-sac." See Exhibit 3.

5. The Statement states that the proposed eight (8) foot fence will prevent children and animals from being able to enter the pool from the Petitioner's property, thus helping to ensure that there is "no liability" for accidents on the part of the Petitioner.

6. At the hearing, Mr. Sharp testified that he and his wife are the original owners of their home, having purchased it in 2005. He testified that there are four houses on his cul-de-sac (shared driveway), and that the properties all slope down to the subject property, which is at the bottom of a hill. Mr. Sharp testified that his abutting neighbors built a pool, and Mrs. Sharp testified that this pool sits on a four (4) foot retaining wall, and that it is level with that wall.

Mrs. Sharp testified that the retaining wall is between their house and their neighbors' house. Mr. Sharp testified that the retaining wall is at the edge of their neighbors' property, and that he and his wife would like to build an eight (8) foot fence against that wall, noting that a 6.5 fence would be allowed without a variance. Mrs. Sharp added that the neighbors have said they intend to construct a fence on top of their retaining wall, but that it is still not there, and that as a result, there is no protection from the pool for their grandchildren. She testified that the proposed fence would provide safety and privacy. Mr. Sharp testified that he and his wife are trying to match the height of the fence and wall combination that their neighbors presumably intend to erect. He testified that the proposed stretch of fence for which they are requesting variance relief is 48 feet long.

CONCLUSIONS OF LAW

Based on the evidence of record, the Board finds that the variance can be granted. The requested variance complies with the applicable standards and requirements set forth in Section 59.7.3.2.E of the Zoning Ordinance, 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 with photographs, and testimony of record, that the elevation of the subject property is lower than that of the abutting property to the east, and that as a result, the Petitioner's abutting neighbors to the east have installed a four (4) foot high retaining wall along the shared side property line in the area of their swimming pool. The Board further finds that there is no fence around their neighbors' pool, creating a potentially dangerous situation for the Petitioner and his family, and exposing the Petitioner to potential liability for incidents arising as a result of persons or animals accessing the neighbors' pool from his property. The Board finds that this constitutes a unique situation, peculiar to this property, in satisfaction of this element of the variance test. See Exhibit 3.

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 Petitioner purchased his property in 2005, and is not responsible for its topography, 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 subject property's lower elevation than the abutting property to the east limits the utility of a standard height privacy fence with respect to preventing access to, and screening the view of his property from, his neighbors' pool, causing the Petitioner a practical difficulty. The Board further finds that the Petitioner is seeking to install a privacy fence that is 18 inches taller than would otherwise be allowed along his side lot line, and finds that this increase in height is the minimum needed for the Petitioner to overcome the practical difficulty posed by his property's lower elevation. See Exhibit 3. The Board notes that the taller fence will only be installed in the area of the pool, as shown on the Site Plan, and that other fencing will comply with the height limitations. See Exhibit 4. Thus the Board finds that the requested variance is the minimum needed to allow the Petitioner to install the proposed fence along the shared property line in the area of the pool, and to overcome the practical difficulty caused by the topography of his property, 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 allowing the Petitioner to proceed with the proposed construction will continue the residential use of this home, and thus can be granted without substantial impairment to the intent and integrity of the applicable master plan.

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.*

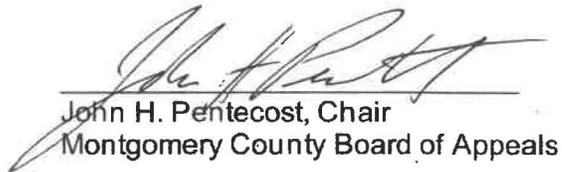
The Board finds, based on the Statement, that the proposed segment of fence will not be visible to any other residences on the cul-de-sac, and that only four (4) feet of it will be visible from the neighbors' pool deck because four (4) feet will be behind the retaining wall/pool deck. See Exhibit 3. The Board further finds that the lower topography of the subject property will mitigate the apparent height of the fence. Thus the Board finds that granting the requested variance will not be adverse to the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test.

Accordingly, the requested variance is **granted**, subject to the following conditions:

1. Petitioner shall be bound by the testimony and exhibits of record; and
2. Construction shall be in accordance with Exhibits 4 and 5(a).

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Caryn Hines and Laura Seminario-Thornton in agreement, and with Alan Sternstein opposed, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.


John H. Pentecost, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 17th day of February, 2023.


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.

