

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6796

PETITION OF GISELLE GUIMARAES AND THIAGO FERREIRA

OPINION OF THE BOARD

(Hearing Held: March 8, 2023)

(Effective Date of Opinion: March 15, 2023)

Case No. A-6796 is an application by Petitioners Giselle Guimaraes and Thiago Ferreira for a variance needed for the proposed construction of an accessory structure (swimming pool). In accordance with Section 59.4.4.4.B.2 of the Zoning Ordinance, the proposed construction requires a variance to be located forward of the rear building line of the principal building.

The Board of Appeals held a hearing on the application on Wednesday, March 8, 2023. Petitioner Giselle Guimaraes participated in support of the requested variance.

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

EVIDENCE PRESENTED

1. The subject property is Parcel N910, Lot 3, Dorsey Hills Subdivision, located at 105 Norwood Road in Silver Spring, Maryland, 20905, in the RE-2 Zone. It is a four-sided, interior property, 2.04 acres in size, located on the northeast side of Norwood Road. The subject property is roughly rectangular in shape and relatively narrow, with a depth that is nearly three (3) times its width. Access to the property is via an ingress/egress and utility easement, intended for use by multiple properties, that runs from Norwood Road along the right side of the property. See Exhibits 7(a)-(b).

2. The property is encumbered with a ten (10) foot wide public utility easement that extends along the entirety of the property's front lot line. In addition, there is a septic tank and field in the property's front yard, occupying approximately 13,320 square feet (0.306

acres), and a propane tank buried in the property's rear yard. Approximately one-quarter of the subject property is encumbered with a Category 1 Forest Conservation Easement (23,172 square feet/0.532 acres) that extends along the front and left side of the property. Finally, there is a turn-around for Fire Department accessibility that is located towards the rear of the property, on the right side, and that extends into the property from the shared driveway. See Exhibits 3, 4(b), and 7(b).

3. The subject property contains a house that is oriented so that it faces the shared driveway (right side lot line). The Petitioners' Statement of Justification ("Statement") states that the Petitioners are seeking to locate a swimming pool in what they consider to be their backyard (i.e. the area behind the functional rear of their house), but that because of the way in which their house is positioned on their property, for zoning purposes this area is considered to be a side yard; accessory structures such as pools are not allowed to be located in side yards without variance relief. The Statement states that the Petitioners did not have a choice regarding the location and orientation of their house because when they purchased the subject property, the "house position was already determined and approved by the county." It states that the Petitioners are unable to locate a pool in the area that is considered, for zoning purposes, to be their rear yard because there is a propane tank buried there, because there is a "fire department turnaround" there, and because a portion of the forest conservation easement extends into that area. See Exhibit 3.

4. The Statement states that the unusual aspects of this property are not the fault of the Petitioners, stating that at the time of their purchase, "the sediment control with all aspects of the property had already been approved by the county," and that they "had to follow the approved site plan prior to beginning planning and building the house." See Exhibit 3.

5. The Statement states that the requested variance is the minimum needed to overcome the practical difficulties that full compliance with the Zoning Ordinance would pose, stating that "[h]aving the pool on the side yard is the only possible way to have and enjoy the house backyard since the lot backyard is not the house backyard." The Statement states that the proposed pool will comply with all of the required setbacks from the property lines. See Exhibit 3.

6. The Statement states that the proposed swimming pool will not adversely affect the use and enjoyment of neighboring properties, stating that "[t]he swimming pool will not impact any abutting property," that "there is no abutting property with a residence nearby to the right side of the lot," that "[t]he pool will not impede property limits," and finally that it "does not require modifying setbacks of any sorts." See Exhibit 3.

7. At the hearing, Petitioner Giselle Guimaraes testified that the subject property is accessed via a private driveway that also provides access to the two lots behind her property (i.e. farther away from Norwood Road). She testified that when they purchased their property, it was one of three lots, all of which contained approved site plans. Thus

she testified that at the time of their purchase, the forest conservation easement and the location of their septic field had already been established.

Ms. Guimaraes testified that her house faces the shared driveway, and agreed with a Board member that if that driveway had been a public road, the proposed pool would be in her "rear" yard. She testified that the proposed pool will meet the required setbacks.

Ms. Guimaraes testified that there is an underground propane tank and a fire department turnaround which preclude construction of the proposed pool behind the rear building line of her house, later adding that in addition to the turnaround itself, there is a clearance radius around that turnaround where nothing can be built. She testified that the proposed location for the pool is the only location on the property where the pool could be constructed. Ms. Guimaraes testified that there is nothing on the abutting property near the area of the proposed pool, and that for a variety of reasons, that area would be difficult to develop. She testified that regardless, the trees in the forest conservation easement and the required fence would screen any view of the pool from that property. Finally, Ms. Guimaraes testified that she had spoken with one of her neighbors who questioned why a variance would be needed for the proposed swimming pool.

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 requested variance complies with the applicable standards and requirements set forth in Section 59.7.3.2.E.2 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, Site Plan, and the testimony of Ms. Guimaraes, that the area available for development on this elongated and relatively narrow property is severely constrained not only by the property's shape and sole permissible means of access being via an ingress/egress easement along the property's right side, but also by the presence of several features which further limit the areas available for construction on the property, including a utility easement, forest conservation easement, septic field, underground propane tank, and fire department turnaround, all of which likely contributed to the siting of the Petitioners' home so that its architectural and functional "front" face the property's driveway and right side lot line. See Exhibits 3, 4(b), and 7(b). The Board finds that these factors combine to create an unusual condition peculiar to this property that 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, based on the Statement, the subdivision plat, and the testimony of Ms. Guimaraes, that prior to the Petitioners' purchase of the subject property, the shape of the property was established, and certain pre-development work, including the imposition of the forest conservation easement and the determination of where the house, septic field, and fire department turnaround would be located, was completed. See Exhibits 3 and 7(b). Thus the Board finds that the special circumstances or conditions applicable to this property are not the result of actions by the Petitioners, in satisfaction of this element of the variance test.

3. *Section 59.7.3.2.E.2.c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;*

The Board finds that the afore-mentioned unusual conditions peculiar to the subject property constrained its development and resulted in the placement and orientation of the Petitioners' house such that its architectural and functional front face the shared driveway along the property's right side lot line. See Exhibits 3 and 4(b). The Board further finds, based on the testimony of Ms. Guimaraes, that the presence of an underground propane tank and fire department turnaround on the property prevent the Petitioners from being able to construct the proposed pool behind the rear building line of the existing house, as required by the Zoning Ordinance, causing the Petitioners a practical difficulty. The Board finds that granting the requested variance, to allow the pool to be constructed behind the functional rear of the existing house, in what is technically the Petitioners' side yard, is the minimum relief necessary to overcome this practical difficulty. Accordingly, the Board finds that the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with the Zoning Ordinance would entail due to the unique conditions peculiar to this 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 granting the requested variance to allow the Petitioners to construct a pool on the subject property, forward of the rear building line but to the functional rear of the existing house, is consistent with the residential use of this property. Accordingly, the Board finds that this variance can be granted without substantial impairment to the intent and integrity of the applicable Cloverly Master Plan, 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.*

Per the Statement and the testimony of Ms. Guimaraes, the Board finds that the proposed pool will be located behind the functional rear of the Petitioners' house, in a location that otherwise meets the required setbacks and will not impact abutting properties. The Board further finds that the view of the proposed pool from the abutting

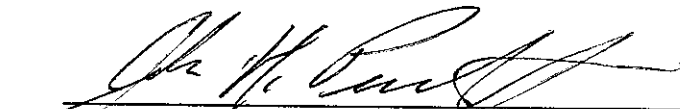
property to the left will be screened by trees and fencing. Finally, the Board notes that the property was properly posted, and that the record does not contain any objections to the requested variance. In light of this, the Board finds that granting the requested variance will not be adverse to the use and enjoyment of neighboring properties, in satisfaction of this element of the variance test.

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

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

Therefore, based upon the foregoing, on a motion by Richard Melnick, Vice Chair, seconded by Caryn Hines, with John H. Pentecost, Chair, and Alan Sternstein in agreement, and with Laura Seminario-Thorton necessarily absent, 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 15th day of March, 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.