

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case No. A-6801
PETITION OF BERTRAND TZENG AND GENA LAI**

OPINION OF THE BOARD
(Hearing Date: April 26, 2023)
(Effective Date of Opinion: May 3, 2023)

Case No. A-6801 is an application by Petitioners Bertrand Tzeng and Gena Lai for a variance from the maximum floor area allowed for an Attached Accessory Dwelling Unit ("ADU"). The proposed attached ADU, which was built by a previous owner and lawfully used by that owner as a Registered Living Unit ("RLU"), requires a variance to be allowed to retain its current floor area of 1,300 square feet. The maximum gross floor area for an Attached Accessory Dwelling Unit of this type is 1,200 square feet, in accordance with Section 59.3.3.3.B.2.b of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on April 26, 2023. Petitioner Bertrand Tzeng participated in the proceedings in support of the requested variance. William Martin, who owns one of the confronting properties across Lone Oak Drive, also participated.

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

EVIDENCE PRESENTED

1. The subject property is Lot 5, Block H, Fernwood Subdivision, located at 6528 Lone Oak Drive in Bethesda, Maryland, 20817, in the R-90 Zone. It is a four-sided corner lot, bordered by Lone Oak Drive to the north and Lone Oak Court to the east. The Petitioners purchased the subject property in 2013. See Exhibits 3 and 6(a).
2. The property is improved with a single-family house that was built in 2006. The house has an attached garage, and over the garage, there is an existing two-bedroom apartment with a separate entrance. This apartment was also built in 2006, and was used by the former owner of the subject property as a Registered Living Unit for his parents. The apartment has an approximate area of 1,300 square feet. See Exhibit 3.
3. The Petitioners' Statement of Justification ("Statement") states that when they purchased the subject property, they "were not informed of requirements relating to the removal of the RLU permit when the apartment was no longer occupied as a registered

living unit, or the requirement to obtain a license as an attached accessory apartment or ADU." The Statement further states that the Petitioners "were also not aware that the apartment did not meet the (1,200 sq. ft.) size requirements applicable to ADUs." The Statement indicates that the Petitioners were notified about these requirements and deficiencies by the County's Department of Housing and Community Affairs ("DHCA") in 2019, and that since that time, they have "complied with all requests to inspect and obtain information about the apartment." See Exhibit 3.

4. The Petitioners are seeking to convert the existing apartment to an ADU. They intend to rent the ADU until such time as their parents want to live there. See Exhibit 3.

5. The Petitioners state that their property is unique because the existing apartment was built and used lawfully as an RLU, but cannot be used as an ADU because of its size, as follows:

...the proposed ADU was originally built and licensed as a RLU (which did not have a 1,200 sq. ft. size requirement). The Applicants understand the apartment was fully compliant with RLU requirements in effect when the apartment was built by the previous owner. However, at approximately 1,300 sq. ft., the apartment does not comply with the size requirement applicable to ADUs without a variance.

See Exhibit 3. The Statement reiterates that "the apartment had already been built to its current size and was in use as an RLU when Applicants purchased it." See Exhibit 3.

6. The Statement states that the requested variance is the minimum needed to overcome the practical difficulties posed by full compliance with the Zoning Ordinance, and to permit the Petitioners to use the existing apartment as an ADU:

A variance would allow the Applicants to maintain the original structure and size of the apartment, and avoid the need to reduce the apartment's physical size to comply with the square footage requirement under Chapter 59 Section 2.c.iii. While the apartment's current size is in technical non-compliance, the excess area (approximately 100 sq. ft.) poses no burden, threat, or danger to the property or community. A reduction in size to 1,200 sq. feet would not enhance the character or enjoyment of the property, or be outwardly visible to the community. However, it would inefficiently eliminate otherwise useful space and require extensive construction, cost, and added burden to bring it into compliance.

See Exhibit 3. The Statement goes on to state that because there would be "no structural or outwardly visible changes" to the Petitioners' house and the existing apartment if the ADU were allowed to be 1,300 square feet as opposed to 1,200 square feet, and because there would be no changes to the "property's existing boundaries and appearance," granting the variance would not be adverse to the use and enjoyment of neighboring properties. See Exhibit 3.

7. The Statement at Exhibit 3 states that granting the requested variance will not impair the intent or integrity of the applicable North Bethesda/Garrett Park Master Plan, as follows:

A variance from the 1,200 sq. foot limitation to allow for the existing 1,300 sq. ft. space to be used as an ADU does not impair the intent and integrity of the general plan and the applicable master plan of the neighborhood. See North Bethesda / Garrett Park Master Plan (link to [webpage](#) and [PDF](#), p. 35-106). No structural changes would be necessary, and no changes will be made to existing offsets, which Applicants believe to be in compliance.

8. At the hearing, Petitioner Bertrand Tzeng testified that he and his spouse own the subject property. He testified that the proposed ADU is an existing apartment attached to their main house, and located over their garage. Mr. Tzeng testified that the existing apartment was built by the previous owner as an RLU for the previous owner's parents, and was used as such until the Petitioners purchased the property. Mr. Tzeng testified that they spoke with the previous owner about the apartment in connection with their purchase of the property, and that while they were informed that it had been used by the prior owner's parents, they were not told that the nature of this use was as an RLU, or that the apartment would lose its RLU status if not used in this manner. He testified that their intention when they bought the property was to use the apartment for a similar purpose, but that their parents still wish to live independently. Mr. Tzeng testified that they have been renting the apartment, and that they were contacted by the County's Department of Housing and Community Affairs regarding the licensing requirements. He testified that they are trying to comply with the licensing requirements, and that the apartment has been inspected numerous times. Mr. Tzeng testified that the only remaining obstacle to being able to have this apartment licensed as an ADU is its size.

9. The Petitioners' neighbor testified that he has lived across the street from the subject property for 44 years, and that he and the Petitioners are friendly. After learning that the requested variance was needed in connection with the use of the existing apartment, and was not for an increase in the size of that apartment, the Petitioners' neighbor testified that he supported the grant of the variance.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the variance from the maximum ADU floor area can be granted. The Board finds that the requested variance complies 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, that the former owner of the subject property lawfully constructed and used the existing 1,300 square foot two-bedroom apartment over the property's attached garage as an RLU. The Board further finds that the RLU use was not maintained by the Petitioners and was not retained in the 2014

Zoning Ordinance,¹ and that the existing apartment is approximately 100 square feet too large to be licensed as an ADU without the grant of a variance. The Board finds that this constitutes an extraordinary condition peculiar to the subject property, in satisfaction of this element of the variance test.

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

The Board finds, based on the Statement, that the existing house, including the attached garage and apartment, were built in 2006 by the previous owner of the property. The Board further finds, again based on the Statement, that the Petitioners, who purchased the subject property in 2013, are not responsible for the square footage of the existing apartment, 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 strict compliance with the 1,200 square foot limitation on the size of ADUs that is set forth in the Zoning Ordinance would cause the Petitioners a practical difficulty in that it would require them to remove a small portion (approximately 100 square feet) of an existing apartment that has been in existence since 2006, and that was legally constructed and used by the property's prior owner. The Board further finds that removal of this portion of the existing apartment would "require extensive construction, cost, and added burden," with no outward change to the home. Accordingly, the Board finds that granting the requested variance is the minimum needed to allow the Petitioners to retain the original structure and size of the existing apartment, and thus to overcome the practical difficulty that full compliance with the Zoning Ordinance would entail, 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;*

The Board finds that the requested variance, which would allow the Petitioners to use an apartment over their garage that has existed in its current configuration since 2006 as an ADU, without requiring that it be reduced in size, can be granted without substantial impairment to the intent and integrity of the North Bethesda/Garrett Park Master Plan, which seeks to "protect and reinforce the integrity of existing residential neighborhoods," in satisfaction of this element of the variance test.

5. *Section 59.7.3.2.E.2.e granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

The Board finds, as noted in the Statement, that the additional 100 square feet of floor space that would be allowed by the grant of the requested variance "poses no

¹ Section 59-A-6.10 of the 2004 Zoning Ordinance governed Registered Living Units, and would have been applicable to the RLU on the subject property. This Section was not retained when the Zoning Ordinance was rewritten in 2014.

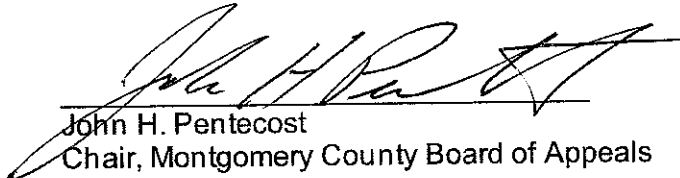
burden, threat, or danger to the property or community,” and that removal of this space “would not enhance the character or enjoyment of the property, or be outwardly visible to the community.” In addition, the Board finds, based on the testimony of one of the Petitioners’ confronting neighbors, that he does not oppose the grant of the variance. Finally, the Board finds that the property was properly posted, and that the record contains no letters of objection to the grant of the variance. On the basis of the foregoing, 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 from the floor area limitation is **granted**, subject to the following condition:


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

Based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Alan Sternstein, with Richard Melnick, Vice Chair, Caryn Hines, and Laura Seminario-Thornton 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 3rd day of May, 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.