

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6808

PETITION OF BRETT AND JENNIFER HOWARD

OPINION OF THE BOARD
(Hearing Held: May 3, 2023)
(Effective Date of Opinion: May 12, 2023)

Case No. A-6808 is an application by Brett and Jennifer Howard (the "Petitioners") for a variance needed in connection with the proposed construction of an accessory structure (an accessory dwelling unit, or "ADU"). The proposed construction requires a variance to be located in the side yard. Accessory structures are required to be located behind rear building line of primary building, in accordance with Section 59.4.4.9.B.2.a of the Montgomery County Zoning Ordinance.

The Board of Appeals held a hearing on the application on Wednesday, May 3, 2023. Petitioner Brett Howard appeared in support of the requested variance with his builder, Michael Novotny. John Ward, whose property abuts the Petitioners' property to the rear, also appeared at the hearing to express his concerns.

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

EVIDENCE PRESENTED

1. The subject property is Lot P28, Linden Subdivision, located at 2115 Salisbury Road in Silver Spring, Maryland, 20910, in the R-60 Zone. It has an area of 18,738 square feet and is located on the north side of Salisbury Road. Despite having six sides, the property presents as generally square in shape, with a width of +/- 135 feet and a depth that varies from 132.6 feet on the left side to 143.9 feet on the right side. See Exhibits 3, 4, and 8.

2. The subject property is located in the Linden Historic District. It contains an historic house that was built in 1906. The Petitioners' Statement of Justification ("Statement")

states that in 1955, the larger estate on which the historic house was previously located was subdivided, "create[ing] lots along Linden Lane, in the rear yard of the Property." The Statement indicates that this was "decades prior to" the Petitioners' purchase of the property. See Exhibit 3.

3. Per the Statement and Site Plan, the Petitioners' historic house is set back +/- 75 feet from Salisbury Road, which is three times the 25 foot setback that is required. The house is set back between 26 and 28 feet from the rear lot line, where the Statement states a 20 foot setback is required. Finally, the sum of both sides setback for the existing house is 89 feet, whereas the Statement indicates that the required sum of both sides setback is only 18 feet. See Exhibits 3 and 4.

4. The Petitioners are seeking variance relief to enable them to construct an accessory dwelling unit ("ADU") on their property. The Statement states that there is not enough room in the rear yard to locate an ADU behind the rear building line of the historic house, in compliance with the Zoning Ordinance, as follows:

The narrow backyard at just 26 to 28 feet precludes the Applicant from constructing the permitted ADU behind the rear building line. ADUs must be setback at least 12 feet from the rear lot line, and although Silver Spring does not specify a setback from the primary home, other jurisdictions establish a minimum setback of 8 feet for reasonable separation. That would leave just six to 8-feet in which the ADU could be constructed.

See Exhibit 3. The Statement later reiterates the difficulties caused by the property's shallow rear yard, stating that "[t]he 1955 subdivision of this property created a condition whereby the bulk of the property is the front and side yards, and the rear yard is insufficient to support a detached Accessory Dwelling Unit," and that if the Petitioners were to "respect the 12 foot building setback from lot lines and establish a reasonable 8-foot separation between principal buildings and ADUs," that "would only leave [them] with six+ feet of buildable area, thus precluding the development of the ADU." See Exhibit 3.

5. Because the rear yard is too shallow to accommodate an ADU, the Petitioners are seeking to locate their proposed ADU in their left side yard, 29 feet from their home. The proposed ADU would be set back approximately 86.5 feet from the front lot line, 18 feet from the side lot line, and 19 feet from the rear of the property. The Statement states that placing the proposed ADU in the side yard would substantially conform with the established historic or traditional development pattern of the Petitioners' street or neighborhood, as follows:

The detached Accessory Unit has an 86.5 foot +/- front setback and is set behind the front building line of the home. This large front yard and building line conforms with the established development pattern of all abutting properties on that side of Salisbury Rd. Additionally, the Applicant's proposal to build the ADU on the same plane as the primary home, thus creating two homes on the approximately 135

foot wide lot, will create a more symbiotic relationship with the homes across Salisbury Road, each which occupy 60-foot wide lots.

See Exhibit 3. The Statement notes that because the subject property is more than twice the required 60-foot minimum width for an R-60 property, “[f]rom appearances, the Property could accommodate two lots or two homes.” As a result, the Statement states that “[t]he Applicant’s proposed ADU will present toward the road and appropriately occupy the existing, unusually large side yard, improving the street presence and creating a more homogenous streetscape with the lots across the street.” See Exhibit 3.

6. The Statement states that the placement of the proposed ADU is intended to maximize the front setback while still satisfying the required rear setback, and is thus the minimum needed to overcome the practical difficulty that full compliance with the Zoning Ordinance would cause. See Exhibit 3.

7. The Historic Preservation Commission reviewed and approved an Historic Area Work Permit for the proposed ADU on January 10, 2023. See Exhibit 7.

8. The Statement at Exhibit 3 states that a variance from the requirement that this ADU be located behind the rear building line of the principal building can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan, as follows:

The applicant’s proposal is wholly consistent with the recently approved Thrive Montgomery 2050 plan (General Plan), which “Support(s) creative housing options including...Accessory Dwelling Units (ADUs)” (p.89, Thrive Montgomery 2050).

Additionally, the applicant’s proposal is consistent with the North and West Silver Spring Master plan, which was approved and adopted August 1, 2000. The intent of the Plan is to “sustain a livable community of neighborhoods in North Silver Spring by preserving the positive attributes and guiding change so that it strengthens the function, character and appearance of the area” (p.21 of the Plan). Further, the Plan remarks that historic buildings should be preserved “to provide a sense of continuity, stability and durability...” (p.27 of the Plan).

In accordance with these goals, Applicant has taken many steps to match the identity and character of the historic home in the design of the ADU to strengthen the appearance, while conforming with the County’s ADU size and dimensional requirements. As mentioned previously, the Historic Preservation Commission has already reviewed and approved the ADU design on January 10, 2023, confirming its fit with the character of the existing historic home, and deeming the proposed placement appropriate.

Additionally, the proposed development avoids any modification to the historic home and preserves it in its entirety.

9. The Statement at Exhibit 3 states that granting the variance to allow the proposed ADU to be located in the Petitioners' side yard would not be adverse to the use and enjoyment of neighboring property owners, as follows:

Given the size of the Property and proposed location of the ADU, the variance will allow a homogenous streetscape with the addition of another building, consistent with the spacing of homes across Salisbury Road. The ADU is a permitted use in the R-60 zoning district; granting the variance does not change that. Its proposed location is consistent with all property line setbacks, thus creating no additional impact to adjacent parcels.

10. The Board received a letter dated May 3, 2023, from abutting neighbor John Ward, laying out his concerns with the proposed construction. See Exhibit 12. Mr. Ward's letter first notes that as a result of the 1950s subdivision of the larger estate property, his house, which was originally an accessory dwelling unit to the house on the subject property, has a reduced 12.5 foot setback from the shared property line. As a result, Mr. Ward requests that the Board consider an additional setback for the proposed ADU, due to the "unusual proximity" of his house to the ADU. In addition, his letter expresses concern about potential drainage and runoff towards his property from the proposed construction. Finally, Mr. Ward asks in his letter where the utility lines for the proposed ADU will be located, and if additional service lines will be needed.

11. At the hearing, referring to the PowerPoint presentation in the record at Exhibit 10, Mr. Novotny testified that the subject property has an area of almost 19,000 square feet, which he stated is more than three times the minimum size for the R-60 Zone. He further testified that the subject property is 135 feet wide, double the required width in the R-60 Zone. Mr. Novotny testified that the Petitioners are seeking to construct a one bedroom, one bathroom ADU, approximately 16 feet by 26 feet, with a height of 17.5 feet, behind the front building line of the existing house but forward of the rear building line. He showed photographs of recently built ADUs that were similar to the proposed ADU, and testified that the proposed ADU would be modified to match the architecture of the existing home. See Exhibit 10, page 5.

Mr. Novotny testified that the proposed ADU would have a 19 foot rear setback (18 foot setback required), an 18 foot side setback (16 feet required), and an 86.5 foot front setback (60 feet required). See Exhibit 10, page 6. He testified that ADUs are supposed to be behind the rear building line of the main house, but that there is not enough room on the subject property to accommodate this. He showed the Board photographs of the subject property with a gold star showing the location of the proposed ADU, and noted that the driveway would be between the existing house and proposed ADU. See Exhibit 10, pages 7-8.¹

¹ Petitioner Brett Howard testified that the shed and hedge shown in the photograph at Exhibit 10, page 8, have been removed.

Mr. Novotny testified that the area behind the main house is only 26 feet deep. He testified that a 12 foot setback from the rear lot line is required, and that if an eight (8) foot separation is imposed between the main house and the proposed ADU,² that would leave a depth of only six (6) feet for the proposed ADU. See Exhibit 10, pages 10-12. He testified that a six (6) foot wide house is too small for a person to live in, and that the depth of the Petitioners' rear yard is insufficient to accommodate an ADU. Mr. Novotny testified that this constitutes an extraordinary condition peculiar to this property.

Mr. Novotny testified that the Petitioners are trying to locate the proposed ADU in an area of their property that can support such a structure. He testified that the proposed ADU would meet all of the setback requirements except the requirement that it be located behind the rear building line of the historic house, and he testified that it would be the same size as a typical garage.

Mr. Novotny testified that the original 1955 subdivision of the larger estate created a condition where the main house was set way back on the property, and that this did not leave enough of a rear yard for the construction of an ADU, which Mr. Novotny noted was allowed in the R-60 Zone. He testified that this situation was not caused by the Petitioners. Mr. Novotny testified that the Petitioners' house is located approximately 64 feet from the property's left side lot line, and that property's side yard is fully sufficient to support the proposed ADU. He testified that the ADU would create a symbiotic relationship with the neighborhood because of its siting.

Mr. Novotny testified that the proposed location for the ADU preserves the existing home, and that the proposed ADU was approved by the Historic Preservation Commission ("HPC") in January, 2023. He testified that the appearance and placement of the proposed ADU were discussed in connection with that approval. Mr. Novotny further testified that construction of the proposed ADU was consistent with the applicable general plan, which calls for ADUs to support the housing supply, and with the North and West Silver Spring Master Plan.

In response to Mr. Ward's letter, Mr. Novotny testified, regarding runoff, that they submitted a drainage plan with their permit application. He testified that the downspouts for the ADU would be on its front, and would drain towards Salisbury Road. He testified that the water and sewer lines for the proposed ADU would tie into those serving the existing house, and that no new water or sewer lines would be needed. Mr. Novotny testified that electrical service is the only question, and that the location of the electrical lines will be determined by PEPCO.³

In response to a Board question asking if the proposed ADU could be turned 90 degrees and placed at the end of the driveway, behind the rear building line, Mr. Novotny

² Mr. Novotny testified that other jurisdictions, such as Arlington County, Virginia, require a separation of eight (8) feet between the main house and ADU in order to create a comfortable distance between the structures.

³ Mr. Howard noted at this juncture that their power comes in from Seminary Road, but that all the new homes have power lines on Salisbury Road. Thus he concluded there were multiple options for power.

testified that they did not consider that because it would push the structure into the side and rear setbacks. He testified that turning the ADU 90 degrees would also change its look from the street and increase its impact on the properties to the rear. In response to a Board question asking if there would be adequate parking for the proposed ADU, Mr. Novotny testified that there was sufficient parking.

12. Mr. Howard testified that they moved into the house on the subject property in 2021, after previously living across the street. He testified that the HPC had described the neighborhood as "eclectic," with historic and non-historic homes, some of which were built more recently. He stated that his father-in-law intends to live in the ADU.

13. Mr. Ward testified that his house and property were part of the larger estate before that estate was subdivided. He stated that Mr. Novotny had satisfactorily answered the questions he had raised about drainage and utilities. Mr. Ward testified that his other question arises from the 1955 subdivision, and the fact that as a result of that subdivision, his home is only 12.5 feet from the shared property line. He noted that this probably would not have been allowed today. Mr. Ward asked if there was any flexibility in the placement of the proposed ADU, in order to create a greater separation between the ADU and his home. Mr. Novotny then noted that the proposed ADU exceeds the required setbacks, and that in siting the ADU, they had tried to balance the needs on the front and back of the property. Mr. Howard testified that they want a good relationship with all of their neighbors. He stated that if they were to move the proposed ADU forward on the property, they might hear from other neighbors who were responsible for the creation of the historic district.

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 variance complies with the applicable standards and requirements set forth in Section 59-7.3.2.E.2, 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, per the Statement, Site Plan, photograph, PowerPoint, and the testimony of Mr. Novotny, that despite the generous size of the subject property, the area behind the rear building line of the existing historic house is unusually shallow, such that an ADU cannot be accommodated behind the rear building line in accordance with the required setbacks. See Exhibits 3, 4, 5(d), and 10. The Board finds that this constitutes an unusual situation peculiar to this 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 Statement and testimony of record indicate that the Petitioners purchased the subject property in 2021, and that they are not responsible for the property's shallow rear yard, which was created when the larger estate on which the Petitioners' home was originally located was subdivided in 1955. See Exhibit 3. 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, based on the Statement, Site Plan, photograph, PowerPoint, and testimony of Mr. Novotny, that the proposed ADU cannot be located behind the rear building line of the Petitioners' house because that area is too shallow to accommodate an ADU. See Exhibits 3, 4, 5(d), and 10. The Board further finds that allowing the Petitioners to locate their proposed ADU in their side yard is the minimum necessary to overcome the practical difficulty that is posed for the Petitioners by this constraint, and thus to allow the Petitioners to have an ADU. In addition, the Board notes that except for the requirement that the ADU be located behind the rear building line of the existing house, the proposed ADU will meet all of the setback/location requirements of the Zoning Ordinance. Finally, the Board notes that the proposed ADU has been approved by the Historic Preservation Commission, and that the requested variance is the minimum needed to allow construction that is consistent with that approval. See Exhibit 7. Thus the Board finds that this element of the variance test is satisfied.

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 is needed to allow the Petitioners to construct an ADU on their property, can be granted without substantial impairment to the intent and integrity of the applicable North and West Silver Spring Master Plan (2000), which seeks to "preserve the existing residential character and to reinforce the many desirable features of the North and West Silver Spring neighborhoods," and recognizes the importance of preserving the Linden Historic District. The Board further finds, as it did above, that the proposed ADU has been reviewed and approved by the County's Historic Preservation Commission. See Exhibit 7. In light of the foregoing, the Board finds that this element of the variance test is satisfied.

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 that granting a variance to allow the proposed ADU will not be adverse to the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test. In support of this finding, the Board notes that although the proposed ADU will be sited forward of the rear building line, it will still meet or exceed the applicable setbacks from the front, rear, and side lot lines. The Board further finds, per the Statement and testimony of Mr. Novotny, that the proposed ADU has been approved by the HPC, and that it has design elements that are intended to complement the Petitioners' historic home. See Exhibits 3 and 7. Finally, the Board finds that while

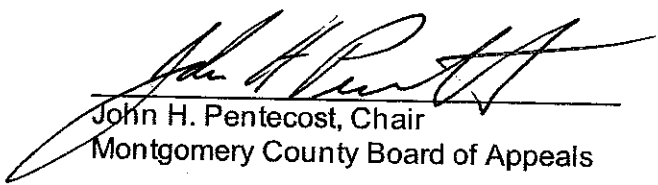
Mr. Ward would prefer that the ADU be located further from the shared property line, the ADU will be located more than the required distance from that lot line. See Exhibits 3, 4, and 10.

Accordingly, the requested variance to allow the proposed construction of an accessory structure (ADU) forward of the rear building line is **granted**, subject to the following conditions:

1. The Petitioners shall be bound by the testimony and exhibits of record.
2. Construction shall be in accordance with Exhibits 4 and 5(a)-(c).

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Caryn Hines, Laura Seminario-Thornton, and Alan Sternstein 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 12th 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.