

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case Nos. A-6815 and S-2092**

**PETITION OF BROOKE GROVE FOUNDATION, INC.**

OPINION OF THE BOARD  
TO CONSOLIDATE REQUESTS, GRANT VARIANCE,  
AND MODIFY SPECIAL EXCEPTION

(Opinion Adopted June 7, 2023)

(Effective Date of Resolution: June 21, 2023)

Case No. A-6815 is a variance application, pursuant to Section 59.7.3.2 of the Montgomery County Zoning Ordinance, submitted by Soo Lee-Cho, Esquire, on behalf of Petitioner Brooke Grove Foundation, Inc. ("Brooke Grove"), for relief from the height restriction applicable to proposed construction on Brooke Grove's special exception property. The proposed construction of an Independent Living Apartment building/Hybrid Home with a total building height of forty-four (44) feet requires a variance of nine (9) feet from the 35 foot maximum building height established by Section 59-G-2.35.1(g)(5) of the Montgomery County Zoning Ordinance (2004).

In addition, Brooke Grove also seeks an administrative modification of special exception Case No. S-2092 to allow changes to the design and location of 150 of its previously approved Independent Living Apartments. The Board of Appeals granted Case No. S-2092 to the Brooke Grove Foundation, effective November 15, 1995, pursuant to Section 59-G-2.35.1 of the Zoning Ordinance, to permit the operation of a life care facility consisting of independent living units, group homes and two nursing homes. The Board has granted administrative modifications to this special exception effective July 23, 1996, May 7, 1997, August 6, 1999, March 11 2003, July 3, 2003, October 31, 2003, November 28, 2005, October 12, 2006, March 24, 2011, February 5, 2013, July 19, 2013, and August 19, 2014, to allow changes to the construction phasing, revisions to the site plan, changes in the allocation of nursing beds, and a new wing on the west side of the Brooke Grove Rehabilitation and Nursing Center to replace the Sharon Wing. Effective December 17, 2015, this special exception was modified to permit an electrical generator, and effective January 24, 2019, this special exception was modified to allow the construction of a dedicated loading area for a new trash/recycling facility, construction of a concrete pad for an emergency generator, and installation of an eight (8) foot privacy fence and gates.



- Phase 3:** Construction of 40 Independent Living villas/cottages  
**Phase 4:** Construction of 330 Independent Living Apartments with a Community Center (or Commons) connecting the apartments units

Ms. Lee-Cho states in the Statement and in the Letter that Phases 1 through 3 are now complete, and that Brooke Grove is seeking to “embark on Phase 4 of development and construct a portion of its approved Independent Living Apartments (“ILAs”) – a key component of the continuum care community originally envisioned by the long-range campus plan.” The Statement and Letter state that all of the ILA units that were originally approved were to be located in three U-shaped buildings organized around a court-yard, with a community building flanking the remaining side of the courtyard. The Statement and Letter further state that Brooke Grove is now seeking to “proceed with the construction of the first 150 of the previously approved 330 ILA units<sup>1</sup> but in structures that have been reconfigured in design and location.” As described in the Statement and Letter, and shown on the attachments and drawings reproduced in the Statement and Letter, 116 of the ILAs “are proposed to be located in the same general area of the campus as the original approval but are no longer organized around a large single open courtyard.” That “area” is basically in the center of the Brooke Grove campus. The Statement and Letter indicate, with respect to the revised siting of these ILAs, that “[t]he proposed Commons (i.e., community building) now serves as both the anchoring structure and centralized link to smaller clusters of ILA units that have been carefully sited to be within a comfortable walking distance to outdoor and indoor amenities and services.” The Statement and Letter further state that the other 34 ILAs are proposed to be “incorporated” into three reconstructed group homes (i.e., Hybrid Homes) that “were already constructed/in existence at the time of the 1995 Campus Plan approval,” and are located to the east of the other units. They indicate that the first “Hybrid Home” to be built will be the center building of the three; this is the home for which the requested variance is sought. See Exhibit 3 of Case No. A-6815 and Exhibit 106 of Case No. S-2092.

2. The Statement and Letter both state that while “the current architectural design” of the proposed structures is “substantially similar to what was approved for the buildings in conjunction with the original 1995 Campus Plan approval,” the way in which the County’s Department of Permitting Services (“DPS”) measures the height of buildings has changed since the original ILAs were approved. See Exhibit 3 of Case No. A-6815 and Exhibit 106 of Case No. S-2092. The Statement states that prior to enactment of the 2014 Zoning Ordinance, building height was measured from the finished grade, whereas now it is measured from the average pre-existing grade across the front of a proposed building. In addition, the Statement asserts that the application of this new method for measuring building height, “coupled with minimum building design standards that have evolved since 1995 such as standard 9 foot floor-to-ceiling heights and increased floor assembly structure depth to meet modern acoustic ratings and ventilation/duct system requirements,” make it “impossible to achieve the previously approved 3-story ILA buildings within the 35 foot height restriction imposed by Section 59-G-2.35.1(g)(5).” See Exhibit 3 of Case No. A-6815.

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<sup>1</sup> Ms. Lee-Cho clarified at the hearing, with the help of Mr. Hunter, that while 330 ILAs were originally approved, that number was reduced by 12 units in the Board’s August 19, 2014, Resolution, and that Brooke Grove is now seeking to proceed with construction of 150 of the remaining 318 ILA units.

3. The Statement and Letter both include cross-sections and elevations of the previously approved ILAs and the proposed ILAs and Hybrid Homes, showing the similarities between the two. The cross-sections note that the slope of the each building's roof will match that of other buildings on the campus to "create a residential aesthetic to the buildings." See Exhibit 3 of Case No. A-6815 and Exhibit 106 of Case No. S-2092. The cross-sections also include reasons for the increased space between floors, as follows:

Outside Air - We are required by the Mechanical Code to provide ducted fresh air to all apartments which increased depth of the floor assembly in the apartments and the corridors

Acoustics – we need to increase the floor assembly structure to get the building code required STC and IIC ratings for sound transfer through the floors which increases the depth of the floor assembly

Market expectations – 9' ceiling heights in the living rooms and bedrooms has become a minimum standard in the LPC/CCRC industry

4. The Statement states that the subject property contains "exceptional topographical conditions and other extraordinary conditions" that make it is unique for the purposes of satisfying Section 59.7.3.2.E.2.a.i of the Zoning Ordinance. The Statement states that at over 222 acres, the subject property is exceptional is size. In addition, the Statement states that the property has "sloping topographical conditions that make siting a 3-story building that adheres to a 35-foot height restriction unduly burdensome." Finally, the Statement states that the standard height limit for buildings in the RE-2 Zone is 50 feet, and that the 35-foot limit imposed on this property by virtue of its special exception thus inflicts an "undue hardship" on Brooke Grove relative to "surrounding properties that are much smaller in size than Brooke Grove's 222 acres." See Exhibit 3 of Case No. A-6815.

5. The Statement states that the need for the requested variance is not the result of actions by the Petitioner, that the requested variance is the minimum needed to overcome the practical difficulty that full compliance with applicable height limit would impose, and that the variance can be granted without substantial impairment to the intent and integrity of the general plan. See Exhibit 3 of Case No. A-6815.

6. Finally, the Statement states that granting the requested variance will not be adverse to the use and enjoyment of abutting or confronting properties. In support of this, the Statement states that "due to the sheer size of Brooke Grove's property and the interior locations of the proposed ILA structures, the additional building height will have no visual impact to adjoining properties whatsoever." See Exhibit 3 of Case No. A-6815.

7. The Letter states that the proposed administrative modification to the special exception, to approve "changes to the original design/siting of previously approved improvements to accommodate a more cost effective and functional design," can be granted under the standard in Section 59-G-1.3(c)(1) of the 2004 Zoning Ordinance because the proposed modification "will have no impact whatsoever upon the effect on

traffic or the nature, character or intensity of the use" insofar as there is "no increase in the overall number of residents/patients previously approved under the special exception for the campus." See Exhibit 106 of Case No. S-2092. Ms. Lee-Cho includes a Plan Set for the Independent Living Apartments, Hybrid Homes, and Commons with her submission. See Exhibit 106(a) of Case No. S-2092.

8. The record contains a letter from the Patuxent Watershed Protective Association (PWPA) stating that the PWPA has reviewed the variance request, and "has no environmental objection to granting the variance or the requested administrative modification to the underlying special exception for this property." The PWPA letter further expresses the Association's belief that "since the need for the variance arises from changes made by Montgomery County to the building codes and starting height measurement points subsequent to previously approved design/build concepts, and through no fault otherwise by the developer, that it would be reasonable to grant the requested variance." See Exhibit 9 of Case No. A-6815 and Exhibit 107 of Case No. S-2092.

9. At the hearing, Ms. Lee-Cho oriented the Board to the subject property, stating that it is comprised of approximately 222 acres, and that it is located in the RE-2 Zone. Ms. Lee-Cho stated that Brooke Grove has been operating on the property since 1950, and that it currently operates pursuant to special exception Case No. S-2092, which was granted to the Brooke Grove Foundation in 1995 for a life care facility. Ms. Lee-Cho stated that Brooke Grove is now seeking to implement Phase 4 of their special exception, the construction of ILAs. She noted that Brooke Grove was originally approved for 330 ILAs, but that a subsequent modification of the special exception had adjusted that number downwards slightly. She stated the Brooke Grove is now seeking to implement the first 150 of the approved ILAs.

Ms. Lee-Cho stated that since the initial approval for these ILAs, the Department of Permitting Services has changed the way in which it measures the height of buildings. She stated that the previous approval was for 3-story buildings, but that the new measuring methodology makes it difficult to construct these types of 3-story buildings in compliance with the height limit. Ms. Lee-Cho noted that the height limit in the RE-2 Zone is actually 50 feet, but that life care facilities are limited to 35 feet. She stated that her client is seeking a nine (9) foot variance to allow a structure with a maximum height of 44 feet as height is measured today.

In response to a Board question asking how the Board could find that the addition of these units did not increase the intensity of this special exception use, Ms. Lee-Cho stated that Brooke Grove is not adding to the number of residential units that have been approved for this use, and that there is therefore no increase in density. She stated that the ILA buildings that were approved in 1995 were three-story buildings, and that the ILA buildings being proposed now are also three-story buildings. In response to a Board observation that the buildings appear to have four stories when viewed from the rear, Ms. Lee-Cho stated that as shown on the cross-section of the buildings that were approved in 1995, included on page 8 of the Statement and page 6 of the Letter, the previously-approved buildings also had a fourth level on the back side. Ms. Lee-Cho stated that the proposed construction will have no adverse impact on neighboring properties.

10. Mr. Hunter explained the history of the Brooke Grove Foundation. He testified that he has been with Brooke Grove since 1996, and that he has been actively engaged with the construction on the property since that time. Mr. Hunter testified that when Brooke Grove first reached the ILA phase of construction (Phase 4), competition/saturation in the marketplace caused them to divert their on-hand resources to the construction of cottages. Mr. Hunter testified that now is the time to build the previously approved ILAs. He testified that construction on the property will always be limited by impervious surface considerations. Finally, Mr. Hunter testified that the three existing group homes on the campus will be torn down and replaced with "Hybrid Homes."

11. Mr. Kimmel testified that he is an architect in a 90-person firm that specializes in senior living facilities.<sup>2</sup> He testified that he is familiar with the Brooke Grove property. He testified that the Brooke Grove property is located in the RE-2 Zone, which has a 50 foot height limit, but that the maximum allowable height for Brooke Grove buildings is 35 feet, by virtue of Section 59-G-2.25.1(g)(5) of the 2004 Zoning Ordinance. Mr. Kimmel then proceeded to testify about the difference between building height calculations under the 2004 Zoning Ordinance and under the 2014 Zoning Ordinance. He testified that height was previously measured using the final grade along the front face of the building, and that in 2014, this was changed to use the existing grade. Mr. Kimmel testified that this makes a significant difference, particularly on a sloped site. He then testified that the subject property is more than just sloped, describing it as "undulating," and testified that this creates challenges in meeting the building height limit.

Regarding Exhibit 10, the existing conditions site exhibit, Mr. Kimmel testified that the green hatched areas are wooded, and that most have forest buffers which preclude building in those areas. He testified that the property also has multiple stream buffers, particularly around its perimeter. See Exhibit 10 of Case No. A-6815. Mr. Kimmel testified that the topography over the entire property creates challenges for using the "existing grade" to determine building height. He testified that the entry to the property is completely wooded and in a conservancy, and that the buildings are generally clustered in the center of the campus. Mr. Kimmel testified that Brooke Grove is seeking to locate the ILAs in areas that are not wooded, and where it is most practical to locate them, in light of the topography.

Mr. Kimmel testified that the Brooke Grove campus is very large, and that this allows Brooke Grove to keep construction on its property significantly far away from neighboring properties. He testified that the new ILAs will be located in the center of the campus and in the area east of center that is currently occupied by three group homes. Mr. Kimmel testified that these group homes will be removed and replaced with three new ILA buildings in the same general area. He testified the term "Hybrid Homes" that is used to refer to these replacement buildings denotes that they are small apartment buildings.

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<sup>2</sup> Ms. Lee-Cho asked that the Board treat Mr. Kimmel as an expert in building height measurements and why additional building height is needed in this case, despite his resume not being included for the record, and the Board agreed to do so.

Mr. Kimmel testified that the Hybrid Homes are three-story buildings. He testified that the market now demands nine (9) foot ceilings, whereas in 1995, when the ILAs were originally approved, that was not the case. Mr. Kimmel testified that another big change affecting the height of these buildings is that the building code now requires outside air to all units, which requires more ductwork in the building's interstitial space to bring fresh air down from the roof.

Mr. Kimmel testified that Exhibit 11 includes distances from adjacent homes, and shows that the proposed construction is removed from neighboring properties. See Exhibit 11 of Case No. A-6815. Mr. Kimmel testified that the buildings in the center of the Brooke Grove campus would follow the grade of the property and would be slightly lower than the road, later adding that without exception, the roads would be at a higher elevation than the buildings, which in turn would reduce the visual height of the buildings. Mr. Kimmel testified that the area behind the proposed Hybrid Homes is forested.

Mr. Kimmel used the average grade study at Exhibit 4(c) of Case No. A-6815 to explain how challenging it is to site a building on this property with a constant grade across the front, and testified that it is also challenging to locate the buildings so that they have similar elevations to one another, which he stated is important to allow seniors to move between buildings. In response to a Board question asking how many of the ILA buildings would need height variances, Mr. Kimmel testified that they would all need variances.<sup>3</sup>

## **FINDINGS OF THE BOARD**

### Case No. A-6815

Based on the binding testimony and 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 of the Montgomery County 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, per the Statement and the testimony of Mr. Kimmel, that the significantly sloped and undulating topography of the subject property is an extraordinary condition peculiar to this property. In addition, the Board notes that at 222 acres, the subject property is exceptionally large for the RE-2 Zone, which has a minimum lot size of two (2) acres. Finally, the Board finds that the change in the way that DPS measures the height of buildings between the time that the ILAs for this property were originally

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<sup>3</sup> Ms. Lee-Cho explained that per DPS, each ILA/Hybrid Home building will require a specific topographical study and will need a separate variance. She stated that the building permit denial submitted with the variance application is for the center Hybrid Home building.

approved and the present also constitutes an extraordinary condition peculiar to this property. Taken together, the Board finds that these circumstances constitute an extraordinary condition that makes the subject property unique, 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 that Brooke Grove is not responsible for the sloped and undulating topography of its property, or for the change in the way that DPS measures the height of buildings, 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 testimony of Mr. Kimmel, that while the subject property is large, the area on the property that is available for construction is limited by the presence of existing forests and streams, and protective buffers associated with those features. See Exhibit 10. In addition, the Board finds that the sloped and undulating topography of this property, which extends to those areas where structures could be built, limits the ability of Petitioner Brooke Grove to site the proposed ILAs, including the Hybrid Home at issue in this case, in accordance with the height limitations of the Zoning Ordinance, causing the Petitioner a practical difficulty. The Board further finds that having to use the property's "existing grade" along the front of the proposed building to determine building height exacerbates the challenges posed by the property's topography, and intensifies this practical difficulty. Finally, the Board finds that the requested height variance is the minimum needed to overcome the practical difficulties posed by the property's topography and the change to the way in which height is measured, and to allow construction of buildings that are substantially similar to those that were previously approved, and that meet modern building codes and market demands. Accordingly, 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 can be granted without substantial impairment to the intent and integrity of the 1998 Sandy Spring/Ashton Master Plan, which seeks, with respect to this property, to "[p]rovide rural open space along Lake Hallowell, MD 108, and Brooke Road," to "[c]luster new structures in the central area of the site," and to ensure protection of the Patuxent River watershed by, among other things, maintaining stream buffers, limiting impervious surfaces, and phasing development. The Board finds, based on the Statement, that development of this property has been phased, and that the proposed Hybrid Home will replace one of three group homes that were already in existence when this Master Plan was adopted. The Board notes that the record contains a letter from the Patuxent Watershed Protective Association indicating that they have no objection to the grant of the requested variance. See Exhibit 9. Finally, the Board finds that in accordance with the testimony of Mr. Hunter, construction on the



property is limited by impervious surface considerations. Accordingly, 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.*

Based on the Statement, the distances from neighboring properties shown on Exhibit 11, and the testimony of Mr. Kimmel, the Board finds that any view of the proposed Hybrid Home will be limited by existing forest, topography, and distance, and 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.

#### Case No. S-2092

Based on the evidence of record and the testimony of Mr. Kimmel, the Board finds that the requested administrative modification of the special exception can be granted. Because Case No. S-2092 was approved prior to October 30, 2014, under Section 59.7.7.1.B of the current Zoning Ordinance, this modification request must be reviewed under the standards and procedures in effect on October 29, 2014, unless the applicant requests otherwise. Section 59.G-1.3(c)(1) of the Montgomery County Zoning Ordinance (2004) provides, pertaining to modification of special exceptions:

If the proposed modification is such that the terms or conditions could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood, the board, without convening a public hearing to consider the proposed change, may modify the term or condition.

The Board finds that the proposed modification, to allow changes to the design and location of previously approved improvements to this property, as discussed herein and in Ms. Lee-Cho's Letter of April 18, 2023, and as shown on the drawings included in and attached to that Letter, will not substantially change the nature, character or intensity of the use or its effect on traffic or on the immediate neighborhood. In support of this, the Board finds, per the Letter, that Brooke Grove is not requesting any increase to the total number of units, residents, or patients previously approved to be located/housed on this campus. Rather, the Board finds that Brooke Grove is simply requesting minor design and location changes to previously approved Commons and ILA units that will be located in the center of this unusually big and largely forested campus, and permission to reconstruct and use three existing group home buildings as Hybrid Homes. See Exhibits 106 and 106(a).

Accordingly, on a motion by John H. Pentecost, Chair, seconded by Caryn Hines, with Richard Melnick, Vice Chair, Laura Seminario-Thomton, and Alan Sternstein in agreement:


**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that requested variance of nine (9) feet from the 35 foot maximum building height, needed for construction of the first Hybrid Home, is **granted**, subject to the following conditions:

1. The Petitioner is bound by the testimony and exhibits of record; and
2. Construction must be completed in accordance with Exhibits 4(a)-(c) and 5;

In addition, on a motion by Richard Melnick, Vice Chair, seconded by Caryn Hines, with John H. Pentecost, Chair, Laura Seminario-Thornton, and Alan Sternstein in agreement:

**BE IT FURTHER RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the request to administratively modify this special exception as described herein and in Ms. Lee-Cho's Letter of April 18, 2023 (Exhibit 106), and shown on the attachments to that Letter (Exhibit 106(a)(i)-(vi)), is granted, and

**BE IT FURTHER RESOLVED** by the Board of Appeals for Montgomery County, Maryland that all terms and conditions of the original special exception, together with any modifications granted by the Board of Appeals, remain in effect.

  
John H. Pentecost  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 21st day of June, 2023.

  
Barbara Jay  
Executive Director

**NOTE:**

Regarding the Variance (Case No. A-6815):

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.

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.

Regarding the Administrative Modification (Case No. S-2092):

Any party may, within fifteen (15) days of the date of the Board's Resolution, request a public hearing on the particular action taken by the Board. Such request shall be in writing, and shall specify the reasons for the request and the nature of the objections and/or relief desired. In the event that such request is received, the Board shall suspend its decision and conduct a public hearing to consider the action taken.

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.