

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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(240) 777-6600

Case No. A-6872

PETITION OF MARTINA S. BARASH AND RUTH ANN MASTERSON

OPINION OF THE BOARD
(Hearing Held: July 17, 2024)
(Effective Date of Opinion: July 24, 2024)

Case No. A-6872 is an application by Petitioners Martina S. Barash and Ruth Ann Masterson for two variances. The Petitioners are seeking to construct an open porch and rear addition to their existing home.

The proposed construction of an open porch requires a variance of 4.70 feet, as it is within 11.30 feet of the front (west) lot line. The required front setback is normally twenty-five (25) feet, in accordance with Section 59.4.4.9.B of the Zoning Ordinance, but is reduced to sixteen (16) feet for open porches, in accordance with Section 59.4.1.7.B.5 in the Measurements and Exceptions section of the Zoning Ordinance.

In addition, the proposed construction requires a variance of 4.72%, as the rear addition increases the total lot coverage to 34.72%. The maximum lot coverage is 30% for infill construction in the R-60 Zone, in accordance with Section 59.4.4.1.B.2 of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on Wednesday, July 17, 2024. Petitioner Ruth Masterson appeared at the hearing in support of the requested variances, and was represented by Soo Lee-Cho, Esquire. Architect Brian McCarthy also appeared.

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

EVIDENCE PRESENTED

1. The subject property is Lot P79, Block 16, B.F. Gilbert's Subdivision of Takoma Park, located at 6807 Allegheny Avenue in Takoma Park, Maryland, 20912, in the R-60 Zone. The property is a narrow rectangle, 23.5 feet wide by 100 feet long, located on the east side of Allegheny Avenue. It has a total area of 2,350 square feet. See Exhibits 3, 4, and 8(a).

2. The subject property contains one-half of a duplex structure that has approximately 840 square feet of above-ground space and that, per SDAT, was built in 1918. See Exhibits 3 and SDAT Printout. Per the Statement of Justification ("Statement"), the half of the duplex that is owned by the Petitioners is "located on a deeded portion (see Deed re 6807 Allegheny recorded at Liber 38264 Folio 493) of what was platted as Lot 79, Block 16 of the B.F. Gilbert's Subdivision of Takoma Park in the Land Records of Montgomery County on Plat No. 205 (except below)." The Statement states that "[a]s originally platted, Lot 79 itself is unusually narrow and small for the R-60 Zone, with a width of only 40 feet and total area of only 4,000 square feet, 33% smaller than current R-60 Zone minimums," but that "as one of two fee simple attached dwellings constructed on the original lot, **the subject property consists of only 2,350 square feet or 58.75% of Lot 79 with a lot width of 23.5 feet.**" (emphasis in original) Thus the Statement concludes that the subject property "is exceptionally small and narrow in size/shape, not only for the R-60 Zone in general, but as compared to the other lots in the neighborhood," noting that "as reflected by the Certified Zoning Map, this is the only property in the area constructed with two (2) fee simple attached dwellings on a single platted lot." See Exhibits 3, 7(a)-(b), and 8(a)-(b).

3. The Petitioners are seeking to "create much-needed expanded livable space" by constructing "a functional and complementary second-floor addition and front/open porch to the existing attached dwelling." See Exhibit 3. The Statement states that the "extreme narrowness and small size" of the subject property necessitates the need for the following two variances in connection with the proposed construction:

(1) For the proposed two-story addition, the proposed construction requires "a variance of 4.72% from the strict application of Section 59-4.4.1.B.2 of the Zoning Ordinance requiring no more than 30% lot coverage for R-60 infill lots that are less than 6,000 SF in size;" and

(2) For the proposed open porch with existing stoop, the proposed construction requires "a variance of 4.70 feet from the strict application of Sections 59-4.4.9.B. and 59-4.1.7.B.5. of the Zoning Ordinance, requiring a front setback of 16 feet (i.e., 25 feet minus a 9-foot encroachment allowable for open porches/stoops) from Allegheny Ave."

See Exhibit 3. The Statement states that the proposed construction "is necessary to create a more functional living space in this modest sized home," and that it "does so in a manner that improves the architectural design of the property."

4. The Statement further states that the requested variances meet the standard set forth in Section 59.7.3.2.E.2 of the Zoning Ordinance and should be granted, as follows:

1. Pursuant to Sections 59.7.3.2.E.2.a.i of the Zoning Ordinance, unusual or extraordinary conditions exist to justify the requested variances in that the Property is not only exceptionally narrow for an R-60 zoned lot, with only 23.5 feet (the standard minimum lot width in the R-60 zone being 60 feet), but extremely small with a total land area of only 2,350 SF (as compared to the R-60 minimum of 6,000 SF).

2. In addition, pursuant to Section 59-7.3.2.E.2.a.ii of the Zoning Ordinance, unusual or extraordinary conditions exist to justify the requested variances in that the proposed development seeks to utilize/enhance an existing legal nonconforming structure.

3. Moreover, pursuant to Sections 59-7.3.2.E.2.b through 59-7.3.2.E.2.d of the Zoning Ordinance, the special circumstances/conditions necessitating the variances are not the result of actions by the Petitioners, the requested variance is the minimum necessary to overcome the practical difficulties discussed herein, and the variance can be granted without substantial impairment to the intent and integrity of the general plan, as follows:

a. The special circumstances are not the result of any action by the Petitioners. The existing legal nonconformity of the house prior to the Petitioners ownership of the Property, and pre-dates the current zoning regulations in the County.

b. The applicable master plan is in the 2000 Takoma Park Master Plan. The construction of the proposed second-story addition and front/open porch with existing stoop will not impair the intent and integrity of the Plan but will vastly improve the functionality of this residential property thereby enhancing and strengthening the mainly residential nature of this area.

4. Finally, pursuant to Section 59-7.3.2.E.2.e, granting of the variances will not be adverse to the use and enjoyment of abutting or confronting properties, as it mainly builds on top of the existing footprint of the property and will remain consistent with the overall character, scale/massing and design of the neighborhood.

See Exhibit 3. The Petitioners' Site Plan shows that the existing duplex does not comport with the required 25-foot setback from the front lot line, making it nonconforming in light of its construction date. See Exhibit 4. The Petitioners' building permit denial confirms that the existing structure is nonconforming. See Exhibit 6.

5. At the hearing, Ms. Lee-Cho explained the history of the property to the Board. She stated that the property is part of what was originally platted as Lot 79. See Exhibit

8(b). She stated that when the duplex was built, Lot 79 was split into two properties by deed, with the blue area shown on Exhibit 8(b) being the subject property.¹ Ms. Lee-Cho stated that with an original width of 40 feet, Lot 79 was narrow to begin with, and that when it was split (lengthwise) in two, it created two properties that are very narrow and very small. Ms. Lee-Cho stated that according to SDAT, the existing duplex was built in 1918, when there were no zoning standards and no Zoning Ordinance.² She stated that the front of the Petitioners' home does not meet the required setback from the front lot line, and that as a result, the structure is legal and nonconforming. Ms. Lee-Cho stated that there are no other duplexes in the immediate neighborhood. See Exhibit 8(a).

Ms. Lee-Cho stated that notwithstanding the narrowness and small size of the subject property, it is subject to the development standards of the R-60 Zone, including the 30% limit on lot coverage for infill construction. She stated that the proposed rear addition causes the coverage to exceed this limit by 4.72%.

Ms. Lee-Cho stated that the other variance requested by the Petitioners involves the addition of a front porch. She stated that the existing home does not comply with the 25-foot front setback, and explained that while porches are permitted to project nine (9) feet into the required front setback, that is measured from the required front setback line, not from the front of the existing house. Thus Ms. Lee-Cho stated that the proposed open porch, which as shown on the Site Plan will be only eight (8) feet deep, requires a variance of 4.7 feet because of the non-conforming placement of the existing home. See Exhibit 4. Ms. Lee-Cho stated that the proposed porch will be consistent with other porches on the street, and thus meets the established historic or traditional development pattern of the street. She submitted photographs of the porches on neighboring houses in support of this assertion. See Exhibits 10(a)-(d).

Ms. Lee-Cho summarized the Petitioners' case by stating that there are many ways in which the request satisfies the uniqueness requirement set forth in Section 59.7.3.2.E.2.a of the Zoning Ordinance, stating that the subject property is extremely narrow and small, that the proposed construction uses the existing legal, nonconforming house, and that the proposed porch meets the established development pattern for porches on this street. Ms. Lee-Cho stated that if the requested variances are not granted, the Petitioners will be in a very tough spot because their property cannot be replatted or built separately, noting in response to a Board question that the property is not eligible for subdivision. She stated that the Petitioners need the requested variances to support the residential and historic use of the property.

6. Ms. Masterson testified that she has owned the subject property since 2009, and that she lives there with her wife and child. She testified that at approximately 864 square

¹ Ms. Lee-Cho later reiterated, in response to a Board observation that Lot 79, as originally platted, was not narrower than surrounding lots, that Lot 79 is a platted lot that was divided (roughly) in half by deed (as opposed to by subdivision). She stated that the Board has granted variances for parts of lots in the past, and that a deeded lot is part of a lot and is a recognized property.

² Ms. Lee-Cho noted that the surveyed plat is dated 1919, and that it is possible that the duplex may have been constructed shortly thereafter, perhaps in 1920, as opposed to the 1918 construction date shown on the SDAT printout.

feet, their house is tiny, and that while this might work for a single person or a couple, it is not adequate for a family. Ms. Masterson testified that they are seeking to add an open front porch that matches others on the street, and that they are also seeking to add a two-story, 15' x 15' addition to the rear of their home, including a half bath on the first floor, which currently does not have a bathroom.

Ms. Masterson testified that their neighborhood is closeknit and friendly. She testified that neighbors frequently gather on Friday evenings to talk. Ms. Masterson testified that she has talked with many of her neighbors, most of whom have additions, and that they are excited about the proposed improvements. In response to a Board question asking about the neighbors who own the other side of the duplex, Ms. Masterson said that they are in favor of the proposed construction.

Ms. Masterson testified that "Lot 78" shown on Exhibit 8(b) does not exist, and that Lots 76 and 77 each own half of that lot, so that their yards are much deeper than shown on this Exhibit.

7. Mr. McCarthy testified, in response to a Board question asking if the size of the proposed rear addition could be reduced to comport with the 30% infill lot coverage limitation, that that would entail removing about one third of the proposed addition, which he stated was modest to start with.

Mr. McCarthy presented a rendered Site Plan, and testified that it shows that the neighbors' front porches extend about eight (8) feet from the fronts of their houses towards the street, and that like the Petitioners' home, the neighbors' houses also encroach into the front setback. See Exhibit 4(a). He testified that the existing 96 square foot addition on the back of the Petitioners' home that is shown on the Site Plan will be removed in connection with construction of the proposed two-story rear addition. In response to a Board question asking about the view of the left side of the proposed addition from the half of the duplex not owned by the Petitioners, Mr. McCarthy testified that he would love to put windows on that side but that they are not allowed by the fire code.

Mr. McCarthy testified that the narrowness of the subject property constrains what can be built on it. He testified that the existing "stoop" on the front of the house is about 4.5 feet deep, and that the proposed porch will extend about eight (8) feet from the front of the house, like the neighbors' porches, leaving it 11+ feet from the front lot line, again similar to the neighbors' porches. See Exhibit 4 and 4(a).

Mr. McCarthy testified that the variance request meets Sections 59.7.3.2.E.2.a.i, ii, and v of the Zoning Ordinance because the property is extremely narrow and small, because the existing property is nonconforming in terms of its size and width, and contains an existing legal nonconforming structure, and because the proposed construction would comport with the established pattern of development in the neighborhood. He testified that it was important to note that the Petitioners' existing home

is less than 1,000 square feet in size, and that even with the proposed addition, it will still be significantly smaller than the median house size in the country.

FINDINGS OF THE BOARD

Based on the binding testimony and evidence of record, the Board finds that the requested variances can be granted. The requested variances comply 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;

Based on the submitted site plan and Statement of Justification, the majority of the Board members find that at 23.5 feet wide, the subject property is unusually narrow, and that with an area of only 2,350 square feet, the property is markedly substandard for the R-60 Zone, which has a 6,000 square foot minimum lot size. See Exhibits 3 and 4. The majority of the Board members further find that the application of the required setbacks and the infill lot coverage limitation to this exceptionally narrow and small lot results in an unusually constrained buildable area and constitutes an extraordinary condition that is peculiar to this property, in satisfaction of this element of the variance test.³

Section 59.7.3.2.E.2.a.ii. – the proposed development uses an existing legal nonconforming property or structure;

The majority of the Board members find, per the Statement, Site Plan, Building Permit Denial, SDAT Printout, and the testimony of Mr. McCarthy, and consistent with the representations of Ms. Lee-Cho, that the proposed development uses an existing property that was created before enactment of the County's first Zoning Ordinance, and that is substandard for its current Zone, both in terms of size and in terms of width, making it both legal and nonconforming. See Exhibits 3, 4, and 6, and SDAT Printout. The entirety of the Board further finds, based on the same, that the front of the Petitioners' home, which per SDAT was built in 1918, encroaches on the required front setback, and as a result, is a legal, nonconforming structure. Finally, the majority of the Board members find that the proposed rear addition, which necessitates the variance from the lot coverage limitation, uses the nonconforming property, and the entirety of the Board finds that the proposed front porch uses the existing nonconforming structure. Thus the Board finds that the application satisfies this element of the variance test.

Section 59.7.3.2.E.2.a.v – the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;

³ A minority of the Board members find that the subject property, which was created when Lot 79 was severed by deed, cannot be considered separate and apart from the remaining portion of Lot 79 (which is not owned by the Petitioners) for the purposes of satisfying this element of the variance test.

The Board finds, based on the rendered Site Plan, the photographs introduced at the hearing, and the testimony of Mr. McCarthy, and consistent with the representations of Ms. Lee-Cho, that the Petitioners' proposed front porch is similar to existing porches on neighboring properties, in terms of design, depth, and proximity to the street. See Exhibits 4(a) and 10(a)-(d). Accordingly, the Board finds that the proposed open front porch substantially conforms with the established historic or traditional development pattern of the Petitioners' street, 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 the subject property was created in and around 1918 or 1919, and that the Petitioners have only owned this property since 2009. See Exhibit 8(b) and SDAT Printout. Thus the Board finds that the Petitioners took no actions to create the special circumstances or conditions peculiar to this property, 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 full compliance with the front lot line setback, including the projection exemption for open porches, would not allow the Petitioners to construct an open front porch that uses the front of their existing legal, nonconforming home and that is consistent with the established pattern of open front porches on their street, causing them a practical difficulty. The Board further finds, based on the Statement, the rendered Site Plan, and the testimony of Mr. McCarthy, that the requested variance from the front lot line setback is the minimum necessary to allow the proposed construction of an open front porch that uses the existing nonconforming home and that is consistent with the established pattern of front porches on this street to proceed, in satisfaction of this element of the variance test. See Exhibits 3, 4(a), and 10(a)-(d).

In addition, the majority of the Board members find that the requested variance from the infill lot coverage limitation is the minimum needed to allow the construction of a modest rear addition, the construction of which involves the removal of an existing, smaller one-story rear addition. The majority of the Board members find that with a width of only 23.5 feet and a total area of 2,350 square feet, the application of the required setbacks to the subject property results in a very constrained and small buildable envelope, and that the additional imposition of the 30% lot coverage limitation placed on infill construction further constrains this available area, causing the Petitioners a practical difficulty and leaving them little room to expand their small home, even modestly, without variance relief. The Board notes, by way of comparison, that the application of the 30% infill lot coverage limitation to a minimally-sized, 6,000 square foot R-60 lot would result in an allowable buildable envelope of 1,800 square feet, whereas the application of the 30% infill limit to the Petitioners' property yields a 705 square foot buildable envelope. The majority of the Board members find this to be an extraordinary and onerous restriction from which variance relief is merited. In light of the foregoing, the majority of the Board

members find that the grant of the requested variance from the lot coverage restriction is the minimum necessary to allow construction of the proposed addition on this extraordinarily small, legal nonconforming property, and therefore to overcome the difficulties that full compliance with the Zoning Ordinance would impose, 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 the proposed construction will continue the residential use of this property, consistent with the recommendations of the Takoma Park Master Plan, which recommends preserving the existing residential character, encouraging neighborhood reinvestment, and enhancing the quality of life throughout Takoma Park. Thus 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 fronting properties.*

The Board finds, per the Statement, that the proposed construction “mainly builds on top of the existing footprint of the property and will remain consistent with the overall character, scale/massing and design of the neighborhood.” See Exhibit 3. The Board further finds, based on the testimony of Ms. Masterson, that she has spoken with many of her neighbors, including the neighbors who own the other side of the duplex, and that they have no objections to the proposed construction. Finally, the Board notes that the variance was properly noticed, that the record contains no letters of opposition to the proposed construction, and that no one appeared at the hearing to object to the grant of this variance. Accordingly the Board finds, in light of the foregoing, that granting the requested variances will not be adverse to the use and enjoyment of neighboring properties, in satisfaction of this element of the variance test.

Accordingly, based on the foregoing:

On a motion by John H. Pentecost, Chair, seconded by Caryn Hines, with Richard Melnick, Vice Chair, Alan Sternstein, and Amit Sharma in agreement, the requested 4.70 foot variance from the front lot line, needed for the construction of the proposed porch, is **granted**; and

On a motion by John H. Pentecost, Chair, seconded by Caryn Hines, with Amit Sharma in agreement, and with Richard Melnick, Vice Chair, and Alan Sternstein not in agreement, the requested 4.72% variance from the maximum lot coverage for infill construction in the R-60 Zone is **granted**; and

Both variances are 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 4 and 5(b).

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 24th day of July, 2024.


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.

Separate Statement of Board Member Alan B. Sternstein

Petition of Martina S. Barash, et al., Case No. A-6872

This variance request requires deciding what should be considered an exceptionally narrow and/or small property, in order to grant, for zoning purposes, a lot coverage variance in a residential subdivision.¹ I believe the Board has incorrectly decided to treat as a lot, for zoning purposes and assessing a variance request, what is actually a privately deeded portion of a platted subdivision lot. For this reason, I have voted against granting all of the variances the Applicants here request, specifically, the lot coverage variance.

Particularly in subdivided residential areas, the County's zoning ordinances are preeminently aimed at uniformity of development, to achieve objectives such as open space, scale uniformity, privacy, open sightlines, lot access and efficient land use. Thus, the ordinances specify a host of maximum and minimum requirements concerning matters such as lot size, lot frontage, setbacks, building height and lot construction coverage. For this reason, factors relevant to granting a variance should be applied with respect to the platted boundaries of a subdivision lot, if the Board is to avoid unduly impairing the objectives of the zoning ordinances in residential subdivisions.

Otherwise, achieving the zoning ordinances' objectives risks being adversely and unduly impaired, particularly if a claimed exceptional condition of any platted lot were to be determined not with respect to the platted shape, size and dimensions of the lot – the lot's approved characteristics – but with respect to privately effected, fee simple boundaries of a parcel within the lot. Such private boundaries, insofar as regulatory zoning objectives are concerned, are beyond the County's plenary control. As the Applicants' counsel acknowledged during the Board's hearing, the zoning laws, in particular, the R-60 lot requirements, would prohibit the platted lot at issue here from being further subdivided for zoning purposes. Indeed, were the deeded lot at issue a platted lot for zoning purposes and its deeded property lines zoning boundaries, the Applicant's proposed construction would be rejected out of hand, for the left wall of **the proposed two-story addition would be built on the zoned property line!** The platted lot was, however, subject to division by deed, which did occur, at the hands of a prior, private owner of the entire lot, allowing the two-story wall on a property boundary.

Suppose, for example, that the prior owner of a platted lot deeded half of it to A, LLC and the other half to B, LLC but retained ownership of both LLCs. Suppose further that the owner constructed two small rental dwellings on the lot, one on each parcel,

¹ One factor specified in Section 59-7.3.2.E of the County's zoning ordinances sufficient, together with other considerations, to justify a variance is "exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary condition peculiar to a specific property."

whose total coverage of the platted lot was just within zoning ordinance coverage limitations. Would the owner at some point in the future, desiring to increase the size of the dwellings, be granted a variance to exceed the coverage limitations on grounds that the deeded parcels, not the platted lot, were exceptionally narrow. I should think not.

The platted lot here, Lot 79 of Block 16 in B.F. Gilbert's Subdivision, Takoma Park, is not unduly narrow or small with respect to zoning standards, although the two unsubdivided parcels created by deed within the lot are. As Exhibit 8(b) shows, Lot 79 is essentially the same size and regular rectangular shape of the five other platted lots most proximate to it, together, a resubdivision of a portion of Block 16. If the size and dimensions of deeded parcels within a platted lot are small, narrow or irregular, that is not because of zoning; it is because of private action, specifically, action by an owner of the entire fee of the platted lot.

Subsequent owners of deeded parcels take title with notice of the platted lot's private division and notice of the private constraints and limitations the deeded parcels' sizes and dimensions impose on their needs and property uses. Variances are not a remedy for privately or personally incurred burdens. Like waivers, pardons, exemptions and other such discretionary safeguards, they are a means for limited but due relief from and only from law's, not private, burdens and impositions, provided by the law itself and granted according to factors and standards the law establishes, in recognition of its own potential imperfections and hardships in possible cases. Likewise, an applicant's personal needs alone, however compelling, are not valid grounds for a variance.

Although the private deeded boundaries of parcels within Lot 79 are limiting as a practical matter, the platted lot's zoning boundaries are not otherwise exceptional or extraordinary from a zoning perspective or justification for a variance from zoning requirements. To be sure, deeding portions of a platted subdivision lot are not the practice, but there are numerous examples of such action in the County, which, if indulged by zoning variances, would be detrimental to zoning objectives.²

Nor does the mere contextual ambiguity of the word "lot", as used in DPS's Building Permit Denial (Exhibit 6) justify a variance for privately deeded lots. To be sure, although the DPS denial characterized the property at issue here as a "lot," the Building Permit Denial also identified the relevant "lot" as "LOT- BLOCK: P79 - 16." Moreover and to the point, DPS, in its imprecise use of the word, did no zoning harm or reject the difference between a platted "lot" for zoning purposes and considerations and a "lot" as the deeded portion of a platted lot.

² There may, of course, be a circumstance where, on account of disregard of zoning limitations, for neglect or for whatever other reasons and although nonconforming, "the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood." This circumstance is another specified factor for granting a variance, but the situation warranting that factor's application is not present here.

In particular, DPS did not find that the narrow or small size of the fee parcel allowed the excess lot coverage which the Board now grants the Applicants. Instead, it denied the building permit requested and had no reason in its purpose for doing so to distinguish between Lot 79 and the Applicants' deeded parcel. Specifically, 30 percent of the platted lot, the maximum coverage its R-60 zoning allows, is also 30 percent of the deeded parcel. Had the Applicants, however, sought from the County a platted subdivision of Lot 79, their proposal, again, would have been denied as inconsistent with R-60 zoning requirements.

I also do not believe that the coverage variance Applicants request "uses a legal nonconformity" within the meaning of the zoning laws. When the duplex involved here was built by an owner on the undivided platted lot, there was no nonconformity created. The duplex met the requirements of the zoning law. Likewise, there was nothing nonconforming, from a zoning or other legal perspective, about the original or some subsequent owner of the entire platted lot deeding halves of Lot 79 and the duplex on it to separate owners. There is no legal nonconformity involved here.

Further, even assuming the existence of some nonconformity by virtue of the size and narrowness of the Applicants' deeded parcel, I do not believe that the requested variance makes "use" of that nonconformity, within the meaning of the zoning law. For example, where the wall of a proposed addition to a structure is extended in line with a legally existing but encroaching wall, use is actually made of the encroaching wall. The existing wall's encroachment guides and limits the proposed extension's encroachment. It also guides and limits the Board's decision. No such "use" of the supposed nonconformity here is made. The amount of additional lot coverage the Board allows here is not determined by any pre-existing nonconformity but simply by what the Applicants say they need.

Finally, it bears noting that the accommodating latitude the Board gives to its application of the zoning laws' coverage limitations cannot be squared with the Board's recent decision in *Petition of Jeisel Gomez*, Case No. 6867 (filed July 3, 2024). There, the Applicants' platted lot was indisputably narrow, viewed in itself and in comparison to all of the other platted lots on its block. Nevertheless, the Board (excluding this Member) denied a coverage variance for a storage shed, even though the narrowness of the lot precluded an attached garage and necessitated a detached existing garage, an accessory structure that limited the size of additional accessory structures on the lot.

Respectfully submitted,



Alan B. Sternstein

Member, Montgomery County Board of Appeals

Date: 7/24/24