

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6873

PETITION OF THOMAS O'NEIL

OPINION OF THE BOARD

**(Opinion Adopted July 24, 2024)
(Effective Date of Opinion: August 16, 2024)**

Case No. A-6873 is an application for two variances needed for the proposed construction of additions to an existing home. The proposed construction of a two-story rear addition requires a variance of five (5) feet as it is within fifteen (15) feet of the rear lot line. The required setback is twenty (20) feet, in accordance with Section 59.4.4.9.B.2 of the Zoning Ordinance. In addition, the proposed construction of a single-story addition facing Center Street requires a variance of 8.50 feet as it is within 16.50 feet of the front lot line. The required setback is twenty-five (25) feet, in accordance with Section 59.4.4.9.B.2 of the Zoning Ordinance.

The Board held a hearing on the application on July 24, 2024. Petitioner Thomas O'Neil and his wife Katherine O'Neil appeared at the hearing in support of the application, assisted by their architect, Jennifer Verbeke, AIA. Neighbors Ruth and David Epstein, whose property abuts the subject property along Center Street, appeared in opposition.

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

EVIDENCE PRESENTED

1. The subject property is Lot P1, Block 9, Chevy Chase Section 1A Subdivision, located at 5600 Cedar Parkway in Chevy Chase, Maryland, 20815, in the R-60 Zone. It is a 5,170 square foot corner lot, with frontage on Cedar Parkway to the northeast and Center Street to the northwest. The property is roughly square in shape, with its Cedar Parkway frontage being slightly concave. It contains an existing two-story house that

was built in 1949 and that faces on Cedar Parkway. The subject property was purchased by the Petitioner and his wife in 2020. See Exhibits 3, 4(a)-(b), 5(f), and 7.

2. The Petitioner's Statement of Justification ("Statement") states that the topography of the subject property "slopes up from both roads to a mostly flat area where the house is situated." The Statement states that because of the property's topography, building on the "front portions of the lot" would "not be recommended." See Exhibit 3. The Petitioner's Site Plans contain contour lines that illustrate this slope. See Exhibits 4(a) and (b). The slope can also be seen in the photographs of the subject property. See Exhibits 5(f) and (g).

3. The Statement states that the subject property is substandard for the R-60 Zone and is shallow, stating that "the existing property is undersized for the zone both in square footage and length of the yard," and that "[t]he lot is shallow when considering either of the frontage streets as the front yard."¹ The Statement states that these factors, combined with the application of two front setbacks, result in an extremely constrained buildable envelope that, even if maximized, would still allow significantly less lot coverage in terms of square footage than would be allowed on a standard R-60 lot, or than would be allowed on this substandard lot, as follows:

This property is a generally square shaped lot situated on the corner of Cedar Parkway and Center Street. The existing lot is 5,170 square feet, which is under the minimum standards of the R-60 zone of 6,000 square feet. Using the allowable 35% lot coverage calculation, a 2,100 square foot footprint would be allowed in this zone, when looking at no other conditions. A 35% lot coverage for the 5,170 square foot lot would be 1,809.5 square feet. As this is a corner lot, the two front yards reduce the allowable buildable area significantly. When considering only the building restriction lines, the total lot coverage available on this lot is 1,315 square feet, which is considerably lower than either of the allowable lot coverages by lot size alone. (25% lot coverage of the actual 5,170 sf lot and only a 21.9% lot coverage of a minimum R-60 lot of 6,000 sf). The proposed additions would bring the lot coverage up from 730.5 existing to 1215.7 proposed. No lot coverage variance is needed or requested as the proposed lot coverage is well below the allowable lot coverage.

See Exhibit 3. The Statement concludes that "these aspects of the lot create unusual and extraordinary conditions that make it challenging to expand the current 1949 home footprint."

¹ The Statement states that the depth of the property is 75 feet when viewed from Cedar Parkway, and 67 feet when viewed from Center Street. The Statement notes that after the application of the 25-foot front setback and the 20-foot rear setback, at best, that would leave room for a 30-foot deep house, which the Statement states is "not exceedingly large by today's standards." The Statement notes that this calculation does not take into account that the existing house "is setback a little from the existing front building restriction line at the Cedar Parkway side." See Exhibit 3.

4. The Statement states that the Petitioner, who purchased this property in 2020, is not responsible for the small size of this lot or its corner location. See Exhibit 3.

5. The Statement states that the proposed additions have been designed to comply with the minimum ICC² standards while providing space of usable size, and to avoid the construction issues that would be associated with removal of the home's rear wall, as would be necessary to meet the minimum ICC room size standards while complying with the rear setback, as follows:

There are two variances requested for two separate areas of the home. For the area of the front setback variance, a one story addition is proposed. The existing home is small for this growing family and the switch from office to work from home during the pandemic only emphasized this. The one story addition is proposed to be a home office and is only 8.5' wide at the exterior. The interior of the space is only 7'-10" wide. The ICC code minimum requirement for a room is 7' wide. The depth of the variance requested is the most minimal so as to allow for a useable room. Within Chapter 59, Section 4.4.9.B.2, there is a description allowing for a 15' side street setback where the abutting lot does not front on the side street. While this section is not applicable to this property, we have proposed a 16.5' front yard at this area, which is slightly larger than the 15' allowed by that section.

For the rear setback variance, a 2 story addition is proposed. By rights, this building can be extended 6'-9" and still be in compliance with the zoning requirements. However, this does not allow for a habitable room as required by the ICC code. It would be unreasonable both in structural integrity and construction costs to remove the entire rear wall of the house in order to expand the proposed addition into the space of the existing home. Therefore, relief of 5' has been requested so as to allow for an interior space of approximately 10'-2". The 2 story addition is proposed to have an expanded kitchen and eating area with a screened porch on the first floor, with a bedroom suite above. This bedroom is needed as the family grows with limited space available on the current second floor.

See Exhibit 3. The Statement states that the proposed additions have been carefully designed to ensure that they are "the minimum required in order to allow for this family to grow and stay in this home," and notes that no variances would have been required for the proposed construction "on a minimum R-60 interior lot." See Exhibit 3.

6. The Statement states that the proposed additions will continue the residential use of the property. The Statement notes that "Chevy Chase Village and the surrounding homes have a history of additions and renovations to expand the existing homes," and that the proposed additions "would be in kind with others seen in the neighborhood." See Exhibits 3 and 11(a)-(b).

² "ICC" refers to the International Code Council, which develops and writes the International Building Code used (as amended) in Montgomery County. See www.iccsafe.org.

7. The Statement at Exhibit 3 states that granting the requested variances will not be adverse to the use and enjoyment of abutting or confronting properties, as follows:

The proposed front yard addition will not block any sight lines around the corner, as the house is set above this area naturally by topography currently. The addition would be similar in aesthetics to other 1 story side additions in the area so it would not have any negative impact to confronting or abutting properties.

The proposed rear addition would not have any impact to the sight lines from the street. The rear addition would not have any adverse effects to the adjacent property at 5516 Center Street as it will still be at least 20' from that house, when you take into account their side yard setback. The proposed rear addition would not have any adverse effects to the adjacent property at 5610 Cedar Parkway as it is conforming with the side yard setback. In addition, the second story addition does not go beyond the existing side wall of the house, which is 11.7' from the property line.

8. The Board of Appeals received a letter of opposition to the grant of the requested variances, dated July 18, 2024, from Ruth and David Epstein, whose property at 5516 Center Street abuts the subject property to the rear.³ The Epsteins assert in their letter that the Petitioner has failed to meet his burden of proof in showing that four of the five elements of the variance test are met. See Exhibit 9.

First and foremost, the Epsteins assert in their letter that granting the requested variances would be adverse to the use and enjoyment of their property, and thus does not satisfy Section 59.7.3.2.E.2.e of the Zoning Ordinance. Their letter addresses the impact of granting the variances for each of the proposed additions separately. See Exhibit 9.

With respect to the proposed two-story rear addition, the Epsteins' letter states that the impact of this addition on their property is "self-evident from the size and placement of the proposed addition relative to [the shared] property line." Their letter states that the proposed construction would reduce the required twenty (20) foot rear setback by five (5) feet, and states that the effect of this would be to "block the light and air provided by the legally required setback buffer" and to "create[e] a looming presence over [their] home and property." The Epstein's letter states that due to its proximity to the shared property line, the proposed rear addition would "look directly into [their] living room and a second floor bedroom," and would "have a negative impact on the maintenance of [their] privacy and that of [their] guests." The letter complains that the presence of the rear addition would cause outdoor activities on the subject property to be conducted closer to the shared property line, and states that "[t]his would shift ... additional noise, artificial light pollution, and smoke" towards their property, which their letter states "would further infringe on and impair [their] enjoyment of [their] own outdoor

³ As shown on the Zoning Vicinity Map, the lot line shared by the Petitioner and the Epsteins serves as the Petitioner's rear lot line, and as a part of the Epsteins' right side lot line. See Exhibit 7.

and indoor space.” Their letter states that “[p]revention of such encroachment and infringement on abutting properties is the very purpose of the 20-foot rear yard setback.” See Exhibit 9. Finally, the Epsteins’ letter states that the Petitioner’s variance application “makes no serious effort” to dispute the negative impact of the proposed construction that would be allowed by the grant of the requested rear lot line variance despite “the self-evident nature of the adverse impact on [the Epstein’s] property.” Their letter asserts that looking at the combined space between the proposed addition and their house “is not a valid justification,” and that the 20-foot rear yard setback “recognizes that back yards are commonly the site of homeowners’ heaviest outdoor recreational uses.” See Exhibit 9.

With respect to the proposed one-story addition, the Epsteins state in their letter that the proposed addition would be visible from various places in their front yard, and that it would block their sight lines “over the [Petitioner’s] lawn, to the open space around the corner.” They disagree with the Petitioner’s assertion that it would be aesthetically similar to other side additions because it is a “front” addition. Their letter thus states that the Petitioner has not met his burden of proving that the proposed one-story addition will not be adverse to the use and enjoyment of neighboring properties. See Exhibit 9.

The Epsteins’ letter states that the Petitioner’s property does not meet the uniqueness test set forth in Section 59.7.3.2.E.2.a of the Zoning Ordinance. Their letter acknowledges that the subject property is substandard in size for the R-60 Zone and that it is subject to two front yard setbacks, which limits its buildable area, but asserts that “[l]imiting permissible building space to protect abutting property owners is the very purpose of imposing setbacks” and does not make the subject property unique. The Epsteins’ letter asserts that being a corner lot does not make a property unique, nor does the fact that it is a small lot, and that not having adequate space for amenities that might seem desirable similarly does not make a property unique, noting that in accordance with applicable case law, the need for a variance must be “substantial and urgent” and not simply for the convenience of the property owner. See Exhibit 9.

With respect to Section 59.7.3.2.E.2.c of the Zoning Ordinance, the Epsteins assert in their letter that the Petitioner has failed to meet his burden of showing that the requested variances are the minimum necessary to overcome the practical difficulty imposed by strict compliance with the Zoning Ordinance. Their letter highlights the term “necessary,” and states that the Petitioner and his wife “have also not shown that there are no alternatives to the proposed construction that would comply with the setbacks and thus avoid the need for a variance.” To the extent that removal of the rear wall was identified by the Petitioner as a structurally impractical and costly alternative, the Epsteins state in their letter that the Petitioner “does not provide supporting evidence for either assertion,” and note that “the Board has recognized that financial hardship is not a sufficient ground for granting a variance and that economic loss alone does not necessarily satisfy the practical difficulty test.” See Exhibit 9.

With respect to Section 59.7.3.2.E.2.d of the Zoning Ordinance, compliance with the applicable Master Plan, the Epsteins state in their letter that the Petitioner's application "does not identify or describe the general plan or applicable master plan," but rather states that this element of the variance test is satisfied because the proposed additions would be "in conformance" with the residential use of the subject property and would be consistent with additions and renovations made to neighboring properties and throughout Chevy Chase Village. The Epsteins' letter proceeds to state that the Petitioner "does not provide examples of other neighborhood additions Applicants have seen that are in kind with those proposed," and "does not provide a narrative explanation of how the other additions Applicants refer to are in kind with the salient aspects of their proposal, including: (1) the need for variances to permit the construction; (2) the magnitude of the new construction relative to the existing structure; and (3) the placement of the additions on the property." See Exhibit 9.

9. The Board of Appeals received a letter of support for the grant of the requested variances, dated July 18, 2024, from Lou and Nancy Morsberger, whose property at 5610 Cedar Parkway abuts the subject property to the right. The Morsbergers state in their letter that the Petitioner and his wife have shared the plans for their proposed additions with them, and that they "find their request for approval reasonable in terms of function and aesthetics." Their letter states that they were "impressed with the thoughtfulness of the plans and the aesthetic design, which [they] believe would add greatly to the appearance of the neighborhood." Finally, the Morsbergers' letter states that they "do not see any reduction in the enjoyment of [their] property based on [the Petitioner's] plans, and in fact believe their plans will be a net benefit to the appeal of [the] immediate neighborhood." See Exhibit 10.

10. At the start of the hearing, Ms. Verbeke handed out two supplemental Exhibits, the first showing photographs relevant to the proposed one-story addition, and the second containing photographs relevant to the proposed two-story addition. See Exhibits 11(a) and (b).

Ms. Verbeke testified that the Petitioner and his wife purchased their "two-story plus basement" corner property in 2020. She testified that the front door of the Petitioner's house faces Cedar Parkway, and that the property has a driveway off Center Street. Ms. Verbeke testified that the subject property was subdivided at some point before the Petitioner took ownership of the subject property, noting that the subject property and the abutting property to its right along Cedar Parkway are both described as "parts" of the same lot. Ms. Verbeke testified that the Petitioner's house is the third smallest house in Chevy Chase Village in terms of square footage. She testified that the subject property is the seventh smallest property in Chevy Chase Village in terms of square footage, and that it is the second smallest corner lot in the Village.⁴ Ms. Verbeke testified that there is a 35% slope up from Cedar Parkway to the Petitioner's home, and a 30% slope up from Center Street to the Petitioner's home, but that the Petitioner's home is situated on a relatively flat area of the property.

⁴ Mr. O'Neil testified that there are 154 corner lots in Chevy Chase Village.

Ms. Verbeke testified that while corner lots are not in and of themselves unique, this corner property, with its area of 5,170 square feet, is unique. She testified that the application of two front yard setbacks greatly restricts the property's building envelope. Ms. Verbeke testified that based solely on the property's area, the 35% lot coverage limitation would allow a buildable envelope that is about 1,800 square feet in size, but that when the required setbacks are applied to this property, the total allowable lot coverage on this property is only 21.9 percent, which she testified is "well below" the 35% lot coverage typically allowed in the R-60 Zone. Ms. Verbeke testified that with the proposed additions, the lot coverage on the subject property would be about 20%.

Ms. Verbeke testified that the subject property is also shallow, which she stated limits its size and compounds the issues posed by compliance with the required setbacks. Ms. Verbeke noted that the Petitioner's house is setback slightly more than required from the front property line along Cedar Parkway. She testified that because of these constraints, there is little that can be done to expand this house without variance relief other than to increase its height. Ms. Verbeke testified that the proposed additions are modest and are in keeping with the scale of the existing house, and that they have been carefully designed to ensure that they are the minimum needed.

Ms. Verbeke testified that the Petitioner is seeking two variances to expand his house, describing the existing house as "quite modest." She testified that the Petitioner is seeking an 8.5 foot variance from the front lot line along Center Street to construct a one-story office addition with a footprint of 113 square feet. Ms. Verbeke testified that this addition would have an interior width of seven feet, ten inches (7'-10"), and that the International Building Code does not consider space to be a "room" unless it is at least seven feet (7') wide. Ms. Verbeke testified that the Center Street side of the existing house is located on the 25-foot setback line, and that even with the 8.5 foot variance that was requested, the proposed addition would still be 16.5 feet from the property line along Center Street, noting that this is more than would be required if the 15-foot side street setback had been applicable along Center Street rather than the 25-foot front setback. Thus Ms. Verbeke argued that the proposed addition thus observes the "spirit" of the law.

In addition, Ms. Verbeke testified that the size of the Petitioner's "perceived yard" is different from the size of his actual yard, testifying that there is additional "yard" space between the subject property's front lot lines and the street along both Cedar Parkway and Center Street. Ms. Verbeke testified that the Petitioner's fence is located, with permission, in the area between his front property lines and the street. She testified that these factors make the subject property appear larger than it is. Ms. Verbeke testified that the Petitioner's house is set back approximately 43 feet from Center Street and 36.5 feet from the fencing along Center Street, and that with the proposed addition, it would still be set back 34.5 feet from Center Street and 28 feet from the fence, thus giving the illusion of meeting the required 25-foot setback. Ms. Verbeke testified that the proposed one-story addition would not block any sight lines around the corner because the house is elevated above the street, later stating in response to a Board question that because of this elevation difference, the proposed addition "would have no

impact on ... visibility around the corner" and will not obstruct any views from the public right-of-way. Finally, Ms. Verbeke testified that the proposed addition would be similar in appearance to other one-story additions in the neighborhood.

Regarding the proposed two-story rear addition, Ms. Verbeke testified that the main level of the proposed rear addition would allow for expansion of the current kitchen, which is small, creation of an informal breakfast area, and construction of a screened porch. She testified that the second floor of the addition would allow for an additional upstairs bathroom and an expanded primary bedroom. Ms. Verbeke testified that the house could be extended towards the rear lot line a distance just under six (6) feet without a variance, but that this would not allow for a room size that meets the minimum ICC (International Code Council) requirements. She testified that it would be unreasonably difficult and expensive to remove the entire rear wall of the house in order to extend the proposed addition into the existing space in the house, and that as a result, the Petitioner is requesting a five (5) foot variance into the rear setback. Ms. Verbeke testified that this would leave a fifteen (15) foot setback from the rear lot line,⁵ and that it would allow for an interior space of approximately ten feet, two inches (10'-2"). She testified that if the subject property had been an interior lot as opposed to a corner lot, the Petitioner would only have had to maintain a seven (7) foot setback from the property line shared with the abutting neighbors on Center Street because the subject property was platted before 1954. Ms. Verbeke testified that taking into account the eight (8) foot side setback on the neighbors' property, the proposed addition would be 23 feet from the neighbors' house.

Ms. Verbeke testified that they have taken great care to ensure that the proposed rear addition is modest in scale. She testified that it is only two stories tall with a low-pitched roof and a total height of 21.5 feet. Ms. Verbeke testified that this is lower than the height of the abutting neighbors' house on Center Street (i.e. the Epsteins' house), which she testified is a three-story, federal style home. Ms. Verbeke testified that because half of the first floor of the rear addition would be used for a screened porch, the "outdoor living" area on the subject property would actually be moved closer to the Petitioner's house (i.e. farther from the subject property's rear lot line), later testifying that some of the outdoor furniture shown on Exhibit 11(b) could be relocated into the porch. Ms. Verbeke testified that the second floor spaces in the proposed addition are a bedroom and a bathroom, and that as such, they are "private" spaces that would not add light or noise to neighboring properties. She testified that due to the small size and shallow nature of the subject property, the Petitioner cannot expand the footprint of his house to an extent that would otherwise be allowed on a standard R-60 lot, and stated that if this had been a standard interior R-60 lot, no variances would have been needed. Ms. Verbeke testified that the requested variances are the minimum needed to allow the Petitioner and his family to stay and grow in their home, and that while the scale of the Petitioner's house with the proposed additions would still be "quite modest," it would be more comparable with adjacent properties.

⁵ Ms. Verbeke later noted that the fifteen (15) foot setback is almost double what would have been required if this had been a side as opposed to rear lot line.

In response to a Board question asking if the construction would also require a variance from Chevy Chase Village, Ms. Verbeke testified that it would.⁶ In response to a Board question asking if there were examples in the neighborhood of other side/front additions similar to the one-story addition that was being proposed, Ms. Verbeke pointed the Board to the last page of Exhibit 11(a) ("Supp. Ex. #5" and "Supp. Ex. #6"). She testified that these are photographs of two houses where side garages had been enclosed, and testified that the houses in these pictures are corner properties located at the same intersection where the subject property is located.⁷ Ms. Verbeke testified that the conversion of garages into sunrooms or porches is quite common in the neighborhood, and that while the two shown on Exhibit 11(a) are the closest to the subject property, there are several that are visible from the triangle park located across Cedar Parkway from the subject property.

In response to a Board request, Ms. Verbeke narrated some of the photographs included on Exhibit 11(a), which she said focuses on the front/side addition (i.e. the one-story addition). Ms. Verbeke testified that the first photograph on Exhibit 11(a) ("Supp. Ex. #1") was taken from the Petitioner's driveway, looking toward the area of the proposed one-story addition. She testified that the second photograph, at the bottom of the first page of Exhibit 11(a) ("Supp. Ex. #2"), is looking in the same direction, but shows the view from the Epsteins' property, to show the impact that the one-story addition might have on that property. Ms. Verbeke testified that the third picture in Exhibit 11(a) ("Supp. Ex. #3"), on the second page, shows the area where the addition is proposed (i.e. the area of the pea gravel). She testified that the proposed addition was a one-story addition with lots of windows, and that the roof of this addition would be lower than the second-story window shown on the photograph.

In response to a Board question asking if the proposed rear addition was the minimum needed, or if there was a different configuration or smaller size that would meet the Petitioner's goals without causing the burdens described by Mrs. Epstein, Ms. Verbeke testified that the Petitioner is allowed, by right, to expand the existing house 5.9 feet towards the rear lot line. She testified that this is the size of a modest walk-in closet. Ms. Verbeke testified that the only way to make meaningful use of this by-right space without getting a variance would be to remove the rear wall of the existing house so that this 5.9 foot space could be extended into the existing house. She testified that this would be very burdensome and a lot more costly, and that it would entail having to support the existing roof structure and the existing walls. Ms. Verbeke testified that while a part of the rear wall was being removed for the kitchen addition, the majority of the rear wall, with its plumbing and electricity, is staying in place. She testified that the request to expand the kitchen to make it a workable size for two adults and a toddler, and to add a second bathroom to the upstairs of this house, is a "modest" request, especially when compared with other work in the County and in Chevy Chase Village.

⁶ The Board, by copy of this Opinion, asks that the Petitioner or Ms. Verbeke submit that approval for the record in this case if/when it is received.

⁷ Mr. O'Neil testified that the sunrooms on both of these houses are on the other "fronts" of those houses, but effectively are on their "sides," like his proposed addition. In response to a Board question, he further testified that these structures are both one story, like the front/side addition he is proposing.

Ms. Verbeke testified that the Petitioner is not trying to quadruple the size of his house or to add a third story. She testified that she did not think that there would really be a discernable difference between the impact of the proposed rear addition, which would be setback fifteen (15) feet from the rear lot line, and an addition that was set back twenty (20) feet from the rear lot line, except for the effect that Mrs. Epstein is feeling.

11. Mr. O'Neil testified, in response to a Board question, that the house to the right of his house on Cedar Parkway (i.e. the Morsberger property) originally had the same basic design as his house. He testified that the property on which that house is located is also part of Lot 1, and that the two properties are essentially mirror images of each other. Mr. O'Neil testified that the house on the other part of Lot 1 was expanded in 2015, and that as part of that expansion, it was extended eleven (11) feet towards the rear lot line, but that because that house was originally set farther forward on the property than his house is, no variance was needed. He testified that that house also had "side" setbacks on both sides because it is an interior lot.

Regarding the fence, Mr. O'Neil testified in response to Board questions that after he and his wife purchased the subject property, they installed the existing fence in an area that is technically outside of their lot lines. He testified that this was done with proper permits from both Montgomery County and Chevy Chase Village.

Mr. O'Neil testified that with the proposed screened porch, they would be able to move some of their outdoor furniture shown on Exhibit 11(b) into the porch. He testified that there is a large pear tree in his rear yard that provides privacy between his house and the Epsteins' house for approximately nine months a year. He testified that there is also a dogwood in their yard, and that there are additional trees in the Epsteins' yard. Mr. O'Neil testified that to maintain the privacy of their backyard, they plan to install additional landscaping for visual and auditory separation.

In response to a Board question regarding the third photograph on Exhibit 11(a) ("Supp. Ex. #3"), Mr. O'Neil testified that this shows the view from the location of the proposed one-story addition towards his driveway and the Epsteins' property. He testified that the car in the picture is his car, on his driveway, and that the string lights are also his and are on a timer. Mr. O'Neil testified that as shown on this picture, there is a 15-foot vegetative buffer between the two properties that provides visual separation.

In response to a Board question noting that his abutting neighbor on Cedar Parkway, in his letter of support for the requested variances, had referenced stormwater runoff, Mr. O'Neil testified that his family had experienced flooding in their basement after purchasing their home, and he explained the measures that they had taken to resolve those issues, including installing a French drain system. Mr. O'Neil testified that in connection with the proposed rear addition, they would need to install additional drains that could tie in with the existing drainage system.⁸ He testified that the proposed

⁸ Mr. Verbeke testified, in further response to this question, that stormwater is a "hot topic" in Chevy Chase, and that in addition to French and trench drains, she anticipated that water from the downspouts would be piped into a drywell system or would otherwise be accommodated via suggestions made by the

construction would not have an adverse impact in terms of stormwater flow on any of the neighboring properties.

In response to a Board question asking about the effect of the proposed additions on light, lines of sight, and views from neighboring properties, Mr. O'Neil testified that as shown on the elevations, the one-story addition is effectively a sunroom, and that any view of it from the corner would be blocked by mature vegetation. See Exhibit 5(f). In addition, he testified that any view from the Epsteins' property would be blocked by the existing hedge, so there would be no visual impairment there either. See Exhibit 11(a) ("Supp. Ex. #3"). With respect to the proposed two-story addition, Mr. O'Neil testified that the subject property is lower than the Epstein's property, and that he had no concerns about the first floor of that addition impacting the privacy of that home or having a visual impact on that home. With respect to the second floor, he testified that the two windows shown on Exhibit 5(c) are for a bathroom and the primary bedroom. Mr. O'Neil testified that these are both private places that would have window treatments to preserve this privacy, and that they would not cause light or noise that would impact the abutting property to the rear. He further testified that because of the way in which their house is situated, they don't have shadows coming off the rear of their house.⁹ Finally, Mr. O'Neil testified that as shown on Exhibit 11(b) ("Supp. Ex. #7" and "Supp. Ex. #8"), foliage will provide screening for about nine months a year.

12. Mrs. O'Neil testified that they had filled in the outdoor stairwell shown in the third photograph on Exhibit 11(b) ("Supp. Ex. #9"). She testified that this allowed them to recapture what was previously dead space behind their house, and allowed them to move outdoor activities closer to the house. Mrs. O'Neil testified that she and her husband are committed to consulting with the County's Rainscapes Program, and that they intend to follow their advice on plantings to help manage rainwater.

13. Mrs. Epstein testified that her property abuts the O'Neils' back yard. She testified that the planned 371 square foot, two-story rear addition would take up about 40 percent of the O'Neils' existing back yard, and that the proposed one-story addition is on the side of the subject property where their (i.e. the Epsteins') house is located. Mrs. Epstein testified that her written submission explains their objections and states why they do not believe the requested variances meet the standard in the Zoning Ordinance. Mrs. Epstein testified that the setback requirements in the Zoning Ordinance are intended to govern what can and cannot be done on a property, and to prevent disputes among neighbors. She testified that while the Zoning Ordinance does have a "safety valve" in the form of a variance to prevent overly rigid application of the Ordinance's requirements and to allow for modest additions, she did not believe that the proposed additions are what was contemplated, calling them a "massive expansion" of the existing house and stating that they will increase the footprint of the house by two-thirds.

County's Rainscapes program, noting that this was further into the "engineering" than the plans are at present.

⁹ Ms. Verbeke testified that because the Petitioner's house is located northeast of the Epsteins' house, any shadow impact would be minimal.

Mrs. Epstein asserted that the requested variances do not meet at least four of the requirements set out in the Zoning Ordinance, as set forth in her letter of opposition. In addition, she reminded the Board that the need for a variance must be substantial and urgent, and not just suitable or desirable for the property owner, and she asserted that the variances requested in this case fail that test too. Mrs. Epstein testified that Ms. Verbeke has not taken their concerns seriously, as is evidenced by her inclusion of their side yard setback when discussing how far the O'Neils' proposed rear addition would be from her house.

Mrs. Epstein testified that the O'Neils' back yard is "where all the recreation takes place," and that their proposed rear door will be the main door used to enter and exit their house. She testified that it was not right to say that all activity will be pulled closer to the house, and that the O'Neils' dogs, which she testified are beloved in the neighborhood and do not bother anyone with their barking, will have less space. Mrs. Epstein testified that the O'Neils' patio appeared to be impermeable, and suggested that it should be counted towards lot coverage.

Mrs. Epstein stated, with respect to the photographs of other front/side additions at Exhibit 11(a) ("Supp. Ex. #5" and "Supp. Ex. #6"), that she did not know if those additions required variances, adding that she had not had time to study them. She testified that Chevy Chase Village usually does not grant front variances unless the structure is already set behind other houses. Mrs. Epstein stated that everyone wants a bigger house. She testified that they have expanded their house, but have done so without requesting variance relief, and noted that there were two projects they wanted to do but did not pursue because they would have required variances.

Mrs. Epstein testified that everyone needs to respect the Zoning Ordinance and the restrictions it imposes. She testified that corner lots have different standards, and that the subject property is a small corner lot. Mrs. Epstein asserted that because the subject property is substandard for the R-60 Zone, a house could not be built on it today.¹⁰ She described the proposed rear addition as "looming" and "massive," and stated that it would "hem in" their property. Mrs. Epstein testified that the impact of the proposed addition on their house would be evident to anyone who saw their property. She testified that the subject property is small, and that with the addition, things would be pushed towards her property. Mrs. Epstein testified that the O'Neils did not reach out to them before filing their variance request, and that the first she learned of their request was from the variance sign.

Mrs. Epstein testified that she and her husband are in the best position to know what is adverse to the use and enjoyment of their property. In response to a Board question asking her to elaborate on what makes the construction that would be allowed if the requested variances were granted adverse to the use and enjoyment of their property, Mrs. Epstein testified that it will significantly reduce the open space between the homes, and that artificial light, noise, smoke, and recreational activities would be

¹⁰ The Board does not believe that the substandard size of this property would prevent its development or redevelopment. See Sections 59.7.7.1.D.1 and 2 of the Zoning Ordinance.

pushed closer towards her home. She testified that even if the lawn furniture were moved into the porch, the O'Neils' back yard would still have play equipment, a fire pit, a grill, and garbage cans, as well as a shed that would presumably be moved closer to the shared property line. She testified that the setbacks are there for a reason, and that the difference in the impact to their property of a fifteen (15) foot rear setback versus the setback of the current house would be "huge."

Mrs. Epstein testified that the hedge near Center Street, which separates the front of her property from the O'Neils' property, is not an "opaque barrier," and that the proposed construction will cause them to miss light, air, privacy, and open space.

Mrs. Epstein testified that their porch is near the shared property line, and that while they have tried to add screening to shield it, the screening is not impermeable. She testified that they have a lot of open space in their back yard, which they use as a garden. Mrs. Epstein testified that their porch looks out over this garden, and that this is where they do their entertaining.

Mrs. Epstein testified that their living room is next to their porch, and that its windows look out onto the O'Neils' garbage cans, causing Mrs. O'Neil to testify that the garbage cans are enclosed with cedar fencing and that they have to be located along the driveway, in accordance with Chevy Chase Village regulations.

14. In response to Mrs. Epstein's testimony that he and his wife were seeking to increase the footprint of their home by two-thirds, Mr. O'Neil testified that the requested increase is much less than that when the additional 200 square feet of footprint that they are allowed to construct by right is factored into the calculation. In response to Mrs. Epstein's assertion that he and his wife were reducing the size of their back yard by 40 percent, Mr. O'Neil testified that they were seeking to reduce the required rear setback from twenty (20) feet to fifteen (15) feet, a reduction of 25 percent.¹¹ He testified that the resultant lot coverage will be about twenty (20) percent in a zone that allows for thirty-five (35) percent lot coverage, adding that on a traditional R-60 lot, 2,100 square feet of lot coverage would be allowed, and that they were proposing just over 1,200 square feet of lot coverage.

15. In response to Mrs. Epstein's testimony, Ms. Verbeke testified that the Epsteins' property is twice as deep as the subject property, and is as deep as the subject property and the abutting property along Cedar Parkway combined. She testified that the Epsteins' property has an area of over 8,000 square feet. Ms. Verbeke testified that most of the properties on this block are twice as deep as the subject property. See Exhibit 7. Ms. Verbeke testified that because of this size difference, the Epsteins had options in developing their property without the need for variances, but that the Petitioner does not have these options. She testified that she understands that setbacks exist for a reason, but asserted that the variance process does as well.

¹¹ Mrs. Epstein made clear at this point that it was not her intent to suggest that the entirety of the addition would be in the setback, but testified that regardless, the addition would have a big impact on her property.

16. Mrs. Epstein asked that the Board continue the proceedings so that she could submit a supplemental filing in response to the new information that was introduced at the hearing (Exhibits 11(a) and (b)) before the Board decides this case, stating that she did not necessarily view the photographs on those Exhibits as being comparable to the instant variance request. For example, Mrs. Epstein stated that she did not know if the additions shown on Exhibit 11(a) ("Supp. Ex. # 5" and "Supp. Ex. #6") had been constructed with variances. Ms. Verbeke then stated that they had looked through the variance cases that had come before the County, and that those properties were not listed. Mr. O'Neil testified that the Board had granted a front setback variance for a screened porch on a different property in Chevy Chase Village in 2023. Mrs. O'Neil testified that that case was very similar to their case, with a single lot having been subdivided into two lots, and that she believed the property involved in that case was the smallest corner lot in Chevy Chase Village. She stated that other than the photographs of the houses that are across the intersection from their house, none of the other information in Exhibits 11(a) and (b) was new in that it was simply photographs of where they live, which is well known to everyone.

CONCLUSIONS OF LAW

Based on the evidence of record, the Board finds that the 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;

The Board finds, based on the Statement, Zoning Vicinity Map, and testimony of Ms. Verbeke, that at 5,170 square feet, the subject property is substandard for the R-60 Zone and is extraordinarily limited in terms of its size. The Board further finds, based on the Statement, Zoning Vicinity Map, and the testimony of Ms. Verbeke, that the subject property is shallower than most, if not all, of the other properties on the block, most of which are approximately twice as deep as the subject property. In addition, the Board finds, based on the testimony of Ms. Verbeke and Mr. O'Neil, that the square footage of the subject property is the seventh smallest in entirety of Chevy Chase Village, and that the subject property is the second smallest corner lot of 154 corner lots in the Village. Finally, the Board finds, based on the Statement and the testimony of Ms. Verbeke, that the application of the required setbacks to this property yields a buildable envelope of 25% in a Zone that allows up to 35% lot coverage, and that this, when coupled with the property's unusually small size and shallowness, severely limits the Petitioner's ability to

expand the existing home and constitutes a unique condition peculiar to this property, in satisfaction of this element of the variance test. See Exhibits 3 and 7.

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 Petitioner, who purchased the property in 2020 with his wife, is not responsible for the small size or shallow nature of this property, its constrained buildable envelope, its original development, or its corner location. See Exhibit 3. Thus, the Board finds that this element of the variance test is satisfied.

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 as noted above, the application of the required setbacks to this unusually small and shallow property creates an extremely constrained buildable envelope that does not allow for other than minimal expansion of the existing home without variance relief, posing a practical difficulty for the Petitioner. In support of this, the Board finds, based on the Statement, the Site Plan, and the testimony of Ms. Verbeke, that the Petitioner's existing house has a footprint of 730.5 square feet, that it is the third smallest house in the Village, that the International Building Code requires that "rooms" have a minimum width of seven (7) feet, and that as shown on the Site Plan, there is nowhere on the subject property where a "room" could be added to the existing house without variance relief because of the property's small size, shallowness, and constrained buildable envelope. See Exhibits 3 and 4(a). The Board further finds, per the Statement and the testimony of Ms. Verbeke, that she has worked with the Petitioner to ensure that the proposed additions are modest in scale, and that the additions have been designed to comply with the minimum ICC standards while providing space of sufficient size to be usable. See Exhibit 3. With respect to the one-story side addition, the Board finds, based on the Statement, proposed First Floor Plan, and the testimony of Ms. Verbeke, that the interior width of the proposed addition is barely wider than the minimum allowed by the ICC for a "room." See Exhibits 3 and 5(d). With respect to the rear addition, the Board finds, based on the Statement and the testimony of Ms. Verbeke, that the proposed addition, which would extend five (5) feet into the rear setback, is the minimum needed to allow the Petitioner to make use of the existing six feet, nine inches (6'-9") of space that is available to him to expand his house by right for the construction of room space of usable size, without incurring the practical difficulties associated with removal of the home's rear wall. See Exhibit 3. The Board notes, based on the Statement and the proposed First Floor Plan, that the proposed rear addition has an interior depth of just over ten (10) feet, and that while this is larger than the minimum "room" size set by the ICC, the Board finds that it is not unreasonably large. See Exhibits 3 and 5(d). In addition, the Board finds, based on the Statement and the testimony of Ms. Verbeke, that having to remove the rear wall of the existing house, as would be necessary to create a room of usable size without variance relief,

would impact the structural integrity of the house and would be “very burdensome” for a number of reasons, including the need to otherwise support the existing roof structure of the house and the home’s existing walls, the need to remove and relocate existing utilities that are located in the rear wall of the house, and expense.¹² See Exhibit 3. In light of the foregoing, the Board finds that the requested variances are the minimum needed to overcome the practical difficulties imposed by full compliance with the Zoning Ordinance, in satisfaction of this element of the variance test.

4. *Section 59.7.3.2.E.2.d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and*

The Board finds that granting the requested variances to allow the proposed additions will continue the residential use of this property, consistent with the recommendations of the Bethesda-Chevy Chase Master Plan, which generally seeks to “[p]rotect the high quality residential communities throughout the Planning Area.” 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.*

The Board finds that the granting the requested variances 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 the finding, the Board finds that the proposed one-story addition is modest in size and is comprised mostly of windows, which will serve to minimize its visual mass. The Board further finds that like the existing house, the proposed one-story addition will be elevated above the street, and thus will not block sight lines around the corner. The Board finds that there is yard space between the subject property and both abutting streets, and that the Petitioner’s fence is located (with proper permissions) outside of his property lines in this yard space, thus giving the impression that his property is larger than it actually is. The Board finds that the proposed one-story addition will be set back 34.5 feet from Center Street and 28 feet from the Petitioner’s existing fence, thus giving the illusion of meeting the required 25-foot setback and further diminishing its impact. Finally, the Board notes that there is a vegetative buffer that would at least partially obscure the view of the proposed one-story addition from the Epstein’s property. See Exhibits 3, 4(a)-(b), 5(c), and 11(a) (“Supp. Ex. #2” and “Supp. Ex. #3”), and the testimony of Ms. Verbeke and Mr. O’Neil.

With respect to the proposed two-story rear addition, the Board finds that with the grant of the requested variance from the rear lot line, the proposed addition will be set back fifteen (15) feet from that lot line, which also serves as part of the Epstein’s right side lot line. The Board finds that this is only five feet closer to the shared lot line than

¹² The Board is aware that financial concerns by themselves are not a reason for granting a variance, but finds, in this case, that the structural concerns associated with removal of the rear wall are as important, if not more important, than the potential cost, and add to the practical difficulty that full compliance with the Zoning Ordinance would pose for the Petitioner.

would have been allowed by right, and is significantly larger than the required setback would have been if this had been a side lot line instead of a rear lot line.¹³ The Board finds that the proposed addition is not unreasonably large, with a height of 21.5 feet (similar to the height of the existing house) and a depth of just over ten feet. The Board finds that with the proposed addition, some of the activity currently conducted in the Petitioner's rear yard would be relocated to the screened porch, thus bringing it father from the shared property line. The Board further finds that the existing fence and foliage will at least partially obscure the view of the proposed addition from the Epstein's property, and that the Petitioner and his wife plan to install additional landscaping for visual and auditory separation. In addition, the Board finds that because the elevation of the Epsteins' property is slightly higher than the elevation of the subject property, and because the proposed addition is no taller than the Petitioner's existing house, the impact of the proposed addition on the view from the Epsteins' property should not be dramatically different than their view of the existing house, and should not be dramatically different than their view of a by-right rear addition would be. The Board finds that the windows in the second floor of the Petitioner's proposed addition are a bathroom and bedroom window, that they will have window treatments due to the private nature of those spaces, and that for these reasons, they will not increase light or noise for abutting properties. Finally, the Board finds that because of the orientation of the Petitioner's house and the proposed addition, it will not cast shadows on the Epstein's property. See Exhibits 3, 4(a)-(b), 5(c), 5(e), and 11(b) ("Supp. Ex. #7" and "Supp. Ex. #8"), and the testimony of Ms. Verbeke and Mr. O'Neil.

The Board notes that the record contains a letter of support from the Petitioner's abutting neighbors along Cedar Parkway, as well as testimony and a letter of opposition from their abutting neighbors along Center Street. See Exhibits 9 and 10. The Board notes that while one element of the variance test is that granting the requested variances will not be adverse to the use and enjoyment of abutting or confronting properties, and while the Board is always interested to receive and consider input from neighboring property owners, zoning is not a plebiscite, and the ultimate determination of whether a requested variance meets the standard set forth in Section 59.7.3.2.E.2.e of the Zoning Ordinance rests with the Board. See *Montgomery County Council v. Scrimgeour*, 211 Md. 306, 313, 127 A.2d 528, 532 (1956), citing *Benner v. Tribbitt*, 190 Md. 6, 57 A.2d 346 (1948).

Accordingly, based on the foregoing, the requested variances are **granted**, subject to the following conditions:

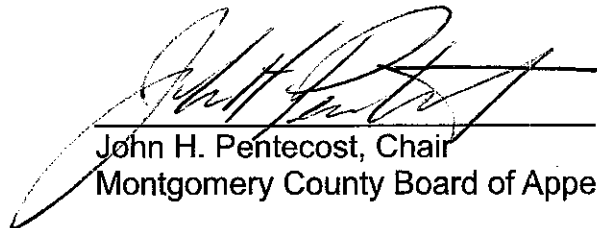
1. Petitioner shall be bound by the testimony and exhibits of record; and

¹³ The Board notes that developers of corner lots can choose which of their non-front lot lines will serve as their property's rear lot line and which will serve as their property's side lot line, and that it was the original development of the subject property that determined that the lot line shared with the Epsteins would be the subject property's rear, as opposed to side, lot line. In addition, the Board notes that if the original developer had oriented the Petitioner's house differently on the property, such that what is now the Petitioner's rear lot line was instead his side lot line, or if the subject property been an interior lot instead of a corner lot, the required setback from the property line shared with the Epsteins would only have been seven (7) feet, far less than the fifteen (15) foot setback that is requested.

2. Construction shall be in accordance with Exhibits 4(a) and 5(c)-(e) (exterior dimensions/elevations only).

Therefore, based upon the foregoing, on a motion by Amit Sharma, seconded by John H. Pentecost, Chair, with Alan Sternstein in agreement, and with Richard Melnick, Vice Chair, and Caryn Hines not 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 16th day of August, 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.