

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6874

PETITION OF DAVE MICHAELS

OPINION OF THE BOARD
(Hearing Date: July 24, 2024)
(Effective Date of Opinion: July 31, 2024)

Case No. A-6874 is an application by Petitioner Dave Michaels for two variances needed for the proposed construction of an eight (8) foot tall fence. The proposed construction requires a variance of 89.95 feet, as it is within 0.50 feet of the left side lot line. The required setback is 90.45 feet, in accordance with Section 59.4.4.8.B.2 of the Zoning Ordinance. In addition, the proposed construction requires a 44.64 foot variance as it is within 0.50 feet of the rear lot line. The required setback is 45.14 feet, in accordance with Section 59.4.4.8.B.2 of the Zoning Ordinance. The proposed fence requires a variance from the Exemption from Controls, Section 59.6.4.3.C.3.c.i of the Zoning Ordinance, because it is more than 6.5 feet in height.

The Board of Appeals held a hearing on the application on July 24, 2024. Petitioner Dave Michaels participated in support of the requested variances.

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

EVIDENCE PRESENTED

1. The subject property is Lot 15, Block D, Whitehall Manor Subdivision, located at 5609 Old Chester Road in Bethesda, Maryland, 20814, in the R-90 Zone. It is a six-sided lot located on the north/east side of Old Chester Road. It has an area of 15,233 square feet, and despite having six sides, is very roughly rectangular in shape. See Exhibits 4 and 8.
2. The Petitioner's Statement of Justification ("Statement") states that the Petitioner is seeking to install an eight (8) foot fence on his property, in place of a "deteriorated" six (6) foot fence, to "provide additional privacy and protection from the large nursery school building and its two playgrounds that are directly adjacent" to his property. See Exhibit 3.

The Statement states the subject property is "one of only three houses in the South Bradley Hills neighborhood that shares a boundary with the Bethesda Community School," which the Statement indicates is a nursery school serving children ages 2 to 5 that is open weekdays from 7 a.m. until 6 p.m. See Exhibit 3. The Statement states that the Petitioner's house and property have the "most exposure to the school" because the Petitioner's house "is the only residence that shares two boundary lines with the school." The Statement states that the back of the Petitioner's house and his patio are "directly next to the school's two active playgrounds (upper and lower playgrounds)," and that his property and the school's property "are currently separated by a deteriorated, 6-foot-tall picket fence." He includes photographs showing how close the school and existing playground equipment are to his fence, and a photograph showing the dilapidated stated of the fence, as Exhibits A and B to his Statement. Exhibit A states that a taller fence would "help reduce noise and visibility." See Exhibit 3.

3. The Statement states that the school's upper playground is used by its youngest children, and is "directly next to the fence that borders our patio," as shown on Exhibit C to the Statement. The Statement further states that "[s]everal pieces of large playground equipment were placed very close to the fence, including a swing set that is within one foot of the property line," as shown on Exhibit D to the Statement. The Statement states that "[a] climbing structure is close to the property line and towers over the fence and is visible from our backyard and our house," as shown on Exhibit E, and that "[t]he children can see into our house and backyard from this climbing structure." Finally, the Statement states that "[t]he upper playground's equipment is visible from all corners of our back lot and house because the school and its property sit at a higher elevation than our property," noting that "Oldchester Road has a very steep grade, so each house/structure is at a higher elevation than the one to the south of it." See Exhibit 3.

4. The Statement states that "[b]ecause the [playground] equipment is so close to the fence line, the noise is significant and the students can also throw toys over the fence into [the Petitioner's] yard." The Petitioner includes photographs of the toys he has to pick up from his backyard "once or twice a week" as Exhibits F and G to his Statement. His Statement asserts that given the young age of the children at the school, they may not be able to throw toys over an eight foot fence. See Exhibit 3.

5. The Statement states that the school's lower playground is also visible from the subject property, and notes that this playground is open to the public on weekends. See Exhibit 3. The Statement states that this playground is also the source of errant balls, etc., landing in the Petitioner's yard, and the occasional person seeking to retrieve those balls, as follows:

The school's "lower" playground is sizable and is also visible from the inside of our house and backyard (Exhibits H - I). It is also open on weekends for anyone to use. As a result, we get the noise from this second playground during the weekends and we sometimes fetch dodge balls and soccer balls that have been thrown or kicked into our yard from this playground. On one weekend, we noticed a teenager climb the fence to get into our yard to retrieve a ball. This made us

realize that a taller fence would also be a defense against people who might want to access our property from the lower playground. A fence that separates a de facto public playground from a neighboring residence should be tall enough to prevent people from scaling the fence and entering private property.

6. The Statement states that denying the requested variances would pose a hardship for the Petitioner because he would “continue to be exposed to the tall climbing structure which towers over our yard because the school sits at a higher elevation than our own yard,” and thus he will “always have an unavoidable and unattractive view of the large red-and-yellow jungle gym that looms over our backyard” because he “can’t make the school replace or move this structure.” The Statement notes that the subject property may also continue to be visited by the “occasional fence jumper.” The Statement states that the location of the school’s playgrounds and the proximity of the play structures on those playgrounds to the subject property “are hardships that [the Petitioner and his wife] face as owners of a house built next to a nursery school with two active playgrounds.” Finally, the Statement states that “allowing [the Petitioner and his wife] to mitigate the negative impact of these playgrounds on [their] privacy and quality of life is a reasonable request and is consistent with previous variances for 8-foot fences that the Board of Appeals has approved.” See Exhibit 3.

7. The Statement notes, and the Petitioner’s Site Plan shows, that the proposed eight foot fence will only be erected where the Petitioner’s property borders the school property, and that the existing six foot fence will be maintained where the Petitioner’s back yard borders other residences. See Exhibits 3 and 4.

8. The Statement at Exhibit 3 states that the Petitioner’s variance application meets the standards set forth in Section 59.7.3.2.E.2 of the Zoning Ordinance, as follows:

1) *“Exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to the property”*: As described above, our backyard sits lower than the school’s “upper playground” because Old Chester Road and Honeywell Lane slope down toward Durbin Drive. As a result, the upper playground’s equipment towers over our property. It is easy for kids to throw toys into our yard. Our yard can be accessed by people jumping the fence from the “lower playground” which is open on weekends to anyone who wants to use it.

2) *“The special circumstances or conditions are not the result of actions by the applicant”*: We did not build the current fence and we were not involved in the decision to build playground equipment so close to our property.

3) *“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 request 8-foot fence is the height that is permitted in the Montgomery County zoning law (6.4.3.c.ii.A) for residential properties that abut a non-residential use (“a Commercial/Residential, Employment, or Industrial zone”). In fact, this section of

the code allows homeowners abutting a non-residential use to build an 8' fence without a variance. The school is a non-residential use. But for either historical reasons or others unknown to us, it has a residential zoning classification. This requires us to seek this exemption. We think our application is consistent with the spirit and purpose of the ordinance, which recognizes the hardships faced by residential properties that abut "commercial" or "employment" uses.

4) *"The variance can be granted without substantial impairment to the intent and integrity of the general plan and applicable master plan."*: The planning department's records do not show a local master plan. South Bradley Hills/Whitehall Manor is a residential neighborhood. The fence would be in our backyard and would not be visible from any of the nearby streets (Oldchester Road and Honeywell Lane).

5) *"Granting the variance will not be averse to the use and enjoyment of abutting or confronting properties."*: Our proposed 8-foot fence will only separate our backyard from the school's property. A new fence will benefit the school because the school will not have to finance and build the new fence. It will also provide added safety to children who attend the school because it will be new and well constructed. The 8-foot fence will not affect our two residential neighbors to the south and east of us. Currently, we have a 6-foot fence that separates our property from those neighbors' yards and we will keep that fence. Therefore, granting the variance would not affect anyone else's enjoyment or use of their property.

9. The Petitioner has submitted letters of support for the requested variances from four of his neighbors, including the director of the school. See Exhibits 7(a)-(d).

10. At the hearing, the Petitioner testified that he and his wife purchased the subject property two years ago. He testified that they noticed the school at that time, as well as the failing fence that separated their property from the school. The Petitioner testified that he initially believed he could replace the sections of fencing that separate his property from the abutting school use with taller fencing, based on a misreading of the Zoning Ordinance as allowing for an eight (8) foot fence when a property abuts a commercial use, as opposed to when a property abuts a commercial/residential zone.¹ He testified that the Planning Department's Memorandum pertaining to their consideration of this Zoning Ordinance provision indicates that it was intended to assist homeowners in residential zones with minimizing intrusions by non-residential uses.

The Petitioner testified that the school is busy and "pretty noisy" Monday through Friday, and that one of its playgrounds is also open on the weekends. He testified that the school's playground equipment is located right against the existing fence, and overhangs his property. The Petitioner testified that the school property is higher in

¹ Section 59.6.4.3.C.3.c.ii(A) of the Zoning Ordinance provides that "Building line and setback requirements do not apply to ... any other wall or fence that is not on a property abutting a national historic park and is ... 8 feet or less in height when the fence abuts ... a Commercial/Residential, Employment, or Industrial zone."

elevation than his property, particularly near the upper playground (i.e. north of his property), where he testified that large playground equipment “towers” over his property, but also near the lower playground (i.e. east of his property), where he testified the slope is less pronounced but still present. The Petitioner testified that the school and the school’s director support the grant of the requested variances, and further testified that his other neighbors have no objections.

The Petitioner testified that he has reviewed other fence variances that have been issued by the Board, notably Case Nos. A-6619 (Solomon) and A-6790 (Sharp), and that he believed his situation was similar.

CONCLUSIONS OF LAW

Based on the testimony and 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 of the Zoning Ordinance, as follows:

1. *Section 59.7.3.2.E.2.a - one or more of the following unusual or extraordinary situations or conditions exist:*

Section 59.7.3.2.E.2.a.i. - exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;

The Board finds, based on the Statement and photographs included as Exhibits to the Statement, and based on the testimony of the Petitioner, that the elevation of the subject property is lower than that of the school property that abuts the subject property on two sides, to the north (left) and to the east (rear). The Board further finds that the school has two separate playgrounds on its property—an upper playground that borders the subject property to the north, and a lower playground that borders the subject property to the east. The Board finds, based on the Statement and photographs, that these playgrounds have large play equipment, and that because of the size of this equipment, its proximity to the shared property lines, and the elevation difference between the school property and the subject property, substantial portions of the equipment are visible above the Petitioner’s existing fence. The Board further finds that children using the equipment can not only see over the fence into the Petitioner’s yard and house, but can easily toss toys into the Petitioner’s back yard, as the Petitioner has indicated happens weekly. See Exhibit 3. The Board finds that these circumstances, taken together, constitute an extraordinary situation peculiar to this property, in satisfaction of this element of the variance test.

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

The Board finds that the Petitioner purchased the property in 2022, and is not responsible for its elevation or for its proximity to the school property and two school playgrounds, 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 the subject property's lower elevation than the abutting school property limits the utility of a standard height privacy fence in shielding the view of the school's playground equipment from the subject property, and in preventing the incursion of toys (and teenagers) into the Petitioner's yard, causing the Petitioner a practical difficulty. See Exhibit 3. The Board further finds that the Petitioner is seeking to install a privacy fence that is 18 inches taller than would otherwise be allowed along the area of his property where he shares property lines with the school, and finds that this increase in height is the minimum needed for the Petitioner to overcome the practical difficulty posed by his property's lower elevation. See Exhibit 3. The Board finds that the taller fence will only be installed along the portions of the Petitioner's property that border the school property, and that the existing (six foot) fencing will be maintained along other shared property lines. The Board observes that while not technically applicable, the Zoning Ordinance does permit eight (8) foot fences by right in most cases where a property abuts certain non-residential zones (and thus presumably abuts non-residential uses). See Section 59.6.4.3.C.3.c.ii(A) of the Zoning Ordinance. In light of the foregoing, the Board finds that the requested variances are the minimum needed to allow the Petitioner to install the proposed fence, and to overcome the practical difficulty that strict adherence to the Zoning Ordinance would cause on account of his property's lower elevation, 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 allowing the Petitioner to proceed with the proposed construction will continue the residential use of this home, and thus can be granted without substantial impairment to the intent and integrity of the Bethesda-Chevy Chase Master Plan (1990). 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, based on the Statement and the Site Plan, that the proposed fence will only be erected on the portion of the Petitioner's property that borders the school property, and will not be visible from nearby streets. See Exhibits 3 and 4. The Board further finds, based on the testimony of the Petitioner and the letters of support, that the school and the school's director support the grant of the requested variances, and the Petitioner's other neighbors have no objections. See Exhibits 7(a)-(d). Finally, the Board finds that the property was properly posted, that the record contains no opposition to the proposed fence, and that no one appeared at the hearing in opposition to the proposed fence. Accordingly, the Board finds that 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.

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

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

Therefore, based upon the foregoing, on a motion by Richard Melnick, Vice Chair, seconded by Caryn Hines, with John H. Pentecost, Chair, Alan Stemstein, and Amit Sharma 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 31st 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.