

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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(240) 777-6600

Case No. A-6895

PETITION OF JACOB AND KIRA HARTMAN

OPINION OF THE BOARD

(Hearing Date: November 20, 2024)

(Effective Date of Opinion: December 4, 2024)

Case No. A-6895 is an application by Jacob and Kira Hartman (the "Petitioners") for a variance needed for the proposed construction of a swimming pool on the side of their home. Accessory structures such as swimming pools are required to be located behind the rear building line of the principal building, in accordance with Section 59.4.4.7.B.2.a of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on November 20, 2024. Petitioner Jacob Hartman participated in support of the variance, assisted by his pool contractor, Chris Conley.

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

EVIDENCE PRESENTED

1. The subject property is Lot 33, Block J, Gayfields Subdivision, located at 1926 Merrifields Drive in Silver Spring, Maryland, 20906, in the R-200 Zone. The subject property is a seven-sided, 51,411 square foot "flag-shaped" or "pipestem" lot, located on the south side of Merrifields Drive. As the names imply, access from the street to the larger, buildable portion of the subject property is via a narrow strip of property that resembles a flagpole or pipe. The flagpole or pipe portion of the subject property extends in a straight line from Merrifields Drive to the south/southeast. It is just over 240 feet long and contains a driveway. The "flag" portion of the property joins this portion of the property at its northern-most (northeast) corner. The "flag" portion of the subject property is a five-sided area that resembles an upside down house. The eastern-most side of this

five-sided area is a continuation of the pipestem from the road, and the “peak” of the “house’s” roof is the property’s southern-most corner. See Exhibits 3, 4, and 7.

2. Per SDAT, the subject property is improved with a single-family home that was built in 1994, and was acquired by the Petitioners in 2016. See SDAT Printout. The Site Plan and Zoning Vicinity Map show that the home is oriented at an angle relative to Merrifields Drive, such that its front façade faces northeast, towards the driveway and pipestem access from Merrifields Drive, and its rear façade faces southwest. The Zoning Vicinity Map also shows that because of the property’s long pipestem driveway, the property’s buildable area and house are located “behind” the neighboring properties and houses on Merrifields Drive, Baughman Drive, and Morningmist Drive. See Exhibits 4 and 7.

3. The Petitioners’ Statement of Justification (“Statement”) states that they are seeking to construct a swimming pool on their property in the area that functions as their rear yard, but that for zoning purposes is considered a side yard. The Statement explains that they were informed by the County’s Department of Permitting Services that under the applicable Zoning Ordinance definitions, “the ‘rear building line’ is defined in reference to road on which it sits.” The Statement states that the Petitioners’ home “is located at least 325’ off of Merrifields Drive, down a long driveway, and the angle of [the Petitioners’] home is not parallel with the road.” The Statement concludes that because of the Zoning Ordinance definitions, “the selected location [for] the pool - which is a practical matter is located nearly in the center of our sizeable back yard - is considered in the ‘side yard.’” See Exhibit 3.¹

4. The Statement states that “because of the angle of [the Petitioners’] home and driveway, the pool will not be visible from the street, and will be located a considerable distance from any neighboring property.” The Statement goes on to state that the location identified by DPS as being acceptable for placement of the pool “would be more visible from the street and much closer to neighboring property.” The Statement states that construction in this location “would make building the desired pool at least impractical (given its distance from [the Petitioners’] home and much closer proximity to [the Petitioners’] neighbor), if not impossible.” See Exhibit 3.

5. The Statement states that the subject property is unlike neighboring properties because the Petitioners’ home “was not constructed in parallel with the road,” but rather, “as a result of [the Petitioners’] long and curved driveway, [their] home is both much farther from the adjacent road (Merrifields Drive) than neighboring properties, and also (unlike neighboring properties), sits at an angle to the adjacent road.” See Exhibit 3.

¹ Section 59.4.4.7.B.2.a of the Zoning Ordinance requires that accessory structures in the R-200 Zone, including swimming pools, be located “behind the rear building line of the principal building.” Section 59.1.4.2 of the Zoning Ordinance defines “Rear Building Line,” in relevant part, as “a line along the edge of the principal building facing the rear lot line that extends between side lot lines and is generally parallel to the rear lot line,” and defines “Lot Line, Rear,” in relevant part, as “[t]he lot line generally opposite or parallel to the front lot line.”

6. The Statement states that were it not for the unusual shape of their property and the Zoning Ordinance's definition of "rear building line," their building permit application for the proposed swimming pool would have been "entirely routine and unobjectionable." See Exhibit 3. The Statement states that the Petitioners' requested variance meets each element of the five-part test set forth in the Zoning Ordinance for the grant of a variance, as follows:

Our request for a variance meets the Board's criteria for the following reasons:

- a) The property at 1926 Merrifields Drive is exceptional in that the property's shape and the orientation of the home relative to Merrifields Drive itself are unusual and unlike the surrounding properties.
- b) The exceptional nature of the property shape and home orientation are not the result of actions we have taken, but rather how the property was divided and the home constructed decades prior to our acquisition of the property.
- c) The requested variance is the minimum necessary to overcome the practical difficulties that full compliance with the Code would impose, as described in our supplement to our variance application.
- d) To the best of our understanding, the variance can be granted without any impairment to any general plan or applicable master plan.
- e) Granting the variance will not be adverse to the use and enjoyment of any abutting or confronting property. Indeed, if the variance is granted, the proposed pool will be placed in the location *least* likely to impair any of our neighbors' use and enjoyment of their own property.

7. At the hearing, Mr. Hartman testified that his is a case where the definitions set forth in the Zoning Ordinance are not reflective of real world circumstances. He testified that his property has an unusual shape, and that the positioning of his house on the property is also unusual. Mr. Hartman testified that his property is set far back from the road, down a long driveway, and that his house is set at a 45 degree angle to Merrifields Drive. He testified that what the Zoning Ordinance views as his "rear" yard is in fact his side yard, and vice versa. Mr. Hartman testified that he is seeking to have a pool constructed in the center of what functions as his rear yard. He testified that the location proposed is as far from his neighbors as possible.

Referring to the Zoning Vicinity Map, Mr. Hartman testified that the shape of his property is unusual, describing it as a house-shaped area attached to a long stick, whereas most of the neighboring properties have a more regular, rectangular shape. Mr. Hartman testified that the positioning of his house on the property is also unusual. In response to a Board member question asking about the trees shown on the Site Plan, he testified that those are existing. Mr. Hartman testified that he had spoken with about two-thirds of his neighbors, and that none objected to the proposed pool. He testified that any

view of the proposed pool from the neighboring property behind his property would be obscured by trees on both properties and a fence.

8. Mr. Conley testified that the Petitioners are seeking to construct their pool right behind their home. He testified that the proposed location would provide increased privacy for the Petitioners and for their neighbors. Mr. Conley testified that if the pool were built further to the left (east) of the Petitioners' house, in what the Zoning Ordinance considers to be the area behind the home's rear building line, it would be visible to the Petitioners' neighbors. In addition, he testified that the slope of the Petitioners' yard increases in that area, such that construction of a pool in that area could require a lot of grading. Mr. Conley testified that this could change the drainage pattern on the Petitioners' property and neighboring properties. Mr. Conley testified that in contrast to the area to the left (east) of the Petitioners' house, the area behind their house, where they are seeking to build their proposed pool, is not sloped. Finally, Mr. Conley testified that more trees would be impacted if the pool were placed in compliance with the Zoning Ordinance than if it were placed as proposed.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the requested variance can be granted. The requested variance complies with the applicable standards and requirements set forth in Section 59.7.3.2.E.2 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, Site Plan, Zoning Vicinity Map, and testimony of record, that the shape of the subject property is unusual relative to the majority of properties in the surrounding neighborhood, and that because of the property's long pipestem driveway, the Petitioners' yard area and house are effectively located "behind" the neighboring houses on Merrifields Drive, Baughman Drive, and Morningmist Drive. In addition, the Board finds that the angled orientation of the Petitioners' home relative to Merrifields Drive is unusual compared to the orientation of neighboring homes on that road, and results in the property's rear and side yards for zoning purposes being incongruous with the property's functional rear and side yards. See Exhibits 3, 4, and 7. The Board finds that these factors combine to create an unusual condition peculiar to this property that satisfies 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, based on the SDAT Printout, that the Petitioners purchased the subject property in 2016, and that the property was developed in 1994. Thus the Board

finds that the special circumstances or conditions applicable to this property are not the result of actions by the Petitioners, in satisfaction of this element of the variance test.

3. *Section 59.7.3.2.E.2.c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;*

The Board finds that because of the unusual shape of the Petitioners' property and the orientation of their house, strict application of the Zoning Ordinance would cause them a practical difficulty in that it would require that they locate the proposed swimming pool in their functional side yard, rather than allowing them to locate their pool in the area that functions as their rear yard and is most proximate to their house. See Exhibits 3 and 4. The Board further finds, based on the Statement and the testimony of Mr. Conley, that locating the proposed pool as required by the Zoning Ordinance would result in the pool being closer and more visible to neighboring properties, and may necessitate regrading of the Petitioners' property, potentially causing drainage issues for the Petitioners and their neighbors, because the area of the property on which the Zoning Ordinance would permit construction is sloped, whereas the area proposed by the Petitioners for construction is flat. The Board notes that the location proposed by the Petitioners is consistent with the intent of the Zoning Ordinance that accessory structures be located behind primary structures, but is not consistent with the letter of the Zoning Ordinance when applied to this unusual property. In light of the foregoing, the Board finds that the requested variance, needed to allow the Petitioners to locate their proposed swimming pool in the area of the property that functions as their rear yard but that is deemed by the Zoning Ordinance to be a side yard, is the minimum needed to overcome the practical difficulties imposed by strict adherence to the Zoning Ordinance on account of the subject property's unusual shape and the orientation of the Petitioners' house. Accordingly, the Board finds that this element of the variance test is satisfied.

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

The Board finds that granting the requested variance, needed to allow the Petitioners to construct a swimming pool on their property in an area forward of the rear building line but to the functional rear of the existing house, would continue the residential use of the home. Thus the Board finds that the requested variance can be granted without substantial impairment to the intent and integrity of the Aspen Hill Master Plan (1994), which seeks, among other things, to "protect and reinforce the integrity of existing residential neighborhoods," in satisfaction of this element of the variance test.

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.*

Per the Statement, Site Plan, and Zoning Vicinity Map, the Board finds that the proposed pool will be located behind the architectural and functional rear of the existing house, in a location that is further from neighboring properties than the area that is technically behind the property's "rear building line" for zoning purposes. See Exhibits 3,

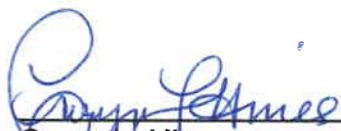
4, and 7. The Board further finds, per the Statement, that if installed in the proposed location, the proposed pool “will not be visible from the street, and will be located a considerable distance from any neighboring property.” See Exhibit 3. In addition, the Board finds, per the testimony of Mr. Hartman, that he has spoken with many of his neighbors, and that they have no objection to the proposed construction. Finally, the Board notes that despite the property having been properly posted and the hearing having been properly noticed, the record contains no opposition to the grant of the variance, and no one was present at the hearing in opposition. In light of this, the Board finds that granting the requested variance will not be adverse to the use and enjoyment of neighboring properties, in satisfaction of this element of the variance test.

Accordingly, the requested variance to allow construction of a swimming pool forward of the rear building line is **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.

Therefore, based upon the foregoing, on a motion by Donald Silverstein, seconded by Amit Sharma, with Caryn L. Hines, Chair, Richard Melnick, Vice Chair, and Alan Sternstein in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Caryn L. Hines
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 4th day of December, 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.

