

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Rockville, Maryland 20850
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(240) 777-6600

Case No. A-6419

PETITION OF NANCY DEMB

OPINION OF THE BOARD

(Opinion Adopted October 9, 2013)

(Effective Date of Opinion: October 29, 2013)

Case No. A-6419 is an application for a 3.67-foot variance from the required five-foot side lot line setback, under Section 59-C-1.326(C). The Petitioner proposes to build a detached garage.

The Board of Appeals held a hearing on the application on October 9, 2013. Alan Kinney, the Petitioner's Agent, appeared at the hearing.

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

EVIDENCE PRESENTED

1. The subject property is Lot 17, Block D, Chevy Chase Gardens Subdivision, located at 4611 Morgan Drive, Chevy Chase, Maryland 20815, in the R-60 Zone.
2. Mr. Kinney stated that the existing garage is in danger of falling over, but that it is not possible to repair it, so the Petitioner proposes to replace the existing garage. The garage is accessed via a shared driveway.
3. Mr. Kinney stated the Department of Permitting Services would not approve a permit to repair the garage.
4. Mr. Kinney stated that the property was subdivided in 1929 and that the existing garage does not conform to current setback requirements.
5. Mr. Kinney noted that there are other, similar garages in the neighborhood [Exhibit No. 11].

6. In response to a Board question, Mr. Kinney stated that the garage cannot be located further west of the side lot line in question because such a location would conflict with an existing deck, walkway and stairs. He also stated that the proposed garage could not be located further back (north) on the lot without conflicting with the required rear lot line setback. He stated that there is no other location on the lot for the garage that would allow access by a car and that the Petitioner would have rebuilt and repaired the existing garage if she could have, but that there was no choice but to ask for the variance to replace it.

7. Mr. Kinney stated that replacing the garage in its current location would allow the property to retain its original look and avoids additional paving in the yard.

8. In response to a Board question, Mr. Kinney stated that Lots 16 and 17 are the same size, as are Lots 25 and 26, and that there are lots on Chevy Chase Boulevard that are smaller than the subject property. Exhibit No. 4(a) shows that the subject property contains 5,096 square feet.

FINDINGS OF THE BOARD

A variance permits a structure that otherwise would not be permitted by the zoning ordinance, which has led the Maryland Court of Special Appeals to clarify that "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances," *Cromwell v. Ward*, 102 Md. App. 691, 703, 651 A.2d 424, 430 (1995) (citation omitted). Review of a variance application under an ordinance like Montgomery County's involves a two-step process to discern a unique characteristic of the property and then to determine whether a practical difficulty results from the uniqueness of the property:

The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is -- in and of itself -- unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, i.e. a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance caused by the property's uniqueness, exists.

Cromwell, 102 Md. App. at 694-695, 651 A.2d at 426. That the variance might allow an improvement to property that is "suitable or desirable or could do no harm or would be convenient or profitable to its owner" does not provide a basis for granting a variance. *Cromwell*, 102 Md. App. at 707, 651 A.2d at 432. The need for the variance must arise from the application of the zoning ordinance to the

unique or peculiar characteristics of the property. See *Cromwell*, 102 Md. App. at 717-718, 651 A.2d at 437. The zoning ordinance must impact upon the land in a unique manner that does not exist where a restriction applies "equally to all lots of similar size." *Cromwell*, 102 Md. App. at 720, 651 A.2d at 438.

In *Salisbury Board of Zoning Appeals v. Bounds*, 240 Md. 547, 554-55, 214 A.2d 810, 814 (1965), the Maryland Court of Appeals enunciated the concept of a self created hardship;

If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have been themselves caused by the property owner or his predecessor in title, the essential basis of the variance, i.e. that the hardship be caused solely through the manner of operation of the ordinance upon the particular property, is lacking. In such a case a variance will not be granted; the hardship, arising as a result of the act of the owner or his predecessor will be regarded as having been self-created, barring relief.

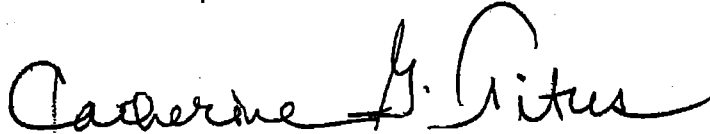
Section 59-G-3.1 of the Montgomery County Zoning Ordinance ("Authority – Board of Appeals") provides that the Board of Appeals may grant petitions for variances as authorized in Section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;

It is under this subsection that the Board must employ the analysis from the *Cromwell* case, set forth above. The Board notes that the subject property is somewhat substandard in size for the zone, but that, according to testimony, there are other lots the same size and some that appear to be smaller, in the neighborhood. There is no evidence that any unique feature of the lot constrains construction on it, rather, opportunities to locate the garage in conformance with the required setback are constrained by the presence of the existing deck. Thus, the property is not "unique, unusual, or different" from properties around it. Even if the Board could find a unique or unusual characteristic of this property, the Board cannot find that there is a disproportionate impact of the setback requirement on this property because the impediment to building the garage several feet to the west, without need for a variance, is the presence of the existing deck, which is a self created hardship. Thus, while the Board is sympathetic to the homeowner's desire to take what seem like common sense actions to replace an existing structure that's been there for a long time, the request does not meet the threshold requirements of Section 59-G-3.1(a) and the variance must be denied.

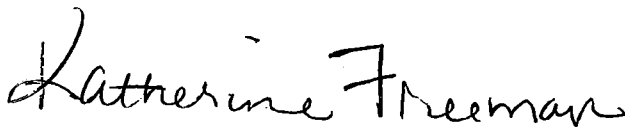
On a motion by David K. Perdue, Vice-Chair, seconded by Carolyn J. Shawaker, with John H. Pentecost, Stanley B. Boyd and Catherine G. Titus, Chair, in agreement, the Board adopted the following Resolution:

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.



Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 29th day of October, 2013.



Katherine Freeman
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 (See Section 59-A-4.63 of the County Code). 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.