

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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CASE NO. A-6490

PETITION OF GAIL FISHER

OPINION OF THE BOARD

(Opinion Adopted March 2, 2016)
(Effective Date of Opinion: March 17, 2016)

Case No. A-6490 is an application for a variance of 17.75 feet from the 22-foot side setback required by Section 59-4.4.8.B.2.c of the Zoning Ordinance. The Petitioner proposes construction to replace the roof of her existing garage with a roof having a steeper pitch.

The Board of Appeals held a hearing on the application on March 2, 2016. Petitioner Gail Fisher, who owns the subject property, appeared pro se. Tony and Pat Vasaio appeared in opposition.

Decision of the Board: Variance granted, with conditions.

EVIDENCE PRESENTED

1. The subject property is Lot 7, Block E, Hillandale 2 Subdivision located at 10412 Rodney Road, Silver Spring, Maryland, 20903, in the R-90 Zone.
2. Ms. Fisher states in her written statement that her existing (detached) garage was constructed in 1963 with approval from the Montgomery County Department of Inspection and Licenses, and is 24 feet wide and 40 feet long. See Exhibit 3. Her testimony confirmed that the garage was approved by the County in the 1960s. Ms. Fisher includes photographs of her garage and the plans approved in 1963 with her statement. See Exhibits 3A and 3C. Her statement references other garages on her street and describes their architecture. See Exhibit 3.

3. The site plan submitted by Ms. Fisher shows that the length of her existing garage is roughly parallel to her side (southern) lot line, that the front of the garage is 5 feet from that lot line, and that the rear is 4 feet 3 inches from that lot line. See Exhibit 4.
4. Ms. Fisher testified that her garage is quite large, and that it is nonconforming both in terms of its size and its proximity to the side lot line she shares with her neighbors. She testified that the garage is built on a cement slab and is not moveable. Ms. Fisher testified that her garage is not attractive, and that she would like to increase the pitch of the roof and re-shingle it with rubber shingles that mimic the slate tiles of the Tudor revival-style homes that she testified are dominant in her neighborhood. See photos at Exhibits 3A and 3B. She testified that the increased pitch of the roof and new shingles would match the Tudor style of her neighborhood, and explained that she was proposing these changes so that her property would better blend in with the neighborhood. She testified that she is not increasing the size or height of the garage walls, but that the proposed change would add a few feet to the height of her roof, which would allow for insulation. Nevertheless, she testified that her roof would not exceed the 20 foot height limit. See Exhibit 4.
5. Ms. Fisher testified that as she understood the direction she received from DPS, she would need a permit to re-shingle the roof of the existing garage or to replace the garage siding. She further testified that DPS told her that because of the size of her garage, it requires a 17 foot setback from the side lot line. Thus she testified that whenever she sought a permit to do work on her garage she would need a variance.
6. Mr. Tony Vasaio, who, with his wife Pat, owns the abutting property at 10416 Rodney Road (next door to the subject Property), testified that the garage in question is a massive structure compared with most in the neighborhood. He testified that if the height of the garage is increased, it will become even more massive. He and his wife testified that the garage is unusual in its position, and is sited towards their back yard. Mr. Vasaio testified that it hovers over their back yard, and that an increase in height will make this worse.
7. Ms. Fisher acknowledged in response to the testimony of Mr. Vasaio that the existing garage is too close to the property line. She testified that the Vasaios' property is a one-half acre wooded lot with a fabulous back yard, and that her proposed construction would not adversely affect the enjoyment of that property because the area is not densely developed. She testified that she had discussed her proposed changes with the Vasaio's son and daughter, who reside in the house at 10416 Rodney, and they had no problem with the changes, but that when the elder Vasaios learned of her plans, they opposed them.

FINDINGS OF THE BOARD

A variance permits a use of 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). Section 59-7.1.1 of the Montgomery County Zoning Ordinance provides that the applicant has the burden of production and has the burden of proof by a preponderance of the evidence on all questions of fact.

Section 59-4.4.8.B.2 of the Zoning Ordinance governs the required setbacks for accessory structures, including detached garages, in the R-90 zone. The "base" setback from the side lot line for an accessory structure is 5 feet, but that is subject to increase depending on the length and height of the structure. Section 59-4.4.8.B.2.b states that "For any accessory structure with a height greater than 15', the minimum side and rear setback must be increased at a ratio of 2' of additional setback for each foot of height in excess of 15'." Similarly, Section 59-4.4.8.B.2.c states that "For any accessory structure with a length along a rear or side lot line that is longer than 24', the minimum side or rear setback must be increased at a ratio of 2' for every 2' that the dimension exceeds 24 linear feet..." Thus, for a structure such as Petitioner's garage, if the height were increased to 20'¹ as the Petitioner proposes, the garage would need to be set back 15 feet from the side lot line ($5' + (5' \times 2') = 15'$), in accordance with Section 59-4.4.8.B.2.b. In addition, because the length of this (existing) garage exceeds 24 feet and parallels the side lot line, Section 59-4.4.8.B.2.c requires that the side setback be increased to 22 feet. Because the 22 foot side setback dictated by the length of the existing garage subsumes the additional setback that would be necessitated by the proposed increase in height, DPS (and the Board) noticed this variance proceeding for the greater of the two setbacks.

With respect to the grant of variances, Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board of Appeals must find that:

1. denying the variance would result in no reasonable use of the property; or
2. each of the following apply:
 - a. one or more of the following unusual or extraordinary situations or conditions exist:
 - i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;
 - ii. the proposed development uses an existing legal nonconforming property or structure;
 - iii. the proposed development contains environmentally sensitive features or buffers;

¹ Twenty feet is the maximum allowable height for accessory structures in this zone pursuant to Section 59-4.4.8.B.3.

- iv. the proposed development contains a historically significant property or structure; or
 - v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;
- b. the special circumstances or conditions are not the result of actions by the applicant;
- 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;
- d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and
- e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.

The Petitioner has not argued that denying the variance would result in no reasonable use of the Property under Section 59-7.3.2.E.1, and thus the Board must consider this request under Section 59-7.3.2.E.2. The various subsections in Section 59-7.3.2.E.2 are joined with an "and," making the test for the grant of a variance set forth in this Section a conjunctive test, in which all elements of the test must be met if a variance is to be granted.

Without addressing Sections 59-7.3.2.E.2.a through d, the Board finds, based on the testimony of Mr. and Mrs. Vasaio, that the proposed construction of a higher roofline on this existing garage, which would otherwise trigger the need for what is, in effect, a lesser-included variance under the development standards for the zone, would be adverse to the use and enjoyment of the Vasaio's (abutting) property due to the unusually large mass of this garage and its proximity to their back yard. For this reason, the Board finds that it cannot grant the requested variance for the purposes of allowing the proposed replacement of the existing garage roof with a roof that has a steeper pitch (and is, as a result, taller). That said, the Board finds that it can grant the requested variance for the purpose of enabling the Petitioner to obtain any permits necessary for the maintenance and repair of her existing garage, provided the dimensions of the garage are not increased, as follows:

Based on the petitioner's binding testimony and the evidence of record, the Board finds that a variance can be granted for this existing structure. The requested variance complies with the applicable standards and requirements set forth in Section 59-7.3.2.E as noted below:

1. *Section 59-7.3.2.E.2.a.v: the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;*

Ms. Fisher's written statement cites the existence of other garages on Rodney Road. Although Ms. Fisher has testified that the architecture of her garage is different from that of others on the street, its existence is not, and thus the Board finds that having

a garage, particularly one that has existed since 1963, substantially conforms with the established historic or traditional development pattern of this street.

2. *Section 59-7.3.2.E.2.b: the special circumstances or conditions are not the result of actions by the applicant;*

Ms. Fisher's written statement indicates that the garage was built in 1963. The Petitioner is not the original owner of the house and is not responsible for the construction and location of the garage.

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;*

Again, the Board notes that the garage in question has been located on the subject Property since 1963, and was approved by at least one County department at the time of its construction. Per the written statement and testimony of Ms. Fisher, the garage is built on a cement slab and cannot be moved. For these reasons, the Board finds that allowing the garage to remain where it has been for the past 50+ years is the minimum necessary to overcome the practical difficulty that compliance with the required side setback would impose, given the prior approval, age and immovable nature of this structure.

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 this existing garage to remain continues the residential use of the property and is consistent with the applicable master plan.

5. *Section 59-7.3.2.E.e: granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

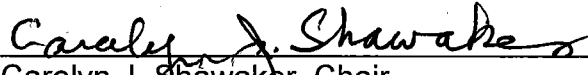
The Board finds that to the extent a variance is needed to allow for the issuance of permits necessary for the upkeep and repair of this garage, which has been located in its current location for over 50 years, any such improvements would not be adverse to the use and enjoyment of abutting or confronting properties.

Accordingly, the requested variance of 17.75 feet from the required side lot line setback is granted to allow for the upkeep of the existing structure, including maintenance and repair to its roof, siding and door, and any other improvements that do not change its footprint or height, subject to the following conditions:

1. The Petitioner shall be bound by all of her testimony and exhibits of record, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.
2. The Petitioner may not proceed with the construction shown in the record at Exhibit 5; any permits issued with respect to this structure cannot change its footprint or height.

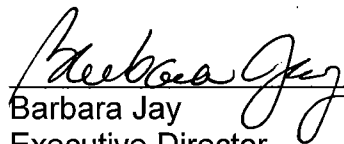
Therefore, based upon the foregoing, on a motion by Stanley B. Boyd, seconded by John H. Pentecost, Vice Chair, with Carolyn J. Shawaker, Chair, Edwin S. Rosado, and Bruce Goldensohn in agreement, the Board adopted the following Resolution:

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.



Carolyn J. Shawaker, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 17th day of March, 2016.



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.