

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**CASE NO. A-6535
PETITION OF MARIA VARGA**

**OPINION OF THE BOARD
(Hearing Held September 20, 2017)
(Effective Date of Opinion: October 4, 2017)**

Case No. A-6535 is an application for three variances necessary for an existing accessory structure/carport. First, the existing structure requires a variance of fifty-six (56) feet as it is within four (4) feet of the front lot line. The required setback is sixty (60) feet, in accordance with Section 59-4.4.9.B of the Montgomery County Zoning Ordinance. Second, the existing structure requires a variance of five (5) feet as it is within zero (0) feet of the side lot line. The required setback is five (5) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance. Finally, the existing structure requires a variance to be located in front of the rear building line of a single family dwelling; Section 59-4.4.9.B.2.a of the Zoning Ordinance requires that accessory structures be located behind that line.

The Board of Appeals held a hearing on the application on September 20, 2017. Petitioner Maria Varga appeared at the hearing, represented by Harry L. Stone, Esquire.

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

EVIDENCE PRESENTED

1. The subject property is Lot 11, Block A6, 84 Subdivision located at 3810 Kayson Street, Silver Spring, MD, 20906, in the R-60 Zone. It is roughly rectangular in shape, and approximately 7,429 square feet in size. See Exhibits 3 and 4.

2. The Justification Statement indicates that the subject property has a shared, short driveway, which the Site Plan shows is located on the left (northeast) side of the property as one faces the property from the street. The Justification Statement further indicates that the property has two large trees which deposit twigs and debris on the Petitioner's cars, causing damage. It states that the "Petitioner's home sits within 10 feet of the lot line on the side where the shared driveway is which makes it impractical to extend the

driveway to the rear of the house, nor would she do so as she has HVAC equipment and a deck installed there." It notes that the property's layout and the trees pre-exist her ownership of the property. See Exhibits 3 and 4.

3. The Justification Statement states that the carport, which is existing, is a minimalist structure, that its presence is less disruptive to the neighborhood than taking down the problem-causing trees would be, and that placing the carport in the rear yard would cause noise that would adversely impact the Petitioner's neighbors to the rear. It asserts that the carport continues the residential use of the property, and is thus consistent with the Kensington-Wheaton Master Plan. Finally, it states that the carport has little impact on adjoining or confronting properties, indicating that all but one of the Petitioner's adjoining and confronting neighbors have written letters indicating that they do not object to the grant of the variances or the continued presence of this carport, and that the one neighbor who did not submit a letter could not be reached. See Exhibits 3 and 7(a)-(d).

4. The Zoning Vicinity Map indicates the presence of accessory structures in the rear yards of several properties on Petitioner's block, but none in the front yard. See Exhibit 8(a).

5. At the hearing, Ms. Varga testified that she is seeking a carport to protect her car. She testified that the oak tree in her yard drops acorns which dent her car and oil which sticks to her car. She stated that both of these things damage her car, and that the carport has resolved these problems. She stated that the carport is about seven (7) feet tall.

Ms. Varga testified that she has a short driveway, and that if her driveway were extended past her house, she would have to relocate her air conditioning unit, remove an existing deck, and cut down a tree. She clarified that the deck and A/C unit existed when her late husband originally purchased this property, which she now owns, and that the only improvement she had made is the carport. Ms. Varga testified that there is even less room for driveway access to her rear yard on the other (right/west) side of her house, estimating that her side yard is approximately three (3) feet wide on that side.

Ms. Varga testified that her property is unique because it is the only property with an oak tree that is inside of the property, as opposed to along the sidewalk. She testified that she thought about cutting down the tree, but decided that that would be very disruptive to her property and to her neighbors. She testified that the tree protects her basement from water damage because it soaks up so much water.

6. In response to a Board question asking Ms. Varga if her property was similar in size and shape to surrounding properties, Ms. Varga noted that her property was very narrow on the right (west) side, and that she had an A/C unit, deck and a tree on the left (east) side; Mr. Stone stated that Ms. Varga's property appeared to be similar to neighboring properties. In response to a Board question asking how many other carports there were along the street, Mr. Stone stated that there were none. Ms. Varga then testified that because the other properties do not have a tree like hers, their driveways extend farther back, allowing her neighbors to park closer to their homes. She went on

to testify that there is a hill on her side of the street, explaining that her property rises a little from the street and then has a tree, right in front. When asked by the Board if she could park on the street in front of her house, Ms. Varga testified that she could park there, but that there is a tree there too.

CONCLUSIONS OF LAW

1. 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;
 - 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.

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.

2. Based on the record in this case, the Board notes that there was no attempt to argue the standard in Section 59-7.3.2.E.1 of the Zoning Ordinance. For this reason, the Board must analyze the instant case under Section 59-7.3.2.E.2 of the Zoning Ordinance. Section 59-7.3.2.E.2 sets forth a five-part, conjunctive ("and") test for the grant of a variance, and thus the Board cannot grant a variance if an applicant fails to meet any of the five elements required by this Section. In the instant case, the Board finds that the requested variance fails to meet Sections 59-7.3.2.E.2.a, as follows:

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 Petitioner and her attorney have argued that the large oak tree in her front yard makes her property unique and results in her need for a carport. They have further asserted that the placement of her home approximately ten (10) feet from the side lot line on the driveway (east) side of her property, and the HVAC unit, deck and tree which are also located on that side of her home, make it impractical to extend her driveway to the rear of her property and to locate her carport there. They have stated that the narrow space between her home and the side lot line on the west side of her property makes it impossible to locate a driveway on that side.

The Board finds that the Zoning Vicinity Map shows, and the Petitioner's attorney has conceded, that the subject property is similar in size and shape to neighboring properties. See Exhibit 8(a). The Board notes that at 7,429 square feet in size, the Petitioner's property is not substandard for the R-60 Zone, which has a minimum lot size of 6,000 square feet. Thus the Board finds that the size and shape of the subject property are not peculiar to the subject property.

Although the Petitioner testified that the presence of a large oak tree differentiates her property from neighboring properties, the Petitioner and her attorney have presented no evidence to suggest that this tree is subject to the Montgomery County Forest Conservation Law or to any other tree protection or environmental ordinance such that it is legally protected and could not be removed. In addition, the photographs submitted with the variance application depict the existence of other large trees in the immediate area. See Exhibits 5(a)-(d). Finally, the Board notes that trees are generally not considered to make a property unique for purposes of meeting the variance standards because absent special protections, they are not considered inherent characteristics of the property.¹ Accordingly, the Board finds that the existence of this tree is not an extraordinary condition peculiar to the property.

Finally, while the Petitioner testified that her side of the street has a hill, the Board finds that, per the Petitioner's testimony, this is a characteristic shared with other properties on her side of the street and is not unique to her property. The Board further

¹ *Cromwell v. Ward*, 102 Md. App. 691, 710, 651 A.2d 424, 433-434 (quoting *North v. St. Mary's County*, 99 Md. at 512, 638 A.2d 1175) describes uniqueness as follows:

In the zoning context, the "unique" aspect of a variance requirement does not refer to the extent of the improvements upon the property, or upon neighboring property. "Uniqueness" of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

notes that there has been no testimony to indicate that the presence of this hill constrains the ability of the Petitioner to construct her carport in compliance with the applicable development standards. Accordingly, the Board cannot find that the variance requested meets Section 59-7.3.2.E.2.a.i of the Zoning Ordinance.

Section 59-7.3.2.E.2.a.ii – the proposed development uses an existing legal nonconforming property or structure;

Section 59-7.3.2.E.2.a.iii – the proposed development contains environmentally sensitive features or buffers;

Section 59-7.3.2.E.2.a.iv – the proposed development contains a historically significant property or structure;

The Board finds that the Petitioner has not presented any evidence to support a finding that the proposed development (existing carport) uses an existing nonconforming property or structure, that it contains environmentally sensitive features or buffers, or that it contains a historically significant property or structure, and thus finds that the variance does not meet Sections 59-7.3.2.E.2.a.ii-iv of the Zoning Ordinance.

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;

Finally, the Board finds that the Petitioner has presented no evidence that her carport substantially conforms with the established or tradition development pattern of her street or neighborhood, and that when asked how many other carports there were along the street, Petitioner's attorney replied that there were none. Thus the Board cannot find that the proposed variance meets Section 59-7.3.2.E.2.a.v of the Zoning Ordinance.

The Board notes at this juncture that even if it had found that the Petitioner's property was unique or extraordinary under Section 59-7.3.2.E.2.a of the Zoning Ordinance, the practical difficulty that gives rise to the variance request—the Petitioner's desire for a carport to protect her car from acorns and other falling tree debris—does not derive from any unique condition of the property, but rather from the Petitioner's desire to protect her vehicle and to retain the carport she has constructed. The Board understands the desirability of protecting one's car, but finds that the Petitioner's choice to use a carport to do so is a matter of personal preference and convenience, rather than a practical difficulty that would justify a variance. The Board notes the holding of the Court of Special Appeals of Maryland in *Montgomery County v. Rotwein* that a variance applicant must show more than simply that proposed construction would be suitable, or desirable, or could do no harm, or would be convenient or profitable to its owner. See *Rotwein*, 169 Md. App. 716, 730, 906 A. 2d 959, 967 (2006).

3. For all the foregoing reasons, the Board finds that the requested variance cannot be granted under Section 59-7.3.2.E.2.a, and must be denied. Accordingly, the Board does not address the remaining elements of the variance test found in Sections 59-7.3.2.E.2.b-e of the Zoning Ordinance.

Therefore, based upon the foregoing, on a motion by John H. Pentecost, then-Vice Chair, seconded by Carolyn J. Shawaker, then-Chair, with Stanley B. Boyd, 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.



John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 4th day of October, 2017.



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.