

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case No. A-6667
PETITION OF KENNETH WARN**

OPINION OF THE BOARD
(Hearing Date: September 15, 2020)
(Effective Date of Opinion: September 30, 2020)

Case No. A-6667 is an application by Petitioner Kenneth Warn for three variances from the requirements of Section 59-4.4.8.B of the Zoning Ordinance, needed to construct two accessory structures. The needed variances are as follows:

In accordance with Section 59-4.4.8.B.2.a of the Zoning Ordinance, the proposed construction of accessory structures requires a variance to be located forward of the rear building line.

The proposed construction of accessory structures requires a variance of twenty-nine (29) feet as they are within one (1) foot of the side street lot line. The required setback is thirty (30) feet, in accordance with Section 59-4.4.8.B.2 of the Zoning Ordinance.

The proposed construction of accessory structures requires a variance of four (4) feet as they are within one (1) foot of the left lot line. The required setback is five (5) feet, in accordance with Section 59-4.4.8.B.2 of the Zoning Ordinance.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on Wednesday, September 16, 2020. All participation was done via Microsoft Teams. Petitioner Kenneth Warn participated in support of the requested variances. He was assisted by JaNay St. Clair.

Decision of the Board: Variance to allow accessory structures forward of the rear building line: **GRANTED.**
Variance to allow accessory structures within one (1) foot of the side street lot line: **DENIED.**
Variance to allow accessory structures within one (1) foot of the left lot line: **DENIED.**

EVIDENCE PRESENTED

1. The subject property is located at 13009 Disney Lane, Silver Spring, Maryland, 20906 in the R-90 Zone. It is located on the east side of the street, at its terminus. It contains an old farmhouse, originally constructed in 1903 and subsequently improved. The subject property is comprised of part of Lot 5, which contains the house, and part of Lot 4, which is currently vacant but used to satisfy the setback requirements of the existing house, and thus is considered to have merged with Lot 5 for zoning purposes. Lot 4 abuts the north side of Lot 5. The application notes that the subject property is unique in terms of its narrowness, shape, topography, and other extraordinary conditions. See Exhibits 1(b), (3) and 4(b).
2. The Petitioner is seeking to locate two pre-manufactured accessory structures, a 12' x 24' A-Frame Cedar Garage Shed and a 6' x 8' Cedar Firewood Shed, at right angles to one another in the area north of the existing home. He proposes to locate the first structure one (1) foot from the side street lot line, and the second structure one (1) foot from the left lot line. Both would be forward of the rear building line. The Petitioner includes site plans showing the proposed locations of the structures with his submission. He also includes elevations of the structures. See Exhibits 3 and 4(a)-(b).
3. The Statement of Justification ("Statement") states that the "original home is considered a farmhouse on the hill facing Briggs Road." See Exhibit 3. The Zoning Vicinity Map attached to the Statement shows that Briggs Road is located south of and perpendicular to Disney Lane, which runs north-south. Attachment A to the Building Permit Denial explains that prior to the recordation of plat 2290 in 1949 and plat 12388 in 1979, the house on the subject property had frontage on Briggs Road. See Exhibit 6. As a result of this history, the home's front façade does not face west towards Disney Lane, but rather faces south. The home's functional rear façade is on its north side. See Exhibit 3. Contrary to the functional and visual layout of this home, for zoning purposes, the property's rear lot line is along its east side, and thus without the grant of a variance, all accessory structures need to be located behind the building line established by the east side of the home.
4. The Statement states that the "Petitioner cannot build or place a garage anywhere else on the property, given the narrowness on the sides and rear of the house," and that "due to exceptional narrowness, shape and conditions," the proposed structures are best located on the north side of the property. The Statement further indicates that the rear of the property experiences issues with runoff during heavy storms, and that locating accessory structures to the rear would entail "major excavation of the posterior of the property, reconstruction or redesign of the primary structure, and would cause unconditional noise and nuisance to properties adjacent due to narrowness and shape of the lot." See Exhibit 3.
5. The Statement describes the vacant property abutting the subject property to the north as having "thickly settled vegetation, large trees and overgrown brush." Accordingly, it states that placing the proposed accessory structures on the north side of the subject property would have no negative impact on confronting or adjacent neighbors. The Statement then notes that if the proposed structures were placed to the (zoning) rear

of the home, they would have a negative impact on those neighbors abutting to the rear, and in addition, that such placement would not be consistent with the siting pattern in the neighborhood. See Exhibit 3.

6. With respect to the need for the proposed accessory structures, the Statement notes that despite a 6-foot fence between the subject property and the vacant property to the north, wildlife and small animals get onto the subject property and "are a nuisance and present a hazard to outdoor parked vehicles," chewing on vehicle wiring and creating "havoc" underneath. The Statement further notes that because there is no cul-de-sac at the end of Disney Lane, commercial vehicles routinely turn around using the Petitioner's property, which results in potential damage to his vehicles. The Petitioner asserts that the requested garage would eliminate costly repairs and keep parked vehicles safe and secure.

7. At the hearing, Petitioner Kenneth Warn began by asking that JaNay St. Clair be allowed to participate as a party, and stated that he authorized Ms. St. Clair to speak on his behalf.

Mr. Warn then testified that he purchased the subject property in 2012. He testified that the house on the subject property was built in 1903, and originally fronted on Briggs Road. Mr. Warn testified that the subject property's narrowness, shape, and shallow nature creates problems for the location of accessory structures in accordance with the requirements of the Zoning Ordinance, that the requested variances are the minimum needed to overcome the property's conditions, and that they can be granted without substantial impairment to the applicable general or master plan.

8. JaNay St. Clair testified that the Zoning Ordinance requires that the proposed accessory structures be located behind the (zoning) rear of this oddly-shaped house, and that they do not fit there. She further testified that location of the proposed garage in the (zoning) rear of the property would require the destruction of Lot 4 and the excavation of the driveway for a distance of approximately 120 feet. Ms. St. Clair testified that Lot 4, which is north of the house and behind its functional rear, is actually used as the property's back yard, and that the proposed accessory buildings need to be on the north side of the house.

In addition, Ms. St. Clair testified that the proposed garage needs to be located off the driveway apron in order to fit in with the pattern in the neighborhood, noting that 13003, 13005, and 13006 Disney Lane have garages off their driveway aprons, and testifying that if the proposed garage were placed behind the rear building line, this would be the only driveway with a garage behind the house.

Ms. St. Clair testified that the front of the existing house faces the home on Lot 9, located at 13005 Disney Lane, and that there is no front entrance to the house from Disney Lane. She testified that when the house was built in 1903, there was nothing around except Briggs Road, and that it was appropriate to use Lot 4 for the proposed garage because that was the original rear of the house. Ms. St. Clair testified that the property on which the existing house is located (Lot 5) is narrow all around, and that the area behind the rear building line of the house is shallow, has drainage issues, and does

not have space to accommodate the proposed accessory structures. She testified that in 1979, someone purchased part of Lot 4 to provide a back yard for the house. Ms. St. Clair testified that this is the only place to locate the proposed accessory structures, and that such a location would match the pattern in the neighborhood. She testified that adding an attached garage to this house would break down the historic four-square design of the home.¹

Ms. St. Clair testified that the subject property abuts an abandoned² lot to the north, and that the proposed garage would be completely covered inside a lawn area (presumably intending to indicate that any view of it would be screened). She testified that as such, the proposed garage will not impact anyone. Ms. St. Clair testified that if the Board were to instruct the Petitioner to move the proposed garage further away from Disney Lane, that was fine, and testified that it could go 40 to 50 feet back.

9. In response to a Board question asking Ms. St. Clair for confirmation that the proposed garage structure could be moved 40 or 50 feet back, Ms. St. Clair confirmed that it could. She then explained that the proposal they had prepared was about 35 feet off of Disney Lane,³ but that the proposed garage structure did not need to be at that distance, and that they could move the structure back to 40 feet. Mr. Warn then testified that they could still accommodate the proposed garage if it were set back farther from the street, but noted that the more the structure was set back, the more it would create a hardship for the driveway.

In response to a Board question asking if the second accessory structure (firewood shed) was to be located one foot from the undeveloped property to the north, Mr. Warn confirmed that it was. He testified that the proposed firewood shed was 6' x 8' in size, and that he was proposing to locate it catty corner to the garage. Ms. St. Clair testified that the proposed firewood shed could be moved further to the right (south), later stating that if the shed has to be five (5) feet away from the left lot line, that is fine, noting that Mr. Warn wants to comply with the code and agreeing with Board members that in light of this testimony, the Board did not need to consider this variance.

FINDINGS OF THE BOARD

¹ In response to a Board question asking if this home or property were officially designated as historic, Mr. Warn testified that they were not listed as being historic in the legal sense, but that they had existed long enough to qualify for such a designation. Ms. St. Clair testified that Disney Lane was named after the Disney family, which had been in the County since the 1890's.

² In response to Board questions asking Ms. St. Clair how she knows that the property to the north of the subject property is abandoned, Ms. St. Clair testified that they do not know who owns that property, that no one tends to it and that vegetation covers the fence, and that it is filled with wildlife. The Board members concluded from the discussion that the property is undeveloped but is not abandoned.

³ Exhibits 4(a) and (b) indicate that the northwest corner of the proposed garage is located one foot from the side street line for the "cul-de-sac" portion of Disney Lane, but that the remainder of the garage is farther away from Disney Lane, which may help to explain Ms. St. Clair's statement. Mr. Warn testified that Disney Lane does not have a cul-de-sac, but rather is a dead end. He testified that Disney Lane has a significant right-of-way, and that the actual asphalt for the road is further to the west than indicated on the site plans. Ms. St. Clair then testified that she thinks that Mr. Warn's front fence marks his property line, that she believes the extent of the variance requested was measured from the fence line, and that Mr. Warn is requesting permission to locate his garage a foot from his fence.

Based on the binding testimony and the evidence of record, the Board finds that the requested variance to allow the construction of accessory structures forward of the rear building line can be granted, but that the requested variances from the setbacks for the side street lot line and left lot line must be denied.

With respect to the requested twenty-nine (29) foot variance from the required thirty (30) foot setback for the side street lot line, the Board finds, based on the testimony of record, that the proposed garage accessory structure could be moved farther back on the property, away from Disney Lane, and so the Board cannot find that the requested twenty-nine (29) foot 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," as is required for the grant of a variance by Section 59.7.3.2.E.2.c of the Zoning Ordinance. Because the variance test is a conjunctive test, meaning that all elements must be satisfied for a variance to be granted, having found that the application fails to meet Section 59.7.3.2.E.2.c, the Board need not address the remaining elements of the variance test, and finds that the variance from the applicable side street lot line setback must be denied.

Similarly, with respect to the requested four (4) foot variance from the required five (5) foot setback for the left lot line, the Board finds, based on the testimony of record, that the proposed firewood shed accessory structure could be moved farther away from that lot line, and indeed could be located in accordance with the required setback. Thus the Board cannot find that the requested four (4) foot 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," as is required for the grant of a variance by Section 59.7.3.2.E.2.c of the Zoning Ordinance. Again, because the variance test is a conjunctive test, having found that the application fails to meet Section 59.7.3.2.E.2.c, the Board need not address the remaining elements of the variance test, and finds that the variance from the applicable left lot line setback must be denied.

Finally, with respect to the request that a variance be granted to permit the Petitioner to locate his proposed accessory structures forward of the rear building line, the Board finds that that variance can be granted because it complies with the applicable standards and requirements set forth in Section 59.7.3.2.E, 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 that the historic orientation of this 1903 farmhouse towards Briggs Road, coupled with the narrowness of the area behind the home's rear building line and

the drainage issues in that area, serve to constrain the Petitioner's ability to locate the proposed accessory structures in compliance with the development standards of the Zoning Ordinance, and constitute unusual or extraordinary circumstances peculiar to the subject property, in satisfaction of Section 59.7.3.2.E.2.a.i of the Zoning Ordinance.

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

The Petitioner acquired the subject property in 2012, long after the construction of the original house in 1903 and the re-plattings of the subject property in 1949 and 1979. There is no evidence in the record to suggest that the Petitioner is responsible for orientation of the house, for the narrowness of the area behind its rear building line, or for the drainage issues in that area. Thus the Board finds that the special circumstances or conditions pertaining to this property are not the result of actions by the Petitioner, in satisfaction of Section 59.7.3.2.E.2.b.

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 allowing the proposed accessory structures to be located forward of the rear building line is the minimum needed to overcome the practical difficulties that full compliance with the Zoning Ordinance would entail due to the orientation of the existing house, the narrow nature of the area behind the rear building line of the existing house, and the drainage and runoff issues in that area, which, taken together, severely constrain the Petitioner's ability to locate the proposed accessory structures in the permitted area. Thus the Board finds that Section 59.7.3.2.E.2.c of the Zoning Ordinance 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;*

The Board finds that the construction of the proposed accessory structures would continue the residential use of the home, and can be granted without substantial impairment to the Glenmont Sector Plan, which envisions retention of existing single family neighborhoods. Thus the Board finds that Section 59.7.3.2.E.2.d of the Zoning Ordinance 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.*

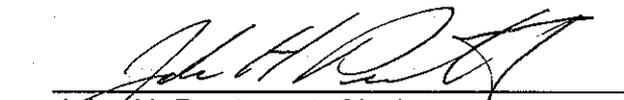
The Board finds, per the exhibits and testimony of record, that construction of the proposed accessory structures in conformance with the required side street lot line and left side setbacks, on an area of the subject property that is north of the existing house and forward of the rear building line and that abuts currently undeveloped land, will not be adverse to the use and enjoyment of abutting and confronting properties. The Board notes in support of this finding that the area described is at the end of a dead-end street, and that the proposed structures will be at least partially screened from view by existing vegetative growth and fencing. Thus the Board finds that Section 59.7.3.2.E.2.e of the Zoning Ordinance is satisfied.

Accordingly, the requested variance to allow the proposed accessory structures to be located in front of the rear building line is **granted**, subject to the following condition:

1. Petitioner shall be bound by the testimony and exhibits of record, to the extent relevant to the variance granted.

Therefore, based upon the foregoing, on a motion by Katherine Freeman, seconded by John H. Pentecost, Chair, with Bruce Goldensohn, Vice Chair, Mary Gonzales, and Richard Melnick 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 30th day of September, 2020.



 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.