

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

**Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600
<http://www.montgomerycountymd.gov/boa/>**

CASE NO. A-6672

PETITION OF STANLEY CHAN

OPINION OF THE BOARD

(Hearings Held December 2, 2020, and January 13, 2021)
(Effective Date of Opinion: January 20, 2021)

Case No. A-6672 is an application by Stanley Chan (the "Petitioner") for two variances necessary for the proposed construction of a left-side carport. The proposed construction requires a variance of 4.50 feet as it is within 3.50 feet of the left lot line. The required setback is eight (8) feet, in accordance with Section 59-4.4.8.B.2 of the Zoning Ordinance. In addition, the proposed construction also reduces the sum of both side yard setbacks to 15.50 feet, necessitating a variance of 9.50 feet. The required sum of both sides is 25 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, December 2, 2020. The proceedings were continued on the record to a second date, January 13, 2021, at which time they were concluded. All participation was done via Microsoft Teams. The Petitioner participated in the proceedings in support of the requested variances.

Decision of the Board: Variances DENIED.

EVIDENCE PRESENTED

1. The subject property is Lot 4, Block 6, Hillandale Heights Subdivision, located at 1107 Devere Drive, Silver Spring, Maryland, 20903, in the R-90 Zone. It is a rectangular property, 180 feet deep and 80 feet wide, located on the south side of Devere Drive. The subject property is located opposite the intersection of Devere Drive and McGovern Drive, which meet to form a "T" immediately in front of the subject property. See Exhibits 3, 4(a), and 9.

2. The Petitioner's Justification Statement ("Statement") indicates that the Petitioner purchased the subject property in 1997,¹ and is seeking to construct a carport large enough to accommodate his recreational vehicle on the left side of his home. The Petitioner needs a variance of 4.5 feet from the required left side setback and a variance of 9.5 feet from the required 25-foot sum of both sides setback. The Statement states that the Petitioner's home is set at an angle to the street, such that the front post of the proposed carport would meet the minimum eight (8) foot side setback, but the rear post would encroach on that setback by 4.5 feet. See Exhibit 3. The updated Site Plan and the Zoning Vicinity Map show that the house is set at an angle on the subject property. See Exhibits 9 and 11(c). The Statement describes the property as narrow, and states that this creates a need for relief from the sum of both sides setback. See Exhibit 3.

3. The Statement states that many houses in the neighborhood have carports, and thus asserts that the proposed construction conforms with the traditional development pattern in the neighborhood. See Exhibit 3.

4. The Statement states that parking is allowed on both sides of Devere Drive. The Statement notes that the Petitioner owns three vehicles and a 22-foot Class C recreational vehicle. It states that parking vehicles on the street creates a dangerous situation because it limits the ability of RIDE ON Bus 22 to make a right turn from McGovern Drive onto Devere Drive. The Statement states that bus drivers are always concerned about the tight turn, and that they complain to the Petitioner when he parks vehicles in front of his property. The Statement states that parking of the Petitioner's recreational or other vehicles in the carport will help the RIDE ON bus make a safe right turn from McGovern Drive onto Devere Drive. See Exhibit 3. The Petitioner includes photographs with his submission to illustrate this problem. See Exhibits 5(g)-(i).

5. The Petitioner has submitted letters of support from five of his neighbors, including those whose properties abut the subject property on the left and right, and those whose properties confront the subject property on either side of McGovern Drive. See Exhibits 7(a)-(e). In addition, with respect to the impact that the grant of the requested variances would have on neighboring property owners, the Statement notes that some of Petitioner's neighbors have suggested that the proposed carport will help boost home values and will "bring new life" to an older neighborhood, and states that the proposed carport will not have a detrimental effect on surrounding properties or the general neighborhood. See Exhibit 3.

6. At the December 2, 2020, hearing, Petitioner Stanley Chan testified that he is a professional engineer, and that he has lived in his house for 23 years. See Exhibits 3 and 8. Mr. Chan testified that he is seeking the requested variances to allow a carport on the left side of his house. He described his carport as a simple structure comprised of four posts and a cover attached to his house. Mr. Chan testified that he mistakenly believed that his carport complied with the required side setback, and that he began construction before receiving a building permit. He testified that he is seeking to rectify that mistake.

¹ SDAT indicates that the house on the subject property was constructed in 1960.

Mr. Chan testified that his carport needs an interior width of 13 feet so that it can accommodate his recreational vehicle. He stated that a solar meter projects one foot from the left side wall of his house, encroaching into the carport space.

Mr. Chan testified that his property is a long, narrow, rectangularly shaped lot. He testified that his house is set at an angle, so that the front of his house is farther from the left side lot line than the rear of his house. Mr. Chan testified that unlike other nearby properties, there is a street (McGovern Drive) that intersects Devere Drive in front of his house. He testified that because of this, there are lots of cars turning in front of his house. Mr. Chan testified that other properties do not have this problem.

Mr. Chan testified that Devere Drive is not wide, and that parking is allowed on both sides. He testified that if he parks his recreational vehicle on the street, it is hard for cars to pass, and that it is hard for the RIDE ON bus to make the right turn onto his street. He testified that parking in the carport would make the street more accessible and reduce traffic problems in front of his house, benefitting the neighborhood. Mr. Chan testified that he had spoken with his abutting and confronting neighbors, and that all consented to his variance request. See Exhibits 5(g)-(i) and 7(a)-(e).

7. In response to a Board observation that the house location survey that Mr. Chan initially submitted with his variance request was misleading in that it did not show his house at an angle, whereas the Zoning Vicinity Map did, Mr. Chan testified that his house is not parallel to the side lot line, and that he had received the survey in question when he purchased his house. See Exhibits 4(b) and 9. He testified that he had prepared another drawing of his property and had put his professional stamp on it. He noted that his drawing shows that the interior dimension of the carport is 13 feet. Mr. Chan testified that the front post of the carport is 8 feet from the left side lot line, and that the rear post is 3.5 feet from that lot line. See Exhibit 4(c). In response to a Board question asking if there was any way to reduce the encroachment of the rear post into the setback, Mr. Chan testified that if the carport were narrower, it could not accommodate his recreational vehicle.

In response to further Board questioning asking if his lot narrows towards the rear, Mr. Chan clarified that his property is rectangular, but that his house is set at an angle. He testified that his property is 80 feet wide. Finally, in response to a Board question noting that the County's Department of Permitting Services (DPS) had characterized the type of construction he was proposing as a "room addition" and not as a "garage/carport," Mr. Chan confirmed that the construction is a carport. See Exhibit 6.

In light of the questions raised by the Board and with the consent of Mr. Chan, on a motion by John H. Pentecost, Chair, seconded by Mary Gonzales, the Board voted unanimously to continue the hearing to January 13, 2021, to give Mr. Chan an opportunity to obtain a more accurate survey, further substantiate any argument that the proposed carport fits the established development pattern in the neighborhood, and seek a corrected building permit denial from DPS. Per the Board's request, Mr. Chan submitted a new survey and updated building permit denial in advance of the January 13, 2021, hearing date. See Exhibits 11(b) and (c).

8. At the January 13, 2021, hearing, Mr. Chan testified that there were two outstanding issues at the last hearing, namely the building permit denial and the house location drawing. See Exhibits 4(b) and 6. He testified that he had procured a new building permit denial from DPS that correctly lists the proposed construction as a carport instead of a room addition. See Exhibit 11(b). In addition, Mr. Chan testified that he had a new boundary line survey of his property done. See Exhibit 11(c). He testified that the new survey had taken a long time to prepare and that he only received it the day before the hearing. Mr. Chan testified that the new survey is very similar to the hand-drawn survey that he had submitted with his variance application. See Exhibit 4(c). He further testified that the new boundary line survey contains a mistake which he did not have time to have corrected before the hearing, and that the dimension from the front carport post to the property line should be eight (8) feet rather than the 6.9 feet shown. See Exhibit 11(c).

Mr. Chan testified that his house is set at an angle on the subject property, and that as a result, while the front post of the carport is about eight feet from the left side property line, the rear post is only 3.5 feet from the property line. He testified that because of the angled orientation of his house, he is not able to fit a carport. He testified that the angle of his house is a site condition and is beyond his control. Mr. Chan testified again that the turning radius of the RIDE ON bus creates a hardship for him and for the whole neighborhood. He reminded that Board that the neighborhood supports his variance request, including his abutting and confronting neighbors. See Exhibits 7(a)-(e). He testified that he had planted bushes as remediation for the proximity of the carport to his left side neighbor's property.

In response to a Board question asking if there were other carports in his neighborhood that needed variances, and if that was a typical feature of his neighborhood, Mr. Chan testified that he had taken pictures of some carports but did not know if they needed variances; he then proceeded to indicate that if these carports did need variances but did not have them, he did not want to cause trouble. In response to a more general Board question asking how many properties in his neighborhood have carports, Mr. Chan testified that he would have to count to be certain, but estimated that between 10 and 15 percent of homes have carports. He testified that the houses adjacent to his own do not have carports.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the requested variances from the left side line and sum of both sides must be denied. Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board 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 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.

The Board notes that there was no attempt in this case to argue the standard in Section 59-7.3.2.E.1 of the Zoning Ordinance. For that 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.

The Board finds, based on the evidence and testimony of record, that the Petitioner has not demonstrated that his property has any unusual or extraordinary situations or conditions for the purposes of satisfying Section 59-7.3.2.E.2.a of the Zoning Ordinance, as follows:

- i. *exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;*

The Board finds that the subject property is rectangular in shape, 180 feet deep and 80 feet wide, with an area of 14,400 square feet. As such, the Board finds that the subject property is neither small for the R-90 Zone, which has a minimum lot size of 9,000 square feet, nor unusual in shape or narrow, as is apparent when the subject property is compared with nearby properties depicted on the Zoning Vicinity Map. See Exhibits 9 and 11(c). While the Petitioner has contended that the angled siting of the house on the subject property and its location opposite a T-shaped intersection on a road with parking on both sides and a RIDE ON bus route constitute an unusual or extraordinary situation or condition peculiar to this property, in satisfaction of this Section, the Board notes that

it is generally the property itself, and not improvements to the property or conditions on neighboring properties, that must be unique or unusual to satisfy this element of the variance test. As noted in *Cromwell v. Ward*:

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.

Cromwell v. Ward, 102 Md. App. 691, 710, 651 A.2d 424, 433-434 (quoting *North v. St. Mary's County*, 99 Md. 502, 512, 638 A.2d 1175). In light of this, the Board finds that the factors asserted by Mr. Chan are not factors the Board can take into account in undertaking its analysis under this Section. Having found that the property does not have an unusual shape and is not unusually small or narrow, and that the angled siting of the house on the property and the configuration and usage of the street in front of the property cannot make the property unique for purposes of satisfying this element of the variance test, the Board finds that Section 59-7.3.2.E.2.a.i of the Zoning Ordinance is not satisfied.

- 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*

The Petitioner did not assert or provide any evidence to indicate that the variance request satisfies Sections 59-7.3.2.E.2.a.ii-iv of the Zoning Ordinance. Accordingly, the Board cannot find that these Sections of the Zoning Ordinance are satisfied.

- v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;*

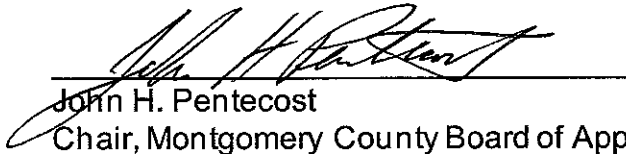
The Statement submitted by the Petitioner states that many houses in the neighborhood have existing or added carports, and thus asserts that the proposed construction would conform with the traditional development pattern in the neighborhood. See Exhibit 3. When the Petitioner was asked about this at the January 13, 2021, hearing, he testified that between 10 and 15 percent of the houses in his neighborhood have carports, and further testified that neither of his adjacent neighbors have carports. Taken in the light most favorable to the Petitioner, at best, 15 percent of the homes in this neighborhood have carports, and the Board finds that this does not constitute an established historic or traditional development pattern as contemplated by this Section. Given this finding, and the lack of any other evidence in the record to corroborate the contention in the Statement that such a pattern exists, the Board cannot find that the

proposed carport substantially conforms with the historic or traditional development pattern of this street or neighborhood, and thus finds that the variance application does not satisfy Section 59-7.3.2.E.2.a.v of the Zoning Ordinance.

Having found that the requested variances fail to satisfy the first element of the variance test, as set forth in Section 59-7.3.2.E.2.a of the Zoning Ordinance, the Board will not address the remaining elements, since the variance test is conjunctive, and all parts of the test must be met if a variance is to be granted.

Based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Bruce Goldensohn, Vice Chair, with Katherine Freeman, 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 20th day of January, 2021.



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.