

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**<http://www.montgomerycountymd.gov/boa/>**

**CASE NO. A-6682**

**PETITION OF HELEN STUART**

**OPINION OF THE BOARD**

(Hearings Held February 24, 2021 and March 24, 2021)  
(Effective Date of Opinion: March 31, 2021)

Case No. A-6682 is an application for two variances needed in connection with the proposed construction of a detached accessory dwelling unit. The proposed construction requires a variance of twelve (12) feet as it is within zero (0) feet of the rear lot line. The required setback is twelve (12) feet, in accordance with Section 59-3.3.3.C.2.c of the Zoning Ordinance. In addition, the proposed construction of a detached accessory dwelling unit located three (3) feet from the right side line requires a variance of four (4) feet from the sum of both side yards because it reduces that sum to ten (10) feet. The required sum of both side yards is fourteen (14) feet, in accordance with Section 59-3.3.3.C.2.c of the Zoning Ordinance.<sup>1</sup>

Due to COVID-19, the Board of Appeals held a remote hearing on the application on Wednesday, February 24, 2021. All participation was done via Microsoft Teams. Petitioner Helen Stuart and her husband, Robert Jones, participated in support of the requested variances. They were assisted by their architect, Eric C. Saul. Following testimony and the receipt of evidence, the hearing was continued on the record to March 24, 2021. The Petitioner and her husband participated in the March 24, 2021, proceedings.

Decision of the Board:                      Variances GRANTED.

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<sup>1</sup> The Board notes that despite calling out that the proposed structure would be three (3) feet from the right lot line, the DPS permit denial did not indicate that a variance was needed from that lot line. The Board herein expresses its intention that if such a variance is determined to be necessary, that it can be viewed as having been noticed as part of the sum of both sides variance, given that the Board's mailed Notice explicitly stated that the proposed structure was located three (3) feet from the right lot line, and similarly that it can be deemed to have been granted as part of the Board's grant of the sum of both sides variance.

**EVIDENCE PRESENTED**

1. The subject property is Block D, Lot 43, McNeills Addition Subdivision, located at 705 Bonifant Street, Silver Spring, Maryland, 20910, in the R-60 Zone. The property is 5,000 square feet in size. It is a five-sided interior lot located on the north side of Bonifant Street. The north side of the subject property abuts an alley that is set at an angle relative to the property's Bonifant Street frontage such that the right side of the property is deeper than the left side. See Exhibits 3, 4, and 7.

2. The Justification Statement ("Statement"), in the record at Exhibit 3, states "[t]he new ADU law, ZTA 19-01, allows existing garages to be converted into ADUs, provided there is no exterior change made to the original structure." The Statement further states that "[t]he garage requires modifications to create a legal ADU and to meet current building codes, which requires a variance," noting that "[t]he current site is unusually small and without a variance, it would be impossible to build an ADU, or any type of accessory structure on the current site." See Exhibit 3.

The Statement states that the detached garage that Petitioner and her husband seek to convert to an ADU was on the property at the time of their purchase in 1997, and is believed to have been built in 1935. The Statement states that the Petitioner and her husband are proposing to increase the footprint of the existing garage because "the footprint of the existing structure is too small for an ADU," and that they are proposing "an addition approximately 6 feet in length to the existing structure to add a full-sized bathroom." See Exhibit 3. In addition, the Statement at Exhibit 3 explains that the height of the structure will be increased, as follows:

To meet building codes, the roof structure needs to be rebuilt to code and made taller for appropriate headroom in the unit. Since the entire roof is being replaced, Owner has proposed a taller roof with dormers less than 50% of the total roof area (dormers less than 50% of the total roof area are not factored into the mean roof height calculation). This additional height does not exceed the maximum allowable height of 20', nor the allowable average height of 15' to require additional setback. The proposed mean roof height is 14'-8".

3. The Statement at Exhibit 3 describes the constraints imposed on the subject property by its size and shape:

Regarding the existing site conditions, the lot size is only 5,000 square feet. The minimum standard size for an R-60 lot is 6,000 square feet. The space between the rear of the main house and the rear property line (which is angled) ranges between 18 and 30 feet. Factoring in the required 12 foot rear setback, a buildable area of only 6 to 18 feet in depth is left to build on, which is impossible to construct a detached accessory structure. An attached ADU would also be impossible as the rear setback would then be 20 feet, leaving only 135 square feet for an addition.

4. The Statement explains how the requested variances satisfy the test for the grant of variances set forth in Section 59.7.3.2.E.2 of the Zoning Ordinance. In doing so, the Statement asserts that the existing detached garage satisfies Section 59.7.3.2.E.2.a.ii of the Zoning Ordinance (that the proposed development uses an existing legal nonconforming property or structure), stating that "[w]hile it is unknown the exact time the existing accessory structure was built, it was constructed prior to the date determining a legal, nonconforming structure (2014). The Montgomery County Zoning Department has also confirmed this status." See Exhibit 3. The building permit denial issued by the Montgomery County Department of Permitting Services indicates that the variances requested are for "proposed construction," but the reviewer did not check the "non-conforming" or "non-complying" boxes. See Exhibit 6.

5. With respect to the satisfaction of Section 59.7.3.2.E.2.c of the Zoning Ordinance (that 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 this property), the Statement at Exhibit 3 states the following:

In order to convert a garage to an ADU, building codes must be met and the structure must be upgraded. The roof structure is too low to allow for proper ceiling height, insulation and HVAC equipment, and the Petitioner is requesting a moderately sized first floor bathroom, and attic loft space to accompany these needs. It would be impracticable and impossible to tear down the structure and rebuilt a new, similar sized structure that meets all county setbacks and regulations.

6. The Statement at Exhibit 3 asserts that the requested variances can be granted without substantial impairment to the intent and integrity of the general plan and applicable master plan, in satisfaction of Section 59.7.3.2.E.2.d of the Zoning Ordinance, as follows:

By remaining in its current location with a small addition and moderate increase in height, the proposed project preserves the residential character of the neighborhood. A two-story accessory structure as high as 20' is allowed on this lot, however, the existing structure has left the Petitioner without another option. Also, ZTA 19-01 establishes the necessity to allow garage conversions into ADUs to further expand their construction within R-60 zones.

7. Finally, with respect to the satisfaction of Section 59.7.3.2.E.2.e of the Zoning Ordinance (that the granting of the variance will not be adverse to the use and enjoyment of abutting or confronting properties), the Statement states that "the proposed additions to the existing structure will not negatively impact the adjoining rear yard," that the addition "will not negatively impact the character, health, safety, welfare, or security of the neighboring residents," and that the resultant structure "will remain under the allowable height limit and not be built any closer to a current setback," See Exhibit 3.

8. At the February 24, 2021, hearing, Petitioner's husband, Robert Jones, testified that he and his wife have been in their house for 20 years, and that they love the neighborhood. He testified that the unusual orientation of the alley behind their house and the small size of

their lot limit their ability to add onto their house. He testified that they had always thought their garage could be turned into an ADU. He stated that because the garage is on the (rear) property line, variance relief is needed. Mr. Jones testified that they were proposing to extend their existing garage three feet forward, to allow for the creation of an entryway and a bathroom above.

In response to a Board question inquiring about the status of the alley behind their home, Mr. Jones testified that it was a paved, public alley.

9. In response to a Board question asking if the existing garage was an existing legal, nonconforming structure, as is required to satisfy Section 59.7.3.2.E.2.a.ii of the Zoning Ordinance, Eric Saul, the Petitioner's architect, testified that it was and that the garage had been on the property as long as the house, which he testified was built in 1935. In response to a Board question asking what evidence there was that the garage was legally built, Ms. Stuart testified that it could probably fit a 1930s-era car and nothing else, and that it was made of the same brick as the house. Mr. Jones then testified that their garage looks the same as all the other garages in the alley, that all appear to have been built in the 1930s, and that all are on or near the property line, like their own. He later testified that the neighborhood was built between 1933 and 1936, and that all of the homes have garages similar to his garage except the colonial homes, some of which have attached garages. He stated that some of the garages are on the property line and that some cross property lines and are shared. Mr. Saul testified that the County's Zoning Ordinance in 1935 was not like the County's current Zoning Ordinance. He testified that DPS said that the garage was a legal nonconforming structure, and he questioned whether the garage would have become a legal structure after 80 years in existence even if it had been constructed illegally. In response to an observation that the building permit denial did not indicate that the garage was nonconforming or noncomplying, it was suggested that perhaps the permit denial only contemplated the proposed construction and not the existing garage.

10. In response to a Board question asking if there had been any reaction from neighbors to the Petitioner's variance request, Mr. Jones testified that when the letters went out,<sup>2</sup> a number of neighbors had approached him and his wife, and indicated that they were in favor of the proposed improvements. He testified that none of the neighbors he spoke with had anything negative to say about the proposal.

11. In the interim between the February 24, 2021, and March 24, 2021, hearings, the Petitioner submitted an excerpt from Volume 1 of the Atlas of Montgomery County, 1941, showing her property and the existence of the detached garage. The excerpt also showed the surrounding neighborhood, and supported the Petitioner's contention that there was a pattern of detached accessory structures (presumably garages) in the surrounding neighborhood that were on or close to, or sometimes straddling, property lines. This submission also included photographs of the detached garage on the subject property and other garages on surrounding properties. See Exhibit 9.

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<sup>2</sup> It is not clear from the testimony, but "letters" presumably refers to the Notice issued by the Board.

12. The Petitioner and her husband, Robert Jones, participated in the March 24, 2021, hearing without the assistance of their architect. Mr. Jones testified that the 1941 Atlas excerpt and photographs demonstrate that all of the garages in the neighborhood are similar and were built at the same time. He testified that the 1941 Atlas map depicts these garages, and indicates that most of them were on property lines. In response to a Board question about the photographs of other garages, the Petitioner testified that the white garage with the electric plug-in is their garage, and that the garages shown in the other photographs are on immediately neighboring properties.

## FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the requested variance relief can be granted. The requested variances comply with the applicable standards and requirements set forth in Section 59-7.3.2.E.2 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.ii - the proposed development uses an existing legal nonconforming property or structure;*

The Board finds, based on the Statement, the testimony of record, and the excerpt from the 1941 Atlas, that the existing detached garage was constructed on or about the time the house was constructed (1935), that it does not meet the development standards in the current Zoning Ordinance, and that it is a legal nonconforming use. The Board specifically notes in support of this finding the testimony of Mr. Saul that DPS said the structure was a legal nonconforming structure, and the 1941 Atlas, which shows the existence of the Petitioner's garage and numerous similarly situated garages in this neighborhood at that time. The Board further finds that the Petitioner is proposing construction that will use this existing structure. Thus the Board finds that the proposed development uses an existing legal nonconforming structure, in satisfaction of this element of the variance test. See Exhibits 3 and 9.

*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;*

The Board finds, based on the Statement, the testimony of record, and the excerpt from the 1941 Atlas and associated photographs, that there are numerous examples of detached garages located on or very close to property lines in this neighborhood. See Exhibits 3 and 9. In addition, the Board finds that the subject property has had such a garage since it was originally built in or around 1935. Thus the Board finds that the proposed development would substantially conform with the established historic or traditional development pattern of this street or neighborhood, in satisfaction of this element of the variance test.

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

The Board finds that the Petitioner purchased the subject property in 1997, and that the garage was present on the property at that time. Thus the Board finds that the Petitioner is not responsible for the construction and location of the existing garage, or for the location of the other garages in the neighborhood, which again were present when the 1941 Atlas was prepared. Accordingly, the Board finds that the special circumstances or conditions are not the result of actions by the Petitioner, in satisfaction of this element of the variance test.

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, based on the Statement, that the existing garage requires modifications to meet current building codes and allow the creation of a legal accessory dwelling unit. The Board further finds that these modifications cannot be undertaken without the grant of the requested variances due to the nonconforming location of the existing garage, constituting a practical difficulty for the Petitioner. Finally, the Board finds that the requested variances are the minimum needed to overcome this practical difficulty and allow the proposed construction, and thus to allow the use of this existing garage as an ADU. Accordingly, the Board finds that this element of the variance test 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; and*

The Board finds that the request variances, needed to allow the proposed conversion of this existing garage to an ADU, can be granted without substantial impairment to the intent and integrity of the East Silver Spring Master Plan, which seeks to preserve existing residential character, encourage neighborhood reinvestment, provide a greater range of housing types, and enhance the quality of life throughout East Silver Spring.

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.*

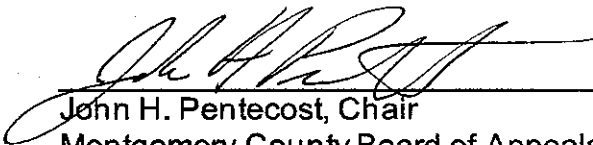
The Board finds, based on the Statement and the testimony of record, that granting the requested variances, needed to allow conversion of this existing garage into a habitable, code compliant ADU, will not be adverse to the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test. The Board notes in support of this finding that the location of the existing garage is not changing, and that the height of the resultant structure will comply with the height limitations on accessory structures. The Board further notes that the testimony of record indicates that the Petitioner's neighbors who have inquired about the proposed construction are all supportive of the project.

Accordingly, the requested variances are **granted**, subject to the following conditions:

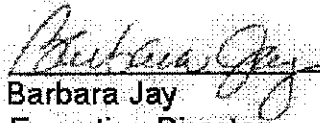
1. Petitioner shall be bound by the testimony and exhibits of record; and
2. Construction shall be in accordance with Exhibits 4 and 5(a)-(c).

Based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Bruce Goldensohn, Vice Chair, with Mary Gonzales, Richard Melnick, and Caryn Hines 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 31st day of March, 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.

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.