

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue, Room 217
Rockville, Maryland 20850
<http://www.montgomerycountymd.gov/boa/>
(240) 777-6600

**Case No. A-6683
PETITION OF MATTHEW AUMEN**

OPINION OF THE BOARD
(Hearing Held: March 10, 2021)
(Effective Date of Opinion: March 17, 2021)

Case No. A-6683 is an application by Petitioner Matthew Aumen for a variance needed for the reconstruction and expansion of a garage. The proposed construction requires a variance of five (5) feet as it is within zero (0) feet of the left side lot line. The required setback is five (5) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on Wednesday, March 10, 2021. All participation was done via Microsoft Teams. Petitioner Matthew Aumen participated in support of the requested variance.

Decision of the Board: Variance GRANTED.

EVIDENCE PRESENTED

1. The subject property is Block 63, Lot P12, B.F. Gilbert Subdivision, located at 422 Mississippi Avenue, Silver Spring, Maryland, 20910, in the R-60 Zone. The property is an interior lot, roughly rectangular in shape, located on the south side of Mississippi Avenue. It is 50 feet wide and slightly less than 140 feet deep, with an area of 6,416 square feet. The rear of the property slopes in a downward direction from back to front and from right to left. See Exhibits 1, 3, 4, and 7.
2. The Justification Statement ("Statement") indicates that there is a detached, legal non-conforming garage on the subject property, constructed in or around 1941, that straddles the property line shared by 422 Mississippi Avenue (the subject property) and 420 Mississippi Avenue (the abutting property to the left/east). See Exhibit 3. The building permit denial confirms that the existing structure is non-conforming. See Exhibit 6. The Statement describes the existing garage as follows:

The garage was originally built on the current property line as a single structure, half now belonging to my neighbor, and the other half belonging to me. There is an internal concrete block wall on the property line that separates the structure into two one-car garages, similar to how a single structure would be divided into two townhouses. This is a legal structure, and somewhat common that garages were once built on the property line within Takoma Park.

See Exhibit 3. The Statement indicates that the Petitioner's half of the existing garage is unsafe and in need of repair, stating that "[i]f the garage is not rebuilt, it will eventually collapse, and is unsafe in its current condition." The Statement describes the problems with the existing structure in detail:

The garage was built partially into the hillside in the back yard (see enclosed photos). The land slopes from back to front, and from right to left, in relationship to looking at the garage from the front. Over approx. 70+ years, the ground pressure and weather conditions are causing the back wall and right side exterior walls on my side of the structure to bow significantly inward. My assessment of the condition of the garage is that it was not built to modern code – the concrete block walls are likely not solid filled cores, likely no rebar for structural integrity, and likely no backfill for proper drainage. There are significant holes in the structure, and the concrete block walls are continuing to separate from the mortar joints. Rain water easily permeates through the numerous gaps in the concrete blocks, which creates mold damage, flooding, mosquito infestation, and continued deterioration of the structure by way of ground pressure and repeated freeze/thaw cycles.

See Exhibit 3. The Petitioner includes photographs with his submission that depict the construction of the garage into a hillside, the compromised condition of the original garage walls, and the existence of mold. See Exhibits 5(m)-(aa).

3. In accordance with Takoma Park regulations, the subject property has been evaluated by a certified arborist, who concluded that excavation should not come any closer than 27 feet to an urban forest tree currently present on the property, as follows:

The city of Takoma Park requires a permit to perform any work that impacts an urban forest protected tree. Construction of a structure within 50 feet of an urban forest tree requires a tree impact assessment, and may additionally require a tree protection plan to mitigate damage to the tree or its critical root zone. The City of Takoma Park had a Certified Arborist perform a tree impact assessment in the spring of 2020, based on the proximity of a 40.5" diameter tree to the garage. Excavation may be performed within a certain proximity of an urban forest protected tree with the implementation of a tree protection plan. The arborist recommends that excavation not come closer than 27 feet from the tree.

See Exhibit 3. As a result, the Petitioner indicates in the Statement that the proposed construction cannot be moved five (5) feet from the left side lot line as that would bring it too close to this tree.

4. The Statement indicates that the existing garage is too small to accommodate a modern car, or to allow for a modern car to navigate out of the garage and past the house, and that as a result, the Petitioner is proposing to increase the width of the garage by four (4) feet, as follows:

The current dimensions of my structure are approx. 9.5 feet high, 10 feet wide, and 20 feet deep. The interior floor space is 9 feet wide and 18.5 feet deep. The current interior area of the garage is itself inadequate to park a modern automobile inside of it. My current vehicle is 7 feet wide. I would need a minimum of 2 feet on each side to safely drive the vehicle straight in and out of the garage and be able to adequately open the doors.

In addition, the garage is positioned in such a way behind the house, that it would be impossible to drive a vehicle straight in and out under the current conditions. To pull into and out of the garage, additional space is needed on the right side to allow a modern full-sized vehicle to maneuver around the back of the house. A retaining wall currently runs from the front of the garage to the back of the house, which is necessary due to the slope and varying levels of topography on the property. I would need additional space between the right edge of the garage door opening, and the interior wall and retaining wall on the right side, for my vehicle to maneuver around the back of the house since I would be unable to pull a vehicle straight into or out of the garage.

The garage, therefore, will need to be expanded to safely and adequately park a vehicle.

The Statement reiterates that the "[t]he garage cannot be moved five feet off the property line to meet the setback requirement due to the proximity of the urban forest tree," and accordingly states that the requested variance is the "minimum necessary to overcome this practical difficulty" and to allow the Petitioner "to rebuild the structure in its current location." See Exhibit 3.

5. The Statement at Exhibit 3 asserts that the subject property satisfies four of the five possible factors that can serve to make a property "unique" under Section 59.7.3.2.E.2.a of the Zoning Ordinance, as follows:

As stated above, the variance requested relates to exceptional narrowness, shape, topographical, or other extraordinary conditions. The proposed development uses an existing legal nonconforming structure. The proposed development contains environmentally sensitive features. The proposed development substantially conforms with the established historic or traditional development pattern of the street and neighborhood.

Narrowness, shape, topography or other conditions –

There is no other reasonable place on the property to relocate the garage to meet the setback requirement. Moving the garage five feet off the property line will interfere with the critical root zone of the urban forest tree that requires protection under Takoma Park regulations. The Takoma Park arborist's assessment of the project is that rebuilding the garage in its current location, while expanding the width of the garage by four feet is fine, provided a tree protection plan is implemented. The arborist recommends against moving the garage five feet closer to the tree to meet the setback requirement. The property is so narrow and small, that there is no other space to place the garage to avoid the critical root zone of the tree.

Existing legal nonconforming structure -

The garage was built as a legal structure prior to the applicant purchasing the property. It was most likely constructed at or around the same time as the primary structure, built in 1941.

Environmentally sensitive features –

The structure is within the critical root zone of an urban forest tree protected by the City of Takoma Park. The garage cannot be moved to a location which would avoid interference with the critical root zone of the tree.

Established historic or traditional development pattern of the street and neighborhood –

The lots are typically small on Mississippi Avenue and the surrounding neighborhood. Many homes have garages, some built beneath the home, some attached to the side of homes, and others built either very close to or on the property line. There are many examples of garages located on the property line, including other garages shared between neighbors. On the 500 block of Mississippi Avenue, there are several similar homes with shared garages (photos attached [See Exhibits 5(bb)-(dd)]).

6. The Statement indicates that the Petitioner purchased the subject property in 2017, and thus is not responsible for any of the factors that make this property unique, all of which were put in place decades earlier. The Statement explains that the proposed improvements are consistent with the Takoma Park Master Plan in that they continue the detached single-family use of the property and serve to revitalize an existing but deteriorated structure. The Statement indicates that the proposed construction will not add to the footprint of the existing structure in the side setback area, and will not encroach on neighboring properties, and thus will not be adverse to the use and enjoyment of abutting and confronting properties. See Exhibit 3.

7. The Statement indicates that the Petitioner had approached the neighbor who (previously) owned the other half of the garage on multiple occasions over the past three years about renovating both sides of the garage, but that the neighbor was content with

the structure as is. The Statement further states that that neighbor "support[ed] having the two garages remain directly adjacent to one another, as opposed to moving the garage off of the property line." It states that with the grant of the requested variance, the Petitioner would be able to "rebuild [his] half of the existing structure so that the two garages are adjacent to one another, but are completely supported independently as separate structures," and that this is important to allow "both property owners to handle their property independently." It notes that the Petitioner intends to "build a new solid core, rebar reinforced wall adjacent to the existing common wall, so that [the Petitioner's] entire structure is only supported by the stronger and more durable wall." The Statement goes on to say that "[t]he neighbor would have the option, then, to leave his structure supported by the existing wall with braces, or [to] replace it at a later date, without impacting [the Petitioner's] structure, if handled properly." Finally, the Statement asserts that if the Petitioner were to demolish his half of the structure, or to allow his half to continue to deteriorate, it would cause a litany of problems, including problems that would likely impact his neighbor's half of the garage. See Exhibit 3.

8. At the hearing, the Petitioner testified that his property has a detached garage that was built into the side of a hill in the early 1940s, when his house was built. He stated that he shares his existing garage structure with his neighbor, likening the structure to two townhouses which share a common wall, and testified that a number of houses on his street share this condition. The Petitioner testified that his garage is falling apart and is very unsafe, and that he believes it could collapse at any time. He testified that he is seeking to rebuild his side of this structure in its current location but with a gabled roof and a slight increase to its width. The Petitioner testified that water leaks from the existing flat roof and contributes to the issues currently affecting the garage, and that the proposed gabled roof would be better able to address the mid-Atlantic climate and rainfall. He testified that the additional width was needed to allow him to open his car doors once inside the garage.

The Petitioner testified that since submitting his variance application, the property with which he shares the garage has been sold. He testified that he has talked to his new neighbor briefly, and while she has no plans at present to rehabilitate her side of the garage structure, she may do so in the future.

In response to a Board question asking what, if any, impact the proposed gabled roof would have on the flat roof that would still cover his neighbor's portion of the garage, the Petitioner testified that he would make sure that the flat roof is well-flashed to the side of the gabled roof, and that a standard gutter system would be installed to handle rain. He stated that in his brief interaction with his new neighbor, she was supportive, and stated that he is willing to work with her to address her concerns throughout the project.

FINDINGS OF THE BOARD

Based on the binding testimony and evidence of record, the Board finds that the requested variance can be granted. The requested variance 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 subject property is almost three times as deep as it is wide, and thus has a relatively narrow shape. The Board further finds, based on the Statement, that the rear of the property slopes downward towards the house, and also from its right side to its left, and that the rear and right side walls of the existing garage are built into this slope. Finally, the Board finds that the rear of the property contains an urban forest tree that is protected by the Takoma Park tree regulations and that limits the ability of the Petitioners to shift the existing structure away from the left lot line. The Board finds that the property's slope, shape, and urban tree combine to limit the area available for construction of an accessory structure behind the rear building line, and constitute an exceptional or extraordinary condition peculiar to the subject property, in satisfaction of this element of the variance test.

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

The Board finds, based on the Statement, that the subject property contains an urban forest tree that is protected by the Takoma Park tree regulations. See Exhibit 3. The Board further finds, based on the Statement, that the location of this tree precludes the relocation of the existing garage to meet the required setbacks, but, per the Petitioner's certified arborist, would allow for the proposed modest expansion of the garage if a tree protection plan is implemented. The Board thus finds that the subject property contains environmentally sensitive features, in satisfaction of this element of the variance test.

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;

Per the Statement and testimony of record, the Board finds that there are many examples of garages located on the property line, including other garages shared between neighbors, including several in the 500 block of Mississippi Avenue. See Exhibit 3. The Board notes that the Petitioner has provided photographs of several such structures. See Exhibits 5(bb)-(dd). Finally, the Board finds that the subject property has had such a garage since it was originally built in or around 1941. 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 2017, and therefore is not responsible for the location of the existing garage on the left lot line, for the presence of a protected urban forest tree, or for property's shape and topography. The Board further finds that the Petitioner is similarly not responsible for the location of the other similar garage structures on Mississippi Avenue and elsewhere in the neighborhood. Thus 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 and on the testimony of the Petitioner, that the requested variance is the minimum needed to allow the reconstruction and expansion of the existing garage in its current location relative to the left side lot line without compromising the protected urban forest tree and given the narrowness and slope of the property. The Board further finds that the requested variance is the minimum needed to allow the proposed construction in conformation with the established development pattern on this street and in this neighborhood of shared garages built to the property line. The Board finds that without the grant of a variance, the existing garage, which the Petitioner's Statement, photographs, and testimony indicate is unsafe, in disrepair, and too small to fit a modern vehicle, cannot be reconstructed to fix its structural deficiencies or expanded to accommodate a modern vehicle, constituting a practical difficulty for the Petitioner. Thus the Board finds that the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with the Zoning Ordinance would impose, in satisfaction of this element of the variance test.

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 proposed construction will continue the residential use of this property, consistent with the recommendations of the Takoma Park Master Plan, which recommends preserving the existing residential character, encouraging neighborhood reinvestment, and enhancing the quality of life throughout Takoma Park. Thus the Board finds that this element of the variance test 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 Statement and the testimony of the Petitioner, that the proposed construction will improve the structural integrity of the existing garage, and will not add to the footprint of the existing structure in the side setback area. See Exhibit 3. The Board further finds that the Petitioner testified that he has spoken with the new neighbor with whom he shares the garage, and she is supportive. Thus the Board finds that the grant of the requested variance will not be adverse to the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test.

Accordingly, the requested variance is **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)-(i).

Therefore, based upon the foregoing, on a motion by Bruce Goldensohn, Vice Chair, seconded by Mary Gonzales, with John H. Pentecost, Chair, 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 17th 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.