

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
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(240) 777-6600

**Case No. A-6789**

**PETITION OF LAURA HUDSON**

OPINION OF THE BOARD

(Hearing Date: February 15, 2023)

(Effective Date of Opinion: February 24, 2023)

Case No. A-6789 is an application by Petitioner Laura Hudson for a variance needed in connection with the construction of an attached garage. Specifically, the Petitioner is requesting a variance of 7.10 feet because the proposed garage will be within 42.90 feet of the front lot line along Snider Lane. The required setback is fifty (50) feet, in accordance with Section 59.4.4.6.B.2 of the Montgomery County Zoning Ordinance.

The Board of Appeals held a hearing on the application on February 15, 2023. Petitioner Laura Hudson appeared with her husband, Nicholas Ford, at the hearing in support of the variance application, assisted by her architect, Aliraba Nsereko, AIA, NCARB. Neighbor Mary Hemingway appeared in opposition. Abutting neighbor Jose Torres also appeared in opposition, along with his daughter and his son-in-law.

Decision of the Board: Variance **DENIED**.

**EVIDENCE PRESENTED**

1. The subject property is Lot 1, Block B, Sniders Estate Subdivision, located at 702 Snider Lane in Silver Spring, Maryland, 20905, in the RE-1 Zone. It is a corner property located on the east side of New Hampshire Avenue and the north side of Snider Lane. The property is generally rectangular in shape and is 23,868 square feet in size. See Exhibits 3, 4, and 9.

2. The Petitioner's Statement of Justification ("Statement") states that the subject property is a "a large, uneven property (regarding its terrain), with an existing house, driveway, shed, and newly constructed beautiful large flat concrete patio...." The Statement states that the house was built in 1955, and that the patio, which was built in 2021, "helps in dealing with the problem of a sloped backyard" in that it "create[s] a flat, clean, usable surface on the property," later stating that the patio was constructed to "remedy the topographical constraints inherent to the property." The Statement states that the unevenness and topographical condition of the subject property existed when the Petitioner took ownership of the property. It notes that the cost to construct the patio was significant (\$43,000), and that the patio was built to be able to hold a hot tub and above-ground pool. The Statement states that the patio serves as a gathering space for family and friends. See Exhibit 3.

The Statement at Exhibit 3 contains a summary of the "unique" features of the subject property for the purpose of satisfying Section 59.7.3.2.E.2.a of the Zoning Ordinance in outline form, as follows:

- i. Topographical conditions
  - a. The existing property is very uneven, therefore making it limited to outdoor use
  - b. A flat patio was constructed to remedy this
  - c. Demolishing the existing patio to construct an attached garage that meets the 50- foot side street setback, will inhibit the use of the property for outdoor purposes - therefore affecting the well-being, including mental health of the owner
- iii. Environmentally sensitive features
  - a. A concrete/ stone Patio
  - b. Having this flat surface helps in controlling soil erosion on the property due to its slopes, from the natural elements - thus reducing problems resulting from the sites topography

3. The Petitioner is proposing to locate an attached garage "at the top of the existing driveway - where the cars are currently parked - and near the primary entrance to the house (off of Snider Lane)." The Statement indicates that this location "makes the most sense." The proposed garage is designed with "extra space in it." See Exhibit 3. The plans for the garage show that it will have parking for two cars and "flexible open space." See Exhibits 5(e) and (g).

4. The Statement states that locating the proposed garage at the top of the driveway brings it up against the new patio and close to the house. It states that reducing the depth of the garage would reduce its functionality. The Statement states that placing the garage on the far side of the patio would necessitate a lengthy breezeway or mudroom connector, and would "increase the property's built-up coverage, and not fit in well with the neighborhood's built-up landscape." It states that demolishing a portion of the patio to accommodate the garage would cause the Petitioner "emotional distress," and thus concludes that "building the attached garage directly below the existing patio, at the

existing driveway, and in close proximity to the existing house is the most feasible, least constructive (physically, mentally, financially, and aesthetically) best option-despite the size of the property." See Exhibit 3.

5. The Statement at Exhibit 3 states that the requested variance is the minimum needed to overcome the practical difficulties that full compliance with the Zoning Ordinance would pose, as follows:

- The property's topography has resulted in practical difficulties
- To remedy the difficulty, a patio is needed at the location stipulated above
- Removing the patio would result in harm, as seen above
- Therefore, the only possible location for an attached garage is in front of the patio
- Placing the garage in front of the patio reduces the 50-foot building setback from the side street property line by approximately 7 feet

6. The Statement states that the proposed garage would increase the value of the property, thereby having a "positive impact on the Cloverly master plan." The Statement further states that the proposed garage will not be adverse to the use and enjoyment of neighboring properties, noting that it "will add to the value and the aesthetic quality of the neighborhood, and community." See Exhibit 3.

7. The written opposition received from Ms. Hemingway and Ms. Albornoaz takes issue with the characterization of the subject property as being "uneven," and states that the subject property is rectangular in shape and has a "soft slope." Ms. Hemingway and Ms. Albornoaz included a topographic map with two-foot contour lines that shows the subject property, as well as photographs of the property. They state in their letter that the photographs show that there is "ample space" to construct a garage outside of the area encumbered with the patio, and that if need be, part of the patio could be removed to make space for the garage. See Exhibit 8(b).

In addition, the written opposition received from Ms. Hemingway and Ms. Albornoaz states that the Petitioner's patio was constructed in 2021, and that less than a year later, plans were drawn up to enlarge the house and construct a garage. Their letter states that a lack of planning is not a justification for the grant of a variance, and suggests that to the extent that the location of the patio impedes construction of the garage in accordance with the required setbacks, that is a self-created hardship. See Exhibit 8(b).

Finally, the written opposition received from Ms. Hemingway and Ms. Albornoaz states that the proposed garage would add to the imperviousness of the property and would increase runoff, negatively impacting the local watershed/environment, neighbors, and the Cloverly Master Plan. See Exhibit 8(b).

8. Written opposition was also received from Jose Torres, whose property abuts the subject property along Snider Lane. Mr. Torres expresses agreement with the points raised by Ms. Hemingway and Ms. Albornoaz. In addition, his letter states that the subject property is not uneven, but rather has "slight slopes," and that there is nothing to preclude

the location of a garage on the property, especially a "standard size" garage. Mr. Torres' letter likens the proposed construction on the subject property to "mansionization." Finally, Mr. Torres' letter states that the proposed construction would negatively impact his peaceful enjoyment of his property. His letter observes that "[s]etbacks and limitations placed on development projects are important to keep ample space for everyone to enjoy their home with family and friends, without feeling the infringement or in this case, the encroachment into my property," and notes that he and his wife "want to continue to enjoy the friendly and peaceful neighborhood." See Exhibit 8(a).

9. At the hearing, the Petitioner testified that she became the owner of the subject property in 2013. She testified that if the proposed garage were moved further back from Snider Lane so as to meet the required front lot line setback, that the financial impact of having to cover part of the patio with the garage would be a hardship for her, adding that she had spent a lot of money on the patio. The Petitioner testified that even if the depth of the garage were reduced to twenty (20) feet, the garage would still cover part of the patio if it had to meet the setback. She testified that the only other option would be to construct a long breezeway and locate the garage at the farthest side of the yard.

In response to a Board question, the Petitioner testified that the patio is about 1,000 square feet in size. She testified that it has poured concrete underneath it so that it can support a hot tub and above-ground pool.

10. Mr. Ford testified that the garage was designed to allow for about two (2) feet of storage (shelving) at the back. He testified that he and his wife intend to use the proposed "flexible space" on the right side of the garage as a workout room. Mr. Ford testified that if the depth of the garage were reduced to twenty (20) feet, that would be the exterior depth, and the interior clearance would be closer to eighteen (18) feet. He testified that that would accommodate his 16-foot car, and might accommodate his wife's SUV crossover, but might not accommodate future cars.

In response to a Board question asking why they could not use part of their patio for the garage, Mr. Ford testified that their biggest concern is that the patio was designed to accommodate a 16-foot round above-ground pool, and that the garage would prevent the location of the pool in that area.

11. In response to a Board question asking if there were any physical aspects of the property that necessitated the grant of a variance, Ms. Nsereko, the Petitioner's architect, testified that the property was very uneven, and that its topography was "not flat." She testified that the patio was installed to deal with this problem. Ms. Nsereko testified that the Petitioner's house was built in the 1950's, and that the patio was built to align with the existing house. She stated that the patio "makes sense" where it is, with the proposed garage in front. In response to a Board question asking how the patio location was selected, Ms. Nsereko testified that the patio is right where the existing house is, adjacent to the kitchen.

In response to a Board question asking why, notwithstanding the presence of the patio, the garage needed to be in the proposed location, Ms. Nsereko testified that the access to the site is there, and that it is the most convenient and least disruptive place for the proposed garage. She testified that the Petitioner could put the garage farther away from the house but that this would necessitate the construction of a long breezeway that would not match the neighborhood.

In response to another Board question regarding the topography of the subject property, as shown in the photographs included with Exhibit 8(b), Ms. Nsereko testified that the property is very sloped, and that while the patio area has been made level, the rest of the terrain is sloped. She later testified that the driveway is flat "to some extent," and that slope really begins to happen towards the back side of the property (when viewed from Snider Lane) as opposed to the front. She testified that the proposed location of the garage is more towards the front of the property.

12. Mr. Torres' son-in-law questioned the accuracy of the Petitioner's survey and the resultant extent of the variance requested. He testified that his father-in-law is concerned that the proposed construction might affect the watershed and might direct run-off towards his property. Finally, he recounted the points made in his written testimony.

13. Ms. Hemingway testified that the Cloverly Master Plan addresses imperviousness, and presented information obtained from the Planning Department on impervious levels in the broader Master Plan area for existing and approved (but not yet built) development. Ms. Hemingway testified that the subject property previously had a New Hampshire Avenue address, and that the Petitioner had the address changed to Snider Lane in 2019. She testified that New Hampshire Avenue is a State highway, and that different variance processes apply to properties that are addressed on a State highway.

## **FINDINGS OF THE BOARD**

Based on the binding testimony and the evidence of record, the Board finds that the requested variance from the front lot line setback 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.

*Section 59.7.3.2.E.2.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;*

The Petitioner asserts in the Statement and through testimony that the subject property has sloped and uneven topography that makes it unique for the purpose of satisfying that the test in Sections 59.7.3.2.E.2.a.i of the Zoning Ordinance. The Board finds, based on the evidence of record, including the topographical map of the subject property and neighborhood in the record at Exhibit 8(b), as well as the photographs included in that Exhibit, that the topography of the Petitioner’s property is not exceptional or extraordinary, and is not so extreme as to necessitate variance relief. Thus the Board finds that Section 59.7.3.2.E.2.a.i of the Zoning Ordinance is not satisfied.

- iii. the proposed development contains environmentally sensitive features or buffers;*

The Petitioner asserts in the Statement that the patio constitutes an environmentally sensitive feature that helps to control erosion on the subject property, in satisfaction of Section 59.7.3.2.E.2.a.iii of the Zoning Ordinance. The Board finds that

even if the patio did help control erosion, that does not make the patio an environmentally sensitive feature or buffer, as that term typically refers to features such as a stream valley buffer, champion/protected tree, or conservation easement. Given that the Petitioner has presented no other evidence to advance this argument, the Board cannot find that Section 59.7.3.2.E.2.a.v of the Zoning Ordinance is satisfied.

ii. *the proposed development uses an existing legal nonconforming property or structure;*

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;*

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, or v of the Zoning Ordinance. Accordingly, the Board cannot find that these Sections of the Zoning Ordinance are satisfied.

*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, who has owned the subject property since 2013, is responsible for the construction of the patio on the property in 2021, and that if it were not for the presence of this patio and the Petitioner's desire to keep it in its entirety, the proposed garage could be built on the subject property in a location that is proximate to the driveway and compliant with the required setback from Snider Lane. The Board understands that construction of this patio was costly, and that removal of a portion of the patio to accommodate the proposed garage would also have a cost. The Board notes that the financial hardship is not a sufficient reason to justify the grant of a variance.<sup>1</sup> The Board further finds that because the Petitioner in this case is ultimately responsible for the construction of this patio, which in turn has caused her to seek variance relief for the construction of her proposed garage, that to the extent that the strict application of the Zoning Ordinance could be said to pose a hardship, this hardship is self-created, and cannot be the basis for a variance.<sup>2</sup> Thus the Board finds that the variance request does not meet Section 59.7.3.2.E.2.b of the Zoning Ordinance.

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<sup>1</sup> See *Montgomery County, MD v. Frances Rotwein*, 169 Md. App. 716, 732-33; 906 A.2d 959, 968 (2006) ("Economic loss alone does not necessarily satisfy the "practical difficulties" test, because, as we have previously observed, "[e]very person requesting a variance can indicate some economic loss." *Cromwell*, 102 Md. App. at 715 (quoting *Xanthos v. Bd. of Adjustment*, 685 P.2d 1032, 1036-37 (Utah 1984)). Indeed, to grant an application for a variance any time economic loss is asserted, we have warned, "would make a mockery of the zoning program." *Cromwell*, 102 Md. App. at 715. Financial concerns are not entirely irrelevant, however. The pertinent inquiry with respect to economic loss is whether "it is impossible to secure a reasonable return from or to make a reasonable use of such property." *Marino v. City of Baltimore*, 215 Md. 206, 218, 137 A.2d 198 (1957). But Rotwein has not demonstrated that, unless her application is granted, it will be "impossible [for her] to make reasonable use of her property." *Id.*)

<sup>2</sup> In *Salisbury Board of Zoning Appeals v. Bounds*, 240 Md. 547, 554-55, 214 A.2d 810, 814 (1965), the Maryland Court of Appeals agreed with 2 Rathkopf, *The Law of Zoning and Planning*, 48-1, that,

*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 the Petitioner and her architect have both testified that the garage could be located elsewhere on the subject property, something that the Statement also indicates is possible but undesirable. Because there is room on this property for the Petitioner to construct her garage in compliance with the established setbacks and without the need for a variance, the requested variance cannot be granted. The requested variance is not necessary to overcome any practical difficulty that full compliance with the Zoning Ordinance would impose. Thus the Board finds that this variance request does not meet Section 59.7.3.2.E.2.c of the Zoning Ordinance.

Having found that the requested variance fails to satisfy Section 59.7.3.2.E.2.a, b and c of the Zoning Ordinance, the Board finds that the application must be denied, and will not address the remaining elements of the variance test, since the variance test is conjunctive, and all parts of the test must be met if a variance is to be granted.

On a motion by John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Caryn Hines, Laura Seminario-Thomton, and Alan Sternstein in agreement, the Board voted to adopt 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.

  
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John H. Pentecost  
Chair, Montgomery County Board of Appeals

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If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have been themselves caused or created by the property owner or his predecessor in title, the essential basis of a variance, i.e., that the hardship be caused solely through the manner of operation of the ordinance upon the particular property, is lacking. In such a case, a variance will not be granted; the hardship, arising as a result of the act of the owner or his predecessor, will be regarded as having been self created, barring relief.

See also *Montgomery County, MD v. Frances Rotwein*, 169 Md. App. 716, 733, 906 A.2d 959, 968-9 (2006) ("the 'hardships' about which Rotwein complains are self-created and, as such, cannot serve as a basis for a finding of practical difficulty. See *Cromwell*, 102 Md. App. at 722. Rotwein contends that the requested location for her garage is the only feasible location. But that is so only because of the location of the other improvements to the property, and the decision whether to build those improvements and where to place them was Rotwein's.").



Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 24th day of February, 2023.



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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.

