

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. A-6803**

**PETITION OF JOSHUA BURGESS**

**OPINION OF THE BOARD**

(Public Hearing Date: March 29, 2023)  
(Effective Date of Opinion: April 12, 2023)

Case No. A-6803 is an application by Petitioner Joshua Burgess for a variance needed for the proposed construction of an accessory structure (shed). The proposed construction requires a variance of six (6) feet as it is within six (6) feet of the side lot line. The required setback is twelve (12) feet, in accordance with Section 59.4.4.7.B.2 of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on Wednesday, March 29, 2023. Petitioner Joshua Burgess testified in support of the requested variance.

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

**EVIDENCE PRESENTED**

1. The subject property is Lot 7, Manor Park Section 1 Subdivision, located at 15217 Rosecroft Road, Rockville, Maryland 20853, in the R-200 Zone. It is a four-sided, 31,475 square foot (0.72 acre) property, located on the east side of Rosecroft Road. The property is much deeper than it is wide, and is roughly in rectangular shape. See Exhibits 3, 4, and 8.
2. The Petitioner purchased the subject property in 2018. The property is improved with a single-family house that was built in 1960. See SDAT Printout. The Petitioner is proposing to locate a prefabricated shed on the property at a distance of six (6) feet from

his left side lot line and fifteen (15) feet from his rear lot line.<sup>1</sup> See Exhibits 4 and 6. The Petitioner's Statement of Justification ("Statement") states that if he were to locate the shed in accordance with the required side setback, he would have to "cut down at least one and more likely two large (over 60 foot) trees in order to site the shed," and notes that "[i]f the environmental impact (and significant cost) [of removing the trees] can be avoided by a variance being approved, it would be of benefit to both myself and the county." See Exhibit 3.

3. The Statement states that the property is at a low point on the street, and that as a result, "runoff from the road comes directly down the right side of the property line to a drain that connects to a groundwater runoff system." The Statement states this condition and the presence of the runoff system preclude placement of the proposed shed on the right side of the property, and goes on to state that due to this drainage system, to an existing shed in the right rear corner of the property, and to a playground space at the rear of the property between the two rear corners, "the potential locations for a shed are limited." The Statement further explains that the proposed shed cannot be located close to the house because of an existing deck, and that "any location along the left side of the property line would necessitate removing trees which the Petitioner would like to avoid." See Exhibit 3. The Petitioner's Site Plan depicts the locations of these impediments, including the trees. See Exhibit 4. In addition, the Petitioner has submitted several photographs of his back yard that clearly show the size and location of the trees and other obstructions. See Exhibits 7(a)-(f).

4. The Statement states that the topographical issues pertaining to the subject property existed when the Petitioner purchased it. The Statement further states that while all of the existing improvements in the Petitioner's rear yard meet the required setbacks, they also "remove the possibility of placing the shed anywhere else without significant environmental impacts by removing trees." The Statement states that granting the requested six (6) foot variance would "facilitate" construction of the proposed shed "without having to remove at least one if not two large trees," would "ensure there was 6 ft clearance to the property line," and finally, would ensure that the trees "would remain in place." See Exhibit 3.

5. The Statement states that other homes in the Manor Park community have sheds in their back yards. See Exhibit 3. The Statement further states that the Petitioner's proposed shed will not adversely affect neighboring properties, as follows:

The shed will not impact any abutting properties since most homes are constructed on similar lots. This shed will not impede property limits and the location has the additional benefit of being screened by the trees that will remain in place if the variance is granted. There is a fence behind it that will screen it from the rear neighbors as well.

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<sup>1</sup> The required setback from the rear lot line is seven (7) feet, which is more than satisfied by the proposed placement of this shed, but the required setback from the side lot line is twelve (12) feet, necessitating the requested variance of six (6) feet. See Exhibit 6 and Section 59.4.4.7.B.2 of the Zoning Ordinance.

6. At the hearing, Petitioner Joshua Burgess testified that he has owned the subject property since 2018. He testified that the existing shed in the right rear corner of his property, and the playground in the center of his property at the rear, were existing when he bought the property, although he acknowledged that he had to rebuild the playground. Mr. Burgess testified that he is seeking the variance to allow him to locate a 12 x 18 foot shed on the property, which he intends to use for woodworking and for storage. He testified that the dimensions of the proposed shed are the smallest that would suit his purpose, and stated that he has letters of support from his neighbors.

Mr. Burgess testified that the proposed location for the shed was free of trees, and that installation of the shed would require digging down about three (3) inches to lay a gravel base. He testified that the shed itself would be placed on 6" x 6" pressure-treated wood to keep it off the ground. In response to a Board question asking if this might hurt nearby trees, the Petitioner testified that ground water would still be able to penetrate the area below the shed through the gravel, and thus it should not harm the trees.

Mr. Burgess recounted the features of his property that make it unique. He testified that there is a drainage swale along the right side of this property that receives all of the water from the neighborhood, and that thousands of gallons of water flow through his yard. Mr. Burgess testified that as a result, he cannot put any obstructions in that area or build on the right side of his property. Mr. Burgess testified that he has installed a French-style drain along this side of the property, and that has worked with the townhouse community behind his property to route water from his property to a retention pond on their property. See Exhibit 7(d). Mr. Burgess testified that there are trees in the back left portion of his property. He testified that one of these trees is 75 feet tall, and that another is over 60 feet tall. He stated that he would rather not have to cut these trees down. Mr. Burgess testified that a sewer line that connects all of the homes on his street runs across the center of his back yard, about halfway between the rear of his house and his playground. He testified that there is a manhole cover and cleanout for this sewer line in his back yard.

In response to a Board question asking if he could locate the shed on the left side of the property, in front of the tall trees, Mr. Burgess testified that that area is clear, but that the shed would not fit in that area because trees would impede access to the structure. In response to a Board question asking if removal of the large trees would eliminate the need for a variance, Mr. Burgess testified that when he had people come out to look at the trees, they told him the trees were healthy, and that he should seek a variance rather than cutting them down. In response to a Board question asking if he could enlarge the existing shed on the right side of the property, Mr. Burgess testified that if it were expanded towards the rear, it would hit the existing fence, and that if it were extended forward, it would hit or be uncomfortably close to the existing playground, which he estimated was six to eight feet away. In response to a Board question asking if he could locate the proposed shed on the right side of the property but clear of the swale, Mr. Burgess testified that in addition to the drainage system, construction on that side would be visible from the street, whereas construction on the left would be screened by trees.

## FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the requested variance from the left side lot line 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 this 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 asserted in his Statement and testimony that his property satisfies the “uniqueness” test in Section 59.7.3.2.E.2.a.i of the Zoning Ordinance for a variety of reasons, including (1) that his property sits at a lower elevation than surrounding properties, and as such, receives thousands of gallons of runoff from the neighboring properties, (2) that the right side of his front and back yard is encumbered with a drainage swale and French-style drain intended to manage this water, (3) that there are very tall trees on the left side of his property, (4) that the rear of the property contains a shed and playground that were present when he bought the property, (5) that there is a sewer line that runs across his back yard, about half way between his house and the playground, and (6) that there is also a manhole in his back yard, which is used for cleanout of the sewer line. The Petitioner’s Statement states that he is seeking variance relief from the required left side lot line setback so that he can locate the proposed shed on the property without having to remove one or two of the large trees.

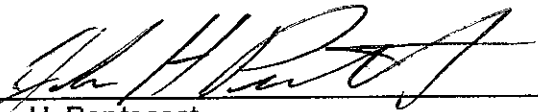
The Board finds, based on the Site Plan and other evidence of record, that the Petitioner has a relatively large back yard, and that while there are areas of his yard where construction might be precluded due to existing conditions, there are other areas where construction is not constrained. The Board further notes that while these available areas may not be the Petitioner’s preferred location for his shed, a variance cannot be granted solely for the convenience of the property owner. See Carney v. City of Baltimore, 201 Md. 130, 137 (1952) (“[t]he need sufficient to justify an exception must be substantial and urgent and not merely for the convenience of the applicant.”) The Board notes that there is nothing in the record to indicate that the trees the Petitioner is seeking to preserve on the left side of his property are protected, and while the Board understands the Petitioner’s desire to retain these trees, the Board finds that non-protected trees do not constitute an extraordinary condition for the purposes of making a property unique under Section 59.7.3.2.E.2.a.i of the Zoning Ordinance because they can be removed at any time. The Board further finds that other than the presence of these trees and the Petitioner’s desire to keep them, there is nothing in the record to indicate that the Petitioner could not locate his proposed shed in this general area of the property in accordance with the required side setback. In addition, the Board finds, per the Site Plan and testimony of record, that there are other locations in the Petitioner’s back yard where the proposed shed could potentially be placed without the need for variance relief. Accordingly, the Board cannot find that the aforementioned conditions make this property unique for the purposes of satisfying Section 59.7.3.2.E.2.a.i of the Zoning Ordinance, and finds that this element of the variance test is not satisfied.

In addition, the Board notes that the Petitioner did not argue that his property was unique under Sections 59.7.3.2.E.2.a.ii-v of the Zoning Ordinance, and that to the extent that his submission could be read to assert that the large trees constitute an environmentally sensitive feature, the Board finds that trees that are not protected do not constitute an environmentally sensitive feature for the purposes of Section 59.7.3.2.E.2.a.iii of the Zoning Ordinance. In light of the foregoing, the Board cannot find that Sections 59.7.3.2.E.2.a.ii-v of the Zoning Ordinance are satisfied.

Having found that the requested variance fails to satisfy the first element of the variance test, set forth in Section 59.7.3.2.E.2.a, 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 Alan Sternstein, with Richard Melnick, Vice Chair, Caryn Hines, Laura Seminario-Thomton 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.

  
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John H. Pentecost  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 12th day of April, 2023.

  
\_\_\_\_\_  
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.