

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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(240) 777-6600

Case No. A-6822

PETITION OF FARZIN BIGLARBEIGI

OPINION OF THE BOARD

(Hearing Date: September 6, 2023)

(Effective Date of Opinion: September 15, 2023)

Case No. A-6822 is an application by Farzin Biglarbeigi (the "Petitioner") for variances needed in connection with the construction of a detached garage. The proposed construction requires a variance of eight (8) feet as it is within seven (7) feet of the left side lot line. The required setback is fifteen (15) feet, in accordance with Section 59.4.2.1.F.3 of the Zoning Ordinance. In addition, the proposed construction requires a variance of eight (8) feet as it is within seven (7) feet of the rear lot. The required setback from that lot line is also fifteen (15) feet, in accordance with Section 59.4.2.1.F.3 of the Zoning Ordinance. Finally, the proposed construction requires a variance to exceed the maximum footprint for an accessory building, which is limited to 50% of the footprint of the principal building (house), in accordance with Section 59.4.2.1.F.3.c of the Zoning Ordinance. The proposed construction is 86.5% of the footprint of the house, and so requires a 36.5% variance.

The Board of Appeals held a hearing on the application on September 6, 2023. Farzin Biglarbeigi and Ali Biglarbeigi appeared at the hearing in support of the variance application. Francoise Carrier, Esquire, who represents abutting property owner Linthicum East Properties, LLC ("Linthicum East"), participated in the hearing in opposition to the requested variances, and called Tom Linthicum, Manager of Linthicum East, as a witness.

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

EVIDENCE PRESENTED

1. The subject property is Parcel P432, Brooke Grove Subdivision, located at 6701 Griffith Road in Gaithersburg, Maryland, 20882, in the AR Zone. It is a four-sided property

that, per the Petitioner's Justification Statement ("Statement"), is shaped like a rhombus. The property is located on the north side of Griffith Road, and has an area of 21,688 square feet. The property drops approximately eight (8) feet its front left (southwest) corner to its back right (northeast) corner. See Exhibits 3, 4, and 8.

2. The southwest corner of the property is improved with a house that is located seventeen (17) feet from the property's front lot line and seven (7) feet from its left side lot line. As shown on the Petitioner's Site Plan and recounted in his Statement, the house has a footprint of 832 square feet. Per SDAT, the house was built in 1933. There is a well on the left side of the property, about halfway between the front and rear lot lines, and a septic tank on the right side of the property, also midway between the front and rear lot lines. Finally, there is an existing 12' x 12' shed in the center of the property that the Site Plan indicates is "to be removed." See Exhibits 3 and 4, and SDAT Printout.

3. The Petitioner is proposing to locate a detached garage in the northwest corner of the property, seven (7) feet from the left side lot line and seven (7) feet from the rear lot line. The proposed garage is 24 feet wide and 30 feet deep, giving it a footprint of 720 square feet. See Exhibits 3 and 4. The Zoning Ordinance requires that the structure be located a minimum of fifteen (15) feet from each of these lot lines, and that its footprint be no more than 50% of the footprint of the house. It is for these reasons that the Petitioner is seeking variance relief.

4. The Petitioner's Justification Statement ("Statement") states that the Petitioner purchased the subject property in 2003. It states that the property had three accessory structures in addition to the house, and that two of these structures have been removed. See Exhibit 3. The Site Plan shows that the third structure—a 12' x 12' shed—will also be removed, presumably if the variances are granted. See Exhibit 4.

5. The Statement states that the Petitioner has been working with the County to get the various approvals necessary to allow him to build the proposed garage. Of note, the Statement indicates that the Well and Septic approval of the proposed garage was conditioned on the garage having no plumbing and no finished or conditioned space, and on the proposed garage replacing the remaining shed so as not to "create multiple accessory buildings on the property."

6. The Statement at Exhibit 3 states that the size and configuration of the property, and existing vegetation, serve to make the property unique for the purpose of the requested variances, as follows:

... The property is only .5 acres in the shape of a rhombus. In the bottom left corner of the property is [the Petitioner's] 1 story home, the principal building. In the bottom right is electrical wiring connected to the telephone pole outside of his property. In the top right of the property are trees and brush making it difficult to build anything, and in the center of the property are more trees and his existing 12'x12' shed. Leaving the only viable location for the garage in the top left corner 7' from the property line.

7. The Statement states that the property “contains unusual situations, topography or conditions.” See Exhibit 3. In support of this, the Statement describes the existing impediments on the property which prevent location of the proposed garage in accordance with the required setbacks, as follows:

The petitioner's property is only .5 acres in the shape of a rhombus, with limited space to build a two car garage. There are trees located in the middle of property as well as a 12'x12' shed and diagonally up and toward the right corner is the holding tank and a large amount of brush and trees, making the top right corner or middle of the property not a suitable location for building. In the bottom right corner are more brush and electrical wires that come off the telephone pole outside of the petitioner's property, and the principal building is located in the bottom left corner of the property leaving only the top left corner of the property, 7' from the property line.

The garage needs to be 7' from the property line because the property is only .5 acres, and if the garage is built 15' from the property line [the petitioner] would be losing roughly 64 square feet of usable space. It would not be optimal for the petitioner to build the garage 15' from the property line because of this.

8. The Statement at Exhibit 3 states that the requested setback variances are the minimum necessary to allow for efficient use of the available space on the property, and that the requested variance from the footprint limitation is triggered by the small size of the Petitioner's house, and is the minimum necessary to allow the Petitioner to construct a two-car garage that will meet his needs, as follows:

The petitioner needs a two car garage given that he owns two cars (one of which is a pick up truck) and a motorcycle. Therefore the garage needs to be big enough to meet the petitioner needs which in turn causes the garage's total square footage to be greater than 50% of the principal building's square footage. The principal building is only 26'x32' or 832 square feet, and the proposed garage is 24'x30' or 720 square feet. So the proposed garages total square footage is 86.5% of the principal buildings square footage. So the petitioner is requesting 36.5% of variance so he can build a garage that will suit his need of safely storing his vehicles.

9. The Statement states that the requested variances can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan, noting that the Agricultural and Rural Open Space Master Plan recommends preserving critical masses of farmland and rural open spaces, and that the subject property is neither a critical mass of farmland nor a rural open space. See Exhibit 3.

10. The Statement states that “[t]he abutting/confronting properties in question are a 100+ acre corn field that is to the left the petitioners property and multi acre wooded area behind the petitioners property.” In light of this, the Statement concludes that granting

the requested variances will not impact the Petitioner's neighbors "in any way." See Exhibit 3.

11. The Board received an email letter from Donald Chamberlin, on behalf of the Patuxent Watershed Protective Association ("PWPA"). Mr. Chamberlin states that the PWPA has no environmental objection to the proposed variances. His letter observes that the subject property and house are small, and that the location proposed for the garage is screened by trees. Mr. Chamberlin's letter suggests that the garage should be sited to "allow enough space for the creation of a suitably sited alternate septic area, should one be required," noting that because the "house was built in 1933, and the land is W-6 S-6 category, the existing septic system may fail at some point (if it has not already been replaced in the not too distant past) and require replacement." Mr. Chamberlin's letter states that "[t]his consideration is another reason to grant the requested variance[s]." See Exhibit 7.

12. The Board received a letter of opposition to the grant of the requested variances from Francoise Carrier, Esquire, on behalf of her client, Linthicum East Properties, LLC ("Linthicum East"), which owns the farmland abutting the subject property to the west. See Exhibit 9. Ms. Carrier states in her letter that her client opposes the variances on the following grounds:

(i) Granting the setback variances would be adverse to the use of the Linthicum East Property;

(ii) The variance cannot be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan.

(iii) The setback variances are requested to achieve an "optimal" location and avoid costs associated with removing brush and trees, not because there is no other viable location on site. The asserted "practical difficulty" of losing 64 square feet of garage space does not justify the requested variances.

Ms. Carrier's letter states that her client's land is farmed. Her letter states that her client has found that the maintenance of a treed buffer between properties minimizes friction between farming operations and abutting residential uses. It goes on to state that the property line shared by the subject property and her client "lies in the middle of a substantial stand of trees that provides some distance and buffering for the Petitioner's home," and to further state that "[i]f the Petitioner is permitted to build a garage that eliminates half of the required side setback, that will erode part of the distance that is so important to maintaining a compatible relationship between agricultural and residential uses and avoiding complaints about farming activity." Ms. Carrier's letter concludes that the "side setback variance should be denied to protect the adjoining farmland from this potential adverse effect." See Exhibit 9.

Ms. Carrier's letter states that her client's property and the subject property are both located in the Agricultural Reserve Zone, which she notes "was created in 1980 following adoption of the groundbreaking *Functional Master Plan for Preservation of Agriculture and Rural Open Space* (the "AROS Plan")." Her letter states that the "primary

objective of the AROS Plan is to preserve agricultural land and promote the continuation of farming,” that “[t]his objective was confirmed and supported in the recent update to the County’s General Plan, *Thrive 2050* (“Thrive”),” and that “[i]t is further reflected in provisions of the Agricultural Reserve Zone....” See Exhibit 9. Ms. Carrier quotes portions of Section 59.4.2.1 of the Zoning Ordinance before asserting that granting the setback variances would not comport with these plans. Her letter then proceeds to assert that there are other locations on the property where the proposed garage could be located that would not require setback relief, and after acknowledging that some relief from the footprint limitation might be merited given the small size of the house, to conclude that granting the variances would be “contrary to the objectives of the AROS Plan and Thrive, and conflict with the general requirements of the AR zone.” See Exhibit 9.

13. At the hearing, Petitioner Farzin Biglarbeigi testified that he purchased the subject property 20.5 years ago. He testified that at that time, there were three sheds on the property. Mr. Biglarbeigi testified that he removed two of those sheds, and that he plans to remove the remaining 12’ x 12’ shed because it is deteriorating and because it will not be needed after the proposed garage is built. He testified that his property is only half an acre, and that the next ten properties on his street are all larger than one acre. Mr. Biglarbeigi testified that because his property is only half an acre, he would like to keep the area that is currently occupied by the 12’ x 12’ shed open for use as yard space; he noted that this area is in the center of his property. In response to a Board question asking if he could locate the proposed garage where the 12’ x 12’ shed is currently located, Mr. Biglarbeigi stated that he could.

Mr. Biglarbeigi testified that he is seeking to construct a garage to protect his vehicles from weather and from the trees. He testified that the location proposed for the garage is the only location he can place the garage because there are no trees in that location, later noting that it is very expensive to remove large trees like the ones located elsewhere on his property. Mr. Biglarbeigi testified that the other side of his property has trees and a holding tank. He explained that his property does not perc, and that as a result, he cannot have a septic system; he testified that the holding tank has to be pumped every other month. Mr. Biglarbeigi further testified that because of this, his home was built for one person and cannot be enlarged under the law, even to add a porch. He testified that the County will not allow him to build anything else on his property.

14. Ali Biglarbeigi testified that the subject property is encumbered with a holding tank and a well, noting that the holding tank is on the right side of the property, and the well is on the left, about half way back on the property. He testified that the well and holding tank have required setbacks around them which limit where the proposed garage can be constructed. Mr. Biglarbeigi testified that neighboring properties are larger than the subject property, which is only half an acre. He testified that because of the small size of the subject property it is important to use the space that is available. Mr. Biglarbeigi testified that there are randomly scattered trees throughout the property. He testified that these trees are forty to fifty feet tall, as shown in the photographs in the record. Mr. Biglarbeigi testified that the proposed location for the garage is flat and open.

15. Tom Linthicum testified that he has worked as a self-employed farmer for 45 years. He testified that he is familiar with the subject property, and that he owns 240 acres abutting that property. Mr. Linthicum testified that he grows corn, wheat, and soybeans on his property. He testified that he has observed the pressure that development places on farmland, citing two farms in the Clarksville Master Plan area that he will no longer be farming because of vandalism and the increasing difficulties associated with moving farm equipment. Mr. Linthicum testified that even in the Agricultural Reserve, cluster development puts pressure on moving equipment.

Mr. Linthicum testified that he opposes granting the setback variances. He testified that the County enacted setback restrictions for a reason, and that he believes granting a variance from those setbacks would be inconsistent with the Master Plan governing the Agricultural Reserve. Mr. Linthicum testified that if the requested setback variances were approved, it may impact the future use of his property. He stated that he did not oppose the construction of a garage on the subject property if the garage met the required setbacks, and that he had no objection to the removal of trees if that was needed to meet these setbacks, later observing that the aerial view of the subject property included in Exhibit 9 shows how wooded the subject property is.¹

In response to a Board question asking him if he was saying that the grant of the requested variances would impact the future use of his property, Mr. Linthicum stated that he believed that it could. Expanding on this, Mr. Linthicum testified that he thought it was possible that the Agricultural Reserve could be reduced in size. He further testified that he could not predict what the future use of the subject property would be, but that he did not want the use of that property to affect the use of his property.

FINDINGS OF THE BOARD

1. Section 59.7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board of Appeals 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;

¹ Counsel for Mr. Linthicum stated that this photograph was included to show the importance of having a treed buffer between the subject property and her client's property.

- 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 Montgomery County 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.

2. Based on the record in this case, the Board notes that there was no attempt to argue the standard in Section 59.7.3.2.E.1 of the Zoning Ordinance. For this 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 will now analyze this request under Section 59.7.3.2.E.2.

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 Petitioner in this case has argued that his property satisfies the first element of the variance test because it is encumbered with a well and a holding tank, both of which have required setbacks, and because it has numerous large trees scattered throughout. In addition, the Petitioner has argued that at only half an acre in size, the subject property is much smaller than all of the neighboring properties. The Board is not persuaded that these factors constitute extraordinary conditions that make the subject property unique for the purposes of fulfilling this element of the variance test, and thus cannot find that this element of the test is satisfied. The Board notes in support of this that unless the trees on a given property are protected by a local ordinance or special designation, they are generally not considered by the Board when evaluating a property for uniqueness under this element of the variance test because they could be removed by the property owner at any time. The Board further notes that there is nothing in the record to indicate

that having a well or not being served by sewer is unusual in this area such that these factors should be deemed to constitute an extraordinary condition peculiar to the subject 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;*

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

Having found that the variance request fails to satisfy Section 59.7.3.2.E.2.a of the Zoning Ordinance, the Board finds that the application must be denied, and that it need 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. That said, because the Board also found at the hearing that the variance request did not satisfy Section 59.7.3.2.E.2.c of the Zoning Ordinance, the Board explains that finding below.

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 Site Plan and the testimony of the Petitioner, that there is room on the subject property to locate the proposed garage without the need for setback relief, either by moving it farther from the left side and rear property lines, or by placing it in the location currently occupied by the 12' x 12' shed. The Board further finds that a standard 20' x 20' two car garage could be built on the property without the need for variance relief from the 50% footprint limitation, which in this case would restrict construction to 416 square feet (half of 832 square foot footprint of the house). See Exhibit 4. Thus the Board finds that because there is room on this property for the Petitioner to construct a garage of reasonable size without the need for variance relief, full compliance with the Zoning Ordinance does not pose a practical difficulty for the Petitioner and the requested variances cannot be granted. The Board notes in this regard that the need for a variance "must be substantial and urgent and not merely for the convenience of the applicant." See Carney v. City of Baltimore, 201 Md. 130, 137 (1952). Accordingly, the Board finds that this variance request does not satisfy Section 59.7.3.2.E.2.c of the Zoning Ordinance.

On a motion by Alan Sternstein, seconded by Caryn Hines, with Laura Seminario-Thornton in agreement, and with John H. Pentecost, Chair, and Richard Melnick, Vice Chair, necessarily absent, 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.



Caryn Hines

Acting Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 15th day of September, 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.