

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. A-6835**

**PETITION OF KERWIN STEPHENS**

OPINION OF THE BOARD

(Hearing Dates: November 15, 2023, and December 13, 2023)  
(Effective Date of Opinion: December 22, 2023)

Case No. A-6835 is an application by Kerwin Stephens (the "Petitioner") for two variances needed for the construction of an accessory structure (shed). The construction requires a variance of forty-seven (47) feet as it is within eighteen (18) feet of the front (northern) lot line along Madrigal Court. The required setback is sixty-five (65) feet, in accordance with Section 59.4.4.7.B.2 of the Zoning Ordinance. In addition, the construction requires a variance to be located in the front yard. Accessory structures are required to be located behind the rear building line of the principal building, 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 November 15, 2023. Petitioner Kerwin Stephens was present at the proceedings in support of the requested variances. Because there were only four Board members present to hear his case, Mr. Stephens requested that the matter be continued to a later date. On a motion by Richard Melnick, Vice Chair, seconded by Alan Sternstein, with John H. Pentecost, Chair, and Laura Seminario-Thornton in agreement, and with Caryn Hines necessarily absent, the matter was continued on the record to December 13, 2023, at 9:30 a.m.

The Board of Appeals held a second hearing on this application on December 13, 2023. Petitioner Kerwin Stephens was again present at the proceedings in support of the requested variances.

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

**EVIDENCE PRESENTED**

1. The subject property is Block C, Lot 12, Kings Square Subdivision, located at 19809 Madrigal Drive in Germantown, Maryland, 20876, in the R-200 Zone. It is a five-sided corner property with frontage along the east side of Madrigal Drive and the south side of Madrigal Court. The property's fifth side is a truncated corner that faces the intersection of these two streets. The Site Plan indicates that the property has a total area of 8,333 square feet. Per SDAT, it contains a house that was built in 1997 and has been owned by the Petitioner since 2010. See Exhibits 3, 4, and 7, and SDAT Printout.
2. The Petitioner is seeking variance relief for a 10' x 20' shed that he "unintentionally" had delivered and placed on his property without the proper permits "due to his misreading of the county requirements." The Petitioner's Justification Statement ("Statement") indicates that he is "very apologetic" for this oversight. See Exhibits 3 and 5(a).
3. The Petitioner's variance Application states that the property is a corner lot with the "majority of land" on the "side" of his house, presumably referring to the area on the north side of the house, located between the house and Madrigal Court. It cites the property's "narrowness" and "shallowness" as factors that make the property unusual compared with neighboring properties. The Application states that failing to grant the requested variances would cause the Petitioner a practical difficulty because the shed would have to be placed over utility lines, because the grading of the yard to allow such placement would cause flooding on neighboring properties, and because it would be "too tough" to fit the proposed structure in the allowed area. See Exhibit 1.
4. The Petitioner's Justification Statement ("Statement") states that the structure for which he is seeking variance relief was installed without permits. It states that this existing shed "was aligned with the garages [of the existing house] and the entrances were made to match said garage in order to have it look appealing." See Exhibit 3. The Statement proceeds to state that in addition to being "the most visually appealing" placement for the shed, "[t]he rear of the house doesn't have the space...." The Statement then states that if the current grading of the property was altered, it would "cause harm to both neighbors to the left of the house<sup>1</sup> and the one behind the house as it would cause water to flow directly toward their basement and cause flooding which they spent a lot of time to make sure wouldn't happen." In addition, the Statement states that locating the shed in the rear of the house would place it over underground utility lines, "caus[ing] an issue" if emergency utility work was needed, and notes that "other properties in the area have their houses placed on the land in such a manner that a shed would fit in the rear of their homes without the issues that the petitioner would have." See Exhibit 3.

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<sup>1</sup> This appears to refer to the property to the south of the subject property, which is left of that property when looking out the Petitioner's front door, but right of that property when viewed from the street.

5. The Statement states that the proposed placement of the shed “doesn't interfere with view around the corner by traffic in either direction ....” The Statement further states that the proposed placement of the shed “does not interfere with the flow of water during storms.” Finally, the Statement states that the proposed location of the shed “is setback so on the side that it doesn't interfere with either pedestrians or buried utility lines.” See Exhibit 3.

6. The Statement at Exhibit 3 states that granting the requested variances will not be adverse to neighboring properties, and will not substantially impair the intent and integrity of the general plan or applicable Master Plan, as follows:

The structure would have no adverse effect on the neighbors or neighborhood. The structure would not create any issues of sound, health, safety, security, or issues of general welfare to the residents, visitors, or those passing through. There also would be no impact to the public utilities.

\* \* \*

The variance granting wouldn't interfere nor set any issues with any of the neighbors, neighborhood, or the integrity of the general or master plan for the area. Both abutting or confronting properties wouldn't be effected in anyway by the Shed.

7. The Board received email letters from several neighbors objecting the grant of the requested variances. The letters indicate that the Petitioner's shed is larger than the 8' x 8' shed allowed by the HOA,<sup>2</sup> and that it is located too close to the street. Some of the letters note that the shed was built without a building permit and without permission from the HOA. One letter states that the sender has spoken with three of his neighbors, and that “[n]o one liked the shed or mentioned it was appealing.” Other letters indicate that the shed has negatively impacted the quality of the neighborhood. See Exhibits 10(a) through (e).

8. At the hearing, the Petitioner introduced an aerial photograph of his property, which he used to discuss his variance request. See Exhibit 11. Referring to this photograph, the Petitioner testified that it shows the location of his shed, and that it shows that the shed does not block the sight lines at the abutting intersection. He testified that the photograph shows that there are windows and a door on the back of his house, and that the brown circle on the photo is where a 50-foot tree that died in 2020 used to be located. The Petitioner testified that there is a deck on the rear of the house, and that a cable line comes from the street between the right side of his house and the left side of his neighbor's house. He testified that there is not enough room for the shed behind his house, and that the shed cannot be placed against the house because of the need for clearance around the windows and door. The Petitioner further testified that the shed cannot be located on the right side of his house because of the cable line.

The Petitioner testified that he is willing to move the shed farther back on his property (i.e. farther from Madrigal Drive), explaining that he had lined the shed up with

<sup>2</sup> Exhibit 5(a) indicates that the Petitioner's shed is 10' x 20'.

the front of his garage because it was purchased to match his home and he felt as though it looked better in that location. He indicated that if the shed were turned, he may be able to locate it behind the rear plane of his house, although not directly behind the house.

In response to a Board question asking what the distance was between the rear of his house and his rear property line, the Petitioner testified that it was about 24 feet, but that with the applicable setback and the need for four feet of clearance between the back door of the house and the structure, the shed did not fit in that space. In response to another Board question asking about the assertion in the Statement that locating the shed behind the house would cause flooding to neighboring properties, the Petitioner testified that if he had to create a flat area for the shed behind his house, it would interfere with the natural drainage pattern.

### **FINDINGS OF THE BOARD**

Based on the binding testimony and the evidence of record, the Board finds that the requested variances from the front lot line along Madrigal Court and from the locational restriction which requires that accessory structures be located behind the rear building line of the principal building 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 has asserted that his property’s shallowness and narrowness make it unique for the purposes of satisfying this element of the variance test. The Board observes, in looking at the Zoning Vicinity Map, that while the Petitioner’s property may not be as deep from front to rear (i.e. from Madrigal Drive to the rear of the property) as some neighboring properties, there are other properties that appear to be similar in depth to the Petitioner’s property, notably the two properties immediately to the north of the Petitioner’s property, along the same side of Madrigal Drive. See Exhibit 7. In light of this, the Board cannot find that the property’s shallowness or narrowness make it unique for the purposes of satisfying this element of the variance test. In addition, the Petitioner has alluded to topographical issues in that he has asserted that he would need to regrade his property to place the shed behind the rear building line of his house, but he has not testified as to the severity of this slope, or provided any documentary evidence such as a contour map that would illustrate this slope. In addition, the Petitioner has not provided any evidence to show that this slope is unique to his property. Thus the Board cannot find that topographical issues make the subject property unique or extraordinary for the purposes of satisfying this element of the variance test. Finally, the Petitioner’s Statement indicates that placement of the shed behind the rear building line of the house would impede access to utility lines, but his Site Plan does not show a utility easement across his back yard, and the only utility line he testified about was his cable line, which he said came down from the street along the right side of his house. Thus the Board cannot find that the presence of underground utility lines makes the subject property unique for the purpose of granting the requested variances. In light of the foregoing, the Board cannot find that Section 59.7.3.2.E.2.a.i of the Zoning Ordinance is satisfied.

*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 has not asserted or provided any evidence to indicate that the variance request satisfies Sections 59.7.3.2.E.2.a.ii, iii, iv, or v of the Zoning Ordinance, and the Board has found that the request does not satisfy Section 59.7.3.2.E.2.a.i of the Ordinance. Accordingly, the Board cannot find that Section 59.7.3.2.E.2.a of the Zoning Ordinance is satisfied. Therefore, the Board finds that the requested variances must be denied, since the variance test is conjunctive, and all parts must be satisfied for a variance to be granted. Nevertheless, because the variances the Petitioner seeks arose from his own actions, the Board will also address Section 59.7.3.2.E.2.b, which the Petitioner also fails to meet, as follows:

*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, based on the Statement and the testimony of the Petitioner, that the Petitioner is responsible for the delivery and placement of the shed for which he is now seeking variance relief, and that he selected its location, at least in part, because it "was aligned with the garages [of his house] and the entrances were made to match said garage in order to have it look appealing." See Exhibit 3. The Board further finds that the Petitioner has testified that the shed could be moved farther back on the property, away from Madrigal Drive, which the Board notes would lessen the variance needed from the front lot line, and that he has also testified that if the shed were turned, it could possibly be placed behind the rear plane of the house. Thus the Board finds that because the Petitioner is responsible for the installation of this shed, in this location, that to the extent that the strict application of the front lot line setback and rear yard locational restriction could be said to pose a hardship for the Petitioner, this hardship is self-created and cannot be the basis for a variance.<sup>3</sup> In addition, the Board finds that the size of the Petitioner's shed – 10' x 20' - was also determined by the Petitioner, and that according to his neighbors, it greatly exceeds the 8' x 8' shed size allowed by the HOA. See Exhibit 10(a)-(e). Thus, the Board finds that the inability of the Petitioner to locate his shed in accordance with the development standards set forth in the Zoning Ordinance is due in part to the size of the shed, which was of the Petitioner's choosing and which arguably is not the "minimum" size needed. The Board finds in this regard that the need for a variance

<sup>3</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,

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.").

"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). Finally, the Board understands that the removal and any potential relocation of the shed is not without cost or hardship, but finds, in accordance with applicable case law, that the financial hardship is not a sufficient reason to justify the grant of a variance.<sup>4</sup> In light of the foregoing, the Board finds that in addition to failing to meet Section 59.7.3.2.E.2.a of the Zoning Ordinance, the Petitioner's request does not meet Section 59.7.3.2.E.2.b of the Ordinance, and must be denied, again because the variance test is a conjunctive test and all elements of the test must be satisfied for the variance to be granted.

Having found that the requested variances fail to meet Sections 59.7.3.2.E.2.a and b of the Zoning Ordinance, the Board will not address the remaining elements of the variance test.

Based on the foregoing, on a motion by John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Caryn Hines, Laura Seminario-Thornton, 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

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 22<sup>nd</sup> day of December, 2023.

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<sup>4</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.*)



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.