

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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(240) 777-6600

Case No. A-6867

PETITION OF JEISEL GOMEZ

OPINION OF THE BOARD
(Hearing Date: June 12, 2024)
(Effective Date of Opinion: July 3, 2024)

Case No. A-6867 is an application by Jeisel Gomez (the "Petitioner") for a variance needed in connection with the proposed construction of an accessory structure (shed). The proposed construction requires a variance of 59.68%, since when combined with other accessory structures already on the property, the cumulative footprint of all accessory structures is 109.68% of the main structure's footprint. The maximum cumulative footprint of all accessory structures is 50% of the footprint of the main structure, in accordance with Section 59.4.4.9.B.2.d of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on June 12, 2024. Petitioner Jeisel Gomez appeared at the hearing in support of the variance application.

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

EVIDENCE PRESENTED

1. The subject property is Lot 11, Block F, Viers Mill Village Subdivision, located at 4414 Randolph Road in Silver Spring, Maryland, 20906, in the R-60 Zone. It is an interior lot located on the south side of Randolph Road. Despite having five sides, the property is roughly rectangular in shape, and is nearly three times as deep as it is wide. The property narrows slightly from front to back (north to south). It has an area of 9,613 square feet, and contains a house that was built in 1946. SDAT indicates that the house has 844 square feet of above-grade living space; the Building Permit Denial indicates that the house has a footprint of 960 square feet. The Petitioner's parents purchased the subject property in 1996. The Petitioner was added as a co-owner of the property in 2020, after her father passed away. See Exhibits 3(b), 4(a)-(b), 6, and 8(a), and SDAT Printout.

2. The Petitioner's initial and supplemental Statements of Justification indicate that she is seeking to construct a storage shed in the back of her property to store personal property. See Exhibits 3(a) and (b). Her initial Statement indicates that if the Petitioner is allowed to construct the proposed shed, she will remove the existing shed, garden, concrete, and BBQ area. See Exhibit 3(a). These items are marked with an "X" on the Existing Site Plan, showing that they will be removed. See Exhibit 4(a). The Petitioner's supplemental Statement states that the removal of these existing improvements dramatically reduces the cumulative footprint of the accessory structures on the property and minimizes the amount of the variance needed. See Exhibit 3(b).

3. The Petitioner's supplemental Statement of Justification ("Statement") states that after removal of the other existing structures, the proposed shed would be the "only structure in the backyard," but the proposed Site Plan shows that the Petitioner's existing detached garage will also still be located in the back yard. See Exhibits 3(b) and 4(b).

4. The Statement states that "[t]he proposed shed substantially conforms with the established pattern of the neighborhood," noting that "a shed already exists in the backyard," and that "most neighbors have a shed in their backyards." See Exhibits 3(b) and 4(a). The Zoning Vicinity Map and the aerial view "Finder" map submitted by the Petitioner show that many properties in this neighborhood have sheds or other accessory structures in their backyards. See Exhibits 8(a) and (c).

5. The Statement explains that the Petitioner and her son are moving in with the Petitioner's mother and brother, both of whom live on the subject property and need assistance. The Statement indicates that it is the consolidation of the two households into the existing small house that has resulted in the need for additional storage space. The Statement states that the requested variance is the minimum necessary to allow a shed that will meet these storage needs. See Exhibit 3(b).

6. The Statement states that the Petitioner's neighbors have seen the plans for the shed, and have signed a letter consenting to its placement of the subject property. See Exhibits 3(b) and 7. The Statement states that "[t]he shed is a fully closed structure and no items in the shed will be seen from the outside." The Statement further states that "[t]he shed will not 'stick out' as extra ordinary or substantially different than any other shed in the area." The Statement states that the shed will be "surrounded by a fence and trees," that it will not be lit, and that "[o]ther neighbors cannot see the shed from their property unless they stand next to the fence from their property line." Thus the Statement concludes that the proposed shed will not be adverse to the use and enjoyment of neighboring properties. See Exhibit 3(b).

7. At the hearing, the Petitioner testified that she is seeking to build the proposed shed because she needs to move into the house on the subject property in order to care for her mother and brother, both of whom need assistance. She testified that her mother's house is "tiny," and that the shed is needed to provide extra storage space for some of her belongings, as well as the belongings of some of her family members. The Petitioner

testified that she was seeking a variance because she wanted to make sure that they did everything in compliance with the applicable law.

The Petitioner testified that she has spoken with all of her neighbors about the proposed shed, and that none are opposed to it. The Petitioner testified that there is a wall at the rear of the subject property, so the neighbor on that side would only see the top of the shed, and that any view from the neighboring properties on either side of the property would be obscured by fencing.

The Petitioner testified that she will remove the existing shed and concrete pad, and that the garden and covered barbeque area have already been removed. In response to a Board question asking about the garage, and specifically about the 14 foot by 20 foot projection on the north side of the garage, the Petitioner testified that the projection is a dog house for her brother's service dog. While she initially testified that she intended to retain the existing garage on the property, she later indicated that she was willing to remove all or part of it if that would mean that she could have the proposed shed.

In response to a Board question asking what made her property unique, the Petitioner testified that the property is very long relative to its width. In response to a Board question asking when the garage was built, she testified that it was there when her parents purchased the property almost 30 years ago. In response to a Board question asking if the shed was the minimum necessary, the Petitioner testified that it was the size that Tuff Shed recommended to meet her needs. In response to a Board question asking if the shed could be reduced in size, the Petitioner noted that she had already made a downpayment on the shed, but testified that she supposed that was a possibility. She noted that the shed would meet the accessory structure setbacks. Finally, in response to a question asking if there was a pattern of similar sheds in her neighborhood, the Petitioner testified that her neighborhood has many larger sheds. When asked by the Board, which was trying to ascertain whether those sheds exceeded the footprint limitation, if she knew if the houses on those properties had larger footprints than her house, or whether there were also detached garages on those properties, the Petitioner testified that she did not.

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;
 - 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 has argued that her property is unusually long (deep), and that this makes her property unique for the purpose of satisfying this element of the variance test. While the Board agrees that the Petitioner's property is deep, the Board finds, based on the Zoning Vicinity Map and the aerial view "Finder" map, that the depth of the subject property is similar to that of several other properties on the block, notably the properties immediately to its left (east), the abutting property to its rear (south) and the properties

east of that property, and the property that abuts the right (west) side of the subject property towards its rear and the property south of that property. See Exhibits 8(a) and (c). Accordingly, the Board cannot find that this element of the variance test is satisfied.¹

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

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 of the Zoning Ordinance. Accordingly, the Board cannot find that these elements of the variance test are satisfied.

v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;

The Petitioner did assert that the proposed shed would substantially conform with the established or traditional development pattern of her street or neighborhood, and the Board finds that the Zoning Vicinity Map and aerial view "Finder" map confirm her assertion most of her neighbors have accessory structures, which she characterized as sheds in her Statement, in their backyards. See Exhibits 3(b), 8(a), and 8(c). That said, in ascertaining whether the proposed shed would conform with the traditional development pattern of this neighborhood, the Board notes that the Petitioner's property already contains a large accessory structure (detached garage), as well as several other accessory structures that have been, or will be, removed. See Exhibit 4(a). The Board notes that in the instant case, consideration of the cumulative number and footprints of accessory structures on the property is important in ascertaining whether the proposed construction is consistent with the neighborhood pattern because the Petitioner is requesting a variance from the cumulative footprint limitation for accessory structures, not a setback or locational variance. The Board finds that when questioned by the Board, the Petitioner was unable to provide testimony about the sizes (footprints) of her neighbor's accessory structures relative to the sizes (footprints) of their homes, and was unable to provide testimony indicating whether her neighbors had detached garages in addition to their sheds. In other words, the Petitioner was unable to provide testimony that there was a pattern of accessory structures exceeding the cumulative footprint limitation in her neighborhood. Given the lack of evidence in the record to support a finding that there is a pattern in this neighborhood of accessory structures that exceed the cumulative footprint limitation set forth in the Zoning Ordinance, the Board is unable to find that this element of the variance test is satisfied.

¹ The Board notes that even if it were to have found that the depth of the subject property made it unique for the purpose of satisfying this element of the variance test, it is hard to envision how having an unusually deep property would pose a practical difficulty in being able to comply with the limitation on the cumulative footprint of accessory structures, as would be necessary to satisfy Section 59.7.3.2.E.c of the Zoning Ordinance.

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.

On a motion by John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Caryn Hines and Amit Sharma in agreement, and with Alan Sternstein not in agreement,² 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.



John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 3rd day of July, 2024.



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.

² Member Sternstein had moved to grant the requested variance on grounds that the proposed construction would comport with the pattern in the neighborhood. That motion failed for lack of a second.

Separate Opinion of Board Member Alan B. Sternstein

Petition of Jeisel Gomez, Case No. A-6867

There are two grounds on which this variance could be granted consistently with the Board's past actions and as authorized by Montgomery County Code ("Code") § 59-7.3.E.2. Accordingly, I have voted against the Board's decision to deny the requested variance.

The Applicant, Jeisel Gomez, requests a variance from the Code's lot coverage limitations, in order to construct a shed on the subject property, which is zoned R-60 and is located in Silver Spring. She represents that the shed is for the storage primarily of personal items and is necessitated because she is moving from her current residence with her daughter to the home of her elderly and widowed mother and a brother with special needs. In the R-60 zone, the Code limits the total coverage area of accessory structures, such as a shed, to 50% of the coverage area of the principal structure on a lot or 600 ft², whichever is greater. Code § 59-4.4.9. In addition, the Code limits the total coverage area of all structures to 35% of the lot area. *Id.* The minimum front building line is 60 feet, and the minimum side set back is 8 feet. *Id.*

A scale diagram, depicting the subject property's residential block, adjacent streets and the lots and structures within those lots, follows this statement and was Exhibit 8(c) to the Applicant's variance request. The proposed site plan, prepared by a professional surveyor, was Exhibit 4(b). The lot area is approximately 9,562 ft² (calculated from the site plan), limiting the total lot coverage to approximately 3,347 ft² (35% X 9,562 ft²). The single-family detached house on the subject property is 960 ft², according to Exhibit 6 (Building Permit Denial), limiting the total coverage of all accessory structures on the subject property to 600 ft². Together with the proposed shed, the total coverage of all accessory structures on the property would be 1,053 ft², according to the Permit Denial. Hence, the Applicant needs a variance of 453 ft² (1,053 ft² - 600 ft²).¹ The total accessory coverage proposed is 109.68% of the house. The percentage allowed is 62.5% (600 ft² / 1,053 ft²). Hence, the variance percentage required is 47.18%. The total lot coverage proposed, 2,013 ft² (960 ft² + 1,053 ft²), however, is still considerably less than the total lot coverage the Code allows, 3,347 ft².

The first ground for granting the requested variance is that the subject property is "exceptional[ly] narrow[.]" See Code § 59-7.3.E.2. At 60 ft (according to the scale in Exhibit 4(b), the lot's front building line is at the minimum 60 ft the Code allows in the R-60 zone. It is also evident from Exhibit 8(c) that the frontage of the lot is the narrowest on the block. Moreover, there should be no disagreement that owners of single detached houses would also strongly prefer garages attached to their houses. This best facilitates

¹ The Permit Denial calculates the Applicant's excess as the difference between the total accessory structure coverage and 480 ft², 50% of the principal structure coverage, the coverage of the house on the subject property. As noted, the Code allows a maximum of 600 ft².

garage access and comfort, with regard to distance, protection from the elements, electrical power and heating and cooling. It also facilitates the storage and retrieval of personal property. The exceptional narrowness of the lot, however, does not permit a reasonable attachment to the house, if any attachment at all.

The widest side yard dimension of the house is 16 ft (Exhibit 4(c)), and the minimum side set back in the R-60 zone is 8 ft, precluding any garage adjacent and attached to the house in a side yard. This garage location limitation has two severe impacts relative to the variance request. First, because the garage cannot be attached, it counts as an accessory structure, and its coverage counts against the allowed accessory structure coverage. Second, because the garage cannot be attached, its coverage is not counted in calculating the allowed accessory coverage, limiting that coverage. Only the house's coverage counts.²

The resulting constraint on accessory lot coverage is a "practical difficulty" due to the exceptional narrowness of the subject property. See Code § 59-7.3.E.2. Given that the total lot coverage allowed is 3,347 ft² but that the house constructed on it is only 960 ft², the difficulty is hardly the result of overbuilding by the Applicant. See *id.* As for the variance's need, the Applicant testified that it is essential to store most of the personal property of the house from which she is moving and that cannot be used in her mother's house or that can be so used but displaces property in her mother's house that would require storage. See *id.* Finally, given the number of other accessory structures in the neighborhood and that the proposed construction would result in considerably less total lot coverage than that allowed without a variance, "the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan." *Id.* In short, all of the conditions authorizing the Board to grant a variance are satisfied here.

The second ground for granting the requested variance is that the proposed shed "substantially conforms [to] the established historic or traditional development pattern of" the subject-property's neighborhood. Judging from Exhibit 8(c), of the 14 other lots on the subject property's block, 8, more than half, have accessory structures, most, if not all, of which appear to be sheds. Four of those 8 do not satisfy accessory structure set back requirements. Moreover, on a lot fronting on Bennon Road, there is an accessory structure that appears to be two thirds to three fourth the size of the principal structure. Finally, as noted, the total lot coverage proposed were the requested variance granted, would be 2,013 ft², considerably less than the 3,347 ft² coverage that the Code allows on

² Not surprisingly, it appears from Exhibit 8(c) that the subject property is the only or, possibly, only one of two lots on the block on which an attached garage was not possible to construct. The lot that is to the right of the Applicant's lot on Exhibit 8(c) has an accessory structure, but it cannot be determined from the exhibit whether that structure is a garage or a shed. It does appear from the configuration of the house structure on the adjacent lot, however, that the house has an attached garage.

the lot. For the reasons discussed above, all other Code conditions for granting a variance on this second ground are also satisfied here.³

In each of my interviews with the County Council for my appointment and reappointment to this Board, one of the standard questions asked was, "If appointed, how would you position this role to work on racial equity and social justice issues?" Even though this Board's role is one of adjudication, not policymaking, I view my answers to the Council in each interview as an undertaking to be cognizant of and heed, as much as is lawful and within my authority, the values and interests implicit in the Council's inquiry. It is a reasonable assumption from the Applicant's testimony and reasons for requesting the subject variance that her means, as with many individual applicants, are limited. I have little doubt that had the Applicant had the means to acquire the representation of any one of several able and well-respected land use lawyers that regularly appear before this Board, the decision in this matter would have been different. I submit this separate statement and the extended consideration it reflects with these matters in mind.⁴

Respectfully,



Alan B. Sternstein

Member, Montgomery County Board of Appeals

Date: June 25, 2024

³ In over a year of experience on this Board and 22 years of previous experience on the Board of Appeals for the City of Rockville, it is the law and my view that variances are not granted merely because of need or because a need sometimes justifies laxness in applying the conditions required to be satisfied before a variance may be granted. That said, it is also my experience that the required conditions are always applied with a view toward accommodation, not denial.

⁴ Had I voted with my colleagues on the Board, I could, pursuant to Board Rule 10, move to rehear this matter. As I did not vote with the majority and without rehearing otherwise being ordered, I am left only with filing this separate statement.

Exhibit 8©



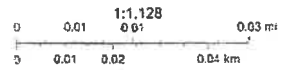
HGomezAreaView 12/7/2023

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- Parcel Boundaries
- Parcel Points
- MD Counties



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