

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case No. A-6883
PETITION OF GUILHERME PEREIRA SCHUEROFF and ALINE BORGES da SILVA**

OPINION OF THE BOARD
(Public Hearing Date: October 30, 2024)
(Effective Date of Opinion: November 6, 2024)

Case No. A-6883 is an application by Guilherme Pereira Schueroff and Aline Borges da Silva for four variances needed for the proposed construction of an accessory structure (pavilion), as follows:

1. 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 59.4.3.4.B.2 of the Zoning Ordinance.
2. The proposed construction requires a variance of eight (8) feet as it is within seven (7) feet of the rear lot line. The required setback from the rear lot line is also fifteen (15) feet, in accordance with Section 59.4.3.4.B.2 of the Zoning Ordinance.
3. The proposed construction, which would result in 13.15% lot coverage, requires a variance of 3.15% from the lot coverage limitation. The maximum lot coverage is 10%, in accordance with Section 59.4.3.4.B.1 of the Zoning Ordinance.
4. The proposed construction requires a variance of 182 square feet from the footprint limitation, since the cumulative footprint of accessory structures on the property is 1,008 square feet. The maximum allowable footprint of all accessory structures is 826 square feet, which is 50% of the footprint of the main building, in accordance with Section 59.4.3.4.B.2.e of the Zoning Ordinance.

The Board of Appeals held a public hearing on the application on October 30, 2024. Petitioner Guilherme Pereira Schueroff appeared in support of the application, assisted by his friend, Thomas Silva. Bruce Clarke, whose property abuts the Petitioners' property to the left, appeared in opposition to the requested variances.

Decision of the Board:

Requested Variances **DENIED**.

EVIDENCE PRESENTED

1. The subject property is Lot 24, Block D, Cliftonbrook Subdivision, located at 805 Tucker Lane in Silver Spring, Maryland, 20905, in the RC Zone. It is a four-sided lot, 0.44 acres in size, located on the south side of Tucker Lane. The property's left and right side lot lines are parallel to one another and perpendicular to the street, but the left side lot line is significantly longer than the right side lot line (205.31 feet versus 118 feet). As result, the property's rear lot line, which extends in a straight line between the side lot lines, is severely angled, meeting the property's deeper left side lot line at an acute angle and its shallower right side lot line at an obtuse angle. See Exhibits 3, 4, and 6.

2. The Petitioners' Statement of Justification ("Statement") states that they are seeking to build a pavilion on their property. The Statement states that variances from the side and rear lot line are needed for the proposed construction because the Petitioners' backyard "has a narrow shape and limited space." See Exhibit 3. The Statement further states that "[t]he property is on a 0.44-acre lot, which is significantly smaller than the 5-acre minimum required for RC zoning," and that "[a]dditionally, the irregular shape and angle of the backyard make it difficult to construct any needed structure while adhering to current setback regulations." The Statement states that without the requested variances, the shape of the property would force the proposed pavilion to be located closer to the Petitioners' house, "encroaching on the limited backyard space," and that granting the requested variances "will allow the pavilion to be built at a reasonable distance from both the house and the property boundaries." See Exhibit 3.

3. The Statement states that the Petitioners are not responsible for the small size of their property, or for its angled rear lot line, stating that these conditions "were predetermined by the original subdivision plan" and "are inherent to the lot's existing condition." See Exhibit 3.

4. The Statement states that the requested variances are "the minimum required to construct the pavilion without disrupting the limited backyard." The Statement states that "[s]trict compliance with the setback requirements would push the structure too close to the house, which would not be feasible," and that granting the variances would allow for construction of the proposed pavilion "at a reasonable distance" between the Petitioners' house and the boundaries of their property. See Exhibit 3.

5. The Statement states that the requested variances can be granted without substantial impairment to the intent and integrity of the applicable Master Plan, and that construction of the proposed pavilion will not be adverse to the use and enjoyment of neighboring properties. See Exhibit 3. In support of this, the Statement states that "[t]he pavilion's location will not interfere with the neighboring properties, as there are no immediate residential homes to the left of the property," explaining that "[t]he left side of the property is adjacent to an open farm/camp, meaning there are no nearby residential structures that could be impacted by the reduced setback." The Statement further states that the proposed pavilion "will help organize materials, maintaining the property's appearance and keeping it well-kept." See Exhibit 3.

6. The Petitioners' abutting neighbors to the left submitted a letter opposing the grant of the requested variances. See Exhibit 8. The letter indicates that Tucker Lane is a "rustic road," and asserts that the proposed pavilion, which their letter states is "big enough to house a commercial vehicle (a large, lengthy truck)," is inconsistent with a rustic road. The neighbors' letter further states that they had planted a row of white pine trees along the property line that they share with the Petitioners, and asserts that if the proposed pavilion is constructed, the pine trees "near the garage will not get enough sunlight in their lower trunk and branches, because of the height of the proposed garage, to thrive." In addition, the neighbors' letter states that if the proposed pavilion is used as a barbeque area, "the danger of fire, from sparks, and the likelihood of smoke from [the Petitioners'] frequent barbeques, would have a harmful effect on the trees...." Finally, after acknowledging that there is nothing wrong with entertaining friends, the neighbors' letter states that their living room "is close enough to [the Petitioners'] breezeway" to "hear their conversations" when the Petitioners entertain outdoors "near their breezeway," and that "[a]s a rule, because of this factor, [the Petitioners' neighbors] do not use the living room of [their] house, which is directly across from [the Petitioners'] house, when [the Petitioners] entertain." The neighbors' letter further states that they are concerned that if the Petitioners construct the proposed pavilion in the corner of their property, near the shared property line, "there is no way [they] will not have to listen to [the Petitioners] and their guests whenever they use this area in the back of their property to entertain." Finally, the neighbors note in their letter that they "are also likely to hear the truck whenever it is moved, if the proposed garage is built so close to [their] property," and that "the rooftop of the structure could be used for parties, or other gatherings."¹ See Exhibit 8.

7. The Board also received a letter from the Patuxent Watershed Protective Association ("PWPA") regarding this variance. The PWPA letter recommends approval of an eight (8) foot variance from the side lot line, and approval of a variance from the limitation on the total square footage for all accessory structures, but does so on the condition that the size of the pavilion is reduced and the location of the pavilion is moved "toward the front of the lot to a point not forward of the rear line of the house/garage." The PWPA letter indicates that these changes would eliminate the need for the rear lot line variance and reduce the extent of the lot coverage variance needed. See Exhibit 9.

8. At the hearing, Mr. Silva stated that he was familiar with the variance request and that he would speak on behalf of Mr. Schueroff.² Mr. Silva testified that the back of the Petitioners' property has an "angled shape," and that the Petitioners want to construct an accessory structure close to their property lines to minimize its impact on their backyard. He testified that adhering to the required fifteen (15) foot setback would result in the structure being too close to the Petitioners' home, and that they are seeking eight (8) foot variances. Mr. Silva testified that the structure would be used as a pavilion and for storage of non-hazardous construction materials, which he said would be hand-loaded into the

¹ The Board notes that the plans for the proposed pavilion show a hip roof on the structure, the height of which increases six (6) feet from its perimeter to its peak. See Exhibit 4.

² Mr. Silva was initially sworn in as an interpreter for Mr. Schueroff, but indicated that he wanted to testify for Mr. Schueroff instead of translating for him. On one or two occasions, when the Board asked a question to which he did not know the answer, Mr. Silva relayed the question to Mr. Schueroff in Portuguese, and then informed the Board of Mr. Schueroff's response.

structure. He testified that the proposed pavilion would be 20 feet wide and 36 feet long, and that it would be about eight (8) feet high.³ Mr. Silva testified that it would have a gravel floor.

In response to a Board question, Mr. Silva testified that the Petitioners' house was built in 1964. In response to another Board question regarding the location of the proposed structure, Mr. Silva testified that the Petitioners want to keep the proposed structure in their backyard, and that they intend to keep their existing shed. He testified that as requested, the proposed structure would be 52 feet from the house, and that if the Petitioners adhered to the fifteen (15) foot setbacks, the proposed pavilion would be too close to their home. When pressed on why it would be too close, Mr. Silva testified, after consulting with Mr. Schueroff, that Mr. Schueroff does not want to disturb his backyard, that he has three children, and that he wants them to have space to play.

In response to a Board question regarding the topography of the property, Mr. Silva testified that the area proposed for construction is a flat, grassy area. When asked by the Board if the Petitioners could build a smaller pavilion than is proposed, which the Board observed would reduce the extent of the variances needed, Mr. Silva stated that they could, but after initially testifying that the Petitioners would reduce the size of the proposed structure as necessary to eliminate the need for a lot coverage variance, Mr. Silva ultimately testified, after consulting with Mr. Schueroff, that the Petitioners did not want to reduce the size of their proposed pavilion, and that they wanted to proceed with their variance request as submitted.

9. Mr. Clarke testified that he objected to the Petitioners' request to be allowed to build their proposed pavilion in the back left corner of the subject property, seven (7) feet from the property line. He testified that Tucker Lane is a rustic road, and that they had planted white pine trees on their property, along the property line shared with the Petitioners, to further the rustic nature of their property. Mr. Clarke testified that the proposed pavilion would block sunlight to two of those trees and would damage them. He testified that any extension of a driveway to the proposed structure could also hurt his pine trees. Mr. Clarke testified that in addition to harming his trees, the proposed pavilion is not consistent with a rustic road.

Mr. Clarke testified that his living room faces the Petitioners' house, and that the proposed pavilion would impact their view from that room. In response to a Board question asking about noise, Mr. Clarke testified that he can hear the Petitioners and their guests when they entertain at their house, but that it is not a huge issue, adding that his main concern is the pine trees.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the requested variances must be denied. Section 59.7.3.2.E of the Montgomery County

³ In looking at the plans, the reference to eight (8) feet appears to refer to the clearance between the finished grade and the roof. The peak of the structure's roof appears to be fifteen (15) feet above the finished grade. See Exhibit 4.

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. In the instant case, the Board finds that the requested variances fail to meet Section 59.7.3.2.E.2.c, as follows:

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 Petitioners have not demonstrated that the variances they are seeking are the minimum necessary to overcome the practical difficulties imposed by full compliance with the Zoning Ordinance on account of the shape and size of their property. In support of this, the Board finds, based on the Statement, Site Plan, and testimony of record, that there is room on the subject property to move the proposed pavilion further away from the property's left side and rear lot lines, but that the Petitioners do not want to do this because moving the pavilion closer to their house would infringe on their backyard space. See Exhibits 3 and 4. The Board further finds, in accordance with representations made at the hearing, that the proposed 20-foot by 36-foot (720 square foot) accessory structure could be reduced in size, but that the Petitioners want to proceed with the structure as proposed. The Board observes that as proposed, the size of the proposed accessory structure would cause construction on the subject property to exceed both the cumulative footprint limitation on accessory structures and the total lot coverage limitation that are imposed by the Zoning Ordinance. The Board further observes that if the size of the proposed accessory structure were reduced, at a minimum the extent of the footprint and lot coverage variances that are needed would be lessened, and depending on the placement of the smaller structure, the side and rear setback variances might also be reduced, even if the proposed distance between the house and the structure were maintained. In light of the foregoing, the Board finds that because there is room on this property for the Petitioner to construct the proposed structure farther from the setback lines, reducing the setback variances that are needed, and because the size of the proposed structure could be reduced, thus decreasing the extent of the lot coverage and footprint variances needed, the requested variances are not the minimum necessary to overcome any practical difficulties that full compliance with the Zoning Ordinance might pose. Accordingly, the Board finds that this variance request does not satisfy Section 59.7.3.2.E.2.c of the Zoning Ordinance, and must be denied. While the Board understands that the Petitioners want to preserve usable space in their backyard for their children to play, and that they would like to build an accessory structure of the size proposed, the Board notes 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).

Having found that the requested variance fails to satisfy Section 59.7.3.2.E.2.c 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 Richard Melnick, Vice Chair, seconded by Alan Sternstein, with Caryn L. Hines, Chair, Amit Sharma, and Donald Silverstein in agreement, the Board adopted the following Resolution:

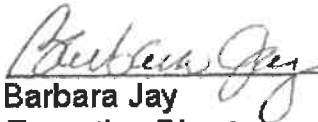
BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Caryn L. Hines

Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 6th day of November, 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. 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.

