

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
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(240) 777-6600

Case No. A-6578

PETITION OF DAVID AND PATRICIA REICHMAN

OPINION OF THE BOARD

(Hearing Date: September 12, 2018)

(Effective Date of Opinion: September 27, 2018)

Case No. A-6578 is an application by David and Patricia Reichman (the "Petitioners") for variances needed in connection with the construction of an accessory structure (garage). Specifically, the Petitioners are requesting a variance of 12.00 feet so that they can locate their accessory structure within 38.00 feet of the side street lot line. The required setback is fifty (50.00) feet, in accordance with Section 59-4.4.4.B.2 of the Zoning Ordinance. In addition, the Petitioners are requesting a variance to permit the proposed construction of an accessory building in a location forward of the rear building line of the principal building. Section 59-4.4.4.B.2.c of the Zoning Ordinance requires that accessory structures be located behind that line. Finally, the Petitioners are seeking variance relief from the limitation set forth in Section 59-4.4.4.B.2.d of the Zoning Ordinance, in order to permit a total accessory structure footprint that is greater than 50% of the footprint of the main building.

The Board of Appeals held a hearing on the application on September 12, 2018. Petitioner David Reichman appeared at the hearing *pro se* in support of the variance application.

Decision of the Board:

Variance to permit the proposed construction of an accessory building in a location forward of the rear building line **GRANTED**.

Variance of 12.00 feet from the required 50.00 foot side street lot line setback **DENIED**.

Variance to permit a total accessory structure footprint greater than 50% of the footprint of the main building **DENIED**.

EVIDENCE PRESENTED

1. The subject property is Lot 88, Block M, Goshen Estates Subdivision, located at 8601 Lochaven Drive, Gaithersburg, MD, 20882, in the RE-2 Zone.
2. The subject property is a seven-sided, 2.13 acre corner lot, bounded to the south by Lochaven Drive, and to the east by Miracle Drive. In 1989, the Board of Appeals granted a variance for the construction of an accessory structure (swimming pool) in the side yard of the subject property. See Exhibit 7 (Board of Appeals' Case No. A-2494). In the hearing for that variance, Petitioner David Reichman testified that he could not construct the proposed pool in the rear yard because, among other things, it would violate the minimum setbacks from the existing well. That Opinion further reflects that Mr. Reichman testified that there is an established orchard on a slope at the rear of the property, and a barn and paddock area located between the house and the orchard. With respect to the visibility of the proposed pool from the abutting roads, Mr. Reichman testified in Case No. A-2494 that the view of the proposed pool from Lochaven Drive would be "obscured by an orchard which goes from the front right corner of the house around to the pine grove on Miracle Drive," and that any view of the pool from Miracle Drive would be screened by a "triple thick row of 8-10 year old pine trees" and a fence. See Exhibit 7.
3. The Justification Statement submitted with the current variance application explains the Petitioners' reasons for wanting to convert their existing attached garage into a first floor master bedroom suite, and for seeking to construct a detached garage in the location proposed. It states that the Petitioners have lived in this home, which was built in 1979, since 1986, and that they are seeking to modify their home so that they can avoid having to go up and down stairs as they age. The Statement explains in detail the reasons why it makes sense to convert the existing garage into the new bedroom suite, including the presence of plumbing and sewer lines on that side of the house. Similarly, the Statement explains the reasons that the Petitioners are seeking to locate the proposed garage in the front yard and off to the side of the house, where it would "sit naturally in the trees, minimizing the appearance of the building and be tucked away, so it looks like it might always have been there, not that noticeable." It indicates that Petitioners "are asking for a 12' variance from the side street so that the garage doesn't sit immediately in front of the existing pool (and possible sunroom) and look like it is sitting out in the front yard instead of off to the side of the house." They indicate that such a location would "balance the neighbor's similarly size garage on the left side of our front yard" and that it would "conform with the surrounding area and various similar structures that have been recently built." See Exhibits 3(a) and (b).
4. The Justification Statement indicates that the rear yard contains an old accessory structure, referred to as a "barn" by DPS and as a "carriage house" by the Petitioners, and indicates that "... Petitioner has no knowledge as to when the

'Barn' (existing accessory building) was built, but it was over 200 years ago. From interviews with former neighbors, it seems the 'Barn' was part of the original farm that preceded the primary structure." See Exhibit 3(a). The Statement explains that because the footprint of the 'Barn' is counted towards the maximum allowable footprint for accessory structures on the property, the proposed garage will exceed the 50% footprint limitation imposed on accessory structures by 73.6 square feet. The Petitioners request that in light of the large size of their property, and the relatively small size of the overage, that this variance be granted.

In explaining why the proposed garage cannot be constructed behind the rear building line, in addition to noting the presence of the "Barn" in the rear yard, the Statement goes on to note that the rear yard is also encumbered by the well water supply line and large black walnut trees, and that "there is no accessible location to place the garage behind the house" and "no backyard availability because of access and topography." The Petitioner further amplified this last statement during his testimony, explaining the difficulties that would be attendant to driving a car in and out of any garage that might be constructed in the rear yard because of the lack of maneuverable space arising from existing conditions/obstructions and topography, and concluding that access to such a location was not feasible. In response to Board questions asking if the existing barn could be converted for use as a garage, the Petitioner testified that it could not because of the way in which it was constructed and its resultant narrowness.

5. The Justification Statement indicates that the grant of these variances and the construction of the proposed garage would not be adverse to the use and enjoyment of abutting or confronting properties, noting that "[t]he majority will not even notice it." It indicates that the Petitioners "have spoken with several of the confronting and nearby neighbors about the location and building of the garage. After explaining the site location, they were all very positive for the addition and proposed location of the accessory building. To quote several neighbors, 'It makes sense to put it there.'" See Exhibits 3(a) and (b). At the hearing, the Petitioner testified that he has talked with his neighbors at 20801 Miracle Drive, and that they strongly support the construction of a new garage in the proposed location. He testified that his neighbors at 8600 Lochaven Drive also support the proposed construction, and that his neighbors at 8610 Lochaven Drive have no objection to it. He testified that these were the only neighbors who could see into the garage if it were built.
6. The Justification Statement states that to the Petitioners' knowledge, "every home in this neighborhood has a garage either attached or detached. To have a property without this feature would be nonconforming to the neighborhood as well as a hardship."
7. At the hearing, the Petitioner testified that he and his wife have lived in the house on the subject property for over 30 years, and that as they age, it is becoming more difficult to manage the stairs. He explained their plans to convert the existing two-

car garage into a first floor master suite, and to construct a new three-car garage on the front right of their property. He testified that the proposed garage would be accessed by an arched front driveway, and showed pictures of a neighboring property with a similar driveway. See Exhibit 5(g).

The Petitioner testified that his property was originally part of a 200-acre asparagus farm owned by two brothers, that his house is located where the original (1805) barn was located, and that his existing barn/carriage house was also located on the property. He testified that there is no room on the left (west) side of his house to locate a garage because the driveway and house, which were built before he acquired the property, are very close to that property line. He also noted the presence of an accessory structure on his abutting neighbors' property which is located approximately 13 feet from that same (shared) property line, and testified that locating his garage on that side would create an alley effect. See Exhibit 5(i). He further testified that large trees on that side would block access to the rear yard. The Petitioner testified that there is no room on the right (east) side of his house to locate a garage because of an existing pool, which was built in that location 30 years ago following the grant of a variance. He later explained, when asked if the pool should be considered a self-created hardship, that it was located on the right side of the house for safety and convenience, and because it could not be located behind the house. Finally, he testified that even if the pool were not there, they could not locate a garage there because of the well water lines and because the space is too small.

The Petitioner testified that the subject property is a corner lot with 50-foot setbacks required along both Lochaven and Miracle Drives. He testified that he is requesting to locate his garage 12 feet into the setback on the Miracle Drive side, indicating that that is the most aesthetically pleasing placement. He testified that his front yard is sloping, and that the proposed location for the garage sits eight to ten feet above Miracle Drive. When asked by the Board if he could move the garage farther away from Miracle Drive (i.e. farther to the west), to eliminate the need for a variance from the side street lot line setback, he testified that he could theoretically do that. He then proceeded to explain why the garage would look better off to the right (east) side of his front yard.

The Petitioner testified that the proposed garage is 24 feet by 40 feet. When asked by the Board if he could reduce the size of the garage to eliminate the need for the variance from the 50% footprint limitation, the Petitioner testified that he would need to check with the person who prepared the drawings for his garage to see if they could shrink the footprint, but that that would seem doable. In response to further Board questioning, he testified that he would prefer a garage with three single doors over a garage with one double door and one single door.

FINDINGS OF THE BOARD

Based on the Petitioners' binding testimony and the evidence of record, the Board finds that the variance to permit the proposed construction of an accessory building in a location forward of the rear building line can be granted, but that the twelve (12) foot variance from the required 50.00 foot side street lot line setback, and the requested variance to permit an accessory structure footprint greater than 50% of the footprint of the main building, must be denied.

With respect to the requested variance from the setback for the side street lot line, the Board finds that the Petitioners have not demonstrated that the subject property has any unusual or extraordinary situations or conditions for the purposes of meeting Section 59-7.3.2.E.2.a of the Zoning Ordinance which would prevent the location of the proposed garage in compliance with the side street lot line setback. Indeed, the Board notes that the Petitioner testified in response to Board questioning that the proposed garage could be located further away from Miracle Drive, outside of the setback, but that he would prefer that it be located in the proposed location. Having found that the application fails to meet Section 59-7.3.2.E.2.a, the Board need not address the remaining elements of the variance test, and finds that the variance from the applicable side street lot line setback must be denied.

With respect to the requested variance from the 50% footprint limitation, the Board finds that the Petitioners have not demonstrated that the subject property has any unusual or extraordinary situations or conditions for the purposes of meeting Section 59-7.3.2.E.2.a of the Zoning Ordinance which would prevent the construction of a garage that meets the 50% footprint limitation. Again, the Board notes that while the Petitioner testified that he would have to check with his designer, he testified that it was probably possible to reduce the size of the garage by the needed square footage (73.6 sq. ft.) in order to comport with the footprint size restriction. In addition, the Board finds that at 24 feet by 40 feet, the proposed garage is large in size, more than would be necessary to replace the existing attached two car garage. Accordingly, the Board finds that the grant of a variance to allow such construction would not be 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 and therefore to satisfy Section 59.7.3.2.E.2.c of the Zoning Ordinance. Having found that the application fails to meet Sections 59-7.3.2.E.2.a and c of the Zoning Ordinance, the Board need not address the remaining elements of the variance test, and finds that the variance from the 50% footprint limitation must be denied.

Finally, with respect to the request that a variance be granted to permit the Petitioners to locate their proposed accessory structure forward of the rear building line, the Board finds that that variance can be granted because it complies with the applicable standards and requirements set forth in Section 59-7.3.2.E, as follows:

1. *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 Board finds that challenging topography and the presence of a well constitute extraordinary conditions peculiar to the subject property which combine to preclude construction of the proposed accessory structure behind the rear building line, in satisfaction of Section 59-7.3.2.E.2.a.i of the Zoning Ordinance. The Board notes that both of these conditions were cited in the grant of a similar variance from the requirement that accessory structures be located in the rear yard in 1989. See Exhibit 7.

2. *Section 59.7.3.2.E.2.b the special circumstances or conditions are not the result of actions by the applicant;*

The Petitioners purchased this property in 1986, and their Justification Statement indicates that the "Accessory building, Primary house and driveway were all in place when [they] purchased the home" See Exhibit 3(a). Furthermore, variance Case No. A-2494, which was granted in 1989, cites the existence of the well as one of the reasons for grant of the variance. See Exhibit 7. Thus the Board finds that there is no evidence in the record to suggest that the Petitioners created the special circumstances pertaining to the property.

3. *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 location of the existing well and the topography of the property's rear yard limit the ability of the Petitioners to locate an accessory structure behind the rear building line, creating a practical difficulty for the Petitioners. The Board finds that the requested variance, to allow the proposed garage to be located in front of the rear building line, is the minimum necessary to overcome the practical difficulty imposed by compliance with the locational restrictions of the Zoning Ordinance.

4. *Section 59.7.3.2.E.2.d the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan;*

The Board finds that the construction of this accessory structure continues the residential use of this property, and is consistent with the recommendations of the applicable master plan.

5. *Section 59.7.3.2.E.2.e granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

The Board finds that, per the Justification Statement and the testimony of the Petitioner, that the grant of this variance to allow the construction of the proposed garage forward of the rear building line will not be adverse to the use and enjoyment of abutting or confronting properties. The Board notes that this is a very large property with several

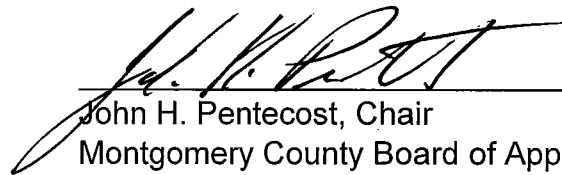
treed areas, and that the Petitioners have expressed a desire to locate their proposed accessory structure in as unobtrusive a location as possible. The Board observes that in its previously proposed location, the proposed construction was supported by the Petitioners' confronting neighbors at 20801 Miracle Drive and 8600 Lochaven Drive, and was not objected to by the neighbors at 8610 Lochaven Drive.

Accordingly, the requested variance to allow an accessory structure (garage) to be located in front of the rear building line is **granted**, subject to the following condition:

1. Petitioners shall be bound by the testimony and exhibits of record, to the extent relevant to the variance granted.

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Katherine Freeman, with Edwin S. Rosado, Vice Chair, Stanley B. Boyd, and Bruce Goldensohn 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.



John H. Pentecost, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 27th day of September, 2018.



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.

See Section 59-7.3.2.G.1 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.