

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
<http://www.montgomerycountymd.gov/boa/>

(240) 777-6600

**Case No. A-6581**

**PETITION OF JOHN R. OLSZEWSKI**

OPINION OF THE BOARD

(Hearing Date: September 26, 2018)

(Effective Date of Opinion: October 10, 2018)

Case No. A-6581 is an application by John R. Olszewski (the "Petitioner") for variances needed in connection with the construction of an accessory structure (garage). Specifically, the Petitioner is requesting a variance of three (3) feet so that he can locate his accessory structure within seven (7) feet of the rear lot line. The required setback is ten (10) feet, in accordance with Section 59-4.4.6.B.2 of the Zoning Ordinance. In addition, the Petitioner is requesting a variance of ten (10) feet to permit the construction of the proposed accessory structure within five (5) feet of the right side lot line. The required setback from that lot line is fifteen (15) feet, in accordance with Section 59-4.4.6.B.2 of the Zoning Ordinance. Finally, the Petitioner is seeking a variance to allow the proposed construction to exceed the limitation set forth in Section 59-4.4.6.B.2.d of the Zoning Ordinance, which states that the maximum footprint of an accessory building on a lot where the main building is a detached house is 50% of the footprint of the main building or 600 square feet, whichever is greater.

The Board of Appeals held a hearing on the application on September 26, 2018. Petitioner John R. Olszewski appeared at the hearing with his father, Robert Olszewski, in support of the variance application.

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

**EVIDENCE PRESENTED**

1. The subject property is Lot 21, Block D, Sycamore Acres Case #42084-FL Subdivision, located at 15904 Maple Ridge Court, Rockville, MD, 20853, in the RE-1 Zone. It is a four-sided property that is nearly rectangular in shape, except for its angled rear lot line. The property is 62,000 square feet in size (1.42 acres).

2. There is a septic tank and drainage field in the center of the property's rear yard. See Exhibit 1. The rear yard also contains a swimming pool, positioned close to the southern side lot line, and a 400 square foot shed, located close to the northern side lot line. See Exhibits 3(a) and (b).
3. The Petitioner is seeking to construct a 3,300 square foot accessory structure (garage) in his rear yard. See Exhibits 1, 3(a) and 3(b). The Application and Justification Statement ("Statement") submitted with the variance application states that the proposed accessory structure is intended as a "private museum for the housing and mechanical repair of classic vehicles currently owned by the Petitioner," explaining that "[t]he proposed structure, while larger than 50% of the house footprint, is the wisest use of land which would allow the Petitioner to have the needed enclosed space to provide for the housing of a current antique car collection and the needed space to repair/restore these vehicles inside." The Statement indicates that the existing house has a footprint of 3,000 square feet. See Exhibit 1.

The Statement indicates that the Petitioner could construct three individual accessory buildings in lieu of the single, larger building, noting that "[i]n order to provide the equivalent useful storage work space [to the proposed accessory structure] the petitioner would need to build two buildings with a 1,500 sq.ft. footprint and full second floors and an additional third building somewhat smaller with a total coverage of the 3 buildings of 4,000 sq.ft." The Statement goes on to assert that the construction of three buildings would "certainly" impact the septic tank and field. It further asserts that "[t]he single structure option will not have any negative impact on any of the neighboring properties or impact their ability to enjoy their houses and yards while the three building option would locate three structures taller than the single structure and have the look of a small subdivision in the back yard." See Exhibit 1. The Statement notes that with the construction of the proposed garage, the total lot coverage would be less than 11% of the property, below the 15% coverage allowed in the RE-1 Zone.

4. The Statement submitted with the variance application states that the need for the variance from the rear lot line setback is due to the angled nature of the rear lot line such that the rear setback of the proposed garage differs from one end to another. With respect to the need for variance relief from the side setback, the Statement explains that it was "for the purpose of aligning the garage door of the structure with the existing drive and house in order to reduce the amount of pavement or hardscaping needed to connect the accessory structure to the existing driveway." The Statement also cites the need to keep construction as far away as possible from the existing septic tank and drainage field as justification for locating the proposed garage close to the northern side lot line. It states that "[d]ue to the configuration of the lot and adjacent structures a single building of the

size and location requested will have limited visibility because of the location of buildings and accessory structures on adjacent lot." See Exhibit 1.

5. The Statement asserts that the proposed accessory structure will fit in with what is described as an eclectic and varied neighborhood, as follows:

[T]he neighborhood and adjacent neighborhood have an unusual development pattern including houses not adhering to the frontline setback, Accessory structures in the front yard, Accessory structures located very close to the side and rear lot lines and Accessory structures as large or larger than the footprint of the house. The style of the houses in the neighborhood is widely varied with no two houses even being remotely similar to one another. Additionally, the age of the house likewise ranges from over 50 years to relatively recent.

See Exhibit 1. The Statement states that the property adjacent to this property is a residential nursing home, that one of the confronting properties is a residential day care center, and that another property in the subdivision is being used "as a storage lot for commercial landscaping equipment." Echoing the description above, the Statement indicates that this subdivision and surrounding developments "represent a wide assortment of housing types with accessory structures of all sizes and shapes and with rear and side line setbacks the same as or less than being requested." See Exhibit 1. The Petitioner attaches to his Statement lists of other properties in the vicinity that have accessory structures within 5 feet or less of the rear lot line setback, properties that have accessory structures within 5 feet or less of the side lot line setback, and properties that have accessory structures that exceed 50% of the main structure footprint.<sup>1</sup> The Statement notes that even with the addition of the proposed accessory structure, the total lot coverage on the subject property will still be less than the 15% allowed. See Exhibit 1.

6. At the hearing, the Petitioner and his father testified that they had been told by the County's Department of Permitting Services ("DPS") that they could construct three accessory buildings in the rear yard, each with a footprint less than 50% of the footprint of the primary structure, without the need for variances provided that the permits for each individual accessory structure were issued, and the construction of that structure was completed, prior to the start of the next structure. The Petitioner's father testified that when his son was first considering buying this property in 2007, they had contacted DPS to make sure that they could construct the proposed garage, and were told that they could, subject to the 15% lot coverage limit. He testified that by the time his son actually purchased the property

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<sup>1</sup> In response to Board questioning, the Petitioner's father testified that they used the measuring tool on Google Maps to determine the setbacks and sizes of these structures, after testing the accuracy of that tool by measuring their own property.

in 2009, the rules had changed, and the footprint of accessory structures was limited to 50% of the footprint of the main building. The Petitioner's father asserted that tying the size of the permitted accessory structure to the size of the house favored wealthier persons because they could afford larger houses, and thus could have larger accessory structures. He testified that his son's neighborhood was an eclectic neighborhood with many large garages, that the proposed garage was not out of character with the neighborhood, and that there were garages in the neighborhood that were larger than the garage his son was proposing. The Petitioner claimed that if the Board were to deny these variances, it would essentially force him to increase the size of his house, including building an attached garage, in order to increase his house footprint to the extent that he could construct an accessory structure adequate to serve his needs.

7. At the hearing, the Petitioner testified that the location for the proposed structure was chosen based on the location of an old septic tank and field in the center of the rear yard, and the fact that there was a pool on the far side of the yard and a water main in the front yard. He testified that he had tried to align the proposed structure with the driveway. The Petitioner testified that the size of the proposed accessory structure was due to the number of collectible vehicles he possessed.<sup>2</sup>
8. The Petitioner testified that the reason he had purchased the subject property was because he thought that he could build the desired garage on this property, and that he never would have purchased in Montgomery County if he had known that he would not be able to do so.

## 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

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<sup>2</sup> The Statement included a list of seventeen (17) vehicles in the Petitioner's collection.

- 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;**

**Section 59.7.3.2.E.2.a.v the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;**

The Board notes that the Petitioner in this case has attempted to satisfy the first element of the variance test by stating that the subject property's angled rear lot line is an extraordinary condition peculiar to the property, in satisfaction of Section 59-7.3.2.E.2.a.i of the Zoning Ordinance. The Board finds that while the rear lot line is slightly angled, the Zoning Vicinity Map shows, and the Board finds, that this condition is common to all of the lots on the Petitioner's side of Maple Ridge Court, and to the properties abutting those properties to the rear. Thus the Board cannot find that this condition satisfies Section 59-7.3.2.E.2.a.i.

The Petitioner has also asserted that the proposed accessory structure conforms with the established historic or traditional development pattern of a street or neighborhood, thereby satisfying Section 59-7.3.2.E.2.a.v of the Zoning Ordinance. Indeed, the Petitioner has included with his submission lists of other properties with accessory structures that are located within 5 feet or less of the rear lot line setback, properties with accessory structures that are within 5 feet or less of the side lot line setback, and properties with accessory structures that exceed 50% of the main structure footprint. While the Petitioner does provide addresses for the properties with these structures, he does not identify the locations of these properties on a map, which would have enabled the Board to better analyze whether their presence constituted a pattern on the street or in the neighborhood. In addition, the Petitioner fails to identify whether these structures were built with variances, and whether they were constructed before or after the enactment of the current (2014) Zoning Ordinance. The latter is particularly important with respect to the list of structures having a footprint that exceeds 50% of the footprint of the principal structure, since as noted in footnote 5, below, DPS interpreted the 50% footprint limitation under the old (2004) Zoning Ordinance as a per structure limitation, and interprets the 50% footprint limitation in the current (2014) Zoning Ordinance as a limit on the total footprint of all accessory structures. Furthermore, as noted in the testimony of the Petitioner's father, the 50% footprint limitation was not in effect when the Petitioner first started looking at this property in 2007, and thus some of the structures identified by the Petitioner may have been constructed before the enactment of this limitation. In light of the foregoing, the Board finds that the evidence presented by the Petitioner in support of his argument that the proposed structure satisfies Section 59-7.3.2.E.a.v of the Zoning Ordinance is not sufficient for the Board to find that the requested variances satisfy this element of the variance test, and the Board notes that even if the Petitioner were permitted to provide additional evidence in support of this assertion, the variance request would fail under Section 59-7.3.2.E.2.c, as explained 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 Petitioner's testimony and Statement, and the testimony of his father, that the size of the proposed accessory structure was determined by the Petitioner's desire to have adequate space to store and work on his collection of classic cars, currently seventeen (17) in number. The Board finds that the location of the proposed garage was chosen to avoid encroaching on an existing septic field and to facilitate access from the existing driveway. The Board notes that it is the large size of the proposed garage—approximately 3,300 square feet<sup>3</sup>—that necessitates the need for

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<sup>3</sup> To provide some perspective regarding the size of the proposed garage, the Board observes that Section 59-6.2.5.E.1 of the Zoning Ordinance states that the minimum dimensions of a standard perpendicular parking space are 8.5 feet wide by 18 feet long, giving that space a minimum footprint of 153 square feet. The minimum dimensions of a standard parallel parking space are 7 feet wide by 21 feet long, giving that

a variance from the 50% footprint limitation as well as from the side and rear setbacks, and finds in this regard that the site plan shows adequate space to locate a smaller garage in the same general area proposed by the Petitioner, at the end of the driveway and away from the septic field, without the need for any variance relief. See Exhibit 3(a). In further support of this finding, while the Board does not agree with the assertion in the Petitioner's Statement and the testimony that if the requested variances were denied, the Petitioner would instead be allowed to construct three individual accessory buildings that would have a combined footprint of approximately 4,000 square feet<sup>4</sup> in lieu of the single structure proposed,<sup>5</sup> the Board finds that this assertion by the Petitioner corroborates its finding that there is adequate space in the rear yard to locate an accessory structure of reasonable size without the need for variances.<sup>6</sup>

Having found that a reasonably-sized detached accessory structure/garage can be located on the property without the need for variances, the Board finds that the strict application of the Zoning Ordinance does not cause the Petitioner a practical difficulty due to an unusual condition of the property because it would not unreasonably prevent the Petitioner from using his property for a permitted purpose, and thus the Board finds that the variances requested are not the minimum necessary to overcome this (non-existent) practical difficulty. In addition, the Board finds that the large size of the proposed single accessory structure, which necessitated this request for variances, was determined by the Petitioner and is for his convenience, to house his collection of cars. The Court of Appeals has previously noted that the need sufficient to justify a variance "must be substantial and urgent and not merely for the convenience of the applicant." Carney v. City of Baltimore, 201 Md. 130, 137 (1952). Accordingly the Board finds that the requested variances fail to meet Section 59-7.3.2.E.2.c of the Zoning Ordinance and must be denied. Having found that the requested variances fail to satisfy this element of the

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space a minimum footprint of 147 square feet. While the Board recognizes that the dimensions of a typical garage are not the same as the dimensions of a parking space, the latter make apparent just how large the Petitioner's proposed garage is.

<sup>4</sup> The Petitioner's Statement indicates that he would have to construct two accessory structures with a 1,500 square foot footprint, and one accessory structure with a 1,000 square foot footprint, in order to gain the workable space that the proposed single structure would afford him. See Exhibit 1.

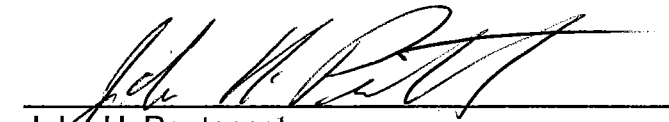
<sup>5</sup> Contrary to the testimony and Statement, the Board understands that, although DPS interpreted the 50% footprint limitation under the old (2004) Zoning Ordinance as a per structure limitation, DPS interprets the 50% footprint limitation in the current (2014) Zoning Ordinance as a limit on the total footprint of all accessory structures and not as a per structure limitation. See BOA Case No. A-6550, decided June 15, 2018 (appeal challenging DPS's denial of building permit for shed based on lot coverage DENIED)(decision currently on appeal, Civil No. 450978-V). For this reason, the Board does not believe that DPS would permit the construction of multiple accessory structures, the cumulative footprint of which exceeded 50% of the footprint of the principal structure, without the need for a variance from the 50% footprint limitation.

<sup>6</sup> Per the Statement, the footprint of the house is 3,000 square feet, and there is an existing accessory structure (shed) with a footprint of 400 square feet on the property. Thus, in light of the Board's understanding of DPS' interpretation of the 50% footprint limitation in Section 59-4.4.6.B.2.d, the Petitioner could construct an accessory structure with a footprint of approximately 1,100 square feet, which could house multiple vehicles (based on the area needed for a single parking space), without the need for a variance ((3,000 / 2) - 400 = 1,100).

variance test, the Board will not address the remaining elements, since as noted above, the test is conjunctive, and all elements must be met if the variances are to be granted.

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



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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 10th day of October, 2018.



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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.