

BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. A-6738
PETITION OF MATTHEW DALBEY

OPINION OF THE BOARD
(Hearing Date: March 2, 2022)
(Effective Date of Opinion: March 11, 2022)

Case No. A-6738 is an application by Petitioner Matthew Dalbey for two variances needed for the addition of a second story and a one-story addition to an existing garage for an accessory dwelling unit. The proposed construction requires a variance of three (3) feet as is it within four (4) feet of the left side lot line. The required setback is seven (7) feet, in accordance with Section 59-3.3.3.C.2.c of the Zoning Ordinance. In addition, the proposed construction requires a variance of three (3) feet as it is within nine (9) feet of the rear lot line. The required setback is twelve (12) feet, in accordance with Section 59-3.3.3.C.2.c of the Zoning Ordinance.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on March 2, 2022. All participation was done via Microsoft Teams. Petitioner Matthew Dalbey participated in the proceedings in support of the requested variance, assisted by his architect, Eric Saul.

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

EVIDENCE PRESENTED

1. The subject property is Lot 64, Branwill Park Sec 2 Subdivision, located at 9307 Wire Avenue, Silver Spring, Maryland, 20901 in the R-60 Zone. It is a four-sided lot located on the east side of Wire Avenue. The subject property has a slanted rear lot line, such that the left side of the property is deeper than the right side. It has a total area of 5,678 square feet, which is substandard for the R-60 Zone. See Exhibits 3 and 4.

2. The Petitioner is seeking to convert an existing detached garage into an accessory dwelling unit ("ADU"). The existing garage is located four (4) feet from the left (north) side property line and nine (9) feet from the rear (east) property line. See Exhibit 3. The Petitioner's Justification Statement ("Statement") describes the changes to the existing structure that are needed to effect the proposed conversion as follows:

Petitioner proposes to convert the existing accessory garage structure into an ADU. The garage requires modifications to create a legal ADU and to meet current building codes, which requires a variance. The current site is unusually small, and, without a variance, it would be impossible to build an ADU in the rear yard, as required in the Zoning Ordinance.

To meet building codes, the roof structure needs to be rebuilt to code and made taller for appropriate headroom in the unit. Since the entire roof is being replaced, Owner has proposed a taller roof with dormers less than 50% of the total roof area (dormers less than 50% of the total roof area are not factored into the mean roof height calculation). This additional height does not exceed the maximum allowable height of 20', nor the allowable average height of 15' to require additional setback. The proposed mean roof height is 14'-8".

It would be impossible to convert the existing garage to an ADU without an increase in footprint, as the footprint of the existing structure is too small for an ADU at only 181 square feet. Petitioner proposes a 1-story addition approximately 7 feet by 13 feet in length on the south side of the existing structure. The addition will maintain a footprint of less than 24 linear feet, which is the maximum length before additional setback is required.

See Exhibit 3. The Statement notes that the substandard size of the property and its angled rear lot line also create a hardship for the Petitioner and factor into the need for variance relief. The Statement states that "[t]he space between the rear of the main house and the rear property line (which is angled) ranges between 18 and 30 feet," and notes that after application of the required 12 foot rear setback, the Petitioner is left with "a triangular buildable area of only 9 to 17 feet in depth" to build on behind the house. The Statement states that it is "impossible to construct a minimum sized detached ADU" on an area this size. See Exhibit 3.

3. The Statement at Exhibit 3 states that the proposed construction uses an existing legal nonconforming building, as follows:

While it is unknown the exact time the existing accessory structure was built, it was constructed prior to the date determining a legal, nonconforming structure (1954), and before 1941 as evidenced by the plat map drawing in the "Atlas of Montgomery County, Maryland, dated 1941 (see attached photos showing the existing garage structure drawn in this map book) [BOA Exhibits 7(a)-(b)].

4. The Statement at Exhibit 3 further elaborates on the time of construction in noting that the Petitioner is not responsible for the construction or location of the existing garage:

The existing accessory structure in the rear yard was constructed prior to the Petitioner's purchase of the house and without their knowledge of when it was built. Petitioner purchased the property in 2014 and it is believed the structure was built in 1937, the same year the main house was built. The existing structure was already constructed in its current location on the site, and the special circumstances or conditions were not a result of actions by the Petitioner.

5. In addressing the practical difficulty that full compliance with the Zoning Ordinance poses for the Petitioner, the Statement explains the need for improvements to the existing building, both for code compliance purposes and for habitability, as follows:

In order to convert a garage to an ADU, building codes must be met and the structure must be upgraded. The roof structure is too low to allow for proper ceiling height, insulation and HVAC equipment, and the existing footprint of only 181 square feet is not enough to accommodate a useful or practical ADU. It would be highly impracticable, and impossible, to tear down the structure and rebuild a new, similar sized structure that meets all of the zoning setbacks and regulations.

See Exhibit 3. The Petitioner's variance application reiterates the practical difficulties imposed by the property itself, stating that the original garage was constructed too close to the side and rear lot lines, and that the rest of the rear yard is too small to fit an ADU within the required setbacks, such that the Petitioner "would find it impossible to construct an ADU in the rear yard of this property." See Exhibit 1.

6. Finally, the Statement states that "[b]y remaining in its current location with a small addition and moderate increase in height, the proposed project preserves the residential character of the neighborhood." See Exhibit 3. The Statement notes that the proposed structure will remain below the height limit for accessory structures, and states that it will not adversely affect the use and enjoyment of neighboring properties, as follows:

The proposed additions to the existing structure will not negatively impact the adjoining neighbors. The variance will not negatively impact the character, health, safety, welfare, or security of the neighboring residents. It will remain under the allowable height limit and not be built any closer than the current structure.

7. At the hearing, the Petitioner testified that he has spoken with his confronting neighbors, as well as with his side and rear neighbors, and that all are supportive of the proposed construction.

8. Mr. Saul testified that as shown on the Site Plan, there is no place else in the Petitioner's rear yard to construct an ADU, noting the required seven (7) foot side and 12 foot rear setbacks. He testified that the original garage was built three (3) into both the side and rear setbacks.

Mr. Saul testified that the footprint of the existing structure is not large enough to accommodate an ADU, noting that the building code requires a full-size bathroom and bedroom. He testified that even with the addition of a second story over the existing garage, the space is not large enough, and that that is why the Petitioner has proposed the one-story addition on the side of the garage. Mr. Saul testified that the one-story addition will maintain the nine (9) foot setback of the original garage from the rear lot line. He testified that there is no other location on this property where the proposed ADU could be constructed without variances, and that he had tried to design the structure to be as small as possible so as not to be offensive to the neighbors. Mr. Saul testified that the

height of the proposed structure will be below the 20 foot peak and 15 foot mean heights allowed.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the variances from the left side and rear lot lines can be granted. The Board finds that the requested variances comply 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 at 5,678 square feet, the subject property is substandard for the R-60 Zone, which has a minimum size of 6,000 square feet. The Board further finds that the subject property has an unusual, angled rear lot line. The Board finds that these factors combine to significantly constrain the buildable area available for construction behind the rear building line of the existing house on the subject property, and that these circumstances, taken together, constitute an extraordinary condition peculiar to this property, in satisfaction of this element of the variance test. See Exhibits 3 and 4.

Section 59-7.3.2.E.2.a.ii. – the proposed development uses an existing legal nonconforming property or structure;

The Board finds that the proposed development is an addition to an existing accessory structure that is located only four (4) feet from the left lot line and nine (9) feet from the rear lot line, and that, per the Statement, is nonconforming because it was constructed before 1954 (likely in or around 1937). See Exhibits 3 and 7(b). Because the proposed development uses this existing structure, the Board finds that this element of the variance test is satisfied.

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

The Statement indicates that the subject property was developed in 1937, and that the Petitioner purchased it in 2014. The Statement further indicates that the existing garage was located on the property in the setbacks at the time of his purchase. See Exhibit 3. Thus the Board finds that the special circumstances or conditions relating to this property and structure are not the result of actions by the Petitioner, and that this element of the variance test is satisfied.

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 compliance with the left side and rear lot line setbacks imposed by the Zoning Ordinance poses a practical difficulty for the Petitioner with respect to his ability to convert his existing garage for use as an ADU. In support of this finding, the Board notes, per the Statement, that the 181 square foot footprint of the existing garage is too small for an ADU, that in order to meet building codes, the roof of the existing garage needs to be rebuilt and raised, and that the property's small size and slanted rear lot line preclude construction of an all-new, minimum-sized ADU without variance relief. See Exhibit 3. The Board further finds, based on the Statement, the Site Plan, and the testimony of Mr. Saul, that the proposed addition to the existing nonconforming garage will not encroach any farther into the affected setbacks than the existing garage, and that the variances requested are the minimum needed to allow the Petitioner to reuse this nonconforming garage for an ADU and thus to overcome this practical difficulty that full compliance with the Zoning Ordinance would entail. See Exhibits 3 and 4. Accordingly, the Board finds that this element of the variance test is satisfied.

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 variances from the left side and rear lot lines, needed to allow the proposed conversion of the existing garage to an ADU, can be granted without substantial impairment to the intent and integrity of the East Silver Spring Master Plan (2000), which seeks, among other things, to preserve existing residential character, encourage neighborhood reinvestment, provide a greater range of housing types, and enhance the quality of life throughout East Silver Spring.

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, per the Statement, Site Plan, and the testimony of Mr. Saul, that the proposed construction will not encroach any farther into the rear setback than the existing garage, and will not exceed the allowable height for accessory structures. See Exhibit 3. The Board further finds, per the Statement, that the grant of the variances will not be adverse to the use and enjoyment of neighboring properties because it will not negatively impact the adjoining properties or "the character, health, safety, welfare, or security of the neighboring residents." In addition, the Board finds, based on the testimony of the Petitioner, that he has spoken with his immediate neighbors and that they do not object to the proposed construction. Finally, the Board notes that the record contains no opposition to the requested variances. On the basis of the foregoing, the Board finds that granting the requested variances will not be adverse to the use and enjoyment of neighboring properties, in satisfaction of this element of the variance test.

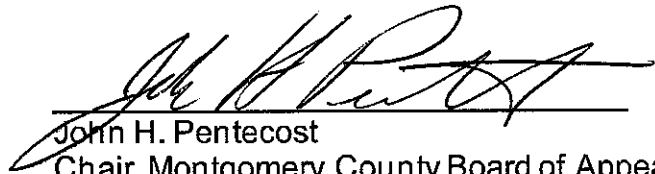
Accordingly, the requested variances from the left side and rear lot lines, needed for the construction of an addition to the Petitioner's existing garage, are **granted**, subject to the following conditions:

1. Petitioner shall be bound by the testimony and exhibits of record; and

2. Construction shall be in accordance with Exhibits 4 and 5.

Based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Caryn Hines, with Richard Melnick, Vice Chair, and Roberto Pinero 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 11th day of March, 2022.



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.

