

**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-6757

PETITION OF JOHN KEARNEY

OPINION OF THE BOARD
(Hearing Date: July 20, 2022)
(Effective Date of Opinion: August 3, 2022)

Case No. A-6757 is an application by John Kearney (the "Petitioner") for a variance needed for the proposed construction of an accessory building (detached garage). The proposed construction requires a variance as it would result in the cumulative footprint of all accessory buildings on the property exceeding 50% of the footprint of the principal building's footprint. The maximum cumulative footprint of all accessory buildings on a property is 50% of the footprint of the principal building, in accordance with Section 59.4.3.4.B.2.e of the Zoning Ordinance.

The Board of Appeals held a remote hearing on the application on July 20, 2022. All participation was done via Microsoft Teams. Petitioner John Kearney participated in the proceedings in support of the requested variance, along with James Irvine, his contractor.

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

EVIDENCE PRESENTED

1. The subject property is Lot 28, Block B, Norbrook Village 624 0/426 Subdivision, located at 17201 Palomino Court in Olney, Maryland 20832, in the RC Zone. The property is 4.528 acres (197,239.7 square feet) in size. The property is designated as historic. It contains an existing house, carriage house, grain silo, and shed. Per SDAT, the primary structure on this property dates to 1790, and the Petitioner purchased the property in 2016. See Exhibits 3 and 4, and SDAT printout.
2. The Petitioners' Statement of Justification ("Statement") indicates that the subject property, at nearly five acres, is larger in size than surrounding properties, which are

typically two to three acres. In addition, the Statement states that the subject property is the only property in the neighborhood that is designated as historic. Finally, the Statement indicates that neighboring properties typically have attached garages, which would be out of place on this historic home, and do not have grain silos:

While other houses nearby typically have attached garages, an attached garage would not be considered consistent with the historic character of the property and therefore would not be approved by the county Historic Preservation Commission. Finally, consistent with its historical nature, there is an old grain silo located on the property.

See Exhibit 3. The Statement further states that the presence of a silo on the property "should not be a reason to limit the owners' ability to construct a garage on the property," noting that the silo "is an agricultural structure and is retained and maintained by the owners to preserve the historic nature of the property," and that it is "situated on a far rear corner of the property" and so "does not cause the property to appear to be crowded with detached structures." See Exhibit 3.

3. The Petitioner is seeking to construct a 24 foot by 36 foot accessory building (detached garage) on the subject property. Because there are already several accessory buildings on this historic property, some of which comprise its historic setting, the addition of the Petitioner's proposed garage would result in the cumulative footprint of all accessory buildings on the property exceeding 50 percent of the footprint of the principal building, which is not allowed. The Petitioner intends to mitigate this by removing the existing 14 foot by 28 foot shed if he constructs the proposed garage, resulting in no change to the total number of accessory buildings on the property, and only a "marginal increase in the aggregate square footage of detached structures." See Exhibit 3.

4. The Statement indicates that the Petitioner's proposed garage is consistent with the size of the house, the size of the lot, and the size of other garages in the neighborhood. The Statement states that the proposed garage will be sited so that its visibility is minimized by trees and distance, as follows:

Because of the size of the lot, and the fact that it is bordered on three sides by woods or heavy trees, the garage would not be visible to neighboring houses. In addition, its proposed location is approximately 300 feet from the front of the property, so visibility of the garage from that vantage would be extremely limited. Please see the enclosed picture of the house; facing the house the new garage would be located to the left and farther back on the property than the house.

See Exhibit 3. As noted above, the Petitioner includes a photograph of the property with his request; he also includes a Site Plan showing the location of the proposed garage. See Exhibits 4 and 5(e).

5. The Statement states that the Petitioner intends to use the proposed garage to store vehicles and other items that would typically be stored out of view in a basement or

similar space. See Exhibit 3. The Statement maintains that failure to grant the requested variance would pose a practical difficulty for the Petitioner in that he would continue to lack this necessary storage, as follows:

If the variance is not approved the property will not include adequate storage space for vehicles and other items. There is a small stone carriage house on the property, but due to the size of its doorway it can only accommodate a single small vehicle. Moreover, the main house does not have a true basement but only a very small below grade space that is not climate conditioned. As a result, the owners' have limited spaces on the property to store vehicles and other items typically kept in garages and basements.

6. The Statement states that the County's Historic Preservation Commission ("HPC") has approved the proposed garage, noting that the HPC took into account the "consistency of [the proposed garage's] design and character with historic nature of the property as well as the general appearance of property." The Statement concludes, based on this approval and on the relationship of the proposed garage with this historically significant property, and based on the garage's similarity in size to other garages in the neighborhood, that the proposed construction would substantially conform with the "historic and traditional development pattern of the street and neighborhood where it is located." See Exhibits 3 and 7(a). In addition, the Petitioner has submitted an email letter indicating that the Architectural Control Committee of his homeowners association has also approved his proposed construction, further demonstrating that the proposed accessory structure fits with the neighborhood. See Exhibit 7(b).

7. The Statement states that the unique circumstances pertaining to the subject property are not due to actions by the Petitioner. See Exhibit 3. The Statement indicates that some of the existing accessory structures are part of the property's historic setting, and that while these structures are counted towards the cumulative footprint limitation imposed on accessory structures, they do not provide the functionality of the detached garage proposed by the Petitioner, as follows:

The special circumstances are not the result of any action by the applicant. The existing detached structures that will remain on the property and account for a portion of the detached structure square footage – the silo and small stone carriage house – are part of the historic nature of the property and do not provide the functionality of the garage structure the applicant seeks to construct. A third detached structure, the large shed, was present when the property was purchased by the applicant and will be removed if the garage is approved and built.

The Statement thus concludes that the cumulative footprint limitation "would not be an issue were it not for the historic silo and carriage house on the property," and that construction of the proposed garage "will not result in the property appearing crowded or overbuilt." See Exhibit 3.

8. The Petitioner submitted supplemental information setting forth the sizes of the various structures on the property that had not previously been called out. This supplemental submission states that the existing home with its covered porches is 2,782 square feet, the existing home without its covered porches is 2,248 square feet, the silo is 706 square feet, and the existing carriage house is 480 square feet. This submission therefore indicates that the proposed garage would be 31 percent of the footprint of the house if the covered porches were included, and 38 percent of that footprint if they were not. The Petitioner's supplemental submission further states that the combined footprint of the proposed garage and existing carriage house would be less than 50 percent of the footprint of the house if the porches are included. See Exhibit 10.

9. The Statement at Exhibit 3 states that the proposed garage will not be adverse to the use and enjoyment of neighboring properties, as follows:

Granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties. As discussed, the proposed garage is not disproportionate to the size of the property and is consistent with other structures in the neighborhood. No variance is being sought to setback requirements or other requirements that may affect other properties. Also, the Historic Commission's approval of the proposed garage demonstrates that its appearance is consistent with the historic nature of the property and will be visibly appealing. In any event, due to its positioning in the property and heavy trees bordering parts of the property, it will be nearly invisible to abutting and confronting properties.

10. The Patuxent Watershed Protective Association, Inc. ("PWPA") submitted a letter stating that the PWPA did not want to be a party to the proceedings because there were no overriding environmental issues. See Exhibit 11. After stating that, the PWPA letter did list several issues for the Board's consideration, including the existence of a stream on an adjacent downhill property, a request for tree replacement if trees of a certain size were removed, and a concern about additional impervious surface if the driveway were extended.

11. At the hearing, the Petitioner testified that his property is unique because it contains a historic house that dates to the 1800s. He testified that the property also contains an old grain silo and a stone carriage house, both of which are considered historic, as well as a non-historic 14 foot by 28 foot shed that will be removed if he is allowed to construct the proposed garage.

The Petitioner testified that the subject property is 4.5 acres in size, and that it is heavily wooded. He testified that the property is bordered to the rear by a large wooded lot that is owned by the homeowners association. The Petitioner testified that the proposed garage would barely be visible from the front of the property, noting that it would be about 300 feet from the street. In addition, he testified that the proposed garage would be barely visible to his neighbor on one side, and would not be visible to his neighbor on the other side. In response to a Board question asking if he had contacted his neighbors about his proposed garage, the Petitioner testified that he had sent an email explaining

his proposed construction to his abutting and confronting neighbors. He testified that one neighbor responded that the proposed construction looked nice. The Petitioner testified that another abutting neighbor had previously offered to write a letter of support when the Petitioner's proposal was pending before the HPC, but that he had declined that neighbor's offer, believing it was unnecessary.

The Petitioner testified that the existing outbuildings on his property preclude his compliance with the 50% footprint limitation. He stated that the grain silo, in particular, seems to "tip the scales" with respect to the footprint limitation. The Petitioner testified that in 2017 or 2018, with permission from the HPC, he had removed the 35 foot by 40 foot building that is shown on the Site Plan with the annotation "remains," because that building was collapsing. See Exhibit 4. The Petitioner stated that the HPC will not allow him to make changes to the historic carriage house, which he testified can only fit one small car because of its limited door size and capacity. He testified that the historic home has extremely limited storage space, and that the proposed garage was intended to help with that. Finally, the Petitioner testified that he could not add an attached garage to this house because it was historic.¹ He noted that the proposed detached garage would meet the required setbacks.

In response to Board questions, the Petitioner testified that if he were to construct the proposed 24 foot by 36 foot garage, he would remove the existing 14 foot by 28 foot shed, for a net gain of 472 square feet and zero new accessory buildings. He testified that if the 35 foot by 40 foot building that he had already removed was considered in the total universe of outbuildings on the property, that even with the construction of the proposed garage, the square footage of accessory structure coverage and the number of accessory buildings would be less than when he purchased the property.

FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the variance from the cumulative footprint limitation complies with the applicable standards and requirements set forth in Section 59.7.3.2.E.2, and can be granted, 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.iv. the proposed development contains a historically significant property or structure;

Based on the Statement, the HPC approval, and the testimony of the Petitioner, the Board finds that the subject property is historically designated, and that as a result,

¹ James Irvine, the Petitioner's contractor, testified that the grain silo is similarly historic, and cannot be removed. He further testified that in his experience, the HPC would not allow an attached garage on this property.

the Petitioner had to seek, and has received, permission from the County's Historic Preservation Commission to undertake the proposed construction. See Exhibits 3 and 7(a). In light of this, the Board finds that the proposed development contains a historically significant property or structure, in satisfaction of this element of the variance test.

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

Based on the Statement and the SDAT information, the Board finds that the Petitioner purchased the subject property in 2016, long after it was developed, that he did not construct the existing historic structures on the property, and that there is nothing in the record to indicate that he is responsible for the property's historical significance or designation, in satisfaction of this element of the variance test.

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 cumulative accessory structure footprint limitation imposed by the Zoning Ordinance poses a practical difficulty for the Petitioner because the footprints of the historic carriage house and silo count towards the accessory structure footprint limitation on this property, but those structures, which must be retained, do not provide the Petitioner with the same functionality, particularly with respect to storage, that a modern accessory structure, or an accessory structure of his choosing, would provide. The Board notes in this regard that the historic carriage house can only accommodate a single vehicle, and that the Petitioner's historic home lacks storage space.

The Board further finds, in accordance with the Statement and the testimony of the Petitioner, that if the variance for the construction of Petitioner's 864 square foot garage is granted, the Petitioner has testified that he will remove an existing 392 square foot shed, so that the net increase in lot coverage on this 4.5 acre property will only be 472 square feet. See Exhibit 3. In addition, the Board notes, based on the testimony of the Petitioner, that if the previously removed outbuilding were counted in the lot coverage calculation, the garage would cause no net increase in coverage.

Finally, the Board finds that because of the historic designation of the subject property, any changes to the property must be reviewed and approved by the Historic Preservation Commission to ensure that they do not compromise the historic significance of this property, and that the HPC has approved the proposed construction. See Exhibit 7(a). The Board notes that Petitioner's Homeowner's Association has also approved the proposed construction. See Exhibit 7(b).

In light of the foregoing, the Board finds that the requested variance is the minimum needed to overcome the practical difficulty that full compliance with the Zoning Ordinance would impose by allowing the proposed construction, which has been approved by the

HPC and by Petitioner's HOA, on this historic property, in satisfaction of this element of the variance test.

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 proposed construction has been approved by the Historic Preservation Commission, and would continue the residential use of the property. The Board further finds that the Olney Master Plan recognizes the importance of and seeks to protect historically designated resources within the Master Plan area. Thus, the Board finds that the variance can be granted without substantial impairment to the intent and integrity of the applicable plans, in satisfaction of this element of the variance test.

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, based on the Statement, that the grant of the requested variance will not be adverse to the use and enjoyment of neighboring properties on account of the large size of the subject property and the fact that it is bordered on three sides by woods or heavy trees. The Board further finds, based on the testimony of the Petitioner, that the proposed structure will not be visible to one neighbor, and will be barely visible to the other. In addition, the Board finds, per the Statement, that the proposed accessory building would be set back approximately 300 feet from the road, again limiting its visibility, and per the testimony of the Petitioner, that the property backs to wooded property held by the homeowners association. See Exhibit 3. Finally, the Board finds that the proposed construction has been approved by the HPC and by the Petitioner's HOA. See Exhibits 7(a) and (b). The Board notes, in accordance with the testimony of the Petitioner, that his neighbors are aware of his proposal and that at least two are supportive, and further notes that the record contains no opposition to the requested variance despite it having been properly notice. Accordingly, the Board finds that granting the variance to allow the proposed construction will not be adverse to the use and enjoyment of neighboring properties, in satisfaction of this element of the variance test.

Accordingly, the requested variance to allow the cumulative footprint of all accessory buildings on the subject property to exceed 50% of the footprint of the principal building's footprint, as needed to allow construction of the Petitioner's proposed accessory building (detached garage), is **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(a)-(d).

Based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Roberto Pinero, with Richard Melnick, Vice Chair, and Caryn Hines 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 3rd day of August, 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.