

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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<http://www.montgomerycountymd.gov/boa/>**

**CASE NO. A-6783**

**PETITION OF JOSE GOMEZ-GARCIA**

**OPINION OF THE BOARD**

(Hearing held January 11, 2023)  
(Effective Date of Opinion: January 20, 2023)

Case No. A-6783 is an application by Jose Gomez-Garcia (the "Petitioner") for a variance necessary for a carport. The proposed carport requires a variance of four (4) feet as it is within three (3) feet of the left side lot line. The required setback is seven (7) feet, in accordance with Section 59.4.4.9.B.2 of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on Wednesday, January 11, 2023. The Petitioner participated in the proceedings in support of the requested variances, assisted by Jeronimo Betancourt and Ricardo Bopp.<sup>1</sup> Petitioner's abutting neighbor to the left (southeast), Rafaela Martinez, participated in opposition.

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

**EVIDENCE PRESENTED**

1. The subject property is Lot 14, Block T, Viers Mill Village Subdivision, located at 12302 Middle Road in Silver Spring, Maryland, 20906, in the R-60 Zone. It is an interior lot located on the southwest side of Middle Road. The subject property is rectangular in shape, with a depth of 122.59 feet and a width of 70 feet, and has an area of 8,581 square feet. Per SDAT, the Petitioner has owned the subject property since 2005. See Exhibits 4(b) and 7(b), and SDAT printout.

2. The Petitioner's Justification Statement ("Statement") indicates that there is an existing fence in the general vicinity of the shared property line between the subject

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<sup>1</sup> Mr. Betancourt and Mr. Bopp assisted both the Petitioner and Ms. Martinez with Spanish to English, and English to Spanish, translation throughout this proceeding. Both swore under oath that they would accurately and truthfully perform this function. The Petitioner did not request a translator prior to the hearing or at the hearing, seeming content to rely on the assistance of Mr. Betancourt and Mr. Bopp, and the Board of Appeals was not made aware that there was a potential need for translation services prior to the hearing.

property and the abutting property to the left. See Exhibit 3. Petitioner's Exhibit D shows that this fence is not located on or parallel to the shared property line between these two properties. Instead, as illustrated on Petitioner's Exhibit D, the end of this fence that is next to Middle Road is located six (6) feet, seven (7) inches to the left (southeast) of the shared property line, on the abutting neighbor's property, and from this point, the fence extends in a straight line until it meets the left rear corner of the subject property. See Exhibit 4(d). The Petitioner's Statement states that the fence, and not the actual property line, "sets the factual limit for both properties and defines the land [the Petitioner] actually enjoys," which the Statement notes has been under the Petitioner's "peaceful possession" since he purchased the property. See Exhibit 3.

3. The Petitioner has constructed a carport on the left side of his house that is large enough to accommodate two vehicles. See Exhibit 3. The Petitioner's variance application indicates that the narrowness of the subject property impacted the location of the carport. See Exhibit 1. As shown on Petitioner's Exhibit 3 ("Carport As Built"), the Petitioner's carport, while within the "fenced" area that the Statement indicates the Petitioner "enjoys," extends onto his abutting neighbor's property. See Exhibit 5(f). The Statement indicates that the Petitioner is seeking variance relief to allow him to bring the structure to within three (3) feet of the fence ("Carport Option A"), or alternatively, to within three (3) feet of the property line ("Carport Option B"), and the Petitioner includes an Exhibit illustrating these two options. See Exhibits 3 and 5(h). The Statement expresses a preference for Carport Option A, and the Petitioner provides plans for retrofitting a portion of the existing structure so that it would be a distance of three (3) feet from the existing fence. See Exhibits 3, 5(b), and 5(j). The Statement acknowledges that the County's Department of Permitting Services found that any variance relief must be granted from the actual property line as opposed to the fence line. See Exhibit 3.

4. The Statement states that the Petitioner needs the carport to protect his vehicles (pick-up trucks) from inclement weather. The Statement states that "[e]ach truck needs total clearance width of 102 inches and each need at least 35 additional inches to get in or out of the car when parking," thus concluding that a "total length of 25 feet and 5 inches is needed to cover the two trucks." The Statement states that if the requested variance is granted from the property line as opposed to from the fence line, the Petitioner will not be able to fit his trucks in the carport, and they will not be protected from bad weather. See Exhibit 3.

5. The Statement asserts that the proposed carport would be consistent with the established pattern in the neighborhood. In support of this, the Statement states that carport roofs "of the type and size proposed are very common throughout the Mill Village neighborhood," that "many of these roofs appear to be within less than 3 feet or even until the side property line, including carport roofs on the same street as the subject property," that the proposed carport "is entirely consistent with the development pattern of both Middle Road and all throughout the Mill Village Neighborhood," and that "[t]his carport roof is not at all unusual compared to other carport roofs on other properties nearby." See Exhibit 3. The Petitioner includes several photographs of carports and other additions to

homes in his neighborhood that appear to be on or very close to the property line. See Exhibit 5(m)-(o).

6. The Statement states that granting the requested variance will not be adverse to the Petitioner's neighbors. In support of this, the Statement notes that the "shape of the carport follows the existing lines of the building," and that the Petitioner "has used the same materials and colors in order to have a building extension that is fully respectful of the typology, shape, form and aesthetics of the original building and those of the neighborhood." The Statement further states that granting the requested variance will not impair light and air to the adjacent property, increase fire hazards or traffic congestion, decrease property values, create a nuisance, cause an increase in public expenditures, or "otherwise impair the public health, safety, comfort, morals or general welfare" of area residents. The Statement specifically states that the Petitioner's carport will not impair light and air to, or cast shadows on, the home of his abutting neighbor to the left, and furthermore states that it will not impact her view, noting the orientation of her house and the presence of a tree between her house and the carport. See Exhibits 3, 4(f), 4(h), and 4(j).

7. At the hearing, Mr. Betancourt testified that the Petitioner received bad advice when he had the carport built, and that he was requesting variance relief to allow the carport to remain at a distance of three (3) feet from the existing fenceline ("Option A"). After being told by the Board that they could not consider Option A, since DPS had determined any variance relief needed to be from the property (survey) line and not from the fenceline, and since the Board has no authority to adjudicate a claim of adverse possession, Mr. Betancourt proceeded to testify that the Petitioner has surveyed his neighborhood and that there are many properties in the neighborhood with improvements that border the property line. He walked the Board through the photographs at Exhibits 5(m)-(o) and testified that it is obvious, as one drives through the neighborhood, that the improvements shown in these photographs are along or very close to the property lines. Mr. Betancourt estimated that as many as 50% or more of the properties in this neighborhood have such improvements, and that this contributed to the Petitioner's mistaken belief that it was allowed.

Mr. Betancourt testified that the Petitioner's neighbor to the left, Ms. Martinez, enjoys a corner property. He testified that her house is not parallel to the road, and that because her house is on a diagonal, the Petitioner's carport has no effect on her view or light to her house. See Exhibit 4(h).

8. Ms. Martinez testified, through Mr. Betancourt, that she does not support the grant of the requested variance, and that she believes the carport should fully comport with the required seven (7) foot side lot line setback that is set forth in the Zoning Ordinance. In response to a Board question asking how granting the requested variance would affect the use and enjoyment of her property, Ms. Martinez testified, again through Mr. Betancourt, that there is nothing that she enjoys on that side of her property, but that she is concerned that the zoning regulations be enforced in her neighborhood.

## FINDINGS OF THE BOARD

Based on the binding testimony and the evidence of record, the Board finds that the variances can be granted. 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.v. - the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;*

The Statement submitted by the Petitioner states that many houses on his street and in the Mill Village neighborhood have similar carports or other additions, in close proximity to the property line, and thus asserts that the construction of a carport three feet from the side lot line would conform with the traditional development pattern of the street and neighborhood. The Petitioner included photographs of several of these structures with his submission that serve to confirm this. See Exhibits 3 and 5(m)-(o). In addition, Mr. Betancourt testified that as many as half of the houses in the neighborhood, possibly more, have improvements along or very close to their property lines. Based on this evidence, the Board finds that the proposed construction of a carport at a distance of three feet from the side lot line would substantially conform with the traditional development pattern of the Petitioner's street and neighborhood, 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;*

The Board finds that there is no evidence in the record to suggest that the Petitioner, who purchased this property in 2005, is responsible for the development pattern on his street or in his neighborhood. Thus the Board finds 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 the requested variance is the minimum necessary to allow the Petitioner to retrofit his existing carport so that it is located three feet from the property line, in conformance with the established development pattern of the street and neighborhood, and thus is the minimum needed to overcome the practical difficulties that full compliance with the Zoning Ordinance would pose, 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; and*

The Board finds that the construction of a carport continues the residential use of the home, and thus can be granted without substantial impairment to the intent and integrity of the applicable master plan, in satisfaction of this element of the variance test.

5. *Section 59.7.3.2.E.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 granting the requested variance will not be adverse to the Petitioner's neighbors. In support of this, the Board notes that as found above, granting the requested variances would allow construction that conforms with the established development pattern of this street and neighborhood. In addition, the Board notes that with the grant of the variance, the carport will be fully on the Petitioner's property, well inside of the existing fence, and that in addition to the screening provided by the fence, there is a tree that will somewhat obscure any view of the carport from the abutting property. See Exhibit 3. Per the Statement and Petitioner's Exhibits 4(f), (h), and (j), the carport will not impair light or air to the abutting property, will not impact the view from that property, and will not cast shadows on the abutting neighbor's home. The Board recognizes that the Petitioner's abutting neighbor testified in opposition to the grant of this variance, but notes the zoning is not a plebiscite. See *Montgomery County Council v. Scrimgeour*, 211 Md. 306, 313, 127 A.2d 528, 532 (1956), citing *Benner v. Tribbitt*, 190 Md. 6, 57 A.2d 346 (1948).

Accordingly, the requested variance from the left side lot line is GRANTED, subject to the following conditions:

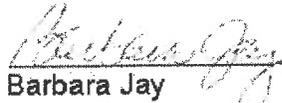
1. The Petitioner shall be bound by the testimony and exhibits of record; and
2. The Petitioner's carport can be no closer than three (3) feet from the surveyed property line, in accordance with "Carport Option B" shown on Exhibit No. 5(h).

Therefore, based upon the foregoing, on a motion John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Caryn Hines, Laura Seminario-Thornton, and Alan Sternstein 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 20th day of January, 2023.

  
\_\_\_\_\_  
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 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.