BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. A-6871

PETITION OF GIL COHEN for USA SERVICES, LLC

OPINION OF THE BOARD
(Hearing Held: July 10, 2024)
(Effective Date of Opinion: July 19, 2024)

Case No. A-6871 is an application by Gil Cohen for USA Services, LLC (the "Petitioner") for variances from the side setback requirements of the Zoning Ordinance, as follows:

The proposed construction of a second story addition over the existing single story home, a 2-story addition at the rear, and a 2-car garage with second floor at the front, requires the following variances:

> The proposed construction requires a 2.70 foot variance as it is within 4.3 feet of the east/left property line.
>
> In addition, the proposed construction requires a two (2.0) foot variance as it is within two (2.0)[1] feet of the west/right property line.
>
> The required side setbacks are seven (7) feet each, in accordance with Chapter 59.4.4.9.B.2 of the Zoning Ordinance.
>
> The existing single story house is located 12.6 feet from the left property line and five (5) feet from the right property line.

[1] This was copied from the Building Permit Denial. It appears, based on the Petitioner's Statement and Site Plan, that it should have read "In addition, the proposed construction requires a two (2.0) foot variance as it is within **five (5.0)** feet of the west/right property line."

The Board of Appeals held a hearing on the application on Wednesday, July 10, 2024. Gil Cohen and Israel Sayag participated on behalf of USA Services LLC, and were collectively represented by Peter Ciferri, Esquire. Mary Ann Robertson, whose property abuts the subject property to the west/right, and Michael Fry and Alyson Foster, whose property confronts the subject property, also appeared at the hearing to express their concerns.

Decision of the Board:	Variance from the east/left property line:	**DENIED.**
	Variance from the west/right property line:	**GRANTED.**

EVIDENCE PRESENTED

1. The subject property is Lot P24, Block 65, Gilberts Subdivision, located at 620 Mississippi Avenue in Silver Spring, Maryland, 20910, in the R-60 Zone. It is a narrow property, roughly rectangular in shape, located on the south side of Mississippi Avenue. The property has a width of 42 feet and a depth of 255+ feet on its east side and 260+ feet on its west side, making it over six times as deep as it is wide. It has an area of approximately 10,835 square feet. See Exhibits 3, 3(a), (b), and (d), and 6.

2. The Petitioner's Statement of Justification ("Statement") states that the property "was originally improved with an existing one-story single family detached house with a basement, and a small rear addition constructed into a crawl space." See Exhibit 3. It states that the Petitioner's client purchased the subject property in 2021. The Statement indicates that the Petitioner received a building permit in 2022 (Building Permit No. 934685) for "front and rear first-story alterations and a second story addition," which added the following to the overall footprint of the original dwelling:

A. to the front of the dwelling:
  (1) a 346 square foot garage addition, and
  (2) a 100 square foot front portico which runs along the existing exterior side wall.

B. to the rear of the dwelling:
  (1) a 507 square foot rear addition that extended the rear foundation but does not extend beyond the existing exterior side walls. A second story and improved basement within the same footprint were also proposed.

3. The Statement states that the Petitioner "survived several rounds of Department of Permitting Services[2] review under the regulations governing alteration permits." It states that the roof and walls were built, but that "as the construction took place, field

[2] The County's Department of Permitting Services is referred to as "DPS" throughout the remainder of this Opinion.

changes for new locations of footings nine inches beyond the planned location occurred, and large portions of the original side structural walls could not be safely preserved, which resulted in field changes to remove and replace those with new framing." The Statement states that because of this, "at the final wall check inspection, DPS inspectors determined that the Applicant's actual construction exceeded the standards applicable to a building permit for an alteration permit and required that the Applicant instead proceed under the rules for construction of a new single-family dwelling." The Statement states that "[b]y this time, construction of the home had been substantially completed." See Exhibit 3.

4. The Statement states that the Petitioner applied for a new Building Permit in 2023, and was informed that variances were needed. See Exhibits 3 and 3(c). The Petitioner then applied for the variances needed to permit "(a) the 23-foot long garage portion of the home to extend by 2.7 feet into the side setback to the east of the Property; and (b) the rear addition to be constructed as a continuation of the existing exterior wall along the west side of the Property, which remains five feet from the Property line." See Exhibit 3.

5. The Statement states that the requested variances can be granted under the standard set forth in Section 59.7.3.2.E.2 of the Zoning Ordinance. With respect to the proposed construction on the west side of the property, the Statement asserts that the construction should be allowed under Section 59.7.3.2.E.2.a.ii of the Zoning Ordinance "because the proposed development uses an existing legal nonconforming property or structure." The Statement explains that the Petitioner's request "is to merely extend the length of the existing foundation which presently exists five feet from the western lot line." It notes that "[t]his is the same location as the side wall of the home when it was purchased, and to the best of the Applicant's knowledge, this is the original location of the wall since the home's original construction, which we believe was around 1922." See Exhibit 3.

6. With respect to the proposed construction on the east side of the property, the Statement asserts that the construction should be allowed under both Section 59.7.3.2.E.2.a.i and Section 59.7.3.2.E.2.a.v of the Zoning Ordinance. See Exhibit 3.

In explaining why the proposed construction satisfies Section 59.7.3.2.E.2.a.i, the Statement states that "[t]he Variance on the east side of the Property is appropriate because of the unusual and exceptional narrowness of the Property." See Exhibit 3. The Statement explains that the property, as platted in 1889, was divided in half in 1945, resulting in the property being "only approximately 42-feet wide, while it is 255.36 deep along the east side lot line, and 260.57 feet deep along the west side lot line," and concluding that as a result, "the Property is more than six times deeper than it is wide." The Statement states that the Petitioner's requested encroachment of less than three feet into the east side setback "is the minimum necessary to construct a two-car garage," going on to state that "[d]ue to the exceptional narrowness of this Lot, it would be practically difficult, or perhaps impossible, to design and provide access to a garage

situated in the rear of the Property," and to assert that "[t]he location proposed by the Applicant is the only practical and logical place for construction." See Exhibit 3.

With respect to Section 59.7.3.2.E,2.a.v, the Statement indicates that the variance on the east side of the property "substantially conforms with the established historic or traditional development pattern of the street or neighborhood," because "[d]ivision of Lots in this manner was apparently common along Mississippi Avenue, historically." The Statement notes that "[l]ots situated throughout the original 'North Takoma Park' subdivision (for example Mississippi Avenue and Ritchie Avenue), and to the northwest within original 'Silver Spring Park' subdivision (for example, Easley Street, Tayer Avenue, and Silver Spring Avenue), were subdivided and re-subdivided historically with the result being a pattern of development of narrow and deep Lots located throughout these two neighborhoods." See Exhibit 3. The Statement states that "[t]his traditional development pattern of this neighborhood is familiar to the Board," and notes that the Board has granted variances in three cases "with similarly situated applicants...." See Exhibits 3 and 3(e)–(g). The Statement asserts that "[t]he Board's actions in prior, similar cases are persuasive of the effects of the traditional patterns of development in this neighborhood," and notes that in the referenced cases, "none of those Lots were quite as narrow (each of those Lots were 50 feet wide), nor quite as deep (each was about three times as deep), as the subject Lot." Finally, the Statement states that "[i]n this case, the Lot is only 42' wide and over six times deeper than it is wide," and that "[e]ven for an R-60 zoned Lot situated within this neighborhood of narrow Lots, this particular Lot stands out as exceptionally narrow." See Exhibit 3.

The Petitioner's Statement concludes that "[t]he exceptional narrowness of the Lot, together with the traditional development pattern of this neighborhood creates conditions that would be extremely difficult to avoid." See Exhibit 3. It states that "the Applicant's proposal is to extend the foundation necessary for the garage by only 4.3 feet beyond the existing east wall foundation," that "[e]ven that modest extension creates the need for a variance," and that "there is almost nowhere to go on this Lot without a variance."

7. The Statement states that the circumstances that make this property unique are not due to any actions of the Petitioner or their client, who is the owner of the property and who purchased the property in 2021. Accordingly, the Statement indicates that Section 59.7.3.2.E.2.b of the Zoning Ordinance is satisfied. In support of this, the Statement states that "[t]he Lot was subdivided prior to 1958, creating the narrow conditions referenced above," that "[t]he originally constructed home was situated in the same location at that time," and that "the Lot size has not changed since." The Statement further states that "[t]he existing single family home already featured a two-foot side setback encroachment on the western line when it was purchased by its current owner." See Exhibit 3.

8. The Statement states that the requested variances are the "minimum necessary to overcome the practical difficulties imposed by the Zoning Ordinance," in satisfaction of Section 59.7.3.2.E.2.b of the Zoning Ordinance. The Statement states that "[o]n the

west side, the Applicant is relying on the existing non- conforming foundation line with no further encroachment proposed." The Statement states that "[o]n the east side, the garage is being extended by the minimum additional footage necessary to allow for a two car garage in the only practical location at this Property for a garage," and that "[t]his results in only a 4.3 foot extension beyond the existing foundation, and only 2.7 feet into the setback." See Exhibit 3.

9. The Statement states that the proposed variances can be granted without substantial impairment to the integrity and intent of the general plan and the applicable East Silver Spring Master Plan because they "allow[] for the continuation of the residential use of this Property," and "advance[] the Master Plan policy 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' (Page 25)." The Statement further asserts that the proposed variances are consistent with the intent of the Master Plan "to 'sustain and enhance residential neighborhoods' like this one; and to 'sustain a livable community of neighborhoods in East Silver Spring by preserving positive attributes and guiding change so that it strengthens the function, character, and appearance of the area.'" See Exhibit 3.

10. The Statement states that granting the requested variances will not be adverse to the use and enjoyment of neighboring properties, in satisfaction of Section 59.7.3.2.E.2.e of the Zoning Ordinance, because "this proposal does not encroach onto neighboring properties and only impacts the present conditions by extending only a 23-foot long portion of a garage by just 2.7-feet into the setback." The Statement notes that "[a]ll other improvements are within the width for the existing foundation walls as those presently exist," and that "[t]he encroachment by less than three feet is less of an encroachment that would be allowed by right if, for example, the Applicant were proposing an unenclosed stoop, or a bay window in the same location." See Exhibit 3.

11. The Board has received a letter dated June 26, 2024, from Susan Farrer and Thomas Spilsbury, whose property at 618 Mississippi Avenue abuts the subject property to the east (left), opposing the grant of the requested variances. These neighbors note in their letter that the request for variance relief is being made "retroactive to the dwelling's completion" and that this concerns them. Their letter states that the house "was finished in mid-2023 then put on the real estate market in July 2023." See Exhibit 5(a).

The letter states that requested variances would allow the "23-foot long, 2-car garage structure on the front, east side of the new house to encroach unnecessarily close to the property line and perhaps pose a public safety issue if fire-fighting equipment were needed at the rear of the house." The neighbors' letter states that, at 4.3 feet from the shared property line and 13 feet from the west wall of their house, the new house's "2-story east wall" would affect their enjoyment of their property. The letter further states that "[w]ith so little space between the dwellings (unlike on properties with wider side lots), a difference of only a few feet is significant," and asserts that because of this, "it is incongruous [for the Petitioner's attorney] to assert that '. . . the Applicant's

request only modestly encroaches into the side setback by less than three feet.'" See Exhibit 5(a).

The letter states that the owners of the subject property were aware of the property's 42-foot width "when they purchased it and designed the new structure." The letter states that given this knowledge, a structure that comported with the required setbacks could have been designed and constructed. The letter takes issue with the comparison of the setback encroachment posed by the two-story garage wall to the encroachment that would be allowed for a bay window or unenclosed stoop, stating that "the side wall of a 2-story, 23-foot-long garage/second floor suite section has far more negative impact on our adjacent property than would any stoop or bay window."

The neighbors' letter disputes the Petitioner's assertion that the variance request is the minimum needed, and that the location proposed is the only practical location for a garage, as follows:

> The applicant's documentation states that "the area is the minimum necessary to construct a two-car garage. . . . The location proposed by the Applicant is the only practical and logical place for construction" (see petitioner's letter prepared by McMillan Metro Faerber, P.C.). Whether USA Services wished to add onto the existing dwelling as originally planned, or wished to demolish it and build an all-new structure as they eventually did, they no doubt were well aware of the exceptional narrowness of the lot from the time of purchase. It would seem that a 1-car garage, a narrower 2-car garage, or no garage at all would have allowed the plans to adhere to the required 7-foot setback, thereby avoiding the need to request a variance *post facto,* and would have been more appropriate for the property width, as well as the development pattern of the street and neighborhood character.

See Exhibit 5(a). After alluding to it above, the letter goes on to elaborate on the reasons that the garage does not conform with the development pattern in the neighborhood, as follows:

> The applicant's documentation further states that "this variance request substantially conforms to the traditional development patterns of the neighborhood." However, anyone who visits our neighborhood can see that 2-car garages are not the norm in this part of East Silver Spring. In fact, excluding 620 Mississippi, only 2 of the other 36 homes on the 500 and 600 blocks of Mississippi (those between Sligo Avenue and Piney Branch Road where we are located) have 2-car garages, and both of those properties are on wider-than-usual lots for these blocks. Furthermore, the 2 newest houses built on these blocks (other than 620) have 1-car garages rather than 2-car garages.
>
> Similarly, on the 600 and 700 blocks of nearby Ritchie Avenue, only 1 of the 44 street-facing properties appears to have a 2-car garage. (Those blocks of Ritchie

Avenue back up to our side of Mississippi Avenue and are similar in character to ours; they are also between Sligo Avenue and Piney Branch Road.)

Based on these numbers, the new construction at 620 Mississippi Avenue (specifically the 2-car garage/second floor suite structure that encroaches into the required setback) appears not to conform to the historic or traditional development pattern of the street or neighborhood. A 2-car garage was unnecessary on this narrow lot and is inconsistent with garages on other nearby properties—it does not "preserve existing residential character," nor is it "compatible with the existing residential character," both of which are community ideals set forth in the East Silver Spring Master Plan.

Finally, the neighbors' letter at Exhibit 5(a) disputes the persuasiveness and applicability of the other variances that the Petitioner's attorney highlighted as supporting the grant of the requested variances, as follows:

The three examples of variances granted nearby that are described in the documentation for Variance Pending Case A-6871 seem irrelevant and inconsistent with this petition:

Case A-6617 at 723 Thayer Avenue: *Petitioned for a variance of 0.84 feet within the required 7-foot setback to create a 1-story addition of approximately 19 square feet that aligns with an existing nonconforming side wall of an existing structure.* In contrast to this small addition, the owners of 620 Mississippi have constructed an all-new structure that includes a 2-story, 346-square-foot garage/second floor suite structure that extends 2.7 feet into the required 7-foot setback on both levels.

Case A-6683 at 422 Mississippi Avenue: *Petitioned to rebuild half of a 10-foot by 20-foot shared garage that straddles the property line at the rear of the property.* In contrast, the owners of 620 Mississippi have, without a variance, replaced an existing 1,392-square-foot, single-story house with a house of more than 4,400 square feet that includes a 2-story garage/second floor suite section built 2.7 feet into the required 7-foot setback at the front of the house. The petition at 422 Mississippi was for a 1-story, 200-square-foot garage rebuild that did not encroach any further than the pre-existing structure and thus is not comparable to the petition being reviewed.

Case A-6540 at 741 Thayer Avenue: *Petitioned to build a second-story addition on the footprint of an existing first floor that extended 1.5 feet into the side yard setback. The existing first floor was considered a legal and nonconforming structure because it was built in 1918, prior to the enactment of Montgomery County's first Zoning Ordinance and before a side setback requirement existed.* In contrast, the owners of 620 Mississippi demolished the previous small, single-story dwelling and built an entirely new structure—rather than adding onto the existing structure. Unlike at 741 Thayer, the construction at 620 Mississippi is not

an addition built above an existing structure, and the 2-story garage/second floor suite section extends 9 feet closer to the east property line than did the previous house.

12. In addition, the Board received a second letter of opposition, dated July 5, 2024, signed by a number of other neighbors on Mississippi Avenue. See Exhibit 5(b). Citing Rule 4 of the Board's Rules of Procedure, Counsel for the Petitioner argued at the outset of the hearing that this letter cannot be considered by the Board because it was submitted less than 10 days before the hearing on behalf of a group, because good cause for the delay in submission had not been shown, and because there had been no showing that submission of the letter would not be adverse to the Petitioner. Mr. Fry, who submitted the letter on behalf of himself and his neighbors, stated that the letter was initially submitted to the Board on July 1, 2024, and that a revised version was submitted on July 5, 2024, with the only change from the original version being the addition of three additional signatories at the bottom. Recognizing that the principal author of the letter, Mr. Fry, was present at the hearing and could provide testimony regarding the content of the letter, the Chair agreed with Counsel that the letter should be excluded.

13. At the hearing, Mr. Cohen testified that he is a licensed contractor, and that he is one of the owners of and a project manager with USA Services, LLC. Mr. Cohen testified that the current owner of the subject property has owned the property for several years. He testified that his company applied for an alteration permit for the house that was located on the property, and that this permit was issued in April 2022. See Exhibit 3(a). Mr. Cohen testified that work proceeded under that permit and that the construction passed several inspections. He testified that all of the plans for the alteration were approved by DPS, and that they showed that the renovated structure would have a five (5) foot setback from the property's east and west side lot lines. See Exhibit 3(a).

Mr. Cohen testified that after the construction was under roof, a DPS Inspector told them that they needed to get a building permit for a new house (as opposed to the building permit for an alteration that they had previously been issued) because of the extent of the new construction, indicating that this was a "large build." Mr. Cohen testified that in February 2023, they re-filed for a new permit to allow a new build, using the same drawings that had been filed with their application for the alteration permit. He testified that the new build permit was approved by DPS in December 2023 with a few additional conditions such as a requirement to add sprinklers. Mr. Cohen testified that after they filed for the new build permit, they were able to continue construction up to the point of substantial completion. He testified that the construction passed most of the inspections required under the new permit, but did not pass the wall check. Mr. Cohen testified that DPS said, in connection with the wall check, that the Zoning Ordinance requires a seven (7) foot setback from each side lot line, despite the fact that both the alteration permit that was originally approved by DPS, and the subsequently approved building permit for a new build, allowed for five (5) foot setbacks from the property's side lot lines. See Exhibits 3(a) and 3(b) (approved Site Plans). He testified that they

received the building permit denial indicating that seven (7) foot side setbacks were required in April 2024. Mr. Cohen later testified that this was when they discovered the setback problem, and that the building had been up for two years at that point.

Mr. Cohen testified that on the west/right side of the house, the plane of the foundation wall for the existing structure was extended by the construction, such that it maintained the existing five (5) foot setback from that side lot line. Thus he argued that the placement of the west/right side of the house is consistent with that of the original structure. Mr. Cohen testified that no variances were needed for the front or rear of the house, or for its height, all of which comply with the requirements of the Zoning Ordinance.

In response to a question from Counsel, Mr. Cohen testified that there are a few homes on Mississippi Avenue with renovations that include attached two-car or single-car side garages. In response to a Board question asking if the garages of these other homes extended into the setback or required variances, Mr. Cohen testified that he did not know. In response to a Board question asking if an architect had prepared the plans for this house, Mr. Cohen responded in the affirmative, and indicated that the approved architectural drawings for both permits are in the record. See Exhibits 4(a)-(t) (alternation permit) and Exhibits 4(u)-(jj) (new build permit). When asked where the plans showed that the house would be five (5) feet from the side lot lines, Mr. Cohen indicated that that was shown on the approved Site Plans. See Exhibits 3(a) and 3(b). Finally, when asked why DPS would rely on the surveyor's plans, Mr. Cohen testified that when you apply for a building permit, the first stop is usually the survey.

In response to a Board request, Mr. Cohen narrated the content of the photographs at Exhibits 4(kk) through 4(aa)(1), indicating that Exhibits 4(kk)-(mm) showed the sides of the house, that Exhibit 4(nn) showed the back patio and yard, that Exhibit 4(oo) showed another house with a garage, that Exhibit 4(pp) showed the typical spacing of houses, that Exhibits 4(qq) through 4(ss) showed other houses with attached side garages on Mississippi Avenue, that Exhibits 4(tt) and 4(uu) showed houses with detached garages, that Exhibits 4(ww) and 4(xx) showed new builds on Mississippi Avenue with garages, that Exhibits 4(yy) and 4(zz) showed the back of the construction on the subject property and the continuation of the foundation walls, and that Exhibit 4(aa)(1) showed the excavation and attempt to keep the original front and side walls.

14. Mr. Sayag testified that the construction continues the "line" of the original home's west/right side, which was located five (5) feet from the property's west/right side lot line. He testified that they measured 32 feet from that line—the width of the renovated house—which should have left the construction on the property's east side five (5) feet from the east/left side lot line, given the 42 foot width of the lot. Mr. Sayag testified that because the cinderblock foundation on the east/left side of the house was inadvertently placed on the outside of the stake showing that distance, instead of on the inside of that stake, the east/left side wall of the house was constructed about eight (8) inches closer to the east/left side lot line than planned (i.e. the width of a cinder block).

Mr. Sayag testified that the wall check at which the setback violation was identified was one of the last inspections to be conducted, and that until that time, they were unaware of the setback problem.

15. In response to a question from Counsel, Mr. Sayag testified that the original house was built in 1922. See SDAT Printout. Mr. Cohen then testified that the subject property was later subdivided into two properties, i.e. the properties located at 620 and 618 Mississippi Avenue. He testified that as a result of this subdivision, the subject property is 42 feet wide in the front and about 250 feet deep, giving it a long and narrow shape. Mr. Cohen testified that the property is located in the R-60 Zone.

16. Ms. Robertson asked if the building permit allowed the patio to be located so close to the shared (west/right) side lot line. She testified, in response to a Board question, that the original house was located the same distance as the new house from the shared side lot line, but indicated that the original house was much smaller.

17. Mr. Fry testified that it is not clear who owns the subject property. He testified that the first point he wanted to make was that someone purchased the subject property knowing how wide it was, and then hired an architect or developer to design and build a house to within one inch of what they believed the side setbacks would allow. Mr. Fry testified that it does not make sense that someone would purchase a 42-foot wide property to construct a 32-foot wide house, leaving no room for error, and that when an error was discovered, that they would continue to build instead of stopping. He posited that there was a point in time a couple of years ago when the Petitioner should have known they were encroaching on the side setback.

Mr. Fry testified that the subject property is unusually deep, but that it is not unusually narrow for the neighborhood, referring the Board to the Zoning Vicinity Map, and asking them to look at the widths of nearby properties on Mississippi Avenue, Ritchie Avenue, and Silver Spring Avenue. See Exhibit 6. He testified that the width of the subject property is like that of other properties in the neighborhood.

Mr. Fry clarified that his comments were not intended to address the existing side setback on the west/right side of the property or the variance requested from that lot line. He testified, with respect to the Petitioner's argument that the construction is consistent with the established pattern in the neighborhood, that he had walked the neighborhood, and that of the 135 houses he had catalogued, only two (2) had two-car garages that faced the street – 622 Mississippi Avenue (Ms. Robertson's house) and 635 Mississippi Avenue. Mr. Fry testified that the traditional development pattern of this neighborhood over the past century was that most homes have no garage. Thus he asserted that having a street-facing two-car garage did not comport with this pattern, and was actually an aberration in this neighborhood. He testified that of the new development on the street, some of the houses have garages, but only one has a two-car garage.

Mr. Fry stated that the Petitioner argues that they had no choice but to request a variance, but Mr. Fry countered that they did not have to buy this property, that they did not have to design such a wide house, and that they could have stopped construction earlier than they did. He argued that the conditions that the Petitioner says make the subject property unique are attributable to the actions of the Petitioner, again noting that the Petitioner could have designed a narrower house, could have not made the error that caused the additional encroachment on the east/left side of the house, and could have purchased a different lot, particularly if they "so desperately needed" a two-car garage. Mr. Fry argued with respect to the Petitioner's assertion that the requested variances are the minimum necessary to overcome the hardship imposed by full compliance with the Zoning Ordinance that this assumes the Petitioner is entitled to a two-car garage and that the setback violation was unavoidable, both of which he testified were not true.

Regarding compliance with the applicable Master Plan, Mr. Fry testified that the Petitioner violated the setback rules to the disadvantage of neighbors, with whom he noted there has been no communication. Mr. Fry testified that they are building a 4,000 square foot house with a two-car garage. He testified that this not only does not preserve the residential character of this neighborhood, but that it is uncharacteristic of the neighborhood. Mr. Fry testified that it is unclear how the Petitioner's construction is consistent with the Master Plan's call for "wider range of housing types," which he interprets as a call to increase housing for low- and middle-income residents, not to construct $1.4 million dollar houses.

Regarding the Petitioner's assertion that the proposed construction would not have any adverse impact on neighboring properties, Mr. Fry stated that the abutting neighbors at 618 Mississippi Avenue had submitted a letter expressing their concerns about the construction and stating that it would have adverse impacts on them. See Exhibit 5(a). Finally, Mr. Fry testified that there were at least three examples of recent renovations in the neighborhood where neighbors had adhered to the setbacks required by the Zoning Ordinance despite the added costs or inconvenience of doing so.

18. Ms. Foster, who is married to Mr. Fry, stated that their larger concern is about developers not following the rules, and the precedent that granting after-the-fact variances would set.

CLOSING STATEMENTS

1. Mr. Fry stated that one of the criteria for the grant of the requested variances is that the special circumstances or conditions pertinent to the property are not the result of any actions by the Petitioner. Mr. Fry testified that someone is responsible for not knowing where the side lot line on this property is, and that it is odd that a builder would not know where he is building. He stated that he is not opposed to the grant of these variances per se, but that he is opposed to rewarding the Petitioner for what has

happened, and that he is opposed to the precedent that granting the requested variances would establish.

2. Mr. Ciferri stated that this is a unique case with a unique history. He stated that in undertaking the construction, the Petitioner relied on DPS's approval of their plans, which for both the alteration and the new build permit showed the home in substantially the same location, with a five (5) foot setback from both side lot lines. Mr. Ciferri stated that a misreading of the stakeout led to the nine inch deviation from the intended five foot setback on the east/left side of the construction, and that this caused DPS to take a closer look at the construction and to revoke the permits. He argued that the Petitioner proceeded under County approvals and was trying to do the right thing, and stated that equity and substantial justice would be served by granting the requested variances.

Mr. Ciferri stated that the requested variances satisfy the criteria in the Zoning Ordinance. With respect to uniqueness, he argued that the variance from the west/right side lot line can be granted because the construction uses an existing nonconforming structure. Mr. Ciferri argued that the variance from the east/left side lot line can be granted because of the extreme narrowness of the property, which he stated is unusually narrow and deep, even for this neighborhood. He noted that the R-60 Zone has a minimum lot width of 60 feet.

Mr. Ciferri argued that granting the requested variances would be consistent with the actions taken by the Board in the three cases highlighted in the Petitioner's Statement (Case Nos. A-6617, A-6683, and A-6540), asserting that Case No. A-6683, which involved a garage that straddled a shared side lot line, was the most pertinent. He asserted that the conditions that make the property unique were not the fault of the Petitioner, noting that the original house was built in 1922 and that the property had been subdivided in 1945. Mr. Ciferri asserted that the requested variances are the minimum needed to overcome what would be "unduly burdensome" compliance with the side setbacks, as well as to do substantial justice. He stated that on the west side of the house, the requested variance is the minimum needed to allow construction consistent with the setback of the existing house, and that on the east side, the requested variance is the minimum needed to allow a two-car garage. Mr. Ciferri argued that pages 25-27 of the Silver Spring East Master Plan anticipated infill development, and that this construction is consistent with that.

Finally, with respect to the impact that granting the requested variances would have on the use and enjoyment of neighboring properties, Mr. Ciferri argued that the Zoning Vicinity Map shows an inconsistent placement of buildings throughout the neighborhood, including many which appear to be in a nonconforming location. See Exhibit 6. He stated that the assertion of the Petitioner's abutting neighbor to the east that granting the requested variance on that side might inhibit access by fire equipment to the rear of their property is not supported in the record. Mr. Ciferri stated that the major concern for the neighbors in this case is the process through which this variance request came about, and not the house itself. He asserted that if the variances had

been requested before the start of construction, they would not have been considered offensive and would have been approvable.

FINDINGS OF THE BOARD

Based on the binding testimony and evidence of record, the Board finds that the requested variance from the west/right side property line can be granted, but that the requested variance from the east/left side property line must be denied.

A. With respect to the requested variance from the west/right side property line, the Board finds that the requested variance complies with the applicable standards and requirements set forth in Section 59.7.3.2.E of the Zoning Ordinance, 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.ii. – the proposed development uses an existing legal nonconforming property or structure;

The Board finds, based on the Statement and Site Plan, that the new construction reuses the original home's foundation and continues the line established by the western side of the original house, which was built in 1922 and is located five (5) feet from the property's west/right side lot line. See Exhibits 3 and 3(a), (b), and (d). The Board further finds, based on the Statement, that the property was subdivided in 1945, before the enactment of the currently applicable seven (7) foot side setback that was imposed by the 1954 Zoning Ordinance, and that its lot lines have not changed since that time. In light of the foregoing, the Board finds that the right side of the original house on this property, which is being modified by the construction for which a variance is being requested, does not comply with the required side setback from the west/right side lot line, and is nonconforming. Accordingly, the Board finds that the application satisfies 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, based on the Statement, that the Petitioner's client purchased the subject property in 2021, and thus the Board finds that neither the Petitioner nor their client, which owns the subject property, is responsible for the nonconforming location of the western edge of the original house, which was built in 1922 on property that was most recently subdivided in 1945. See Exhibit 3. Accordingly, the Board finds that the Petitioner took no actions to create the special circumstances or conditions peculiar to this property, 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, based on the Statement, Site Plan, and the testimony of Mr. Cohen, that the Petitioner is not seeking to increase the encroachment on the west/right side of the house, but rather has designed the new construction to maintain the distance between the western side of the original house, which was built over 100 years ago, and the property's west/right side lot line. See Exhibits 3 and 3(a), (b), and (d). The Board finds that the requested two (2) foot variance from the west/right side lot line is the minimum necessary to allow the western side of the new construction to follow and maintain the setback of the existing legal nonconforming structure, and thus is the minimum needed to overcome the practical difficulty that full compliance with the Zoning Ordinance would otherwise impose, 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 proposed construction will continue the residential use of the home. Accordingly, the Board finds that the variance needed for this construction can be granted without substantial impairment to the intent and integrity of the East Silver Spring Master Plan (2000), which is seeks to "[p]reserve existing residential character, encourage neighborhood reinvestment, and enhance the quality of life throughout East Silver Spring," 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 that granting the variance from the west/right side lot line will not be adverse to the use and enjoyment of abutting and confronting properties, in satisfaction of this element of the variance test. In support of this, the Board finds, per the Statement, that the west/right side of the new construction will not encroach any farther towards the west/right side lot line than the western side of the original house. See Exhibit 3. In addition, the Board notes that the neighbor who shares this side lot line appeared at the hearing and did not raise any issues with the new construction on the western side of the house other than to note that it was much larger than the original house, and to ask about the proximity of the patio to the shared lot line.

Accordingly, the requested two (2) foot variance from the west/right side lot line is **granted**, subject to the following condition:

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

B. With respect to the requested variance from the east/left side property line, needed to accommodate the width of a front-facing, two-car garage (and second story), the Board finds that this variance must be denied. Section 59.7.3.2.E of the

Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board 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
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 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.

The Board notes that there was no attempt in this case to argue the standard in Section 59.7.3.2.E.1 of the Zoning Ordinance. For that 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 Petitioner asserts in their Statement that the construction of the east/left side of this property satisfies the "uniqueness" tests in Sections 59.7.3.2.E.2.a.i and v of the Zoning Ordinance, and the Board makes the following findings with respect to the satisfaction of those Sections:

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

The Petitioner has asserted that the subject property is exceptionally narrow, and that this necessitates the variance from the east/left side lot line. The Board finds, based on the Zoning Vicinity Map and the testimony of Mr. Fry, that the majority of properties in the neighborhood are extremely narrow, notably those on Mississippi, Ritchie, and Silver Spring Avenues. See Exhibit 6. Accordingly, the Board cannot find that the narrowness of the lot is peculiar to the subject property, and finds that Section 59.7.3.2.E.2.a.i of the Zoning Ordinance is not satisfied.

The Petitioner has asserted that granting a variance from the east/left side setback would be consistent with the development pattern in the neighborhood. The Petitioner cites two reasons for this. In their Statement, the Petitioner asserts that there is a historical pattern of properties being subdivided in this neighborhood. See Exhibit 3. The Board finds that even if there is a pattern of subdivisions in this neighborhood, and even if the subdivision of this property in 1945 were to be consistent with this pattern, the Board cannot find that the proposed development of a street-facing two-car garage and second story addition in the east/left side setback would substantially conform with an historical pattern of subdividing properties.

The second reason given for compliance with Section 59.7.3.2.E.2.a.v, if not overtly then through testimony and photographs, is that the proposed two-car garage that necessitates the requested variance relief from the east/left side lot line conforms to the pattern of garages on this street. To the extent that the Petitioner is relying on a "pattern" of garages on the street or in the neighborhood to satisfy the uniqueness criteria of the variance test, the Board finds that at the hearing, Mr. Cohen testified that some of the homes on Mississippi Avenue that had been renovated have attached two-car or single-car garages, but that he did not assert that most of the homes on the street or in the neighborhood had this feature. The Board further finds that while the Petitioner has submitted pictures of a few of homes in the neighborhood that have garages, this cannot outweigh the data supporting a conclusion that the Petitioner's garage does not comport with the neighborhood pattern set forth in Exhibit 5(a), or the testimony of Mr. Fry that of the 135 houses in the neighborhood that he had catalogued, only two (2) had two-car garages that faced the street, and that the traditional development pattern of this neighborhood over the past century is that most homes have no garage. Accordingly, the Board cannot find that the proposed development of a street-facing two-car garage and second story addition in the east/left side setback would substantially conform with a traditional pattern of garages on this street or in this neighborhood.

To the extent that the Petitioner is seeking to rely on previously-issued variances in this neighborhood as justification for the grant of the requested variance from the

east/left side lot line, the Board notes that it reviews each variance request individually, based on the specific facts of each case. The Board further notes that because no two variance cases are exactly alike, and few—if any--properties are exactly alike, variance decisions made by the Board are generally not considered to have precedential value. Finally, the Board observes that the Petitioner's neighbors did a good job of recounting the details of the three variance cases that were cited by the Petitioner, and of explaining why the instant request can and should be distinguished from those cases. See Exhibit 5(a).

Having found that the requested variance from the east/left side lot line fails to satisfy the first element of the variance test, as set forth in Section 59.7.3.2.E.2.a of the Zoning Ordinance, the Board will not address the remaining elements, since the variance test is conjunctive, and all parts of the test must be met if a variance is to be granted.

The Board recognizes that the Petitioner has spent money on the construction of this garage and home, and that making what is now an existing structure comport with the required seven (7) foot setback from the east/left side lot line will entail additional expense. The Board notes that financial hardship is not a sufficient reason to justify the grant of a variance.[3] The Board further finds that because the Petitioner in this case is ultimately responsible for the construction of this garage/side of the house in derogation of the required left side setback, that to the extent that this could be said to pose a hardship, this hardship is self-created, and cannot be the basis for a variance.[4]

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[3] See *Montgomery County, MD v. Frances Rotwein*, 169 Md. App. 716, 732-33; 906 A.2d 959, 968 (2006) ("Economic loss alone does not necessarily satisfy the "practical difficulties" test, because, as we have previously observed, "[e]very person requesting a variance can indicate some economic loss." *Cromwell, 102 Md. App. at 715* (quoting *Xanthos v. Bd. of Adjustment, 685 P.2d 1032, 1036-37 (Utah 1984))*. Indeed, to grant an application for a variance any time economic loss is asserted, we have warned, "would make a mockery of the zoning program." *Cromwell, 102 Md. App. at 715*. Financial concerns are not entirely irrelevant, however. The pertinent inquiry with respect to economic loss is whether "it is impossible to secure a reasonable return from or to make a reasonable use of such property." *Marino v. City of Baltimore, 215 Md. 206, 218, 137 A.2d 198 (1957)*. But Rotwein has not demonstrated that, unless her application is granted, it will be "impossible [for her) to make reasonable use of her property." *Id.*).

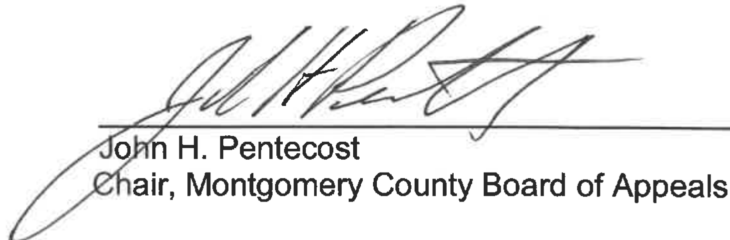
[4] In *Salisbury Board of Zoning Appeals v. Bounds*, 240 Md. 547, 554-55, 214 A.2d 810, 814 (1965), the Maryland Court of Appeals agreed with 2 Rathkopf, The Law of Zoning and Planning, 48-1, that,

> If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have been themselves caused or created by the property owner or his predecessor in title, the essential basis of a variance, i.e., that the hardship be caused solely through the manner of operation of the ordinance upon the particular property, is lacking. In such a case, a variance will not be granted; the hardship, arising as a result of the act of the owner or his predecessor, will be regarded as having been self created, barring relief.

See also Montgomery County, MD v. Frances Rotwein, 169 Md. App. 716, 733, 906 A.2d 959, 968-9 (2006) ("the 'hardships' about which Rotwein complains are self-created and, as such, cannot serve as a basis for a finding of practical difficulty. *See Cromwell, 102 Md. App. at 722*. Rotwein contends that the requested location for her garage is the only feasible location. But that is so only because of the location of the other improvements to the property, and the decision whether to build those improvements and where to place them was Rotwein's.").

Based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Alan Sternstein, with Richard Melnick, Vice Chair, and Caryn Hines in agreement, and with Amit Sharma 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.



John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 19th day of July, 2024.

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.