

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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(240) 777-6600

Case No.A-6429

PETITION OF OSAMA FARRAG AND ABIR FAREED

OPINION OF THE BOARD

(Opinion Adopted March 26, 2014)

(Effective Date of Opinion: April 10, 2014)

Case No. A-6429 is an application for a variance to construct a room addition. The proposed construction requires a twelve (12)-foot variance as it is within nine (9) feet of the rear lot line. The required setback is twenty (20) feet, in accordance with Section 59-C-1.624.

The Board of Appeals held a hearing on the application on March 26, 2014. Osama Farrag appeared and gave testimony. Wilma George, the Applicants' adjoining neighbor to the west, and Kevin Hunter from the Applicants' construction company, also testified.

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

EVIDENCE PRESENTED

1. The subject property is Lot 9, Block D, Seneca Park North Subdivision, located at 19236 Golden Meadow Drive, Germantown, Maryland, 20876, in the R-90 Zone. The property is a corner lot, containing 6,750 square feet.

2. In his written submission and in his testimony, Mr. Farrag explained that the variance request is to allow construction of a covered wheel chair ramp, a two-level elevator shaft, and an accessible bathroom with a curb-less shower. These improvements are needed to assist the Applicants in caring for their teenage son, Farris, who has significant impairments, as set forth in Exhibit No. 3. The addition will add 277 square feet to the footprint of the house. [Exhibit No. 5(l)].

Mr. Farrag further explained that the addition is located specifically to allow accessibility to the main and upper levels of the house. He testified that he and his wife now carry their son up and down the stairs. He stated that his home is located slightly downhill from his neighbor to the west and that the plans for the addition take the potential drainage issues into account.

3. The Seneca Park North Homeowners' Association expressed its approval of the proposed addition in a letter dated October 2, 2013. [Exhibit No. 8].

4. Wilma George testified that she does not oppose the Applicants' addition. She expressed concern about water collecting in a storm drain on her property that is adjacent to the location of the proposed addition.

5. Kevin Hunter testified that he has inspected the drainage swale Ms. George referred to and that the construction will maintain the swale and will not affect it.

FINDINGS OF THE BOARD

Section 59-G-3.1 of the Zoning Ordinance gives the Board of Appeals authority to grant variances, as authorized in Section 59-A-4.11(b), upon proof by a preponderance of the evidence that:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;

The Board finds that the lot is significantly substandard in size, comprising just 6,750 of the 9,000 square-foot minimum for the R-90 zone. The Board finds that the lot's small size combined with the required front setbacks constrains construction on the lot in a way that is peculiar to this lot, and that given the family's needs, the inability to construct the addition would pose a practical difficulty for the Applicants.

- (b) Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;

The Board finds that the requested variance, to allow an increase of 277 square feet to the home's footprint, is the minimum reasonably necessary to overcome the constraints imposed by the Zoning Ordinance on this property and the resultant hardship on the Applicants.

- (c) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property; and

The Board finds that the requested variance continues and enhances the single family use on the property and is entirely consistent with the intent, purpose and integrity of the master plan.

- (d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties. These provisions, however, shall not permit the Board to grant any variance to any setback or yard requirements for property zoned for commercial or industrial purposes when such property abuts or immediately adjoins any property zoned for residential purposes unless such residential property is proposed for commercial or industrial use on an adopted master plan. These provisions shall not be construed to permit the Board, under the guise of a variance, to authorize a use of land not otherwise permitted.

The Board finds that the addition will pose no detriment to adjoining or neighboring properties. The addition is modest in size and will have minimal visual impact. Mr. Farrag and Mr. Hunter testified that the construction will not adversely affect drainage on neighboring properties.

In addition to its eligibility under the provisions of Section 59-G-3.1 of the Zoning Ordinance, the Board finds that the requested variance can be granted as a reasonable accommodation to Farris Farrag under Title II of the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008, and the Fair Housing Act Amendments Act of 1988 (FHAA) provisions.

STANDARDS FOR EVALUATION OF A VARIANCE ON ADA/FHAA GROUNDS

A variance can be granted as a reasonable accommodation of a petitioner's disability under Title II of the Americans With Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA), and the Fair Housing Amendments Act of 1988 (FHAA).

The ADAAA and FHAA define a disability, or handicap as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(1)(A); 42 U.S.C. §3602(h).

Whether an individual has an impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001).

Prohibition on Housing Discrimination Based on Disability

The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibits discrimination against "any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" on the basis of that person's handicap. 42 U.S.C.A. § 3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodation in "rules, policies, practices or services when such accommodation may be necessary to afford" a person with a handicap "equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). A "necessary accommodation" to afford "equal opportunity" under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation "will be denied an equal opportunity to enjoy the housing of their choice." *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996)). The failure to provide reasonable accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. at 497 (citing *Smith*, 102 F.3d at 794-96).]

Reasonable Accommodation by Local Government of an Individual's Disability

The "reasonable accommodation" provision of the FHAA has been interpreted to require municipalities to "change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities." *Trovato*, 992 F. Supp. at 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996)). Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an "activity" of a public entity within the meaning of the ADA. [See, *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n. 16 (citing *Trovato*, 992 F.Supp. at 497).]

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications "would fundamentally alter the nature of the service, program or activity." 28 C.F.R. §35.130(b)(7) (2012). Therefore, unless the proposed accommodation would "fundamentally alter or subvert the purposes" of the zoning ordinance, the variance must be granted under Title II of the ADA. [See *Trovato*, 992 F.Supp. at 499.]

In connection with the grant of the variance on ADA and FHA grounds, the Board must make the following findings:

1. Determination of disability: An evaluation of whether a disability exists under the ADAAA or FHAA requires a three-step analysis. The applicant's medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking, independent mobility) and the Board must determine whether it constitutes a major life activity under the ADAAA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.

3. Reasonable modification of local government policies: Because a zoning ordinance is among the local governmental rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance should be granted to the extent necessary to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the Zoning Ordinance.

Applying the above analysis to the requested variance, the Board finds as follows:

1. Based upon the testimony and evidence, the Board finds that Farris Farrag's medical challenges, which are set forth in the record and which cause him to rely on a wheelchair for all mobility, constitute a physical impairment for the purposes of the ADAAA and FHAA. The Board finds that these challenges and his need for a wheel chair for limit virtually all of his major life activities.

2. The Board finds that the requested variance for a modest addition to the family's home to assist the Applicants in caring for their son is a reasonable accommodation to allow the Applicants and their son to continue living in their home.

3. The Board finds that the twelve-foot variance, to allow the approximately 277 square-foot addition, should be granted to prevent Montgomery County's development standards from preventing the Farrags' continued use of their home. The Board further finds that the requested variance is de minimus and, as such, will not fundamentally disrupt the aims of the Zoning Ordinance.

Therefore, based upon the Petitioners' binding testimony and evidence of record, the requested variance of twelve feet from the required 20-foot rear lot line

setback to allow construction of a one-story addition, is granted subject to the following conditions:

1. The Applicants are bound by their exhibits of record, their testimony and the testimony of their witness, to the extent that such testimony and evidence are identified in this Opinion.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 11(a-b) and 5(a-l).

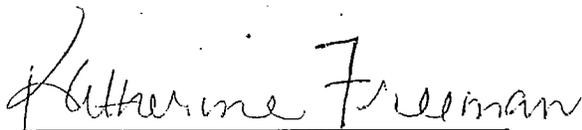
On a motion by John H. Pentecost, seconded by Carolyn J. Shawaker, with Stanley B. Boyd, and Catherine G. Titus, Chair, in agreement and David K. Perdue, Vice-Chair, necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 10th day of April, 2014.



Katherine Freeman
Executive Director

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.

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 (See Section