

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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(240) 777-6600

**Case No. A-6435**

**PETITION OF RAGHU BABU**

OPINION OF THE BOARD  
(Opinion Adopted June 18, 2014)  
(Effective Date of Opinion: July 11, 2014)

Case No. A-6435 is an application for a fifteen-foot variance from the required 20-foot rear lot line setback required by Section 59-C-1.624 of the Montgomery County Zoning Ordinance in the R-200 Zone. The Petitioner proposes to build a two-story addition within five feet of the rear lot line.

The subject property is Lot 1, Block G, Kingsview Village Subdivision located at 13926 Rockingham Road, Germantown, Maryland 20874, in the R-200 zone.

The Board of Appeals held a hearing on the application on June 18, 2014. The Petitioner, Raghu Babu appeared and testified. Robin Rothstein and Sandra Moore, neighbors and members of the Kingsview Village Homeowners Association, also testified.

Decision of the Board: Requested variance **denied**.

**EVIDENCE PRESENTED**

1. Mr. Babu stated that his mother has knee problems and is no longer able to visit his home because all of the bedroom and bath facilities are above the first level of the house, requiring negotiation of stairs, which she cannot do. The record contains a letter from Mrs. Babu's doctor [Exhibit No. 12] that describes her knee condition and recommends against her use of stairs.

2. Mr. Babu wishes to convert his existing garage into a bedroom and bathroom suite for his parents' use when they visit him, and to build a new, two-car garage, which requires the requested variance. [See, Exhibit Nos. 4, 15; Transcript, June 18, 2014, pp. 6, 16-17].

3. According to records of the State Department of Assessments and Taxation, the subject property contains 11,752 square feet. In response to a Board comment that his lot appears to be one of the largest in the neighborhood, Mr. Babu acknowledged that the lot's greater size than others around it is one of the reasons he bought this lot. In response to a Board question asking what characteristic of the lot requires Mr. Babu to do his construction as he proposes to, Mr. Babu stated that the lot has no peculiar or unusual characteristics that constrain building on it, but that his proposal is the most aesthetically feasible way to do the construction. [Transcript, pp. 15-16].

4. Mr. Babu stated that if his rear yard had been designated as a side yard, and the side yard as the rear, or if the house had been sited two or three feet in a different direction, he would not need the requested variance. [Transcript, pp. 19-20].

5. In response to Board questions about what he would do if the Board did not grant the variance request, Mr. Babu stated that he would build within the required setbacks. [Transcript, pp. 32, 38].

6. Robin Rothstein, a member of the Kingsview Village Homeowners Association, expressed concern that Mr. Babu has not secured the HOA's approval of his plans. Ms. Rothstein expressed her further concern that the proposed addition will be very close to the neighboring house to the north of the subject property, and that this proximity of structures would be an undesirable precedent in the neighborhood. [Transcript, pp. 22-27].

7. Sandra Moore echoed Ms. Rothstein's concern about the possible closeness of Mr. Babu's addition to his neighbor's house, and about a possible trend of variances, and of houses becoming too close together. [Transcript, pp. 27-29].

## **FINDINGS OF THE BOARD**

A variance permits a structure that otherwise would not be permitted by the zoning ordinance, which has led the Maryland Court of Special Appeals to clarify that "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances," *Cromwell v. Ward*, 102 Md. App. 691, 703, 651 A.2d 424, 430 (1995) (citation omitted). Review of a variance application under an ordinance like Montgomery County's involves a two-step process to discern a

unique characteristic of the property and then to determine whether a practical difficulty results from the uniqueness of the property:

The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is -- in and of itself -- unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, i.e. a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance caused by the property's uniqueness, exists.

*Cromwell*, 102 Md. App. at 694-695, 651 A.2d at 426. That the variance might allow an improvement to property that is "suitable or desirable or could do no harm or would be convenient or profitable to its owner" does not provide a basis for granting a variance. *Cromwell*, 102 Md. App. at 707, 651 A.2d at 432. The need for the variance must arise from the application of the zoning ordinance to the unique or peculiar characteristics of the property. See *Cromwell*, 102 Md. App. at 717-718, 651 A.2d at 437. The zoning ordinance must impact upon the land in a unique manner that does not exist where a restriction applies "equally to all lots of similar size." *Cromwell*, 102 Md. App. at 720, 651 A.2d at 438.

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.

In McLean v. Soley, 270 Md. 208, 214-15, 310 A. 2d 783, 787 (1973, quoting 2 Rathkopf, *The Law of Zoning and Planning* (3d ed. 1972) 45-28, 29, the Court of Appeals adopted criteria for determining whether an applicant has established practical difficulty, including, in pertinent part, "1) Whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the use of the property for a permitted

purposed or would render conformity with such restrictions unnecessarily burdensome.”

Section 59-G-3.1 of the Montgomery County Zoning Ordinance (“Authority – Board of Appeals”) provides that the Board of Appeals may grant petitions for 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;

1. It is under the first subsection that the Board must employ the analysis from the *Cromwell* case, set forth above. There is no evidence that any unique feature of the lot constrains construction on it. Mr. Babu acknowledged that there is no exceptional or peculiar characteristic of the subject property that constrains the building envelope. His lot is one of the largest lots in the neighborhood, and Mr. Babu stated that if he does not get approval for the variance, he will locate his construction elsewhere within the buildable area, according to the required setbacks. Thus, the property is not “unique, unusual, or different” from properties around it.

2. Because Mr. Babu is able to locate his proposed construction elsewhere within the buildable area on his property, the application of the rear setback does not unreasonably prevent his proposed use of his property to the extent of causing him a practical difficulty.

3. With respect to Mr. Babu’s theory that if his house had been placed differently on his lot, he would not need the variances, the Board notes that, as the Court of Appeals pointed out in Salisbury Board of Zoning Appeals v. Bounds, a property owner is deemed responsible for the actions of his predecessors in interest, as, in this case, the location of the house on the lot.

4. Thus, the Board finds that the application fails to meet the requirements of Section 59-G-3.1(a), and the variance must be **denied**. Because the application does not meet the threshold requirements of Section 59-G-3.1(a), the Board did not consider its conformance with subsections (b)-(d).

#### 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).

#### 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 F3d 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).]

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).]

5. The Board finds that Mr. Babu has submitted proof that his mother has a disability as defined under the ADAAA and the FHAA. However, the Board finds that the requested variance is not necessary as a reasonable accommodation for Mr. Babu's mother. His proposal is to convert his existing garage, which does not require a variance, into an accessible bedroom suite for his parents' use. The variance is needed to allow construction of a garage for his own use, which does not require an accommodation under the ADAAA and FHAA.

Therefore, based on the foregoing, on a motion by David K. Perdue, Vice-Chair, seconded by John H. Pentecost, with Stanley B. Boyd, Carolyn J. Shawaker and Catherine G. Titus, Chair, in agreement:

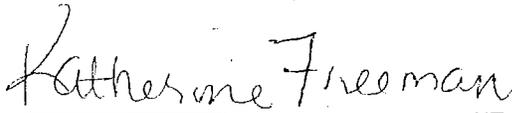
**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the requested variance is **denied**.



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Catherine G. Titus  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 11<sup>th</sup> day of July, 2014.



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Katherine Freeman  
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 (See Section 59-A-4.63 of the County Code). 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.