

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
<http://www.montgomerycountymd.gov/boa/>

(240) 777-6600

**Case No. A-6487**

**PETITION OF MARC SOLOMON**

OPINION OF THE BOARD

(Opinion Adopted March 9, 2016)  
(Effective Date of Opinion: April 1, 2016)

Case No. A-6487 is an application for a variance from the rear lot line setback. The proposed construction of a screened porch requires a variance of two (2) feet, as it is within thirteen (13) feet of the rear lot line. The required setback is fifteen (15) feet, in accordance with Section 59-7.7.1.D.2(c).

The subject property is Lot 16, Block 4, Hendry Estates, located at 5817 Wilmett Road, Bethesda, Maryland, 20817, in the R-60 Zone.

As authorized by Section 59-7.3.2.A, the Board of Appeals held a hearing on the application on March 9, 2016. Petitioner Marc Solomon appeared pro se in support of his application. Petitioner's wife was also present.

Decision of the Board: Requested variance denied.

**EVIDENCE PRESENTED**

1. Mr. Solomon stated that this is basically a case about his being able to have screens on his porch versus his not being able to have screens. He testified that he was advised when building his porch that constructing an open porch would be faster from a permitting standpoint than constructing a screened porch. He explained that his existing open porch is allowed under the Zoning Ordinance and meets all of the Zoning Ordinance setback requirements, but that when screens are added, a variance is needed because the porch is then considered an

enclosed structure. He testified that he found out about this when he received a Notice of Violation<sup>1</sup> after adding screens to his porch, and that he has been working with Mark Moran and Mark Beall in the County's Department of Permitting Services since learning of the problem.

Mr. Solomon testified that the subject property is a corner lot, and that what a lay person would typically describe as his "side" yard is in fact his "rear" yard for zoning purposes. He testified that he had assumed when he built the porch that an eight (8) foot side setback was applicable, which he thought the porch met.

2. In discussing the uniqueness of his property, Mr. Solomon testified that his children are allergic to insect bites, and have had allergic reactions that require medical attention. See Exhibit 7. He went on to explain that in order to be able to enjoy the porch during the buggy season, for the health and safety of his children, the porch needs to be screened.

Mr. Solomon further testified that his property is unique because his lot has a "rear" yard in the side yard. He argued that what, for zoning purposes, has been termed his "rear" yard is actually a side yard for light and air purposes. He explained that the porch is at least 13 feet away from the property line that he shares with his abutting neighbor along Wilmett Road (his eastern property line), and that that neighbor's house is only 8 feet from the same property line. He testified that from the viewpoint of the neighborhood, his screened porch looks fine, and that from a practical standpoint, a "normal" setback exists between his house and his neighbor's house.

In his written statement of justification, Mr. Solomon asserted that the addition of screens to his existing open porch "conforms with the look, feel, and pattern of the neighborhood." See Exhibit 3.

3. Mr. Solomon testified that he did not build the house on the subject property, and that the way in which the house was built and positioned on his property created the circumstance in which he now finds himself.
4. Mr. Solomon noted in response to a question about the impact of his porch on his neighbors' enjoyment of their properties that he had received several letters of support, that most of the porches in his neighborhood are screened, and that many of his neighbors had pointed out in their letters that having an open porch was actually an aberration in this neighborhood. See Exhibits 12-14. Addressing the letter of opposition that was submitted by his abutting neighbor along

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<sup>1</sup> Mr. Solomon noted that the NOV cites a violation of the "required side yard setbacks." See Exhibit 8.

Wilmett Road, Mr. Solomon testified that the noise concerns voiced in the letter will not be affected by the presence or absence of screens on the porch, and that his neighbor's concern about construction taking place before the building permit was posted had been addressed. See Exhibit 11.

5. In response to Board questions pertaining to whether this variance could be granted as a reasonable accommodation for his children's allergies, Mr. Solomon reiterated that the screens were a medical necessity for his children. He testified that their getting bitten by insects is a big deal, and that they have needed medical attention. When asked what was meant by the children's doctor when he stated that one of the children would benefit greatly from having the family porch screened in due to his history of having "increasingly uncomfortable reactions" to insect bites, Mr. Solomon described his son's very painful reaction to the bites in detail, and explained that while this type of reaction might happen to other people as a result of repeated scratching, it happens naturally to his son, with no scratching or provocation.

When asked if the children could wear insect repellent while on the porch, Mr. Solomon testified that they would not want to coat themselves in chemicals before sharing a family meal. When asked if spending time on the porch was a major life activity, Mr. Solomon answered that being able to spend quality time with his children is great

## **CONCLUSIONS OF LAW**

1. Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board of Appeals 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 Montgomery County 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.

2. Based on the record in this case, the Board notes that there was no attempt to argue the standard in Section 59-7.3.2.E.1 of the Zoning Ordinance. For this 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. In the instant case, the Board finds that the requested variance fails to meet Section 59-7.3.2.E.2.b, as follows:

The Board finds that while the positioning of this house on the subject property is not attributable to Mr. Solomon, Mr. Solomon had this open porch constructed, and thus the extension of this porch into the rear setback, allowed pursuant to Section 59-4.1.7.B.5.a.i of the Zoning Ordinance,<sup>2</sup> and the fact that this is an open as opposed to an enclosed porch, are both a direct result of Mr. Solomon's own actions. For this reason, the Board finds that the proposed construction cannot satisfy Section 59-7.3.2.E.2.b of the Zoning Ordinance,

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<sup>2</sup> Section 59-4.1.7.B.5.a.i reads as follows: "Any building or structure must be located at or behind the required building setback line, except ... [a]ny unenclosed porch, deck, terrace, steps, or stoop may project a maximum of 3 feet into any side street or side setback and may project a maximum of 9 feet into any front or rear setback. This encroachment includes an unenclosed roofed porch or terrace."

which requires that the special circumstances or conditions not be the result of actions by the applicant. Accordingly, the Board finds that the requested variance must be denied, and does not address the remaining elements of the variance test in Section 59-7.3.2.E.2.

The Board now analyzes whether the requested variance can be granted pursuant to the Americans with Disabilities Act, as amended by the ADA Amendments Act of 2008, and under the Fair Housing Amendments Act of 1988.

#### 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 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).]

## 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 and based upon the evidence of record, including the written statement of justification in the record at Exhibit 3, the doctor's note at Exhibit 7, and the testimony of Mr. Solomon, the Board finds that at least one of the Solomon children has an adverse reaction to insect bites that is severe enough to warrant medical attention. Assuming (without deciding) that this could constitute a physical impairment, the next step in determining whether a "disability" exists is for the Board to determine whether using the Solomon family porch would be considered a "major life activity," generally considered to be an activity of central importance to daily life, and then to ascertain whether an allergy to insect bites would substantially limit the ability of this child to engage in this major life activity.

Section 42 U.S.C. 12102 of the United States Code defines "disability" and "major life activity" for purposes of the ADA<sup>3</sup> as follows:

(1) Disability. The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

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<sup>3</sup> The U.S. Department of Housing and Urban Development uses similar definitions for determining a "handicap" under the Fair Housing Amendments Act, defining "major life activity" as including "walking, talking, hearing, seeing, breathing, learning, performing manual tasks, and caring for oneself." See [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/disabilities/in\\_housing](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/disabilities/in_housing).

In light of this definition, the Board finds that using a porch does not rise to the level of a "major life activity" for the purpose of establishing a disability under the ADAAA or FHAA, and thus the Board need not determine whether an adverse reaction to insect bites would substantially limit this activity. The Board concludes that a disability for the purposes of the ADAAA and FHAA does not exist, and accordingly finds that a variance cannot be granted on disability grounds.

On a motion by Edwin S. Rosado, seconded by John H. Pentecost, Vice Chair, with Carolyn J. Shawaker, Chair, Stanley B. Boyd, and Bruce Goldensohn in agreement, the Board voted to deny the requested variance, and 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.

  
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Carolyn J. Shawaker, Chair  
Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 1st day of April, 2016.

  
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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.

