

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. A-5710

PETITION OF JOHN A. TICKTIN
(Hearings held February 13 and March 27, 2002)

OPINION OF THE BOARD
(Effective date of Opinion, May 8, 2002)

This proceeding is a petition pursuant to Section 59-A-4.11(b) of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for a variance from Section 59-C-1.323(a). The petitioner proposes to construct a one-story addition that requires an 8.20 foot variance as it is within 19.50 feet of the established front building line. The required setback is 27.70 feet.

The subject property is Lot 6, Block A, Broadhurst Subdivision, located at 5907 Lone Oak Drive, Bethesda, Maryland, in the R-60 Zone (Tax Account No. 00673547).

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

EVIDENCE PRESENTED TO THE BOARD

1. The petitioner proposes to construct a one-story addition (sunroom/greenhouse) in the front yard.
2. The petitioner testified that he suffers from a Seasonal Affective Disorder (SAD) and that he has been encouraged to add a sunroom/greenhouse to his residence to prevent the condition.
3. The petitioner testified that he could not construct the addition at the rear of the house because the front of the house faces south and receives the most sun during the winter months.
4. The petitioner testified that the proposed structure would not materially impact the line of sight for his neighbors and that he has spoken with his neighbors and his neighbors support the variance request.
5. A letter from the petitioner's physician, Thomas A. Wehr, M.D., supports the variance request and was entered in the record as Exhibit No. 13. Dr. Wehr's letter states in part: "Mr. Ticktin has a long-standing history of recurrent winter depression. The rationale for the greenhouse is consistent with current scientific knowledge of the pathogenesis and treatment of recurrent winter depression."

FINDINGS OF THE BOARD

Based upon the petitioner's binding testimony and the evidence of record, the Board finds as follows:

The requested variance does not comply with the applicable standards and requirements of the Montgomery County Zoning Ordinance as set forth in Section 59-G-3.1. However, the Board finds that the variance can be granted as a reasonable accommodation to the petitioner's disability under Americans With Disabilities Act (ADA) provisions.

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 v. City of Manchester, N.H.*, 992 F. Supp. 493, 497 (D.N.H. 1997)).

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) (1997). 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. *Trovato*, 992 F. Supp. at 499.

The ADA defines a disability for an individual, in pertinent part, 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(2)(A).

The Board finds that the petitioner's recurrent Seasonal Affective Disorder is a disability which would be improved with the winter sunlight that would be provided by the sunroom/greenhouse. The Board finds that the proposed construction would provide the petitioner with winter sunlight to alleviate his medical condition and would constitute a reasonable accommodation to permit the petitioner the use and enjoyment of the premises of his residence.

Therefore, based upon the petitioner's binding testimony and the evidence of record, the Board finds that the grant of the requested variance is a reasonable accommodation of the petitioner's disability because (1) it will have a minimal impact on the adjoining neighbors; (2) the proposed construction is necessary to provide the petitioner with additional winter sunlight; and (3) the proposed structure can be easily removed when no longer required by the petitioner's medical condition.

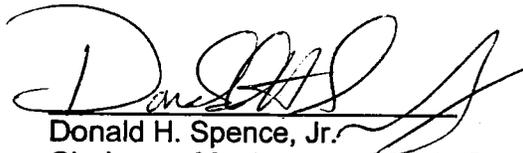
Accordingly, the requested variance of 8.20 feet from the required 27.70 foot established front building line is granted subject to the following conditions:

1. The petitioner shall be bound by all of his testimony and exhibits of record, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 4 and 5(a) and 5(b).
3. The variance is granted to the petitioner only, and the one-story addition (sunroom/greenhouse) shall be removed at such time as it is no longer required in relation to petitioner's medical condition or the petitioner no longer resides on the property.

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.

On a motion by Allison Ishihara Fultz, seconded by Angelo M. Caputo, with Donna L. Barron, and Donald H. Spence, Jr., Chairman, in agreement, the Board adopted the following Resolution. Board member Louise L. Mayer was necessarily absent and did not participate in this Resolution.



Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 8th day of May, 2002



Katherine Freeman
Executive Secretary to the Board

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.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of 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.

