BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
www.montgomerycountymd.gov/content/council/boa/index.asp

(240) 777-6600

Case No. A-6408

PETITION OF CAROL HANKIN

OPINION OF THE BOARD
(Opinion Adopted September 11, 2013)
(Effective Date of Opinion: October 3, 2013)

Case No. A-6408 is an application for a five-foot variance from the required 25-foot streetline lot line setback under Section 59-C-1.535 of the Montgomery County Zoning Ordinance. The Petitioner proposes to build a one-story addition.

The subject property is Lot 23, Block A, Red Coat Woods Subdivision, located at 10600 Great Arbor Drive, Potomac, Maryland, 20854, in the R-200 Zone.

The Board of Appeals held a hearing on the application on September 11, 2013. Susan Carter, Esquire, appeared on behalf Carol Hankin and Norbert Hankin. Ms. Carter called Mr. and Mrs. Hankin as witnesses. She also called Richard Shay as an expert in architectural design. Earl Lissit, a resident of Great Arbor Drive, spoke in support of the variance.

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

EVIDENCE PRESENTED

1. Ms. Carter noted that the Department of Permitting Services regards the property as a corner lot, with 25-foot front setbacks applicable both from Trotters Trail and Great Arbor Drive. The variance is only needed for a corner of the proposed addition, amounting to about 35 square feet, along Trotters Trail.

2. Ms. Carter stated that although Trotter's Trail was once intended to be a through street, that will not happen because there is a Forest Conservation Easement on the properties west of the subject property where the road would

extend, preventing such an extension [Exhibit No. 10(b)]. Ms. Carter submitted a letter from the Montgomery County Planning Department [Exhibit No. 7], explaining that the 2002 Approved and Adopted Potomac Master Plan recommended against road continuity between Tuckerman Lane and Democracy Boulevard to which Trotters Trail would have contributed, and that the right of way immediately west of Trotter's Trail was abandoned, which is reflected on Plat No. 23678.

3. Ms. Carter stated that the Hankins' house is a very unusual design, comprising four, ascending levels connected by stairs. She explained that both Mr. and Mrs. Hankin have developed medical problems that compromise their ability to negotiate the stairs. Desiring to remain in their home, they hired Mr. Shay to design living space on the ground floor that includes a bedroom, closet space and a bathroom large enough for handicap accessibility.

4. Carol Hankin testified under oath that she has osteoporosis, as a result of which she has broken both a femur and one of her knee caps. Mrs. Hankin stated that she has never gotten back full range of motion in her knee. She has difficulty negotiating the stairs in her home. During her recuperations she was confined to the main floor of her home where she had to sleep on a couch. The bathroom on that level of the home could not accommodate the walker she needed to get around. Mrs. Hankin stated that it is possible that she will suffer additional broken bones because of her osteoporosis. She stated that her husband has weak legs and balance problems, and testified that he uses a cane.

In response to Board questions, Mrs. Hankin stated that the only entrance to the home accessible from the driveway is the front door. She testified that there is another door to the house, but that it is up a steep hill. She testified that they cannot locate the proposed addition on the rear of their home because such a location would cause them to have to climb stairs in order to access the addition. Mrs. Hankin stated that Trotter's Trail is not maintained by the county, that it is used for parking, and that children play there.

5. Mr. Shay, who has 30 years of experience in architectural design, was accepted as an expert in architectural design for accessibility. He testified that the addition is located as proposed due to the sloped topography of the subject property and the Petitioner's need to avoid having to climb stairs. Mr. Shay testified that the lot is an unusual shape, wider in front, and angling in, along Trotters Trail, toward the back. He testified that the 25 foot setback along Trotters Trail angles in and cuts off five feet of the rear corner of the proposed addition, and is thus constraining. He testified that the lot is sloped, rising one half story from the street to the front door, and another full story from that point to the rear of the house. He testified that the proposed bedroom and bathroom are sized to allow for handicapped accessibility, and that in his professional opinion, the variance is the minimum reasonably necessary to overcome the exceptional conditions pertaining to the Hankins and their property. He further testified that

this variance can be granted without impairing any master plan, and that it will not be detrimental to the use of adjoining properties.

In response to a Board question asking what was unique about this lot, Mr. Shay testified that it has an unusual shape, starting out wide and angling towards the rear. He testified that development of this lot is constrained by its steep topography, which necessitates the use of stairs. Finally, he testified that this lot is unusual in that it is subject to a 25 foot setback from a street that is not in use, instead of a typical 10 foot side yard setback. He stated that the Zoning Ordinance requires two front yard setbacks for corner lots because residences typically front on both streets, but he testified that that is not the case with this lot because Trotters Trail is truncated.

6. Norbert Hankin testified under oath that he has a neurological condition that affects his balance, which is a "cause of extreme concern" [Transcript, September 11, 2013, p. 34] for him. He stated that because of his balance problem he is at risk of falling when he goes up the stairs in his home.

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).

<u>Prohibition on Housing Discrimination Based on Disability</u>

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.]

FINDINGS OF THE BOARD

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

The requested variance does not comply with applicable standards and requirements of the Montgomery County Zoning Ordinance set forth in Section 59-G-3.1(a). Specifically, the Board finds that while there are some unique shape and topographical aspects of this lot, they do not constrain development of this property, as there is room for the construction of an addition on the rear/western portions of this property, and thus do not pose a practical difficulty for this petitioner. The Board finds, however, that an addition on the rear of this property would not meet the accessibility needs of the petitioner and her husband, and that this variance can be granted as a reasonable accommodation to the petitioner's disability 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.

In connection with the grant of such a variance, 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 their sworn testimony Mr. and Mrs. Hankin each have significantly limited mobility related to ongoing medical problems. Their limited mobility affects their ability to walk, and to use the stairs, and thus the rooms accessible by stair, in their home. The Board finds that the ability to walk around in their home is a major life activity for the Hankins which is substantially limited by their mobility problems.

2. The Board finds that the requested five-foot variance, to allow the approximately 35 square-foot section of the proposed addition on an accessible level of this home, is a modest and reasonable accommodation to allow the Hankins continued use of their home.

3. The Board finds that five-foot variance, to allow the approximately 35 square-foot section of the proposed addition, should be granted to prevent Montgomery County's development standards from preventing the Hankins 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 five feet from the required 25-foot streetline lot line setback to allow construction of a one-story addition, is granted subject to the following conditions:

1. The Petitioners are bound by their testimony and exhibits of record 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. 4(a-c) and 5(a-c).

On motion by Stanley B. Boyd, seconded by Carolyn J. Shawaker, with John H. Pentecost and David K. Perdue, Vice-Chair, in agreement and Catherine G. Titus, 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.

David K. Perdue
Vice-Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 3rd day of October, 2013.

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.

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.