

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**[www.montgomerycountymd.gov/content/council/boa/index.asp](http://www.montgomerycountymd.gov/content/council/boa/index.asp)**

**CASE NO. A-6482**

**PETITION OF ELFRIEDE HARPER**

**OPINION OF THE BOARD**

(Opinion Adopted January 13, 2016)

(Effective Date of Opinion: February 10, 2016)

Case No. A-6482 is an application for two variances necessary for the construction of a carport. The first is a variance of 7.50 feet, necessary because the proposed construction is within 0.50 feet of the side lot line. The required setback is eight (8) feet, in accordance with Section 59-4.4.9.B.2 of the Montgomery County Zoning Ordinance. The second is a variance of 8.50 feet, needed because the proposed construction reduces the sum of both side yards to 9.50 feet. The required sum of both side yards is eighteen (18) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on January 13, 2016. Elfriede Harper appeared and testified. Sherrie Moreira, a friend of Ms. Harper, also testified on Ms. Harper's behalf.

Decision of the Board:                      Variance Granted.

**EVIDENCE PRESENTED**

1.     The subject property is Lot 20, Block 54, Wheaton Woods Subdivision, located at 13503 Keating Street, Rockville, MD, 20853, in the R-60 Zone.

2.     Ms. Harper testified that she will be turning 87 years old in May, that she has no surviving relatives in the United States, and that she lives alone. She testified that she has had her hip replaced and that she walks with a cane. Ms. Harper testified that she has fallen on the driveway several times and has had to go to the emergency room at Walter Reed. She testified that her car is not covered and that she is afraid of black ice

on her driveway. She requested that her porch roof be extended so that it covers her car so as to avoid any possible ice when going from her car to the house and vice versa.

3. Ms. Sherrie Moriera, a friend of Ms. Harper's who was testifying on her behalf, indicated that Ms. Harper was pursuing the requested variances as a reasonable accommodation under the pertinent provisions of the Americans with Disabilities Act Amendments Act and the Fair Housing Amendments Act. Ms. Moriera further testified that she did not believe that the subject property satisfied the criteria set forth in Section 59-7.3.2.E of the Zoning Ordinance for the grant of a standard variance, and elaborated as to why the subject property did not meet several of the "uniqueness" standards set forth in Section 59-7.3.2.E.2.a of the Zoning Ordinance.

Ms. Moriera testified that Ms. Harper is turning 87 years old this year, and has no surviving family. She testified that Ms. Harper lives alone, without day-to-day assistance. Ms. Moriera confirmed statements set forth in Ms. Harper's written justification for the requested variances, namely that in 2013, Ms. Harper had a hip replacement, that she walks with a limp, that she uses a cane to assist her ambulation, and that she has a disability tag on her car which allows her to park in disabled parking spaces. See Exhibit 3. Again as reflected in Exhibit 3, Ms. Moriera testified that Ms. Harper has fallen several times on her driveway when trying to get from her car to her home, which she accesses through her side porch, and that inclement weather (particularly snow and ice) exacerbates her problems. The written justification for this variance makes clear, as did Ms. Moriera's testimony, that Ms. Harper is otherwise capable of routine driving and doing her own shopping and errands, but that she is rendered housebound when there is snow or the possibility of ice on the ground because of the unique hazards presented to her by her disability in traversing her driveway. See Exhibit 3.

Ms. Moriera testified that there is a fence, approximately five feet high, along the east side of the property where the carport would be constructed. She testified that the carport would be within the fence. Ms. Moriera testified that she had spoken to the neighbors on both sides of Ms. Harper's house, and that none of them had any concerns with the proposed construction. Ms. Moriera asserted that the grant of a variance to allow construction of this carport would increase Ms. Harper's safety, would not disadvantage Ms. Harper's neighbors, and was a reasonable accommodation necessary to give Ms. Harper the ability to move about, run errands, and be safe.

4. The written justification further amplifies Ms. Harper's disability and her need for a reasonable accommodation, as follows:

Mrs. Harper is physically limited in her mobility because of her hip replacement and required use of a cane for ambulation. She has been granted a disability sticker for her car so that she can park in handicapped parking spaces. She is in

pain on a daily basis and risks additional injury if the variance is not granted in order for her to have protection from the elements that the carport would afford. Being able to move independently to and from her home to get to her medical appointments, pharmacy, grocery store, etc., is a major life activity under the ADA and FHAA and should not be impaired.

See Exhibit 3.

## 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, and on Ms. Moriera's acknowledgement that the subject property does not meet the requirements for a standard variance, the Board finds that the requested variance does not comply with the applicable standards and requirements set forth in Section 59-7.3.2.E.

### **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, the Board finds as follows:

1. Based upon the evidence of record, including the written statement of justification in the record at Exhibit 3 and the testimony of both Ms. Harper and Ms. Moriera, the Board finds that due to hip replacement surgery, Ms. Harper has a physical impairment that severely reduces her mobility and requires her to use a cane for ambulation. The Board finds that because of her ambulatory instability, Ms. Harper has particular trouble walking across her driveway during periods of inclement weather to get between her car and her home, resulting in repeated falls and the need for medical attention. The Board notes that Ms. Harper still drives, and depends on her car to go to medical appointments and run necessary errands such as going to the pharmacy and grocery store. The Board finds that the ability to walk, and to safely exit one's own house in order to independently care for oneself, is a basic life activity for the purposes of the ADA and FHAA, and that this activity is curtailed, especially during times of actual or possible adverse weather conditions, because of Ms. Harper's physical impairment. Thus the Board finds that Ms. Harper's impairment constitutes a disability under the ADA and FHAA.

2. The Board further finds that the construction of a carport on the east side of Ms. Harper's existing house, as depicted on Exhibits 4(b) and 5, with a roof that extends from the existing house and porch, will provide Ms. Harper with covered access between her home and her car, and will allow her to safely traverse that distance despite her disability and irrespective of the weather so that she can continue to live independently. The Board finds that the proposed construction is a reasonable accommodation for Ms. Harper's mobility impairment which will allow Ms. Harper to continue to enjoy and live in her home. The Board finds that allowing this construction on the side of Ms. Harper's home would not impose an undue burden or expense on the County, and would not constitute a fundamental disruption or subversion of the County's zoning scheme, which is intended to protect and promote the health, safety, morals, comfort and welfare of the present and future inhabitants of the County. The Board notes that the proposed carport is an extension of an existing roof, and that the house on the lot abutting Ms. Harper's lot to the east appears to be angled away from the subject property, facing the corner as opposed to facing on Keating. See Exhibit 7(a).

3. Thus the Board finds that the 7.50 foot variance from the side lot line requirement set forth in Section 59-4.4.9.B.2 of the Zoning Ordinance, and the 8.50 foot variance from the sum of both side yards, also set forth in Section 59-4.4.9.B.2, both necessary to allow the proposed construction, should be granted so that the strict application of Montgomery County's Zoning Ordinance and development standards do not prevent Ms. Harper's continued use of her home on account of her disability.

Therefore, based upon the Petitioner's binding testimony and evidence of record, the requested variance of 7.50 feet from the required eight (8) foot side lot line setback, and the requested variance of 8.50 feet from the required eighteen (18) foot required sum of both side yards, are granted to allow the proposed construction, subject to the following conditions:

1. The Applicant is bound by her exhibits of record, her testimony and the testimony of her 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. 4(a) and (b) and 5.

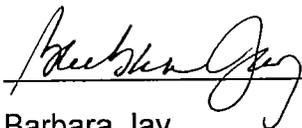
On a motion by John H. Pentecost, Vice Chair, seconded by Edwin P. Rosado, with Carolyn J. Shawaker, Chair, and Bruce Goldensohn in agreement, and Stanley B. Boyd necessarily absent, the Board adopted the following Resolution:

**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.



Carolyn J. Shawaker, Chair  
Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
This 10th day of February, 2016.



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.

See Section 59-7.3.2.G.1 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.