

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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CASE NO. A-6484

PETITION OF DOLORES E. CUMMINGS

OPINION OF THE BOARD

(Opinion Adopted February 3, 2016)
(Effective Date of Opinion: February 26, 2016)

Case No. A-6484 is an application for a variance from Section 59-3.3.3.B.2.a.i of the Zoning Ordinance to allow the entrance to an accessory apartment to be located on the front of a dwelling. Section 59-3.3.3.B.2.a.i requires the entrance to an accessory apartment to be located on the side or rear of the dwelling.

The Board of Appeals held a hearing on the application on February 3, 2016. Reverend James Webb, Jr., who has a power of attorney for Dr. Cummings, appeared and testified on her behalf.

Decision of the Board: Variance Granted.

EVIDENCE PRESENTED

1. The subject property is Lot 19, Block C, Carroll Springs Subdivision, located at 2216 Westview Drive, Silver Spring, Maryland, 20910, in the R-60 Zone.
2. The written justification for this variance, submitted by Reverend Webb on behalf of Dr. Cummings in the form of a letter, states that Dr. Cummings "is in her 70s and has extremely limited mobility due to her deteriorating physical condition and the health issues attendant to her deteriorating physical condition." The justification further notes that Dr. Cummings would like to age in place, and that as a result of her condition, she "will opt to inhabit the accessory apartment, which was an existing feature of this house when it was constructed, so that she can have easy access and egress to her home without having to

negotiate the stairs. The basement door was added to give her this easy access and egress to her home so that she can age in place despite her physical disabilities.” See Exhibit 3(a).

3. Reverend Webb testified that Dr. Cummings has a physical condition which is causing her physical deterioration and which places extreme limits on her mobility. He testified that Dr. Cummings is mentally sharp, and that access to medical care is essential to her survival. He testified that she had only been to the doctor one time in the past six months, that she can no longer negotiate the front steps of the house that she has lived in for the past 45 years (i.e. the subject property), and that she requires ambulatory services for transport to and from medical appointments.

Reverend Webb testified that because Dr. Cummings can no longer use her front stairs, she has moved into an existing suite on the lower level of her home. He testified that a door was added on this level to the front of the house to provide direct access from Dr. Cummings’ driveway to this level of her home. See Exhibit 5(b). He explained that this would allow ambulances the access needed to transport Dr. Cummings for necessary medical care. The written justification for the variance indicates that the house next door, and several others in the neighborhood, share this feature. See Exhibits 3(a) and 5(a).

4. The record contains a letter from Dr. Alpana Goswami, MD, who has been Dr. Cummings’ primary care physician for over 15 years, detailing Dr. Cummings’ many medical conditions, and indicating that one condition in particular “significantly limits her mobility,” “compounds her health situation,” and “jeopardizes her overall health.” Dr. Goswami’s letter states that Dr. Cummings’ “disability now presents a grave risk because she can no longer egress her home to receive the necessary medical treatment without emergency ambulatory services because of her inability to negotiate her stairs. Despite the plethora of medical issues, she has been unable to receive medical treatment for over 6 months.” Dr. Goswami urges approval of the variance “to alleviate the grave health risks currently created by her severely limited mobility and her inability to egress her home due to the stairs.” See Exhibit 3(c).

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. The written justification, attempting to argue that the subject Property meets the requirements for a standard variance, states that "[t]his modification of an existing accessory apartment substantially conforms with the established historic and traditional development pattern of the neighborhood, as it is consistent with the home next door (2214 Westview Drive) that also has a basement door and retaining wall (pictures attached). Other homes in the neighborhood also have this same configuration." See Exhibit 3(a). Although the Board may have been able to conclude that having a second door on the front of the house would be in substantial conformance with the established development pattern of this street or neighborhood, there was no evidence that the other "front" doors were for accessory apartments, and the requested variance was not to allow a second door on the front of this home, but rather to allow the entrance to an accessory apartment on the front of this home. Thus the Board finds that the Petitioner has not shown that the requested variance meets the standard set forth in Section 59-7.3.2.E.2.a, and did not consider the remaining subsections of the standard variance test.

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 F.3d 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 justification in the record at Exhibit 3(a), the testimony of Reverend Webb, and the letter from Dr. Cummings' primary care physician, in the record at Exhibit 3(c), the Board concludes that Dr. Cummings has a physical impairment that severely reduces her mobility and makes it impossible for her to enter or exit the main level of her home without assistance because of the existing front stairs, preventing her from obtaining necessary medical treatment. The Board finds that because her mobility is so limited, Dr. Cummings has elected to move into an existing apartment on the lower level of her home, which has a door with direct, on-grade access to the driveway, enabling her ingress and egress from her home,

via ambulance if needed. The Board finds that the need for assistance with general mobility constitutes a restriction of Dr. Cummings' major life activities (walking, independent mobility). Because of the direct impact of Dr. Cummings' impairment on this major life activity, the Board finds that a disability exists for purposes of the ADAAA and FHAA.

2. The Board further finds that permitting this entrance to this lower level accessory apartment on the front of Dr. Cummings' house, in close proximity to her driveway, is necessary to provide Dr. Cummings with ingress and egress from the lower level apartment in which she now lives, and constitutes a reasonable modification necessary to allow Dr. Cummings the opportunity to use and enjoy her home. The Board notes that having a second door on the front of the house is not unusual in Ms. Cummings' neighborhood, and that her next door neighbor's house has a similar configuration. See Exhibit 5(a).

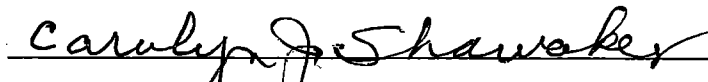
3. Thus the Board finds that the variance requested from Section 59-3.3.3.B.2.a.i of the Zoning Ordinance, to allow an entrance to Ms. Cummings' accessory apartment to be located on the front side of her house instead of on the side or rear, should be granted so that the strict application of Montgomery County's Zoning Ordinance does not prevent Dr. Cummings' continued use of her home on account of her disability.

Therefore, based upon Reverend Webb's binding testimony and the evidence of record, the requested variance to allow the entrance to the accessory apartment at the subject property to be located on the front of the house, instead of on the side or rear, is granted, subject to the following conditions:

1. The Applicant is bound by her exhibits of record and the testimony of her witness, to the extent that such testimony and evidence are identified in this Opinion.

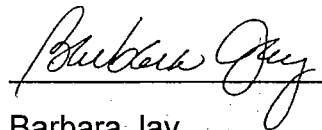
On a motion by Edwin P. Rosado, seconded by Bruce Goldensohn, with Carolyn J. Shawaker, Chair, and John H. Pentecost, Vice Chair, in agreement, and Stanley B. Boyd necessarily absent, the Board adopted the following Resolution:

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 26th 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.

