

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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CASE NO. A-6502

PETITION OF ARACELI E. VELASQUEZ

OPINION OF THE BOARD

(Hearing Held October 19, 2016)

Worksession Held and Opinion Adopted November 2, 2016)

(Effective Date of Opinion: November 22, 2016)

Case No. A-6502 is an application for three variances necessary for an existing structure/carport. First, the existing structure requires a variance of 5.50 feet as it is within 4.50 feet of the rear lot line. The required setback is ten (10) feet, in accordance with Section 59-4.4.9.B.2 of the Montgomery County Zoning Ordinance. Second, the existing structure requires a variance of 25 feet as it is within zero feet of the side street lot line. The required setback is twenty-five (25) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance. Finally, the existing structure requires a variance to be located in front of the rear building line of a single family dwelling, in accordance with Section 59-4.4.9.B.2.a of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on October 19, 2016. Araceli Velasquez appeared at the hearing, assisted by her daughter Karina E. Ventura, who testified and helped to translate the proceedings for her mother. At the close of the hearing, the Board kept the record open for receipt of documentation to support the Petitioner's assertion that the requested variances were necessary to accommodate her disability. While the Petitioner did not provide any additional information concerning her need for the requested variances on disability grounds, at the November 2, 2016, Worksession, the Board did receive and review a letter from the Petitioner indicating that she was willing to reduce the size of the existing structure/carport, and thus lessen the extent of the variances requested, as discussed below.

Decision of the Board: Variances denied.

EVIDENCE PRESENTED

1. The subject property is Lot 1, Block 21, 0059 Subdivision located at 12830 Holdridge Road, Silver Spring, Maryland, 20906, in the R-60 Zone. It is 6,663 square feet in size.
2. Ms. Ventura testified that she is Ms. Velasquez's daughter, and that she lives at the subject property. She testified that when construction of this carport was started, she did not realize that it required a building permit. She testified that by the time she realized she needed a permit, construction was nearly complete and a stop work order had been issued.
3. Ms. Ventura testified that the subject property has a very large front yard, and almost no rear yard. She noted that an accessory structure like a carport is required to be in the rear yard, and that because of the way the house is situated on this lot, there would be barely enough room to drive around the house to get to the rear yard.
4. Ms. Ventura testified that the carport is built over the existing driveway, which she said has been there since the house was built. She testified that her family has three vehicles, and that when it snows, they cannot get out of their driveway. She testified that the carport covers all three cars, and that they have no plans to enclose it.
5. Ms. Ventura testified about her mother's medical conditions; the record contains documentation to support this testimony. See Exhibit 9. Ms. Ventura testified that because of her condition, it took her mother 15 minutes to walk from the Council Office Building parking garage to the Board's hearing room. She testified that her mother is going back to the doctor for treatment next week, and that if that treatment is unsuccessful, she would need surgery. A letter submitted by Ms. Velasquez regarding her condition indicates that recovery from surgery, if necessary, would take about two months. See Exhibit 9. The letter submitted by Ms. Velasquez further states that until her condition is resolved, she cannot shovel snow, and that "with the Carport there covering almost the entire driveway, it would help me a lot."
6. At the November 2, 2016, Worksession, the Board reviewed an additional letter submitted by Ms. Velasquez. See Exhibit 11. That letter states that the placement of her home on her corner lot "makes it too narrow to build a carport towards the rear of the property. The property is placed too close to Lot 33-Block 21 and Lot 2-Block 21, which leaves my property with a rear property space of 10 ft., accounting the additional 10 ft setback from property to property. Also, there are a couple houses that have closed carports that are corner houses ending right by the public sidewalk line." The letter goes on to state that "[s]ince the carport is already built, I was hoping if by moving the carport 5 ft – 10 ft away from my property line that would help in approving the variance." In response to Board questions at the Worksession, Ms. Ventura clarified that her mother is proposing to move the carport five feet (5) away from Janet Road. This would reduce the

variance needed from the side street lot line from 25 feet to 20 feet. Ms. Ventura noted that this would still allow coverage for two cars.

7. The Zoning Vicinity Map shows that in this neighborhood, there are many corner lots like the Petitioner's where the house is sited at an angle on the property, facing the corner. See Exhibit 7.

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 Sections 59-7.3.2.E.2.a.i and v, and alternatively, Section 59-7.3.2.E.2.b, as follows:

The Petitioner has argued that the placement of her home on this corner lot leaves her with a large front yard and small rear yard, and "makes it too narrow to build a carport towards the rear of the property," noting that the placement of her home "leaves my property with a rear property space of 10 ft., accounting the additional 10 ft setback from property to property." The Board finds, in looking at the Zoning Vicinity Map, that the placement of Petitioner's house at an angle on her corner Property, such that her rear yard is not as large as her front yard, is not usual in this neighborhood. Indeed, the Zoning Vicinity Map shows that at least three of the four corner houses are the intersection of Holdridge and Janet Roads are similarly situated, as are homes at the intersection of Janet and Matey Roads. See Exhibit 7(a). The Zoning Vicinity Map further indicates that the configuration of corner lots along Janet Road is indeed very regular, with a repeating "corner lot, five-sided lot, corner lot" pattern. Accordingly, the Board concludes that the Petitioner's lot is not unusually shaped or constrained. Furthermore, at 6,663 square feet, the Petitioner's lot is not substandard for the zone. Thus the Board concludes that this Property does not meet the uniqueness test set forth in Section 59-7.3.2.E.2.a.i.

The Petitioner asserted in her letter of November 2, 2016, that "there are a couple houses that have closed carports that are corner houses ending right by the public sidewalk line," but has provided no other evidence of that. The Board finds that even if there are a couple of corner houses with closed carports by the public sidewalk line, a couple of houses does not constitute an "established historic or traditional development pattern" for this street or neighborhood, and thus finds that the requested variances cannot be granted on these grounds. Thus the Board concludes that this Property does not meet the test set forth in Section 59-7.3.2.E.2.a.v. The Board notes that Petitioner did not attempt to argue that the Property meets the tests in Sections 59-7.3.2.E.2.a.ii, iii, and iv.

The Board further finds that even if this Property had been found to satisfy Section 59-7.3.2.E.a, that while the positioning of this house on the subject property is not attributable to the Petitioner, the Petitioner had this carport constructed, and thus the extension of this carport into the side and rear setbacks, and in a location not behind the rear building line, is a result of her 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,

which requires that the special circumstances or conditions not be the result of actions by the applicant.

For all the foregoing reasons, the Board finds that the requested variances cannot be granted under Section 59-7.3.2.E, 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 variances and based upon the evidence of record, including the letter and medical records in the record at Exhibit 9, the Board finds that the Petitioner has a medical condition which causes her pain and which she is actively seeking to resolve, and that she is requesting variances to allow an existing

carport to remain in order to eliminate the need for her to clear her driveway of snow or ice during the upcoming winter, activities which she cannot undertake currently because of her condition. A major life activity is generally considered to be an activity of central importance to daily life. In light of this definition, and given that the frequency with which this area is impacted by snow and ice cannot be predicted with any certainty, the Board cannot find that snow removal is a major life activity. Accordingly, even if one were to accept that Petitioner's condition constitutes a physical impairment, the Board cannot find that the Petitioner's condition severely limits her ability to engage in a major life activity, and cannot grant the requested variances on disability grounds.

On a motion by John H. Pentecost, Vice Chair, seconded by Stanley B. Boyd, with Carolyn J. Shawaker, Chair, Edwin S. Rosado, 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.



Carolyn J. Shawaker, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 22nd day of November, 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.