

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**CASE NO. A-6563**

**PETITION OF MALCOLM FRIAR**

**OPINION OF THE BOARD  
(Opinion Adopted May 16, 2018)  
(Effective Date of Opinion: May 24, 2018)**

Case No. A-6562 is an application for a 3.5 foot variance necessary for the proposed construction of an elevator shaft within 6.5 feet of the left lot line. The required setback is ten (10) feet, in accordance with Section 59-4.4.7 of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on May 16, 2018. Petitioner Malcolm Friar appeared at the hearing pro se.

Decision of the Board:                   Variance **GRANTED**.

**EVIDENCE PRESENTED**

1.     The subject property is Lot 86, Block O, Sherwood Forest Manor Subdivision, located at 721 Brandon Green Drive, Silver Spring, Maryland, 20904, in the R-200 Zone. Per SDAT, the subject property is 11,820 square feet in size. The property is located near the end of Brandon Green Drive, on the east side of a cul-de-sac.

2.     Mr. Inder Vijay owns the subject property, and resides there with his wife and sister-in-law. See Exhibits 3(a) and (b). The record includes a signed, notarized letter from Mr. Vijay designating Malcolm Friar, a design/build contractor with Angles Unlimited, as his representative, and granting Mr. Friar permission "to sign any documents on [his] behalf for the procuring of a construction permit and the necessary work from the Board of Appeals, survey services or any other documentation related to this issue." Mr. Vijay indicates in his letter that he is "going away for an extended period and it is necessary to keep to our timetable that [he] allow Mr. Friar the permission to sign the various forms and applications on [his] behalf." See Exhibit 1(b).

3. The Statement submitted at Exhibit 3(a) describes the uniqueness of the property as follows:

The lot is pie shaped and is wider in the rear and narrower at the street (front). This causes an unusual condition with regards to the proposed project. There is only one location where the shaft can be built and effectively be used, and this location intrudes into the BRL. ... A standard rectangular lot would not cause this issue.

This Statement further indicates that the elevator shaft "has been designed to blend with the existing architecture and to be built in the historic vernacular of the neighborhood," and is intended to "virtually disappear into the existing building." See Exhibit 3(a).

4. Per Exhibit 3(b), Mr. Vijay has a progressive medical condition such that "[a]t this time, it is unsafe for him to try to use stairs as his balance has been compromised," and that as his condition continues to worsen, "it is anticipated he will be confined to a wheelchair in the very near future." Per his doctor, Mr. Vijay's condition "severely limit[s] his walking and ability to climb steps. He has progressive difficulty maintaining his balance and has become increasingly unstable with regards to his gait." The doctor's letter goes on to note that Mr. Vijay "is at very high risk for sustaining a fall," and that he "strongly recommend[s] that he should avoid climbing steps and use an elevator at all times." See Exhibit 8.

5. The Statement submitted at Exhibit 3(b) explains the reason for the proposed location of the elevator shaft as follows:

The permit requested was for the construction of an elevator shaft to be on the left side of the property. That location would allow Mr. Vijay to have access to all floors of his residence whereas positioning the elevator shaft in any other location would not allow Mr. Vijay the ability to access all the floors of his home. The arguments for this statement are 1) The right side of the property is not feasible because the interior floor is not level with most of the house due to a sunken family room and the property also has a storm drain easement on the right side which will not allow the construction of any projection into it; 2) The front of the property is not acceptable as The Home Owners Association will not allow the structure to be built in the front of the house; and 3) the rear of the residence is not possible because the lowest stop of the elevator would open into the day care center main classroom, which could cause a potential safety issue as well [as] limit the use of the elevator only to times when the day care center is closed. Mr. Vijay needs to access the basement level of the house at all times, as that is where his office and the laundry room are located.

See Exhibit 3(b).

6. At the hearing, Mr. Friar testified that Mr. Vijay has lived in his home for approximately 25 years, and that he has a medical condition which makes him very

unstable when walking. He testified that he and Mr. Vijay discussed all options for adding an elevator to Mr. Vijay's home, and that the solution for which the variance is sought was the only solution that worked for the reasons set forth in Exhibits 3(a) and (b). Mr. Friar testified that locating the elevator as proposed would allow Mr. Vijay access to his bedroom, which is on the second floor, the living room, which is on the main floor, and his office, which is in the basement. He testified that without an elevator, Mr. Vijay would not have access to all of the levels of his house. Finally, he testified that the homeowners' association and the neighbors were both supportive of the proposed construction. See Exhibit 7. In response to a Board question, Mr. Friar testified that a chairlift was not an option because of the configuration of the stairway.

## 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 Petitioner did not attempt to argue the standard in Section 59-7.3.2.E.1 of the Zoning Ordinance, and thus the Board must start its review of this request under Section 59-7.3.2.E.2. While the Petitioner has asserted that the architectural design of the proposed elevator shaft would be "built in the historical vernacular of the neighborhood," in satisfaction of the criterion under Section 59-7.3.2.E.2.a.v of the Zoning Ordinance, the Petitioner has not presented any evidence that other homes on the street or in the neighborhood have exterior elevator shafts or other similar protrusions, and thus the Board cannot find that proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood. In addition, the Petitioner has asserted that the property is unique pursuant to Section 59-7.3.2.E.2.a.i because it is "pie shaped," wider at the rear than the front, and that this has caused the Petitioner difficulty in locating the elevator shaft. Based on the Zoning Vicinity Map in the record at Exhibit 9, even if the Board were to accept as correct the Petitioner's characterization of this property as "pie shaped," the Board finds that being pie-shaped is not unusual amongst the properties on this and other courts in this neighborhood. Accordingly, the Board cannot find that the property satisfies Section 59-7.3.2.E.2.a.i. Because the Petitioner did not attempt to argue that his property was unique under the remaining standards in Section 59-7.3.2.E.2.a, the Board finds that the subject property does not satisfy the requirements for the grant of a variance under Section 59-7.3.2.E.2.a, and thus the Board will not address the remaining requirements of Section 59-7.3.2.E.2 of the Zoning Ordinance.

Having found that the requested variance cannot be granted under Section 59-7.3.2.E of the Zoning Ordinance, the Board now reviews whether the requested variance can be granted under 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 ADA 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 Statement in the record at Exhibit 3(b), the letter from Mr. Vijay's doctor in the record at Exhibit 8, and the testimony of the Petitioner, the Board finds that Mr. Vijay has a medical condition which significantly limits his mobility and balance, such that his physician "strongly recommend[s] that he should avoid climbing steps and use an elevator at all times." See Exhibit 8. The Board further finds that this condition constitutes an impairment which limits his independent mobility and ability to access all levels of his home, including his office and laundry room, which are in the basement of the home, and his bedroom. The Board finds that the ability to access vital areas of one's own house in order to work, do laundry, and sleep, among other things, is a major life activity for the purposes of the ADAAA and FHAA, and that Mr. Vijay's mobility impairment substantially limits this activity. Thus the Board finds that this impairment constitutes a disability under the ADAAA and FHAA.

2. The Board further finds that the construction of an elevator shaft, on the left (north) side of the existing house, will provide Mr. Vijay with safe access to the various levels of his home, improving his mobility and preserving his independence by allowing him to access his office and to engage in other necessary and normal activities inside of his home. Thus the Board finds that the proposed construction is a reasonable accommodation for the homeowner's mobility impairment which will allow him to continue to use and enjoy his home. The Board further finds that allowing this construction on the left side of Mr. Vijay'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 design of the proposed elevator shaft is intended to blend in with the architecture of the existing home and of the neighborhood, to minimize its impact on surrounding properties. The Board further notes that the record contains the signatures of several

neighbors indicating their approval for the proposed project, including the neighbor who shares the property line from which the variance relief is sought. See Exhibit 7.

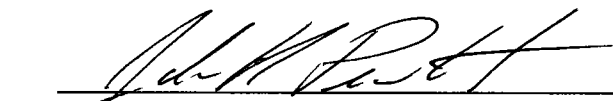
3. Thus the Board finds that the 3.5 foot variance from the side lot line requirement imposed by Section 59-4.4.7 of the Zoning Ordinance, necessary to allow the construction of the proposed elevator shaft, should be granted so that the strict application of Montgomery County's Zoning Ordinance and development standards do not prevent the homeowner's continued use of his home on account of his disability.

Therefore, based upon the Petitioner's binding testimony and the evidence of record, the requested variance of 3.5 feet from the required ten (10) foot side lot line setback is granted to allow the proposed construction of an elevator shaft, subject to the following conditions:

1. The Petitioner and the homeowner are bound by the testimony and exhibits of record, to the extent that such testimony and evidence are identified in this Opinion.
2. Construction must be completed in accordance with Exhibit Nos. 4(a)-(b) and 5.

On a motion by John H. Pentecost, Chair, seconded by Edwin S. Rosado, Vice Chair, with Stanley B. Boyd and Katherine Freeman in agreement, and with Bruce Goldensohn 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.

  
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 John H. Pentecost, Chair  
 Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 24th day of May, 2018.

  
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 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.