

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6787

PETITION OF LUIS O. GONZALEZ

OPINION OF THE BOARD
(Hearing Date: February 8, 2023)
(Effective Date of Opinion: February 17, 2023)

Case No. A-6787 is an application for a variance by Petitioner Luis O. Gonzalez to allow the construction of an accessory structure (shed) in the side yard. Section 59.4.4.7.B.2 of the Zoning Ordinance requires that accessory structures be located behind the rear building line of the principal building.

The Board of Appeals held a hearing on the application on February 1, 2023. Petitioner Luis Gonzalez appeared in support of his application.

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

EVIDENCE PRESENTED

1. The subject property is Block G, Lot 4, Gum Springs Farm Subdivision, located at 1813 Cullen Drive in Silver Spring, Maryland, 20905, in the R-200 Zone. The subject property is an interior lot, roughly rectangular in shape, located on the south side of Cullen Drive. It has an area of 16,949 square feet. Per SDAT, the subject property contains a house that was built in 1967. See Exhibits 4 and 8 and SDAT printout.

2. The Petitioner is seeking permission to have a shed in the yard to the right of his house, instead of in his rear yard. The Petitioner's Justification Statement ("Statement") states that when the Petitioner purchased the subject property in 1992, there was an old metal shed "in place at the same location" as the shed for which he now seeks variance relief. The Statement states that the old shed "rustled with the weather conditions," and that the new shed is made of wood. See Exhibit 3. The Petitioner include dimensions for

the shed along with a Site Plan showing its location with his submission. See Exhibits 3, 4 and 5(a).

3. The Statement states that the property's "back yard slopes downhill and the ground is uneven," and that the "front yard slopes downhill as well." The Statement states that placing the shed behind the rear building line of the house "would not make it readily accessible" to the Petitioner or his spouse, both of whom are persons with disabilities. The Statement states that the variance is being sought for medical reasons to allow the shed to be located in an area that is accessible. See Exhibit 3.

4. The Statement states that the shed substantially conforms with the established historic or traditional development pattern in the neighborhood, noting that "[s]heds of the type and size proposed in this request are common throughout the Gum Springs Farm neighborhood," and that "[t]he use of the shed appears to be in keeping with the traditional development patterns of the neighborhood." See Exhibit 3.

5. The Statement states that "the new shed would not impact other properties owners" and that the "shed location would not interfere with any other property owners." It states that granting the requested variance will not be adverse to the use and enjoyment of neighboring properties "because the shed is located on the side yard and in the same location as the old shed." Finally, the Statement states that the Petitioner is unaware of any complaints about the shed. See Exhibit 3. The Petitioner has included photographs showing that the view of the shed is largely obscured by a board-on-board fence. See Exhibits 5(b)-(e).

6. The record contains two letters of opposition to the grant of the requested variance. The first, from the Petitioner's abutting neighbors to the left, states that the Petitioner's shed was "poorly constructed," "built without a permit," and is "currently not maintained." The letter asserts that the shed is affecting property values. See Exhibit 7. The second, from the Petitioner's abutting neighbors to the right, states that these neighbors "object to the non-permitted construction and pending variance of the shed currently in place located forward of the rear building line," and that the "structure's current state of disrepair and questionable stability present safety concerns and an unattractive view which will affect resale values." These neighbors request denial of the variance and removal of the structure. See Exhibit 10.

7. At the hearing, the Petitioner testified that he purchased the subject property in 1990. He testified that at that time, there was a metal shed on the property in the same location as the new shed for which the variance relief is sought. He testified that the metal shed rusted and was removed. The Petitioner testified that sometime later, he erected a new shed where the old shed had been. He testified that the new shed meets the side setback for accessory structures. The Petitioner testified that the new shed was purchased from Lowe's, and that the view of it is largely blocked by an existing fence that he testified has been there since they purchased the property. He noted that while they did not install the original fence, they have repaired and replaced sections of it. The Petitioner testified that they had planned to put in a new fence once the shed was

completed. He testified that they planned to use the shed to store gardening tools and supplies. The Petitioner testified that before the shed was finished, someone complained to the County, and a County inspector ordered him to stop work on it. He testified that he has not worked on the shed since that time, and that it looks awful.

The Petitioner testified that there is a patio behind his carport, and that his yard slopes downhill beyond that point. He testified that the same condition exists in the front yard. The Petitioner explained that the patio goes around from the back of the house to the front, behind a fence.

The Petitioner testified that he and his wife both have disabilities that prevent them from being able to walk on hills. The Petitioner detailed the nature of his disability and its impact on his mobility in sworn testimony before the Board. He also testified about his wife's disability. The Petitioner testified in response to a Board question that he has a handicapped sticker on his car. He testified that in addition to being the location of the shed that was on the property when he purchased it, the location of the new shed was chosen because it was accessible to his wife and to him. The Petitioner stated that if he and his wife could not use the shed, they may as well not have it.

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 put forth arguments that the subject property is encumbered with sloping topography, and that the proposed shed would substantially conform with the established development pattern of the neighborhood, in satisfaction of the variance criterion under Sections 59.7.3.2.E.2.a.i and v of the Zoning Ordinance, the Board is not persuaded by the evidence of record that that is the case. In support of this, the Board notes that the Petitioner provided no evidence to show that the slope of his rear yard was peculiar to his property or that it precluded construction of a shed behind the rear building line of his house. Similarly, the Petitioner provided no information about the placement of other sheds in the neighborhood or the frequency with which they occur. Thus the Board cannot thus cannot find that the property satisfies Section 59.7.3.2.E.2.a.i or v of the Zoning Ordinance. 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 variances 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 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 Statement in the record at Exhibit 3 and the testimony of the Petitioner, the Board finds that the Petitioner has a significant mobility impairment that limits his ability to safely walk on terrain that is not level, and that would preclude his ability to access items stored in a shed if accessing that shed required the navigation of sloped terrain. The Board finds that the ability to safely access one's home and related structures that are typically associated with a home, such as a shed for the storage of gardening tools and supplies, is a basic life activity for the purposes of the ADAAA and FHAA, and that the Petitioner's compromised mobility substantially limits this activity. Thus the Board finds that the Petitioner's impairment constitutes a disability under the ADAAA and FHAA.

2. The Board further finds that the construction of a shed on the side of the Petitioner's existing house, as depicted on Exhibits 4 and 5(a)-(e), will provide the Petitioner with level access between his home and his shed, and will allow him to safely traverse that distance despite his disability, preserving his mobility and allowing him to engage in necessary and normal activities outside of the house. Thus the Board finds that the proposed construction is a reasonable accommodation for the Petitioner's mobility impairment which will allow the Petitioner to continue to enjoy and live in his home. The Board further finds that allowing this construction on the side of the Petitioner'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 shed will be partially screened by an existing board-on-board fence, and is set back the required distance from the side lot line, thus reducing its impact on surrounding properties.

3. Thus the Board finds that the variance from the requirement that accessory structures be located behind the rear building line of the principal building should be

granted so that the strict application of Montgomery County's Zoning Ordinance and development standards do not prevent the Petitioner's continued use and enjoyment of his property on account of his disability. The Board notes that it could have made similar findings regarding the disability of the Petitioner's wife, and would have concluded that the location of the shed was a reasonable accommodation necessary to allow her to use and enjoy the property, but need not do so given its finding that the grant of the variance is necessary to accommodate her husband's disability.

Therefore, based upon the Petitioner's binding testimony and evidence of record, the requested variance to permit the location of a shed on the right side of the Petitioner's house, forward of the rear building line, is granted, subject to the following conditions:

1. The Petitioner is bound by his testimony and exhibits of record.
2. Construction of the shed must be completed in accordance with Exhibit Nos. 4 and 5(a)-(e).

On a motion by Alan Sternstein, seconded by Caryn Hines, with John H. Pentecost, Chair, and Laura Seminario-Thornton in agreement, and with Richard Melnick, Vice Chair, abstaining, 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.



John H. Pentecost, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 17th day of February, 2023.



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.