

BOARD OF APPEALS  
for  
MONTGOMERY COUNTY

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**Case No. A-5809**

**PETITION OF LEWIS M. AND TAMARA J. KESSLER**

(Hearing held September 18, 2002)

**OPINION OF THE BOARD**

(Effective date of Opinion, October 17, 2002)

This proceeding is a petition pursuant to Section 59-A-4.11(b) of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for variances from Sections 59-C-1.326(a)(1) and 59-C-1.326(a)(2)(c)(4). The petitioners propose to construct an accessory structure (therapeutic pool) in the side yard that require a variance of 19.5 feet as it is within eight (8) feet of the side lot line and a variance to locate the therapeutic pool in the side yard. The required side lot line setback is 27.5 feet and Section 59-C-1.326 requires accessory structures to be located in the rear only.

Robert Gurney, architect, appeared with the petitioners at the public hearing.

The subject property is Lot 28, Block 4, Chevy Chase Section 3 Subdivision, located at 6807 Florida Street, Chevy Chase, Maryland, in the R-60 Zone (Tax Account No. 00458694).

Decision of the Board: Requested variances **granted**.

**EVIDENCE PRESENTED TO THE BOARD**

1. The petitioners propose to construct an 8 x 75 foot accessory structure (therapeutic pool) in the northern side yard.
2. Mr. Kessler testified that his daughter, Isabel, has cerebral palsy and that the pool would provide daily therapeutic water exercise. Ms. Kessler testified that water therapy is essential to her daughter's health and physical treatment. The record contains a letter of medical necessity from Katharine Alter, M.D., and a letter of support from Katie Parker, MSPT, PCS, Children's National Medical Center.
3. Mr. Gurney testified that the pool is designed and built for therapeutic purposes and that the structure could be removed when no longer required. Mr. Gurney testified that the pool will have an automatic cover and will allow the user independent entry to the pool.

## **STANDARDS FOR EVALUATION**

Based on the petitioners' binding testimony and the evidence of record, the Board finds as follows:

The requested variances do not comply with the applicable standards and requirements of the Montgomery County Zoning Ordinance as set forth in Section 59-G-3.1. However, the Board finds that the variances can be granted as a reasonable accommodation of the petitioner's disability under Title II of the American with Disabilities Act (ADA) and the Fair Housing Amendments Act of 1988 (FHAA).

### **Determination of Disability**

The ADA 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(2)(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) (1997). 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.]

### **FINDINGS OF THE BOARD**

Based on the above, 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 ADA 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 variances constitute 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 variances 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, the Board finds as follows:

The need by the petitioners’ daughter for daily physical therapy to assist mobility demonstrates that the petitioners’ daughter’s major life activities are restricted. Because of the direct impact of cerebral palsy on their daughter’s major life activities, the Board finds that a disability exists pursuant to the definitions in the ADA and FHAA. The Board finds that the proposed construction of an accessory structure/therapeutic pool constitutes a reasonable accommodation to permit daily, therapeutic, water exercise required by the petitioners’ daughter.

The proposed therapeutic pool will not undermine the intent of the Zoning Ordinance.

Therefore, based upon the petitioners' binding testimony and the evidence of record, the Board finds that the grant of the requested variances are a reasonable accommodation to the petitioners’ child’s disability because (1) it will not fundamentally alter or subvert the purposes of the zoning ordinance; and (2) the proposed construction is necessary to permit the use of a therapeutic pool by the petitioners’ daughter to provide essential daily therapeutic exercise.

Accordingly, the requested variances of 19.5 feet as it within eight (8) feet of the required 27.5 foot side lot line setback and to permit the construction of an accessory structure/therapeutic pool in the side yard are granted subject to the following conditions:

1. The petitioners shall be bound by all of their testimony, the testimony of their witnesses, and exhibits of record, to the extent that such evidence and representations are identified in the Board’s Opinion granting the variance.

2. Construction must be completed according to plans entered in the record as Exhibit Nos. 5 and 6.

3. The variance is granted to the petitioners only, and the accessory structure (therapeutic pool) shall be removed at such time as it is no longer required in relation to petitioners' daughter's medical condition or the petitioners no longer resides on the property.

On a motion by Allison Ishihara Fultz, seconded by Louise L. Mayer, with Donna L. Barron, Angelo M. Caputo and Donald H. Spence, Jr., Chairman, in agreement, the Board adopted the following Resolution:

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Donald H. Spence, Jr.  
Chairman, Montgomery County Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 17th day of October, 2002

\_\_\_\_\_  
Katherine Freeman  
Executive Secretary to the Board

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). 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.