

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. A-5824

PETITION OF MAHIN GHADIRI

(Hearing held November 12, 2003)
(Worksession held November 26, 2003)

OPINION OF THE BOARD ON THE HEARING ON REMAND

(Effective date of Opinion, January 9, 2004)

This proceeding is a petition pursuant to Section 59-A-4.41 of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for a variance from Section 59-C-1.323(b)(1). The petitioner proposes to construction a one-story addition (garage) that reduces the sum of both side yards to 21.30 feet. A variance of 3.70 feet is required. The required sum of both side yards is twenty-five (25) feet.

Shahriar Amiri, Division Chief, Division of Building Construction, Department of Permitting Services (DPS), appeared at the public hearing.

The subject property is Lot 23, Block 1, Regency Estates Subdivision, located at 11703 Smoketree Road, Potomac, Maryland, 20854, in the R-90 Zone (Tax Account No. 00104530).

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

EVIDENCE PRESENTED TO THE BOARD

1. The petitioners proposes to construct a 9.7 x 33 foot one-story garage addition.
2. Ms. Ghadiri testified that her mother, Mohtaram Rashtchain, resides with her and that the proposed addition would provide a necessary and easier accessibility to the residence that her mother's disability requires.
3. Mr. Amiri testified that he had reviewed the petitioner's record for any sediment control issues and also the statement from Dr. Brian G. Evans. See, Exhibit No. 21 (letter dated 5/12/03 from Dr. Evans). Dr. Evans' letter states that "Ms. Rashtchian has . . . severe bilateral osteoarthritis of her knees. She has markedly limited overall ambulatory ability."
4. Mr. Amiri testified that Ms. Rashtchian is a qualifying individual for a variance under the American Disabilities Act (ADA). Mr. Amiri testified that

the proposed addition will provide more than 3 feet from the side lot line boundary to the proposed structure, as shown on Exhibit No. 22(b) [foundation plan] and required by the fire code regulations.

STANDARDS FOR EVALUATION

Based upon the petitioner's binding testimony and the evidence of record, the Board finds as follows:

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

Determination of Disability

The ADA and FHAA define a person's disability, or handicap, in pertinent part, 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. See, *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 accommodations 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." [See *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).

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. 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

In order to determine if a variance can be granted based on the ADA considerations, 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 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 zoning ordinances are among the varieties of local government rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance must be granted in order 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. The Board finds that the need for assistance with general mobility demonstrates that the petitioner’s mother’s major life activities are restricted. Because of the direct impact the impairment has on the petitioner’s mother’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 a one-story addition/garage with a level floor surface and also as an enclosed structure will provide the necessary stable and safe accessibility required by the petitioner’s mother.

2. The Board finds that the one-story addition/garage will not undermine the intent of the zoning ordinance. Garages are generally commonly found in residential areas such as the R-90 Zone in which the subject property is located, and are consistent with the intent of the zoning ordinance to promote a residential scale and streetscape in residential zones.

The Board further finds that, although the proposed construction of the one-story addition/garage requires a variance pursuant to the sum of both side yards requirement of Section 59-C-1.323(b)(1), the grant of the variance will not create a non-conforming condition under the general requirements of Sections 59-C-1.323(b)(1) for the R-90 Zone. Accordingly, the proposed construction will not impair the intent, purpose, and integrity of the general plan affecting the subject property.

Therefore, based upon the petitioner's binding testimony and the evidence of record, the Board finds that the grant of the requested variance is a reasonable accommodation of the petitioner's mother'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 petitioners' mother safe and level access to the residence.

Accordingly, the requested variance of 3.70 feet from the required twenty-five (25) foot sum of both side yards requirement is **granted** subject to the following conditions:

1. The petitioners shall be bound by all of her testimony 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. 22(a) through 22(d).
3. The variance is granted to the petitioner only, and the garage shall be removed at such time as it is no longer required in relation to the petitioner's mother's condition or the petitioner no longer resides on the property.

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.

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 foregoing Resolution.

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 9th day of January, 2004.

Katherine Freeman

Executive Secretary to the Board

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve-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.