

BOARD OF APPEALS
for
MONTGOMERY COUNTY

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

Case No. A-5940

PETITION OF NEIL T. WERNER

(Hearing held December 10, 2003)

OPINION OF THE BOARD

(Effective date of Opinion, February 4, 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). The proposed construction of a one-story addition (garage) requires a 6.79 foot variance as it is within 1.21 feet of the side lot line. The required setback is eight (8) feet, in accordance with Section 59-C-1.323(b) (1).

Neil and Jacqueline Werner appeared at the hearing.

The subject property is Lot 34, Block C, located at 11915 Seven Locks Road, Potomac, Maryland, 20854, in the R-90 Zone, (Tax Account No. 00114163).

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

EVIDENCE PRESENTED TO THE BOARD

1. The petitioners testified that they seek a variance to enable them to build a garage with a footprint of 16' x 21' [Exhibit No. 4], and that the garage has been designed to accommodate the needs of their daughter, who was born four months premature on Oct. 23, 2002, at a birth weight of less than one pound and who experiences developmental complications stemming from her extreme prematurity.
2. The petitioners presented a letter from their daughter's physician, Deborah A. Hoy, MD, describing the extent of their child's disabilities, including chronic lung disease, risk of cessation of breathing, inability to regulate body temperature, underdeveloped skin pigmentation and an impaired immune system. Dr. Hoy states that these conditions require the petitioners' daughter to be protected from changes in her environment to the greatest extent possible while her immune and circulatory systems, skin, heart and lungs mature. [Exhibit No 3.]
3. In response to questions from the Board, the petitioners testified that the 16 foot width of the garage was required in order to accommodate loading

- of equipment, such as a wheelchair, that is or will be required for their daughter. [Transcript, pp. 10-11.]
4. The petitioners testified that the proposed location for the garage was the only feasible spot in which to build because of their property's sloping topography and the existence of a deck and in-ground pool in the backyard. [Transcript, pp. 5-7.]
 5. The Zoning Vicinity Map, Ex. 8, shows that the petitioners' lot is similar to adjoining lots in size and shape.
 6. The petitioners provided drawings describing the proposed wood frame construction of the garage, including roof framing and the anticipated method of connecting the proposed garage to the existing house. [Exhibits 5(a) – 5(f).] The garage is intended to butt directly to the wall of the house and its roof will remain independent of the roof of the house. [Exhibits 5(b)-(d), (f).]

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 of the petitioner's disability under Title II of the Americans 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 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) (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 petitioner's medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the petitioner 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 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. The need for protection in order to facilitate basic bodily regulatory functions (i.e., breathing, circulation, temperature regulation, immune response) demonstrates that several of the petitioners' daughter's major life activities are restricted. Because of the direct impact these impairments have 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 a garage would permit the petitioners' daughter a sheltered area for passage from the house to the car, as recommended by the daughter's physician. [Ex. 3.]

2. The proposed construction of the garage is such that it can be removed without damage or structural impairment of the house at such time as it is no longer needed by the petitioners' daughter.

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 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 petitioners' daughter a safe means of passage, protected from the elements, between her home and car.

Accordingly, the requested variance of 6.79 feet from the required 8 foot side lot line setback is **granted** subject to the following conditions:

1. The petitioners shall be bound by all of their 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. 5(a) – (f).
3. The variance is granted to the petitioner only, and the one-story addition (garage) shall be removed at such time as it is no longer required in relation to petitioner's medical 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 Angelo M. Caputo, with Donna L. Barron, Vice Chair, and Donald H. Spence, Jr., Chairman, in agreement, the Board adopted the foregoing Resolution. Board member Louise L. Mayer was necessarily absent and did not participate in the hearing or 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 4th day of February, 2004.

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.