

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**CASE NO. A-6546**

**PETITION OF REZA HOSSEINI**

**OPINION OF THE BOARD**

(Opinion Adopted December 20, 2017)  
(Effective Date of Opinion: January 4, 2018)

Case No. A-6546 is an application for two variances necessary for the construction of an attached garage. The first is a variance of eight (8) feet, necessary because the proposed construction is within four (4) feet of the side lot line. The required setback is twelve (12) feet, in accordance with Section 59-4.4.8.B.2 of the Montgomery County Zoning Ordinance. The second is a variance of six (6) feet, needed because the proposed construction reduces the sum of both side yards to nineteen (19) feet. The required sum of both side yards is twenty-five (25) feet, in accordance with Section 59-4.4.8.B.2 of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on December 17, 2017. Reza Hosseini appeared pro se and testified in support of his application.

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

**EVIDENCE PRESENTED**

1. The subject property is Lot 1, Block 4, Regent Park Subdivision located at 11739 Devilwood Drive, Potomac, MD, 20854, in the R-90 Zone. The Petitioner purchased the subject property in 1999. See Exhibit 3(a). Per SDAT, the property contains a dwelling built in 1963, and is 10,409 square feet in size. It is an interior, four-sided lot, bordered on the northwest side by Devilwood Drive. See Exhibits 3(a), 4 and 7.

2. The Justification Statement submitted in connection with this variance application indicates that the Petitioner needs a garage because of multiple documented medical conditions which have rendered him legally blind/visually impaired, and which put him at risk for a bad fall because they severely limit his ability to function in low-light and dark

settings, as well as in extreme weather conditions. It specifically notes that the Petitioner cannot see black (clear) ice. See Exhibit 3(a).

The Justification Statement references a letter from a doctor at Johns Hopkins Hospital which indicates that if the Petitioner "experiences a major fall or bumps into an object he could risk further worsening his eye conditions, losing his eye completely or complete blindness," and urges Petitioner to "reduce any risks that may potentially cause trauma or damage to petitioner's vision, possibly worsening his conditions." In light of his visual impairment, the Petitioner asserts in his Statement that the proposed variance is the minimum necessary to allow him to safely traverse from his driveway to his home, stating that a garage is medically necessary to allow him "to walk straight from his home to the family car without having to walk on the ice (clear ice/black ice) and/or without taking risk of walking in inclement weather." He indicates that he is seeking a variance under the Americans with Disabilities Act. See Exhibits 3(a) and (b).

3. In attempting to establish that the proposed construction of an attached garage comports with the established development pattern in the neighborhood, the Justification Statement states that:

[T]here are many properties with attached car garages lacking enough setback (less than what code requires) as little as few feet set back, pictures of four of those properties located on Devilwood Drive (Lot.1 address), Post Oak and Victory Lane of Potomac, MD in close proximity of Lot.1 and their attached car garages are submitted. Therefore the proposed structure would be in substantial conformity with the development pattern of the neighborhood.

\* \* \* \* \*

Many of the houses on the neighborhood already have attached car garage with less than required set back and their street names were submitted with the application. A variance for the proposed attached garage will make Lot.1 in conformity with the general neighborhood.

See Exhibits 3(a) and 5(c)-(f).

4. The Petitioner purchased the subject property in 1999. He states that the driveway where the garage is proposed to be built was in place when he purchased the property, and that he took no actions to cause or affect its location.

5. With respect to the effect of the proposed garage on neighboring properties, the Petitioner states in the Justification Statement that the proposed garage is far away from all but one of the adjoining properties. It states that the roof of the proposed garage will be lower than the closest neighbor's roof, and will also be lower than the roof of his own home, which he describes as a rambler. Thus the Petitioner concludes that the proposed garage will not be adverse to the use of adjoining or confronting properties.

6. At the hearing, the Petitioner testified that he is considered disabled at his place of employment, and that as an accommodation for his visual impairment, he is permitted to

work from home full-time. He elaborated about the severity of his condition, and explained that it will not get better, only worse. The Petitioner testified that he is very near-sighted, that he is losing his vision from the side, and that he cannot see black ice. He testified that he has been advised by his doctor that if he falls, it will kill his optic nerve and he will lose his eye. He testified that his driveway is steeply sloped such that it is possible to fall on the driveway even in dry weather.

The Petitioner testified that he has to go to the doctor almost weekly. He testified that he does not drive, and that he relies on his wife and friends to take him to the doctor and other places. He testified that he needs to have the family car parked next to the door to his house and under shelter so that he can safely walk between the house and car to go to his medical appointments and elsewhere. He stated that this variance request is a medical necessity, not a luxury.

The Petitioner reminded the Board that his house is a one-story rambler. He testified that the proposed one-story garage will not adversely impact his neighbor to the northeast, explaining that there is an existing fence between the two properties, that his neighbors have a two-story house, and that they will not see his one-story garage from their house.

## 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 put forth an argument that the proposed garage would substantially conform with the established development pattern of the neighborhood, in satisfaction of the variance criterion under Section 59-7.3.2.E.2.a.v of the Zoning Ordinance, the Board is not persuaded by the evidence of record that that is the case. In addition, based on the Zoning Vicinity Map in the record at Exhibit 7, the Board is not convinced that this lot is unusually configured relative to its neighbors because of its location along a curve in the street, and thus 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 variances 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 Justification Statement in the record at Exhibit 3(a), the letter from Petitioner's doctor in the record at Exhibit 3(b), and the testimony of the Petitioner, the Board finds that the Petitioner has a significant vision impairment that severely limits not only his ability to see, but also his ability to navigate and walk safely in numerous circumstances (darkness, dim light, adverse weather conditions). The Board further finds that this impairment prevents the Petitioner from being able to see and avoid black ice, and interferes with his ability to safely enter and exit his home. The Board finds that the ability to exit one's own house in order to attend medical appointments and engage in other everyday activities that take place outside of the home is a basic life activity for the purposes of the ADAAA and FHAA, and that the Petitioner's vision impairment 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 an attached garage, on the northeast side of the Petitioner's existing house, as depicted on Exhibits 4 and 5(a)-(b), will provide the Petitioner with covered access between his home and car, and will allow him to safely traverse that distance despite his disability and irrespective of the weather, 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 vision 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 attached garage would have a roofline that is lower than that of the existing house, and lower than that of the neighboring house, to minimize its impact on surrounding properties.

3. Thus the Board finds that the eight (8) foot variance from the side lot line requirement set forth in Section 59-4.4.8.B.2 of the Zoning Ordinance, and the six (6) foot variance from the sum of both side yards, also set forth in Section 59-4.4.8.B.2, both necessary to allow the proposed construction, 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 of his home on account of his disability.

Therefore, based upon the Petitioner's binding testimony and evidence of record, the requested variance of eight (8) feet from the required twelve (12) foot side lot line setback, and the requested variance of six (6) feet from the required twenty-five (25) foot required sum of both side yards, are granted to allow the proposed construction, subject to the following conditions:

1. The Petitioner is bound by his 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 the plans entered in the record as Exhibit Nos. 4 and 5(a)-(b).

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 4th day of January, 2018.

  
\_\_\_\_\_  
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.