

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
<http://www.montgomerycountymd.gov/boa/>
(240) 777-6600

Case No. A-6858

PETITION OF VINCENT AND GRACE SCHIRALDI

OPINION OF THE BOARD
(Hearing Date: April 3, 2024)
(Effective Date of Opinion: April 10, 2024)

Case No. A-6858 is an application for two variances by Petitioners Vincent and Grace Schiraldi, needed for the proposed construction of a screened porch. The proposed construction requires a variance of 8.80 feet as it is within 11.20 feet of the rear lot line. The required setback is twenty (20) feet, in accordance with Section 59.4.4.9.B.2 of the Zoning Ordinance. In addition, the proposed construction requires a variance of 4.1 percent as it exceeds the maximum lot coverage. The maximum lot coverage is thirty-five (35) percent, in accordance with Section 59.4.4.9.B.1 of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on April 3, 2024. Petitioner Grace Schiraldi appeared at the hearing in support of the requested variances. She was represented at the hearing by Soo Lee-Cho, Esquire. Brian McCarthy, AIA, the architect of record, was also present to answer questions.

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

EVIDENCE PRESENTED

1. The subject property is Lot 1, Block A, Gude's Addition to Takoma Park Subdivision, located at 6615 Gude Avenue in Takoma Park, Maryland, 20912, in the R-60 Zone. The property is a corner lot that is bordered on the southwest by Gude Avenue, and on the northwest by Circle Avenue, which is an unbuilt paper street in that area. The property is roughly rectangular in shape, with a rounded corner that faces the "intersection." See Exhibits 3, 4, and 7(a).
2. The Petitioner's Statement of Justification ("Statement") states that the property has an area of 5,640 square feet. The Statement further states that the property "is bounded on the northwest by a 'paper-street' (i.e., Circle Street) that remains unbuilt," and "is

bounded on the northeast (to the rear of the home where the project will be built) by an empty field.” Finally, the Statement states that the property’s rear yard has a “steep slope” that makes it unusable by persons in wheelchairs. See Exhibit 3.

3. The Statement indicates that the subject property is improved with a two-story house that has an elevated, uncovered deck on its rear that is accessed from the first floor of the house. The Statement notes that while the Petitioners’ existing open deck is permitted to extend up to nine (9) feet into a rear setback and is not counted towards lot coverage, their proposed enclosed/screened porch would not be afforded that exception, and would be counted towards lot coverage. Accordingly, the Statement states that while “the screened porch addition would encroach into the rear setback no more than what an open porch would otherwise be allowed to encroach under Section 59-4.1.7.B.5.a.i, since it is an enclosed structure, the screened porch is subject to the R-60 Zone’s rear setback standard of 20 feet” and needs variance relief. See Exhibit 3. With respect to lot coverage, the Statement states:

Moreover, as floor space that is ‘under roof’, the new screened porch area (i.e., 275 square feet) must now be counted as part of the property’s overall lot coverage pursuant to Section 59-4.1.7.B.4.a of the Zoning Ordinance where the previous open deck area did not. The resulting lot coverage of the property (calculated below) is 4.1% greater than the 35% allowable under Section 59-4.4.9.B.1 of the Zoning Ordinance, thereby necessitating approval of a variance.

4. The Statement states that the Petitioners purchased the subject property in March 2023, “with the intention of having Grace Schiraldi’s parents, John and Grace Mannix, reside with them full-time,” and that Ms. Schiraldi’s parents did in fact move in with the Petitioners in April 2023. The Statement further states, after a brief explanation, that both of Ms. Schiraldi’s parents have disabilities and rely on wheelchairs for mobility. The Statement states that the Petitioners are seeking “variances to facilitate the proposed screened porch addition as a reasonable accommodation 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).” See Exhibit 3.

5. The Statement states that “the current steep slope of the backyard of the property makes it unusable by people in wheelchairs,” and that “[t]he purpose of the screened porch addition is to provide an accessible outdoor space where Petitioners’ parents may be able to more fully use and experience their new home.” The Statement proceeds to explain that the proposed porch will allow the Petitioners’ parents to “safely enjoy fresh air, experience nature, spend time with each other and with family on a three-season basis, protected from the elements like sun, rain, and mosquitoes,” that the proposed porch “is easily accessible from the first level of the house which benefits from a fully open floor plan design and is where John/Grace’s shared room is located,” and that the proposed porch will “afford[] John/Grace and their caretakers maximum mobility.” See Exhibit 3.

6. The Statement at Exhibit 3 states that the requested variances can be granted under the ADAA and FHAA, addressing the factors that need to be shown for a variance to be granted under those laws as follows:

Based on the evidence to be presented in more detail at the Board's hearing on this matter, Petitioners believe that the proposed construction is a reasonable accommodation for their parents' physical impairments which will allow them to more fully use and enjoy their home, in particular outdoor living space that will be of great benefit to their physical health and mental wellbeing. Moreover, allowing the proposed construction at the rear of Petitioners' home will not impose an undue burden or expense on the County, and will 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.

7. The Petitioners submitted a letter of support for the grant of the requested variance from their abutting neighbors to the right. See Exhibit 9.

8. At the hearing, Ms. Lee-Cho oriented the Board to the property and to the variance request. She stated that the subject property was platted in 1939 and was originally located in Prince George's County. Ms. Lee-Cho stated that at 5,640 square feet, the subject property is substandard in size for the R-60 Zone. She stated that the street shown on the Zoning Vicinity Map to the west of the subject property is an unbuilt paper street, and that to the north of the subject property is an open field that was a former school site and is currently used for senior apartments. Ms. Lee-Cho submitted four additional photographs for the record showing that the rear of the subject property is sloped. See Exhibits 10(a)-(d).

Ms. Lee-Cho explained the variances that are needed for the proposed construction. She stated that with the proposed screened porch, the amount of the property that is under roof will be 39.1%, exceeding the 35% limit by 4.1% and necessitating a variance. In addition, Ms. Lee-Cho explained that with an 8.8 foot encroachment, the proposed screened porch will not extend any further into the rear setback than a deck is allowed to project (i.e. nine (9) feet), but that since screened porches are not afforded the same projection exception as decks, a second variance is needed. She stated that her clients are seeking that the requested variances be granted as a reasonable accommodation for the disabilities of Ms. Schiraldi's parents, who live with them, pursuant to Title II of the Americans With Disabilities Act. In response to a Board question asking if there were conditions that might permit the Board to grant the requested variances under Section 59.7.3.2.E of the Zoning Ordinance, Ms. Lee-Cho stated that the rear of the property is significantly sloped, and that the size of the property is substandard for the R-60 Zone. She then stated that because there are other properties on the street that share these characteristics, she was unsure if they were sufficient to support the grant of a variance under the Zoning Ordinance, and for that reason had elected to proceed under the Americans With Disabilities Act and Fair Housing Amendments Act.

9. Ms. Schiraldi testified that she and her husband purchased the subject property last year, and invited her parents to come live with them so that her parents, who have been married for a very long time, could continue to live together. She testified that her parents are now permanent Maryland residents, and that they reside at the subject property. Ms. Schiraldi provided detailed and compelling testimony regarding the nature

and extent of the disabilities that affect her mother and her father. She testified that these conditions have caused both of her parents to rely on wheelchairs for mobility. Ms. Schiraldi testified that her parents cannot access the property's backyard because of its slope, and that without the proposed screened porch, they cannot use the property's backyard at all. She testified that the existing deck is barely big enough for a table and two wheelchairs, and that it is slightly lower than the first floor of the home. Ms. Schiraldi testified that the floor of the proposed porch will be raised so that it is level with the first floor of the house to facilitate access. She testified that the proposed porch will be slightly larger than the existing deck to provide better communal space and wheelchair access. Ms. Schiraldi testified that the proposed porch will also provide protection from the sun and from insects, allowing her parents to enjoy the home's outdoor space for longer periods of time.

10. Ms. Lee-Cho stated that hedges provide screening from the neighboring property, and that the record contains a letter of support from the Petitioners' abutting neighbors to the right. She stated that the Petitioners had also spoken with their other neighbors about the proposed porch. Ms. Schiraldi then testified that they had spoken with the neighbors on the other three corners of the "intersection," and that none objected to the proposed porch.

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 Petitioners did not attempt to argue that the requested variances should be granted pursuant to the standard in Section 59.7.3.2.E of the Zoning Ordinance, but rather requested that their variance application be reviewed as a request for a reasonable accommodation under the Americans With Disabilities Act, as amended by the ADA Amendments Act of 2008, and 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, as amended by the ADA Amendments Act of 2008, and the Fair Housing Amendments Act of 1988.

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.A. §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 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 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 Ms. Schiraldi, the Board finds that both of Ms. Schiraldi’s parents, who reside at the subject property, have physical impairments that necessitate the use of wheelchairs, substantially limiting their independent mobility. In addition, the Board finds that the ability to independently move, and to fully use and enjoy the house where one lives, including the associated outdoor space, constitutes a major life activity for the purposes of the ADA and FHAA, and further finds that the physical impairments of Ms.

Schiraldi's parents and their necessary reliance on wheelchairs for mobility substantially limits this activity. Thus the Board finds that the impairments of the Petitioner Grace Schiraldi's parents constitute disabilities under the ADAAA and FHAA.

2. The Board finds that the construction of the proposed screened porch, as described in Exhibit 3 and depicted on Exhibit 5(b), will provide the Petitioner's parents with an accessible outdoor space where they can more fully use and experience their home, enjoy fresh air, experience nature, and "spend time with each other and with family on a three-season basis" despite their disabilities, thereby preserving their ability to engage in basic and typical family interactions and activities notwithstanding their mobility impairments. The Board notes, in accordance with the Statement, that being able to engage in these types of activities and interactions "will be of great benefit to their physical health and mental wellbeing." Thus the Board finds that the proposed construction is a reasonable accommodation for the mobility impairments of the Petitioner's parents, and is necessary to allow them to enjoy and live in their home. The Board further finds that allowing this construction in the location of an existing deck 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 porch is intended to occupy an area already occupied by an elevated, open deck, and will not extend any further into the rear setback than an open deck is permitted to extend. The Board further notes, per the Statement, that the abutting property to the rear of the Petitioners' house is an "empty field." See Exhibit 3.

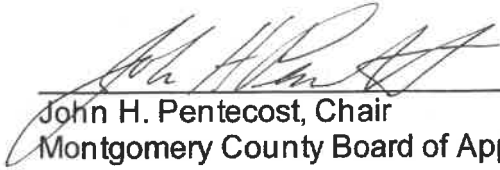
3. In light of the foregoing, the Board finds that the requested variances from the required setback from the rear lot line and the lot coverage limitation should be granted so that the strict application of Montgomery County's Zoning Ordinance and development standards does not prevent the continued use and enjoyment of the subject property by the Petitioners' parents, who live on the property, on account of their disabilities.

Therefore, based upon the binding testimony and evidence of record, the requested variances needed for the construction of the proposed screened porch are granted, subject to the following conditions:

1. The Petitioners are bound by the testimony and exhibits of record.
2. Construction must be completed in accordance with Exhibit Nos. 4 and 5(b).

On a motion by Richard Melnick, Vice Chair, seconded by John H. Pentecost, Chair, with Caryn Hines, Alan Sternstein, and Amit Sharma in agreement, 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 10th day of April, 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.