BOARD OF APPEALS
for
MONTGOMERY COUNTY

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

http://www.montgomerycountymd.gov/boa/

Case No. A-6860

PETITION OF ELLEN DYE

OPINION OF THE BOARD

(Board hearing held September 11, 2024; Board decision to re-open the record and render a decision held September 25, 2024)
(Effective Date of Opinion: October 25, 2024)

Case No. A-6860 is an application for two variances by Petitioner Ellen Dye needed for the proposed construction of an addition to an existing detached accessory structure. The proposed construction requires a variance of 19.71 feet as it is within 12 feet of the rear lot line. The required setback is 31.71 feet, in accordance with Sections 59.3.3.3.C.2.c and 2.d of the Zoning Ordinance. In addition, because the proposed final structure will be used as an Accessory Dwelling Unit, the proposed construction requires a variance of 610.28 square feet, as it will have a total gross floor area of 1098.29 square feet. The required minimum gross floor area is 488.01 square feet, in accordance with Section 59.3.3.3.C.2.e.i of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on September 11, 2024. Petitioner Ellen Dye appeared at the hearing in support of the requested variances, along with her daughter Cecelia Dye. Ileana Schinder, the architect of record, was also present to answer questions about the proposal. Jonna Stoycos and Beverly Tadeu appeared at the hearing in opposition to the application. At the close of the hearing, the Board deferred their decision to their next Worksession on September 25, 2024 to further consider the evidence and the law.

Prior to the September 25, 2024 Worksession, the Board received an additional email correspondence from Ms. Stoycos, requesting the Board to reopen the record to receive additional photographs and an additional statement. The Board also received additional correspondence from the Petitioner on September 15, 2024 requesting that the Board deny the motion to re-open the case. At the Worksession on September 25, 2024, pursuant to Board Rule 5.0(b), the Board voted unanimously (5-0) to reopen the record to receive the additional evidence but did not receive any additional testimony.

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

EVIDENCE PRESENTED

1. The subject property is Lot 5, Block 17, Huntington Terrace Subdivision, located at 5508 McKinley Street, Bethesda, Maryland 20817, in the R-60 Zone.

2. The Petitioner's Statement of Justification ("Statement") states that her lot has an area of 12,632 square feet. See Exhibit 3. The Statement further states that the lot has a coverage of 1,287 square feet, with a main structure, the Petitioner's house, that has a footprint of 870 square feet and an existing accessory structure that is 417 square feet. See Exhibit 3.

3. The wood frame house is two stories, with a walk-out basement. The Petitioner states that the other structure is an "existing additional dwelling structure," although it has never been authorized pursuant to the zoning code for such use. The structure consists of "a round base building with a domed roof." See Exhibit 3. The Statement notes that the main house has a total living area of 1,900 square feet and includes a parking garage that is 175 square feet. The additional existing structure is 417 square feet, with a loft area that is 150 square feet that can be accessed through spiral stairs. See Exhibit 3.

4. The Statement states that the proposed addition would be "an addition to the existing additional dwelling unit to create accessible dwelling for a family member with disabilities." For the existing structure, the "interior alterations consist of the elimination of the spiral stair, new kitchen and living space." See Exhibit 3. Further, the Statement notes that the addition to the structure "will include a bedroom and a zero-barrier bathroom." See Exhibit 3. The floor plan in Exhibit 3 showed that the proposed addition would be limited to a bedroom, a closet and a bathroom. There will not be a bathroom added to the existing structure.

5. The Statement explains that "the massing of the proposed addition will add 340 square feet to the existing structure, totaling it to an area of 760 sq ft. The proposed rear setback will be 12'-0", and the side setback will be 37'-6'." See Exhibit 3. The Statement concludes that "[b]ased on the unique needs of the homeowner's family, we respectfully request that the Board of appeals to approve the footprint size of the proposed addition. This project will have minimal negative impact on the surrounding properties while allowing the homeowners to remain in their space as a family unit." See Exhibit 3.

6. Opposition to the Statement from Ms. Stoycos expressed concerns about allowing an oversize dwelling unit on the property and expressed concerns that the disabled family member, a second daughter of the Petitioner, who did not attend the hearing, does not currently reside at the property. Further, the opposition noted that the "homeowner has maxed out their buildable property-homes are simply too close together in our neighborhood and this type of lot coverage should not be permitted." See Exhibit

9(a).

7. Opposition to the Statement from Ms. Tadeu and Mack Tadeu opined that the proposed structure was "an abuse of what is appropriate for a variance" and that the proposal was "essentially trying to squeeze a second family home" into the property's backyard. While the opposition expressed sympathy for the health needs of the family member, the opposition also expressed concern about "having this large, unsightly structure adjacent to our properties, effecting the aesthetics and potential value of our homes." See Exhibit 9(b). The Board received other letters of opposition expressing similar concerns found at Exhibit 9(c) and 9(d).

8. At the hearing, the Petitioner testified that her daughter has difficulty breathing and cannot live in a property attached to other housing. She testified that cooking could lead to breathing issues for her daughter, that she cannot work, and that she needs her own house. The Petitioner testified that her daughter needs a mold proof and smoke proof environment, and that the Petitioner's current house is the original house on the property and that it is small. She testified that her house is worth 1.2 million dollars and that she cannot afford to purchase another house on her street for her daughter.

The Petitioner testified that she already has a geodesic dome accessory structure in the back of her house, that she lives at the bottom of a hill, and that the accessory structure cannot be seen from the street. She testified that the proposal was to add a bedroom to the dome for her daughter to live in. In response to questions from the Board, the Petitioner testified that her daughter currently resides in an apartment a mile away from her, but that odors still come into her apartment, and that due to her health issues she cannot live in the apartment anymore.

The Petitioner testified that no trees would need to be cut down to build the proposed structure but noted that she was going to be required to take down a historic tree on her property because it was diseased. She reiterated that her daughter suffers from a rare disease that her neighbors are not equipped to discuss or to comment on how the architecture to accommodate her could be assessed. The Petitioner testified that her daughter requires 24-hour assistance and requires an aide.

9. Cecelia Dye, the Petitioner's other daughter, read a statement from Petitioner's ill daughter for whom the Petitioner was requesting the accommodation but was unable to be present at the hearing. See Exhibit 22. The statement indicated that the Petitioner's daughter suffers from Mast Cell Activation Syndrome which causes, among other things, "a limited ability to be in an environment where the air is not tightly controlled." She also stated that she has "a connective tissues disorder called Ehlers Danlos Syndrome, which among other things causes me to experience full or partial joint dislocations multiple times per day and has so far resulted in two neck fusion surgeries." See Exhibit 22. Thus, the statement informed the Board that "[d]ue to my breathing issues, I cannot safely continue to live in an apartment (or live in any other shared setting) because there is no way to isolate myself from the airborne matter coming from the hallway or from other units." See Exhibit 22.

10. Ms. Schinder, the architect for the proposal, testified that the basement of the Petitioner's house is covered in mold and would require hospital grade improvements. She testified that the Petitioner could not use the walls and the low ceiling in the basement to house her daughter, and that she should not put her daughter in a basement that is partially underground with few windows. Ms. Schinder testified that the required filtration in the existing house would likely need to be hospital filtration in order for the Petitioner's daughter to reside in the existing house, and that would not be financially feasible. Ms. Schinder testified that the current house is a colonial style two-story home with a basement typical of the neighborhood. See Exhibit 5(b). She testified that the house includes a small garage and that the dome in the backyard was added in 2010 pursuant to permits. Ms. Schinder testified that the domed structure does not offer conditions under which the Petitioner's daughter could reside full-time, and that she needs to create the addition to offer living conditions for someone with disabilities.

In response to questions from the Board, Ms. Schinder testified that no one ever lived in the domed structure full-time, which is why the Petitioner is now applying for approval of an Accessory Dwelling Unit. She testified that the proposed addition would be smaller than the existing dome, would not be visible from the street, and would only be visible through trees in the rear of the property. Ms. Schinder testified that the proposal would provide the Petitioner's daughter with the space to live independently on the same property as the Petitioner and would not increase water use or waste generated and therefore would not be a burden on the County. She testified that the proposed addition would not increase the height of the existing structure and would not have windows higher than those in the existing structure. Ms. Schinder testified that the design was intended to be as respectful to the neighborhood as possible.

Ms. Schinder testified that the proposed structure would not cause any increase in traffic because the Petitioner's daughter does not own a car. Referring to Exhibit 5(b), she testified that the property has a 12-foot rear setback and that the proposed structure was designed to match the existing setback of the dome. In response to questions from the Board, Ms. Schinder testified that because the existing dome already has an opening on the structure, adding an addition to it will reduce costs.

Ms. Schinder testified that mobility was not an issue for the Petitioner's daughter and that the health concerns involved respiratory issues. She testified that the proposal would not involve ramps or wheelchair clearance for the bathroom. Ms. Schinder testified that while the existing dome is large, it cannot accommodate a bathroom and a bedroom. She testified that the required air filtration system would be harder to seal off in a structure such as the existing house.

Ms. Schinder testified that the existing accessory domed structure to which the proposed addition would be attached would not be environmentally controlled. Instead, the remodeled living areas in the structure and the kitchen to be added to it would have a controlled connection between it and the proposed addition She testified that there would not be air mixed between spaces and that there would be less toxins traveling from

one space to another. Ms. Schinder acknowledged that Petitioner's daughter would live at least some of the time in the remodeled domed structure, that the kitchen to be added to the existing structure would be handicap accessible, and that the new facility would provide independent living for two people. Specifically, the daughter's spouse would live in the space with her, so that they can support each other but would not do the cooking.

Ms. Schinder testified that she had written a book about accessory dwelling units and that the concern with the Petitioner's daughter residing in the existing house is that it is 100 years old and she was not sure whether the house could be sealed to isolate a portion to accommodate her respiratory issues. Ms. Schinder testified that the Petitioner's daughter currently lives in a commercial grade apartment building but that she needs to live in a structure that is not attached to other residents. Ms. Schinder offered no testimony as to why the addition to be attached to the domed structure through a controlled passage could not instead be attached through a controlled passage to the house's walkout basement, with the house serving the same functions as the domed structure, as suggested in opposition testimony. The daughter would utilize the domed structure but not full-time, because the domed structure, like the house, does not offer conditions under which the Petitioner's daughter could reside full-time. She noted that the if the domed structure were not currently located on the property, the Petitioner would have more room to build a larger structure to accommodate the daughter.

11. Ms. Stoycos testified that while she is concerned about the needs of the Petitioner's daughter, she is also concerned to see the preexisting dome structure expanded and about the fact that the Petitioner is requesting a large amount of variance from the Zoning Ordinance. She expressed concerns over discrepancies in the placement of the existing dome and where it is set on the property and testified that the proposed additional unit would consist of a lot of lot coverage that would impact the neighbors' views. Ms. Stoycos testified that the dome was built in 2011, and that it could be used as an accessory dwelling unit, but that if the Petitioner wants to increase the size of the dome, the side setbacks must match those of the house, which they do not.

Ms. Stoycos testified that the property is the same size as all the other properties in the neighborhood. She testified that the proposed addition's bedroom was not sealed off, and that smells could come into the bedroom from the kitchen. Ms. Stoycos testified that there did not seem to be any American with Disabilities ("ADA") elements in the plans, that there were not going to be any doorways sealed, and that she did not see any special air filtration plan. She testified that she understands the Fair Housing Act ("FHAA") and the need to accommodate persons within reason, and questioned whether there was a way to expand the existing house or to seal off the basement and build a deck, removing the dome structure to provide space for the Petitioner's daughter while also preserving the trees on the property.

Ms. Stoycos reiterated her concerns over the discrepancy in the plans submitted to the Board. She explained the pictures that she submitted with her opposition to the Board, testifying that they were taken from her yard on the right side and show where the basement could be extended, the slope on the Petitioner's property, and the dome from

the street. See Exhibit 9(a) (p. 69-75). Ms. Stoycos testified that she is a residential contractor who has worked on nursing homes, and that she recently built a home with a residential grade filter. She testified that sealing off the lower level of the house would not be cost prohibitive.

12. Ms. Tadeu testified that she has lived in her home next door to the Petitioner since 1988 and that she wants to see the Petitioner's daughter provided with an accommodation, but that she does not think this variance request is appropriate. She testified that when the existing dome structure was built, she was not happy about it but did not complain. Ms. Tadeu testified that the Petitioner resides in a large house and that things could be done to accommodate her daughter within the house without building an additional large structure. See Exhibit 5(b).

Ms. Tadeu testified that the Petitioner could remove the interior of the existing dome or could build onto the side of the existing house. She expressed concern over how the approval of this additional accessory structure would set an unfavorable precedent for the neighborhood and felt that this proposal was not the way to address a difficult situation. Ms. Tadeu testified that the Petitioner is attempting to fit a second home onto the property.

CONCLUSIONS OF LAW

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 the burden of proof by a preponderance of the evidence on all questions of fact.

The Petitioner does not argue that the requested variances should be granted pursuant to the standard in Section 59.7.3.2.E of the Zoning Ordinance. Rather, she requests that her variance application for an Accessory Dwelling Unit be reviewed as a request for a reasonable accommodation under the Title II of the Americans With Disabilities Act, as amended by the ADA Amendments Act of 2008 (ADA), and the Fair Housing Amendments Act of 1988 (FHAA).

Standards for Evaluation of a Variance Request on ADA/FHAA Grounds

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 purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C.A. § 12101(b)(1).

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(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*, 296 F.3d 831, 837 (7th Cir. 2001).

Reasonable Accommodation by Local Government of an Individual's Disability

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). The reasonable accommodation provision of the FHAA has been interpreted to require municipalities such as Montgomery County to "change, waive, or make exceptions to their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disability." *Trovato v. City of Manchester,* 992 F. Supp. 493, 497 (D.N.H. 1997) (*citing Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996).

The ADA "requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* . . . opportunities that those without disabilities automatically enjoy." *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (emphasis in original). 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). In *Mastandrea v. North*, 760 A.2d 677, 687 n.16, 361 Md. 107 (2000) (citing *Trovato,* 992 F. Supp. at 497), the Maryland Supreme Court held that zoning decisions constitute an "activity" of a public entity within the meaning of the ADA. Likewise, the Appellate Court of Maryland recently relied on *Mastandrea* in characterizing a reasonable accommodation as a "'reasonable modification to the relevant zoning ordinance' that allows a disabled individual to enjoy the property '*equally with a non-disabled person.*'" *In the Matter of Christopher Gendell*, 262 Md. App. 557, 574 (2024). Therefore, unless the proposed accommodation would "fundamentally alter or subvert the purposes" of the Zoning Ordinance, a variance should be granted under the ADA. *See Trovato,* 992 F. Supp. at 499.

In short, a variance can be granted as an accommodation to comply with the ADA and the FHAA on account of a person's disability or handicap, provided the variance is reasonable with respect to fundamental purposes of the Zoning Ordinance. Likewise, denying a variance request because, for particular, bona fide and articulated reasons, it is judged an unreasonable departure from a fundamental purpose of the Zoning Ordinance is not unlawfully discriminatory or, more particularly, a denial based on a person's handicap or disability.

FINDINGS

Because a zoning ordinance is among the local government activities subject to the ADA and the FHAA, this Board may grant a variance to comply with the ADA and FHAA, provided it can make the following findings:

1. Determination of a disability: An evaluation of whether a disability exists under the ADA or FHAA requires a three-step analysis. The individual's medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (for example, walking, independent mobility), and the Board must determine whether it constitutes a major life activity under the ADA and FHAA. Third, the analysis requires 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 also find that the proposed variance constitutes an accommodation necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.

3. Reasonable modification of local government policies: The Board must find that

the proposed variance can be granted without fundamentally disrupting or altering the purposes of the Zoning Ordinance.

Applying the above analysis to the requested variance, the Board finds as follows:

Based on the evidence of record, including the Statement in the record at Exhibit 3, the oppositions at Exhibits 9(a)-(d), the Statement at Exhibit 22, and the testimony at the hearing, the Board finds that it is uncontested that the Petitioner's daughter suffers from a physical impairment that interferes with major life activities and renders her disabled in satisfaction of the first required finding.

Looking to the second requirement, however, the Board cannot find that the proposed Accessory Dwelling Unit is necessary to afford Petitioner's daughter equal opportunity to use and enjoy Petitioner's house, the dwelling for which the accommodation, an Accessory Dwelling Unit, is requested, not the domed structure. The FHAA requires that the requested accommodation 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) (emphasis added). The variance, however, is not requested to afford Petitioner's daughter any opportunity to use and enjoy Petitioner's house. The testimony was clear that the daughter will not live in or use the house. Indeed, Petitioner's architect rejected any notion that the house, in its current state, was suitable for the daughter's use. Rather, the Accessory Dwelling Unit requested is intended to be a new facility that would provide independent living for two people, Petitioner's daughter and her spouse, so that they can support each other. Indeed, the requested accommodation will in no manner serve to make the existing dwelling, Petitioner's house, itself suitable for her daughter's living in, or even visiting or better enjoying, the house itself, unlike other cases warranting an accommodation. *Compare Mastandrea* (approving, as a reasonable and necessary accommodation, constructing pathways from a child's living dwelling, to allow access, like other residents of the dwelling, to a beach proximate to the dwelling) *with Gendell* (rejecting, as a reasonable and necessary accommodation, allowing a therapeutic lap pool on the relevant dwelling's property).[1]

---

[1] Similarly, *Gendell* reasoned:

> [I]n fact, Appellants argue that their sons "are not able to use and enjoy their property, *or any property,* when they are unable to receive the necessary treatment."
>
> This strikes us as an overbroad interpretation of what constitutes a reasonable use of property and, in turn, an overbroad interpretation of what constitutes a reasonable accommodation. As the Board noted, this interpretation would "demand an injudicious approval of *any* proposed accommodation as inherently reasonable." Adopting the standard suggested by Appellants would create a slippery slope whereby administrative agencies must grant any proposed accommodation if it would in any way improve the applicant's overall quality of life.

The Board does not doubt that some sort of place to live within a controlled atmospheric environment is necessary for the daughter's enjoyment of life, but, with regard to both the FHAA and the ADA, the Board cannot find that the Accessory Dwelling Unit requested is the only facility that can satisfy that need.[2] The Board notes that the burden is on the Petitioner to demonstrate the need for a variance and that there was no testimony as to why a separate accessory structure on Petitioner's lot in particular was necessary to accommodate the needs of Petitioner's daughter.

Even assuming the requested Dwelling Unit is necessary within some sense that the ADA and FHAA intends, the Board finds that the accommodation requested is not reasonable. The Board is aware that the provisions in the Zoning Ordinance for Accessory Dwelling Units have been particularly controversial because of their potential impact on residential neighborhoods. The very specific lot coverage and floor area limitations that the Zoning Ordinance places on Accessory Dwelling Units were intended to balance the strongly competing concerns about allowing them in the County. Even though, as the dissent here notes, the total lot coverage of the Petitioner's house, together with the Accessory Dwelling Unit she proposes for her daughter, would not exceed the *generally applicable* lot coverage provisions of the Zoning Ordinance, the Board notes that the proposed dwelling's footprint would be nearly the footprint size of the main house. In particular and with respect to the *specific ordinance provisions* governing accessory structures, the footprint of Petitioner's house is 807 square feet, but the footprint of the proposed dwelling would be 757 square feet. An accessory structure is intended to be subordinate to a main structure, which in the instant case is the Petitioner's house.[3] The plain meaning of the term "subordinate" is: "dependent," or "to make subject, subservient or dependent."[4] The facts in the instant matter, however, show that Petitioner seeks a proposed addition that would be attached not to the house but to what had been a smaller, non-dwelling, domed accessory structure and would create a newly-established dwelling of almost the same size as the house, with features that permit its resident(s) to live there wholly independently from the house. Moreover, under ordinance provisions specific to Accessory Dwelling Units, the maximum floor area of an accessory dwelling permitted on Petitioner's lot would be 488 square feet. Including the 150 square feet of loft space in the existing domed structure, however, the proposed dwelling's floor space would be at least 907 square feet (1098 square feet according to DPS) nearly double the floor space

---

262 Md. App. at 573 (emphasis in original).

[2] Even if the Board were to assume that the property for which the accommodation is sought is and could only be the domed structure, not Petitioner's house, the accommodation is not warranted. That structure is not itself suitable as a dwelling, so no one is currently capable of enjoying it as such, and denying the accommodations is not necessary to render use of the structure enjoyable for Petitioner's daughter as much as others.

[3] Section 59.3.7.4.A.1 states: "Accessory Structure means a structure subordinate to and located on the same lot as a principal building, the use of which is incidental to the use of the principal building or to the use of the land."

[4] *The Random House College Dictionary* 1309 (1975).

that the Zoning Ordinance permits.

Under the *Gendell* case cited above, the Petitioner did not provide sufficient evidence to support her assertion that the variances requested for an Accessory Dwelling Unit qualify as a necessary and reasonable accommodation. Although the Petitioner provided the Board with evidence that her daughter would benefit from the accessory dwelling, the Board is not persuaded that the Petitioner's daughter would be unable to use and enjoy any other property if she were unable to obtain the variances requested. *See Gendell*, 262 Md. App. at 576. Even if the accommodation were necessary, the Zoning Ordinance violations that accommodation contemplates grossly disregard Zoning Ordinance provisions carefully considered and intended to increase housing stock in the County while respecting established residential neighborhoods. The proposed accommodation would "fundamentally alter [and] subvert the purposes" of the Zoning Ordinance.

Based on the foregoing, the Board has decided that the variances requested for the proposed Accessory Dwelling Unit may and should be denied.

On an amended motion by Vice Chair Richard Melnick, seconded by Member Caryn Hines, with Members Alan Sternstein and Amit K. Sharma in agreement and Chair John H. Pentecost in opposition, the Board voted 4 to 1 to deny the two requested variances.

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above-entitled petition.

Caryn L. Hines
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 25th day of October, 2024.

Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

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 (see Section 2-114 of the County Code).

Dissenting Opinion in Case No. A-6860, Petition of Ellen Dye
By John Pentecost, Chairman, Board of Appeals, Montgomery County

Case A-6860, Petition of Ellen Dye, requests two variances from the Montgomery County Zoning Ordinance (the Ordinance) per Building Permit Denial 398427 from the Department of Permitting Services. Mrs. Dye requests putting an addition on an existing legally permitted detached accessory dwelling unit (ADU) to create a larger ADU to meet the special needs of her daughter. The variances include: (1) an increased rear setback required by the addition to the accessory building (Section 59.3.3.3.C.2.c), and (2) the completed expanded gross floor area of the completed ADU exceeding 50 percent of the footprint of the principal dwelling ("50% rule")(Section 59.3.3.3.C.2.e.i). The property is located at 5508 McKinley Street in Bethesda, MD.

The petitioner recognizes that the variances cannot be granted using the provisions for granting variances as permitted under the standards contained in Section 59-7.3.2.E of the Ordinance. However, the Americans with Disabilities Act (ADA) (specifically 42 U.S.C. 12101 *et seq*) and the Fair Housing Amendments Act (FHAA) (specifically 42 U.S.C. 3601 *et seq*) require building and zoning regulations to be waived in certain instances when a homeowner (in this case Ms. Dye) needs and wants to provide a reasonable living accommodation on the property that meets the special needs of a family member. From testimony at the hearing, the current principal dwelling on the property cannot be successfully modified to meet the needs of Mrs. Dye's daughter. However the ADU currently on the property can be modified and enlarged to meet her daughter's needs with a waiver of the setback and 50% rule. This case is similar in part to another case where the board has granted variances under the variance procedures to a setback requirement and the 50% rule for the use of an existing garage for a detached ADU (see Variance Case No.A-6659, Bacon, Opinion adopted July 15, 2020).

The Board of Appeals denied the request for accommodation, indicating that the request was not reasonable. The Board failed the intent and purpose of both the ADA and FHAA by denying her request. The Board second-guessed the owner and architect whose presentation provided a solution that would meet the family member's basic long-term housing needs with a handicap-accessible design for both a kitchen/living area (using the existing ADU) and a new bedroom/bathroom addition with dedicated and isolated HVAC system. Their solution would also assure significant support and assistance to the young woman living there from other family members and less dependence on community emergency services. Instead, the Board posited an unsolicited alternative for just a bedroom/bathroom addition to the basement of the existing house with no other living or dining/cooking facilities. Testimony in the record indicates that the petitioner's daughter's condition is exacerbated by mold, and that

adding HVAC to the basement was not an acceptable alternative and usually not effective in handling mold issues common in older houses like that of the petitioner.

Montgomery County has approved numerous ADA/FHAA cases under the reasonable accommodation requirement when a variance or waiver could not be approved under the County"s variance procedures. In past cases, the Board's approach has taken several steps:

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. Dadian v. Village of Wilmette, 269 F.3d 831, 837 (7th Cir. 2001) (citations omitted). In this situation, it is clear that the person for whom the accommodation is requested is a "Person with Disabilities." It was undisputed in both documentation, including a letter from her doctor with very specific detail, and testimony even by neighbors, that the petitioner's daughter has a record of and observable physical impairments that severely limit her major life activities. These disabilities cause the petitioner's daughter to need assistance with ambulation and needing a "dedicated HVAC system and air filtration to minimize risk of respiratory emergency events."

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).]

A failure to make a 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 for housing as those who are without disabilities." [See 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. §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.] Nowhere in the interpretation of accommodation is there a restriction that the accommodation must be limited to the existing principal dwelling on the property; it does indicate that the accommodation should afford an "...opportunity for housing...". And there is an existing Accessory Dwelling Unit on the property.

In the past, the Board would make a three-step analysis to evaluate whether a disability exists under the ADA or FHAA requirements. The applicant's medical condition must first be found to constitute a physical impairment. Second, 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). It is clear from the record in this case that the person needing the accommodation has medical conditions that create physical impairments; these impairments specifically limit her life activities of walking and breathing: and both of these life activities are generally considered major life activities.

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 for housing. From the record, the petitioner is

proposing accommodation from two zoning policies that are necessary to enable the daughter with very specific disabilities an equal opportunity to use and enjoy housing on her parents property.

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.

In terms of the 50% rule, the submitted request indicates that the current ADU's gross floor area is 667 sq.ft. (417 sq.ft. main floor and 150 sq.ft. for the loft); comparing 667 sq.ft. to the 870 sq.ft. footprint of the main dwelling, or 77 percent, the currently permitted ADU is already over the 50% rule. With the elimination of the spiral stairs to the loft and removal of 150 sq.ft. from the calculation and adding 340 sq.ft. for the new addition, the ADU would have a gross floor area of 757 sq. ft., or 87 percent—a 10 percent increase. However, the 50% rule is the most stringent of three tests that limit the size of detached ADUs. The others are that the accessory unit not exceed either: (1) 10% of the lot area (the proposed ADU complies with this rule – with a lot of over 12,600 sq.ft. {1260 vs. 757 sq.ft. or six percent}), or (2) 1200 sq.ft. gross floor area (again the ADU as proposed complies as it is only 757 sq.ft.). Further, in this instance, the accommodation will not fundamentally change the immediate neighborhood by overbuilding on the lot by creating a less than three percent increase in lot coverage from the current coverage of 10.2 percent to 12.9 percent.

In terms of infringing into the rear setback, the petitioner agreed not to have the addition to the ADU any closer to the rear lot line than the current building to which it is attached. By review of the zoning vicinity map submitted as part of the record, nearby lots appear to have accessory buildings not only in the rear setback but also nearly directly on the rear lot line. In sum, an accommodation for the rear setback will not further disrupt the aims of the zoning ordinance in terms of rear setbacks for this neighborhood.

The City of Baltimore, Office of the Zoning Administrator, has published a guide for addressing the ADA and FHAA: "Reasonable Accommodations Policies and Procedures," referenced below as the "Baltimore Guide." While Montgomery County has not provided or adopted similar guidance, the 22-page Baltimore Guide does provide common sense definitions and procedures that assist homeowners and the City assure compliance with the law. That guide was submitted by the petitioner as part of their request.

First, it is clear that the person for whom the accommodation is requested is a "Person with Disabilities." It was undisputed in both documentation and testimony that the petitioner's daughter has a record of and observable physical impairments that severely limit her major life activities.

Secondly, I contend that the proposal is a "reasonable accommodation." As defined in the Baltimore Guide (and as a practical approach for Montgomery County), this means "a modification or a waiver of zoning requirements, rules, policies, or practices if the modification is reasonable and necessary to give a person with disability an equal opportunity to use and enjoy a dwelling." The guide goes on to define "reasonable" to mean that "without the accommodation, the person would not be able to live in the dwelling of his or her choice;" and "necessary" to mean "that the accommodation will not create an undue financial or administrative burden for the City and will not fundamentally alter the zoning scheme of the City." Without the addition to the ADU, the petitioner's daughter will not be able to live in an existing accessory dwelling unit already permitted for the property. Even with the waiver of the requirements related to the building size and setback, there is no fundamental change to the zoning scheme of Montgomery County or to the immediate R-60 zoned community. In fact, the Board proposed that the addition be removed when it would no longer be needed for the person intended to occupy the unit; this would assure that the property would not remain with a detached ADU that exceeds allowable size limitations under an "accommodation." In addition, while the addition does exceed the limitation that ADU's gross floor area not exceed 50% of the footprint of the house now on the property, that house is now uncharacteristically small compared to the replacement houses being constructed throughout the neighborhood and on adjacent and abutting lots. And the resulting lot coverage with any addition of similar functionality for living, eating and sleeping (either attached to the existing house or to the existing ADU) will be approximately 13%, well within the limits for the zone. Finally, the proposal clearly does not create either a financial or administrative burden to the county; in fact, the testimony is that it may lessen the Dye's dependence on emergency services and hence lessen the financial burden on the County's emergency services.

While the petitioner's neighbors raised objections to adding to the ADU on the Dye's property, if their objections are the principal imperative to deny the request, our refusal to provide the requested reasonable accommodations on that ground would be a plebiscite on the petitioner's proposal. Neither the Board nor the neighbors are in a position to make a judgment on the doctor's opinion or on the dwelling solution for the disability recommended by an architect who specializes in ADA adaptations. The proposed single story addition is necessary to permit the petitioner's child an equal opportunity for housing and to provide a safe and suitable living unit consistent with her

disabilities. The multiple medical issues that necessitate handicap accessibility and clean air demonstrate that the petitioner's child's major life activities are restricted and that a disability exists pursuant to the definitions in the ADA and FHAA.

Anne Arundel County *(In the Matter of Christopher Gendell, et al.*, case No 1156, Sept. Term 2023, Opinion filed on August 1, 2024, by Berger, J.) was referenced in discussion as a basis to deny the request as not reasonable. That case was a denial of a request for a swimming pool in a Designated Chesapeake Bay Critical Area to assist with the physical therapy of two children of the owner. The accommodation was denied because the pool did not address a critical life function, and was a means to provide supplemental medical therapy for the children that was also available within the community. This decision creates no precedent for this case.

Granting the requested variances is a reasonable accommodation of the petitioner's child's disabilities. The Board of Appeals should have found that the proposed addition will not impair the intent, purpose, and integrity of the general plan affecting the subject property nor fundamentally alter or subvert the purposes of the zoning ordinance. Accessory buildings, including ADUs, are commonly found in residential areas such as the R-60 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. In addition, while not currently a standard condition in most Montgomery County cases where variances are granted as an accommodation under ADA/FHAA, the Board can require (as was proposed by the Board in discussion) that the proposed addition to the ADU be removed at such time as it is no longer required to address the petitioner's child's medical condition or the petitioner's child no longer resides in the ADU.

John H. Pentecost, Chairman
Montgomery County Board of Appeals