

**BOARD OF APPEALS**  
for  
**MONTGOMERY COUNTY**  
**Stella B. Werner Council Office Building**  
**100 Maryland Avenue**  
**Rockville, Maryland 20850**  
**(240) 777-6600**

**Case No. A-6110**

**PETITION OF JUDITH F. AND LAKE C. HENNIG**

(Hearing held January 11, 2006)

**OPINION OF THE BOARD**

(Effective date of Opinion, March 17, 2006)

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 variances from Sections 59-C-1.323(a) and 59-C-1.323(b)(2) of the Zoning Ordinance. The proposed construction of a second-story addition requires a two and one-half (2.50) foot variance as it is within twenty-two and one-half (22.50) feet of the rear lot line, and a variance of seventeen and one-half (17.50) feet as it is within twelve and one-half (12.50) feet of the streetside lot line. The required setbacks are twenty-five (25) feet from the rear lot line, in accordance with Section 59-C-1.323(b)(2), and thirty (30) feet from the streetside lot line, in accordance with Section 59-C-1.323(a).

Judith Forbes-Hennig and Lake C. Hennig, petitioners, appeared without counsel at the hearing.

The subject property is Lot 6, Block K, Fairview Estates Subdivision, located at 12900 Kilgore Road, Silver Spring, Maryland, in the R-90 Zone (Tax No. 00338313).

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

**EVIDENCE PRESENTED TO THE BOARD**

1. The petitioners testified that they seek variances to enable them to build a single story addition over their existing garage for the purpose of providing two fully accessible rooms—a bedroom and a living room—for their permanently disabled, twenty-three-year-old daughter. They testified that because this addition would be over their existing garage, it is termed a “second story addition,”

even though it would in fact be approximately level with the main floor of their existing house because of the slope of their yard.

2. The petitioners testified that the shape of their lot is an irregular polygon, with an arced corner curve and a shallow back yard. petitioners testified that the surrounding lots are much deeper than their lot, and that their entire rear yard is in the setback. They further testified that their lot is unique because of the sloping of their front, side and rear yards, and that there is no area on the lot where a variance would not be required to build.
3. The petitioners presented a letter from their daughter's physician, Dr. Norval A. Rios, MD, M. Sc., indicating that their daughter is challenged by spina bifida, and has been disabled since birth. The letter describes the extent of their daughter's disabilities, which include but are not limited to a lack of static balance, partial paralysis of her lower extremities, a dysfunctional colon and bladder, and impaired vision. The letter indicates that the Hennig's daughter requires the use of braces for ambulation and bifocal/prism lenses for vision. It states that she uses an electric scooter to travel distances, as well as during those periods when her balance and stability are compromised. When the use of an electric scooter is not feasible, the letter indicates that she has a manual wheelchair. It further states that the daughter has undergone a total of 22 surgical procedures as of this date. She is dependent on assistance for many aspects of her day-to-day existence, including her residence and care needs. Since spina bifida is a permanent disability with no cure and the aim of the daughter's medical management is to maintain her health and well-being by treating illness and injuries as soon as possible, and to provide supportive care and intervention to prevent complications and deterioration of the daughter's health. [See, Exhibit No 3(b) (letter from Norval A. Rois)].
4. The petitioners testified that they had arranged the first floor of their existing house to accommodate the needs of the daughter, but that as they are now older, and she is an adult, they are no longer able to lift her as necessary, and desire for her to have a fully accessible living space so that she is able to live as independently as possible. They testified that the addition they are seeking to build would provide their daughter with the personal space and privacy they believe she is entitled to as an adult, while enabling them to continue providing their daughter with the services and care she needs. Petitioner Judith Forbes-Hennig testified that she is a registered nurse, and that she is her daughter's caretaker.

5. The petitioners testified that the size of the addition is necessary to provide the ramping and turning radii necessary to accommodate their daughter's accessibility needs. They further testified that there are no other areas on their lot on which they could build the proposed addition.
6. The petitioners testified that the design of the addition is meant to conform to the design of their current home, and that it fits with the style of the neighborhood. They further testified that they have spoken to their neighbors, and that no one is opposed to their addition.

### **STANDARDS FOR EVALUATION**

Based upon the petitioners' 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. The Board finds that the lot does not exhibit characteristics peculiar to this parcel as required by Section 59-G-3.1(a), despite its irregular shape, since any effects due to this shape are mitigated by the substantial widening along the front of the lot as it moves towards the street. In addition, while there was testimony that the lot is sloping, there was no testimony to indicate that this is a condition unique to this lot. Finally, the Board finds that this lot, at almost 9,400 square feet, is not substandard for the R-90 zone.

The Board finds, however, 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) provisions.

#### **Determination of Disability**

The ADA and FHAA define a person's disability, or handicap, in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(2)(A); 42 U.S.C. §3602(h).

Whether an individual has an impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001) (citations omitted).

#### **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 F.3d 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 to 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.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 applicant's medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking, independent mobility) and the Board must determine whether it constitutes a major life activity under the ADA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.

3. Reasonable modification of local government policies: Because zoning ordinances are among the varieties of local government rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance must be granted in order to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the zoning ordinance.

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

1. The Board finds that the need for assistance with general mobility and the elimination of waste, among other things, demonstrate that more than one of the petitioners' daughter's major life activities are restricted. Because of the direct impact that these and other impairments set forth in the record have on their daughter's major life activities (i.e., walking, etc.), the Board finds that a disability exists pursuant to the definitions in the ADA and FHAA. The Board finds that the proposed construction of an addition would permit the Petitioners' daughter a fully accessible area for sleeping and general living purposes, and constitutes a reasonable modification to address the accessibility and other medical needs of their adult child.

2. The Board finds that the provision of a fully accessible and connected, yet private, space is necessary for the petitioners' adult daughter to live as independently and with as much dignity as possible, and yet still receive the care and services she needs. Furthermore, the Board finds that this addition is necessary to allow petitioners' daughter an equal opportunity to use and enjoy the subject dwelling.

3. The Board finds that the proposed addition will not undermine the intent of the Zoning Ordinance. Second-story additions are commonly found in residential areas such as the R-90 Zone in which the subject property is located, and are consistent with the intent of the Zoning Ordinance to promote a

residential scale and streetscape in residential zones. The Board further finds that, although the proposed construction of this second-story addition requires variances pursuant to Sections 59-C-1.323(a) and (b)(2) of the Zoning Ordinance, the grant of these variances would not encroach any farther upon the applicable setbacks than does the existing garage, for which a variance was granted in 1977. Accordingly, the proposed construction will not impair the intent, purpose, and integrity of the general plan affecting the subject property. Therefore, based upon the petitioners' binding testimony and the evidence of record, the Board finds that the grant of the requested variance is a reasonable accommodation of the petitioners' 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 fully accessible living and sleeping area, providing her equal access to the use of this home.

4. The Board finds that the design of the proposed construction over an existing flat-roofed garage is such that it will allow the structure to be readily dismantled in the future. The structural system of the proposed addition is simple and largely independent of that of the existing house and therefore facilitates the straight-forward removal of the addition.

Accordingly, the requested variance of 2.50 feet from the required twenty-five (25) foot rear lot line setback, and the requested variance of 17.50 feet from the required streetside lot line setback of thirty (30) feet are **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. 4(a) through 4(c) and 5(a) through 5(d).
3. The variance are granted to the petitioners only, the second-story addition shall be removed at such time as it is no longer required to address the petitioners' daughter's medical condition or the petitioners no longer reside in 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 Wendell M Holloway, seconded by Angelo M. Caputo, with Donna L. Baron, Caryn L. Hines and Allison Ishihara Fultz, Chair, in agreement, the Board adopted the foregoing Resolution.



Allison Ishihara Fultz, Chair  
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 17th day of March, 2006.

---

Katherine Freeman  
Executive Secretary to the Board

**NOTE:**

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve-month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.