

IN THE MATTER OF	:	BEFORE THE
JOSEPH AND SANDY BOYD	:	HOWARD COUNTY
Appellants	:	BOARD OF APPEALS
vs.	:	HEARING EXAMINER
DEPARTMENT OF PLANNING AND ZONING HOWARD COUNTY, MARYLAND	:	BA Case No. 626-D

Appellee

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DECISION AND ORDER

On March 31, 2008, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the appeal of Joseph and Sandy Boyd (the "Appellants"). The Appellants are appealing a Decision and Order of the Director of the Howard County Department of Planning and Zoning ("DPZ") dated December 11, 2007, denying an administrative adjustment petition to vary the 165-foot front recorded setback from a public street right-of-way to 157.22 feet for a single-family detached dwelling in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District. The appeal is filed pursuant to Section 100.F.3 of the Howard County Zoning Regulations (the "Regulations").

The Appellants certified that notice of the hearing was advertised and that adjoining property owners were notified as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Phillip Petty, Esquire, represented the Appellants. Joseph Boyd testified in favor of the petition. No one appeared in opposition to the petition.

Section 100.F.3 provides that appeals of administrative adjustment decisions be heard on a *de novo* basis.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The Appellants are the owners of the subject property, 3641 Point Hitch Road. It is located on the southeast section of the cul-de-sac and about 1,300 feet southeast of Countryside Drive (the "Property"). The Property is referenced on Tax Map 21, Grid 10, as Parcel 63, Lot 15.

2. The 3.5-acre Property is irregularly shaped and has a recorded front setback from the Point Hitch Road cul-de-sac of 165 feet (Record Plat 4783). The lot is about 506 feet deep along the northerly side lot line and 557 feet deep along the southerly lot line. The concrete foundation and partial cinderblock walls of the front section of a house under construction on the Property encroach some 7.78 feet into the recorded setback. The rear foundation is situated about 160 feet from the septic field in the lot's southeast section. The partially constructed house sits atop a knoll on the lot. The front lawn slopes downhill to the cul-de-sac and the rear section slopes down to the rear lot line.

3. Adjacent properties are also zoned RR-DEO. Lots 16 and 17 are irregularly shaped and both have curved front building restriction lines. Lot 16, which is 4.16 acres, has a recorded front setback of 263 feet. Lot 17 is 3.028 acres in area and has a recorded front setback of 80 feet. Lot 14, which adjoins the Property's northeasterly side lot line, is rectangular, about 3 acres in size and has a 75-foot recorded front setback.

4. A foundation location survey dated October 11, 2007 and attached to the petition depicts the encroachment.

5. Access to the Property is gained from a driveway off Point Hitch Road, which runs alongside the southwest lot line to terminate at a future multi-car attached garage.

6. The Appellants are seeking a retroactive variance of 7.78 feet from the recorded 165-foot setback from the public street right-of-way, as depicted on Record Plat 4783.

7. Mr. Boyd testified that he and his wife began to build the house themselves in the mid-1980s. He stated the original excavator recommended that the dwelling be moved forward somewhat within the building envelope to reduce the amount of blasting for the foundation and basement, based on the presence of a substantial rock formation in the knoll area. He presented evidence showing the survey stakes for the dwellings and the amount of blasting undertaken to remove the subsurface rock formation for the basement and foundation.

8. No encroachments were noted when a Department of Inspections, Licenses and Permits inspector approved the footings in 1990. Work on the house slowed down when Mrs. Boyd was in a serious car accident in the early 1990s. According to Mr. Boyd, the encroachment was discovered only in 2007. Mr. Boyd testified that he had to apply for a new building permit because the first expired. When an inspector requested a new plat, the Boyds had a new survey done and this survey showed the encroachment.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and for the reasons stated below, I find the requested variance complies with Sections 130.B.2, and may be granted.

1. The first criterion for a variance is that there must be some unique physical condition of the property, e.g., irregularity of shape, narrowness, shallowness, or peculiar topography that results in a practical difficulty in complying with the particular bulk zoning regulation. Section 130.B.2(a)(1). This test involves a two-step process. First, there must be a finding that the

property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A “practical difficulty” is shown when the strict letter of the zoning regulation would “unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974).

2. With respect to the first prong of the variance test, the Maryland courts have defined “uniqueness” thus:

In the zoning context, the ‘unique’ aspect of a variance requirement *does not refer to the extent of improvements upon the property*, or upon neighboring property. ‘Uniqueness’ of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to characteristics as unusual architectural aspects and bearing or party walls.

North v. St. Mary’s County, 99 Md. App. 502, 514, 638 A.2d 1175 (1994). (Italics added.)

In this case, the combination of the Property’s topography and subsurface conditions are such that the 165-foot front setback requirement disproportionately impacts it. Although the site is generally the same size as adjoining properties, its topography is not. The Property slopes upward toward the knoll and then slopes down to the rear lot line. Importantly, the rocky subsurface conditions within the building envelope pose a practical difficulty in complying with the front setback requirement. I therefore conclude the Property’s topography and subsurface conditions are unique physical conditions that together cause the Appellants practical difficulties in complying with the recorded setback, in accordance with Section 130.B.2.a(1).

3. The dwelling under construction is a permitted residential use and will not change the nature of intensity of use relative to the front public street right-of-way setback or impact it disproportionately. The variance, if granted, will therefore not alter the essential character of the neighborhood in which the lot is located, nor substantially impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare, in accordance with Section 130.B.2.a(2).

4. The practical difficulty in complying strictly with the recorded setback arises from the combined effect of its topography and subsurface conditions and was not created by the Petitioner, in accordance with Section 130.B.2.a(3).

ORDER

Based upon the foregoing, it is this 7th Day of April 2008 by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of appeal of Joseph and Sandy Boyd for a variance to reduce the 165-foot recorded setback to 157.22 feet for a single-family dwelling in an RR: DEO (Rural Residential: Density Exchange Option) Zoning District is **GRANTED**;

Provided, however, that:

1. The variance shall apply only to the uses and structures as described in the petition submitted and not to any other activities, uses, structures, or additions on the Property.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**

MICHELE L. LEFAIVRE
Michele L. LeFaivre

Date Mailed: 4/8/08

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.