

IN THE MATTER OF	:	BEFORE THE
	:	HOWARD COUNTY
<b>JAMES S. GUZMAN</b>	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 12-026V

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**DECISION AND ORDER**

On June 24, 2013, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of James S. Guzman (Petitioner) for a retroactive variance to reduce the 30-foot setback from a public street right-of-way (ROW) to approximately 6 inches for a 5'11", solid wood fence, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (the Zoning Regulations).

The Petitioner certified to compliance with the advertising and posting requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure.

Rebekah Lusk, Esquire, represented the Petitioner. James Guzman testified on his own behalf. Kristy Mumma and Howard Johnson testified in opposition to the petition.

**FINDINGS OF FACT**

Based upon the evidence presented at the hearing, the Hearing Examiner finds as follows:

1. Property Identification. The subject property is located on the northwest side of US 1 (Washington Blvd.), about 950 feet northwest of Bonnie View Lane. It is identified as Tax Map 38, Grid 3, Parcel 861 and is also known as 6100 Washington Boulevard (the Property).<sup>1</sup>

2. Property Description. The 1.73-acre B-2 (Business: General) zoned Property is an irregularly shaped generally triangular site. It is also relatively shallow compared to other area properties along US 1 southwest of Elkridge. The improved area comprises a small portion of the front portion of the Property. This area consists of a former tavern building with one corner sited almost directly on the front lot line, a large open gravel surface area on the building's northeast side and a smaller open gravel surface area on the building's south side. Beyond the 60-70 foot depth of the improved area, the Property has a steep drop in elevation and a stream running through the back portion of the Property. Petitioner has installed a 5'11" wood fence parallel to and about six inches from the front lot line.

3. Vicinal Properties. To the Property's north and northwest is the R-ED (Residential: Environmental Development) Open Space Lot 65 of the Gables of Lawyers Hill subdivision. Beyond this lot are the R-ED residential lots on Judge Dobbin Court. The B-2 zoned Parcel 805 to the northeast is zoned B-2 in the front and R-Ed in the rear. The front portion of Parcel 805 is a parking area. Across US 1 to the southeast are the R-12 zoned Parcels 140 and 139, both unimproved wooded parcels. The southwestern, B-2 zoned Parcel 39 is a motel.

4. Variance Request. Petitioner requests a retroactive variance from Section 119.D.2.a to reduce the 30-foot public street ROW to about 6 inches for a 5'11" solid wood fence. The

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<sup>1</sup> The Property is actually two separate lots, 6100 and 6080 Washington Blvd.

petition explains the lack of lighting along this portion of US makes the Property an ideal place for dumping car parts, tires, dirt and trash.

5. Mr. Guzman testified to purchasing the Property at auction in September 2012 for his janitorial business. He had allowed his brother to park cars on the site in relation to a car sales business, but ended the practice when county law enforcement officials informed him the practice was illegal without permits. He erected the fence because of the persistent dumping on the property. The choice of a wood fence was his wife's, who thought a chain link fence would be ugly. The wood fence has been damaged recently, apparently from a vehicle hitting it. On redirect, Mr. Guzman testified that the wood fence is also intended to address security concerns along this stretch of US 1 and that it would provide a measure of safety for his 8-9 member staff.

6. On cross-examination by Ms. Mumma, who questioned Mr. Guzman about the viability of installing electronic recording devices to deter dumping instead of the existing fence, Mr. Guzman said he would consider her suggestions.

#### **CONCLUSIONS OF LAW**

The standards for variances are contained in Section 130.B.2.a of the Regulations. That section provides a variance may be granted only if all of the following determinations are made:

- (1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.
- (2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

Based upon the foregoing Findings of Fact, and for the reasons stated below, I find the requested variance fails to comply with Sections 130.B.2.a.(2) and (3), and therefore must be denied.

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).

In this case, the Property's irregular shape and topography are unique physical conditions. The presence of the fence does not appear to substantially impair the appropriate use or development of adjacent properties owing to environmental constraints and an undevelopable

Open Space lot. However, the presence of this highly visibly fence along a wooded and undeveloped stretch of US 1 is wholly out of character with this immediate neighborhood.

Furthermore, the Hearing Examiner is not persuaded Petitioner has met his burden of demonstrating any practical difficulties arising from the application of the Zoning Regulations as they relate to the Property's unique physical conditions. Mr. Guzman testified that the wood fence was his wife's aesthetic preference, and on redirect, would provide a measure of security, but as his counsel argued in closing, he could erect a fence in compliance with Zoning Regulations Section 128.A.9.<sup>2</sup> Lastly, The Hearing Examiner does not address compliance with

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<sup>2</sup> Section 128.A. 9. Setback Requirements for Fences, Walls and Retaining Walls

The following regulations shall apply to fences and retaining walls in all zoning districts.

a. Fences shall be classified in the following categories:

(1) Open fence are fences which do not restrict visibility beyond the fence line.

Open fences include wire, chain link, post and rail, paddock, picket, and other fences in which more than 50 percent of the fence area is left open. The fence area is the surface area from the bottom to the top of the fence section, including stringers supporting the section but not the post area above or below the fence section.

(2) Closed fences include board on board, privacy or stockade fences, or any other fences in which 50 percent or less of the fence area is open. Masonry walls that serve the same purpose as a closed fence are considered closed fences.

b. The following types of fences and retaining walls shall be exempt from all structure or use setback requirements, including the setbacks in the M-1 and M-2 Districts which apply specifically to fences:

(1) Closed fences three feet or less in height.

(2) Open fences five feet or less in height.

(3) Retaining walls three feet or less in height.

(4) A series of retaining walls in which the height of each individual wall does not exceed three feet and the horizontal distance between walls is three feet or greater, however, a series of retaining walls must be set back in accordance with engineering requirements in the Design Manual. If the adjoining property is developed for residential use, no more than two retaining walls are permitted in a series and the closer wall can be no nearer than 10 feet from the property line.

c. Fences and walls six feet or less in height shall not be subject to structure or use setback requirements if located in a side or rear yard which is not adjacent to a public street right-of-way.

d. Fences and walls six feet or less in height shall not be subject to setback requirements if located in a side or rear yard which adjoins a public street right-of-way, provided the property is not a corner lot. On corner lots, fences and walls six feet or less in height shall not be subject to setback requirements if located in a side yard which adjoins a public street right-of-way, provided the fence complies with Section 128.A.9.E, below, and does not encroach into a front setback from a public street right-of-way.

Section 130.B.2.a.(4) absent a demonstrated practical difficulty for which relief from the inordinate impact of the Zoning Regulations upon the Property is warranted.

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*[Council Bill 17-2009 (ZRA-112) Effective 6/9/09]*

e. On a corner lot, closed fences and walls over three feet in height shall not be located within a triangle formed by the property corner where the streets intersect and the points on the property line twenty-five (25) feet from the property corner where the streets intersect.

*[Council Bill 17-2009 (ZRA-112) Effective 6/9/09]*

f. Where the ground is higher on one side of a fence or retaining wall than another, the height of a fence shall be measured on the side where the ground is lower.

g. Other than the exceptions noted above, fences must comply with all bulk requirements of the applicable zoning district.

**ORDER**

Based upon the foregoing, it is this **15<sup>th</sup> day of July 2013**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Petition of James S. Guzman for a retroactive variance to reduce the 30-foot setback from a public street right-of-way (ROW) to approximately 6 inches for a solid wood fence, in the B-2 Zoning District, is **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS**

**HEARING EXAMINER**

A handwritten signature in black ink, appearing to read 'Michele L. LeFaivre', is written over a horizontal line.

**Michele L. LeFaivre**

Date Mailed: \_\_\_\_\_

**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.