IN THE MATTER OF	:	BEFORE THE
STEPHEN LINTON	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner		
	:	HEARING EXAMINER
	:	BA Case No. 13-004V

DECISION AND ORDER

On April 22, 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 Stephen Linton (Petitioner) for front and rear principal structure setback variances related to a proposed subdivision in an R-12 (Residential: Single) Zoning District, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure.

The Petitioner was not represented by counsel. John Carney testified on behalf of the Petitioner. Frederick Rowe testified in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

1. Amended Variance Plan, April 2013
2. Howard County Historic District Commission, Draft Minutes from March 7, 2013

Preliminary Matters

1. Amendment to the Variance Petition and Plan. At the outset of the proceeding, Mr. Carney introduced into evidence Petitioner's Exhibit 1, an April 2013 Variance Plan amendment

depicting proposed porch setbacks and dimensions. As proposed, the Lot 2, 4'x7' rear porch would be located 2.3 feet from the rear property line. The proposed Lot 3, 4'x7' front porch would be located 12.6' feet from the front property line.

2. Notice. An issue arose during the hearing as to whether Petitioner complied with due process hearing notice and posting requirements. Hearing Examiner Rules 4.1-3 establish the Howard County Code hearing notice and posting requirements, including compliance with Board of Appeals Rule §2.203, which requires in relevant part a property involving a variance petition to be posted at least 15 days before the hearing. The posting must provide the time, date and place of the initial hearing. The Department of Planning and Zoning prepares the actual poster, which includes a description of the variance request based upon the language of the variance request provided on the first page of the variance petition (Section 1).

Section 1 of the BA 13-004V variance petition defines the variance request as a variance from HCZR Section 109.D.4.c and is described as "[F]ront and rear setbacks from lot line for lots in the R-12 Zoning District." Petitioner also submitted a three-page information supplement as permitted pursuant to Section 6.(t). This supplement explains Petitioner's objective to subdivide Lot 9 into three residential lots. Lot 1 requires no variances. However, owing to the Petitioner's desire to remove the breezeway between the two existing dwellings on Lot 9 and place each dwelling on its own residential lot, the resultant proposed configurations of proposed Lots 2 and 3 do not meet current bulk regulations. Petitioner is therefore seeking variances from the principal structure rear setback for Lot 2 and the principal structure front setback for Lot 3.

The variance petition poster and DPZ's technical staff report (TSR) describe the petition as a request for variances to 1) reduce the 20' front setback to 15.8' for an existing single-family detached dwelling and to 16.7' for a proposed garage, and also to reduce the 30' rear setback to five feet for an existing single-family detached dwelling and 10.33' for a proposed detached garage.

Mr. Rowe, an adjoining neighbor, expressed concern that the hearing poster gave no notice of a three-lot subdivision and concerns only variances for the garage. Mr. Carney stated the petition supplement plainly states the proposed detached garage is depicted only to demonstrate the full proposal for the subdivision if the variances are approved and that no variance is required for the proposed garage on Lot 3. As Mr. Carney explained, the bulk regulations cited on the poster, Sections 109.D.4.c.(1)(a) & (c), do not apply to the garage, which is an accessory, not a principal structure, and thus subject to the 10-foot accessory structure imposed by Sections 109.D.4.c.(2)(a) & (c).

The Hearing Examiner considered the issue and found no violation of administrative due process. Mr. Rowe's concerns about the future subdivision of the Property are not properly before the Hearing Examiner. She explained the community's opportunity to address concerns about the subdivision issue at a pre-submission subdivision community meeting pursuant to Howard County Subdivision and Land Development Regulations Section 16.144.(a). The inclusion of unnecessary language regarding proposed setbacks for the garage does not violate administrative due process, as the hearing poster properly referenced the proposed setbacks for the dwellings. Mere technical irregularities in a petition (or in this case in a hearing notice)

not amounting to a jurisdictional defect do not offend administrative due process. Substantial compliance is sufficient. Beall v. Montgomery County Council, 240 Md. 77, 89 (Md. 1965) (quoting Heath v. Mayor and City Council of Baltimore, 187 Md. 296, 299, 49 A.2d 799 (1946)).[1] For these reasons, the Hearing Examiner finds Petitioner certified to compliance with the notice and posting requirements of the Howard County Code.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, I find as follows:

1. Property Identification. The subject property is located on the west side of Burgundy Lane at the intersection with Welcome Night Path. It is officially identified as Tax Map 35, Grid 13, Parcel 450, Lot 9 and is also known as 6520 Burgundy Lane (the Property).

2. General Property Description. The petition supplement describes the 1.68-acre Lot 9 as improved with two dwellings listed on the Howard County Historic Sites Inventory (HO-462). These dwellings are attached by a breezeway. The front dwelling sits about 18 feet from the Burgundy Lane right-of-way and the approximately 13-foot breezeway connects the front and rear dwelling, which is sited behind the front dwelling. A Forest Conservation Easement encumbers the rear of the Property. An existing gravel and concrete driveway on the south side

[1] In Heath, the Court of Appeals held that a grey sign posted on the premises instead of a white one, as required by the applicable notice provisions did not render the special exception permit application defective. In Beall, the applicant's failure to list all owners of property in a zoning application was not a jurisdictional defect because it did not impair the proceeding or affect the validity of a decision. Although not controlling, the Howard County Board of Appeals Hearing Examiner applied this "minor irregularities" test in BA Case No. 559D to conclude Appellants' administrative appeal petition should not be dismissed as defective because Appellants failed to sign the affirmation contained on the appeal petition form and the petition was submitted only on their counsel's signature. Nor was the administrative appeal petition in BA Case No. 618D defective because one of the Appellants who signed the petition was an "unknown individual." The identity of the other Appellants was easily discernible and their counsel had signed the petition and was known to have spoken at the public hearing on their behalf.

of the Property provides access. Petitioner resides in the front dwelling and rents out the rear dwelling.

3. Adjacent Properties. Adjacent properties are also zoned R-12, excepting the western open space lot, and are each improved with a single-family detached dwelling.

4. The Requested Variances. To accommodate his subdivision objective, Petitioner is seeking variances from the rear and front principal structure setbacks imposed by Sections 109.D.4.c.(1)(a) & (c) for proposed Lots 2 and 3. According to the April 2013 Amended Variance Plan, a proposed 4'x7' rear porch would be located 2.3 feet from the rear property line of Lot 2 and the dwelling would be located five feet from the rear lot line. (The required setback is 30 feet.) A proposed 4'x7' front porch would be located 12.6' feet from the front property line of Lot 3 and the dwelling would be located 15.8 feet at its closest point to the front property line. (The front setback is 20 feet.)

5. Mr. Carney introduced into evidence Petitioner's Exhibit 2, a copy of March 7, 2013 Draft Minutes of the Howard County Historic District Commission, regarding Plan #13-08 for 6520 Burgundy Road, HO-462. The staff comments section states staff has no objection to the removal of the breezeway or proposed property lines, that the breezeway was added to keep both houses on one lot during a prior subdivision, and that the house does not appear particularly historic, although there may be an older historic house inside the existing structure.

6. When queried by the Hearing Examiner as to how the requested variances met the four standards for granting a variance, Mr. Carney testified the dwellings are historic, the two structures exist today, the removal of the breezeway is an improvement, the variances would

not have any impact on the neighborhood, and Petitioner is burdened by the cost of maintaining a forest conservation easement on the exiting property.

7. Frederick Rowe testified to being the adjoining neighbor to the north. As discussed above, Mr. Rowe discussed the proposed language on the hearing poster.

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. Based upon the foregoing Findings of Fact, and for the reasons stated below, the Hearing Examiner concludes the requested variances do not comply with Sections 130.B.2.a.(1) and (3) and therefore must be denied.

> **(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.**

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, Petitioner argues the Property is unique because the two structures are connected by a breezeway and are historic, at least on the interior. To Petitioner's detriment, these conditions are not unique physical conditions. As to the historic importance of the dwelling, the Howard County Historic District Commission staff report did not consider the house particularly historic. Further, Maryland case law, as applied to several Hearing Authority variance petition decisions, does not permit the Hearing Authority to consider the location of improvements on the Property as unique physical conditions.[2] Thus, in BOA Case No. 06-006V the Hearing Examiner denied a variance petition based on a claim of uniqueness owing to the location of the dwelling, having determined he must view the property in a variance petition

[2] There is an exception for noncomplying structures. Ordinarily, existing structures may not be considered "unique" features of a property. However, when an existing structure is noncomplying to the HCZR, it constitutes a unique physical condition of the Property. See HCZR Section 128.D. In this case, the dwelling currently complies with R-20 bulk regulations.

"as if the house had not been built" and explaining the "improvement location" rule is to "prevent a property owner from creating a need for a variance."

Significantly, Petitioner's need for the variances arises not from any unique physical quality of the Property. It is only because Petitioner proposes to subdivide the Property into multiple lots that a difficulty arises. Pursuant to HCZR Section 130.B.2.a.(3), the practical difficulty in complying with the bulk regulations may not be created by the petitioner. This limitation caused the Hearing Examiner in BOA Case No. 05-035V to deny petitioners' requested variances to reduce the minimum lot size because petitioners failed to show the property was in any way physically unique, and that it was only through their desire to subdivide the property into three lots (lots that had yet to be created) that practical difficulties arose.

This "self-created hardship" rule commonly applies when an owner has already constructed something on the property in violation of the applicable zoning regulations, then requests relief from the regulation in order to avoid the hardship of removing the structure. See Cromwell v. Ward, 102 Md. App. 691, 651 A.2d 424 (1995); Evans v Shore Communications, 112 Md. App. 284, 685 A.2d 4554 (1996); and Ad+Soil, Inc. v. County Commissioners of Queen Anne's County, 307 Md. 307, 513 A.2d 893 (1986). Because the practical difficulty in these cases arose from actions of the appellant and landowner, and not because of the disproportionate impact of the zoning regulations on the particular property, the cases failed the test for

variances.[3] Whether the hardship was inflicted intentionally or unintentionally is irrelevant; if it is the result of the owner's action, the variance must be denied. Salisbury Board of Zoning Appeals v. Bounds, 240 Md. 547, 214 A.2d 810 (1965); Cromwell, 651 A.2d at 441.

In this case, the Petitioner did not erect the dwelling in violation of the bulk regulations and then seek relief from the bulk regulations. Rather, Petitioner seeks to subdivide the Property in such a way that the dwellings on Lots 2 and 3 do not comply with the bulk regulations. Nevertheless, by virtue of creating substandard lots, Petitioner will be creating the very difficulty from which he seeks relief. The courts have squarely addressed this circumstance.[4] See Richard Roeser Professional Builder, Inc. v. Anne Arundel County, 368 Md. 294, 793 A.2d 620 (2002), citing Randolph Hills, Inc. v. Montgomery County Council, 264 Md. 78, 285 A.2d 620 (1972) (wherein the Court concluded the resubdivision of land is an act of an owner considered to be a self-created hardship.)[5]

In this case, Petitioner proposes to subdivide the Property in a manner that will cause the rear setback for the dwelling on proposed Lot 2 and the front setback for the dwelling on proposed Lot 3 to be noncomplying to the HCZR. This circumstance is a self-created hardship, i.e., the Petitioner is creating the very practical difficulty from which he seeks relief, a hardship caused by an affirmative act of commission.

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[3] The self-created hardship rule, while listed as the third variance criteria in the Section 130.B.2.a, is actually a complement to the first criterion. If the hardship is self-created, then it is not the result of a unique physical condition of the land and therefore fails the test of Section 130.B.2.a.(1) as well.

[4] BOA Case No. 05-035V provides an extended analysis of self-created hardship as an improper basis for a positive variance decision.

[5] While the Randolph Hills decision concerned a rezoning case, the Roeser Court found the same "act of commission" applies to variance cases. 368 Md. at 316.

Moreover, Petitioner's stated interest in subdividing the property to allow for better maintenance is also an unnecessary hardship argument. There is no unnecessary hardship where Petitioner may continue to use the Property for his residence and create one additional lot. While the economic costs of such maintenance may be more than Petitioner desires, it not a basis for granting the requested variances. This conclusion is consistent with the line of cases interpreting "practical difficulty" or "unnecessary hardship" as a denial of reasonable use standard. See Belvoir Farms Homeowner Association, Inc. v. North, 355 Md. 259, 734 A.2d 227 (1999) (discussing the interpretation of variance standards). See also Citrano v. North, 123 Md. App. 234, 717 A.2d 960 (1997) (holding board of appeals properly denied variance for a deck accessory structure in a 100-foot critical area, finding no unwarranted hardship where property was already developed with a single family dwelling and related improvements), citing North v. St. Mary's County, 99 Md.App. 502, 638 A.2d 1175 (1994) ("If reasonable use exists, generally an unwarranted hardship would not.") North v. St. Mary's, 99 Md. App. at 517-18, 638 A.2d 1175.[6]

[6] In Belvoir Farms, The Court of Appeals interpreted the terms "unwarranted hardship" and "unnecessary hardship" to be generally indistinguishable. Belvoir Farms Homeowner Association, 355 Md. at 275-276.

ORDER

Based upon the foregoing, it is this **9th Day of May 2013,** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Stephen Linton for front and rear setback variances related to a proposed subdivision in an R-12 (Residential: Single) Zoning District, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations is hereby **DENIED**.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

Michele L. LeFaivre

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.