

IN THE MATTER OF : BEFORE THE  
FAROOQ A. KHAWAJA : HOWARD COUNTY  
Petitioner : BOARD OF APPEALS  
: HEARING EXAMINER  
: BA Case No. 16-029V

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**DECISION AND ORDER**

On March 9, 2017, 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 Farooq A. Khawaja (Petitioner) for a retroactive variance to reduce the accessory structure side setback from 10 feet to 0.0 (zero) feet for a shed in an R-20 (Residential: Single) zoning district, filed pursuant to § 130.0.B.2 of the Howard County Zoning Regulations (the HCZR).

The Petitioner certified to compliance with the notice and posting requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Petitioner was not represented by counsel. Farooq A. Khawaja testified in support of the petition. Dr. Nollie Wood, Dr. Wendy Hannon, and James Franson testified in opposition to the petition.

**A Preliminary Matter**

The Hearing Examiner noted out the outset of the hearing that she had visited the site several weeks before the hearing and asked Petitioner when the shed was built, as she did not recollect the shed based on its locational representation on the variance plan. Upon admission

of an opponent's photographic exhibits into evidence, the Hearing Examiner's recollection was refreshed; during her "drive-by" site visit, the Hearing Examiner had "read" the shed as a small addition to the dwelling, not as an independent structure. Critically, the Hearing Examiner's site visit observations about the location of the shed does not bear on the merits of the petition.

Opponent Wendy Hannon submitted into evidence the exhibits as follows.

1. Photograph of the subject shed
2. View of property.
- 3-4. Photographs of existing shed in the rear yard

#### **FINDINGS OF FACT**

Based upon the evidence of record, the Hearing Examiner finds as follows:

1. Property Identification. The subject property is located on the east side of Font Hill Road about 280 feet north of Culverene Road. It is located in the 2<sup>nd</sup> Election District, identified as Tax Map 0024, Grid 0014, Parcel 1146, Lot 17 and is known as 3749 Font Hill Drive (the Property). The Property is Lot 17 of the Font Hill Village subdivision.

2. Property Description. The 20,140sf Property is improved with a single-family detached dwelling located about 50 feet from the southwesterly front lot line and 23 feet from the southerly side lot line. The subject shed sits on this side lot line. A portion of the rear Property is fenced. In the northern corner of the Property, outside the fence, is a second shed. The Property is accessed from a driveway in front of the dwelling. The Property slopes upward toward the rear lot line and is dotted with vegetation. The variance plan denotes a twenty-foot

wide drainage easement along the southerly lot line, 10 feet of which is located on the Property. The subject shed is sited within this drainage easement.

3. Adjacent Properties. Adjacent properties are also zoned R-20. The plan does not call out the location of adjacent residences on these properties or their distance from property lines or the subject shed. These properties are each improved with a single-family detached dwelling.

4. The Requested Retroactive Variance and Variance Plan. Petitioner is requesting retroactive approval to reduce the 10-foot accessory structure side setback imposed by HCZR § 108.0.D.4.c(1)(b) to 0.0 (zero) feet for an existing shed. The variance plan does not denote the square footage of the shed, its height, or its distance from the adjoining residence at 3753 Font Hill Road. The July 26, 2016 variance plan contains a note in the upper left section that "encroachments may exist."

5. Zoning History. Attached to the petition is a copy of a Zoning Regulations Notice of Violation issued to Petitioner for an accessory building that does not meet the 10-foot side setback requirements on R-20 zoned property (CE-16-097, issued June 24, 2016).

6. Mr. Khawaja testified that the Department of Inspections, Licenses and Permits (DILP) informed him that a building permit was not required for the shed owing to its size and further, that DILP did not tell him about any required setbacks. When questioned by the Hearing Examiner, Petitioner testified that the shed is 10'(w) x 14'(l) (140sf) and 8 feet high. The Hearing Examiner questioned Mr. Khawaja about any unique physical conditions of the Property that imposed practical difficulties to compliance with the setback. As he testified, the

Property has more of a slope in the back section. Referring to the aerial image included in DPZ's agency comments, which does not depict the encroaching shed, he testified to the sloped area running along the entire rear section and that an adjoining property has the same slope (a small hill). The Hearing Examiner used the aerial image as a reference to discuss alternate locations for the shed, but Mr. Khawaja rejected them. When the Hearing Examiner questioned Petitioner about the shed's location within the drainage easement running through the side lot line, Mr. Khawaja testified it was not an issue because he had talked to Zoning and they were not concerned about it. He further testified that the easement no longer exists.

7. On cross-examination by Dr. Nollie Wood, who lives across the street, Petitioner testified to there being another shed on the Property sitting on the hill. Petitioner agreed that this shed could be removed and replaced with the encroaching shed, but it would be a little hardship for him. When asked if the shed could be located in the level space where chickens and goats had been kept, Petitioner testified that the space would block the view and a part of the fence would have to be removed.

8. In his direct testimony, Dr. Nollie Wood testified to Petitioner's house having no basement and the former owner erecting the back shed on the hill, which Dr. Wood believes would accommodate the relocated shed. He agreed with the Hearing Examiner that her identification of another area in the rear (where the animals had been kept) could also accommodate the relocated shed. When asked by the Hearing Examiner about other neighborhood sheds and their locations, Dr. Wood testified that most sheds are located in the

rear, close to property lines. None is located in/near the front yards and they are not generally visible from the street.

9. On cross-examination by Dr. Wendy Hannon about children or visitors crossing onto the adjoining property at 3753 Font Hill Road, Petitioner testified that they do go on this property to get around to the back yard because there is no fence.

10. In her direct testimony, Dr. Hannon testified that no fence could be erected down the side lot line at 3753 because the shed at issue is located along the property line or possibly on a portion of this property. She introduced Opponent Exhibit 1, a photograph of the shed, which is intended to demonstrate why Petitioner or other persons must walk onto 3753 to get to the back yard. Opponent Exhibit 2 photographically depicts the rear shed on the hill and shows its derelict condition. Opponent Exhibits 3 & 4 depicts the Property's side yard and the rear shed.

11. James Franson testified that the shed looks very bad from the street. He lives two houses down from the Petitioner and can see Mr. Khawaja's back yard from his property. In his view, there is room for a shed in the back yard. The shed is built on the property line and possibly on the adjoining property. He believes the regulations should be enforced. The Hearing Examiner explained the county has in recent years required property owners who violate county laws to tear down the offending structures.

### **CONCLUSIONS OF LAW**

#### **I. Background Issues**

A. Deficiencies in the Variance Plan. One of the challenges in evaluating this variance petition is the insufficiency of the variance plan submitted with the petition. As the Hearing

Examiner discussed with Petitioner, the "plan" lacks basic information required by variance petition Sec. 6, which lists 20 items to be included on the plan. Rather than submit the proper variance plan, Petitioner elected to submit a location drawing, which, based on its July 26, 2016 date, appears to have been prepared in response to the Notice of Violation issued to him. The Hearing Examiner provided Mr. Khawaja with an example of an acceptable variance plan.

B. The Requested Setback & the "Encroachment May Exist" Note on the "Variance Plan." During the hearing, the Hearing Examiner reviewed her long-standing policy, with limited exception, of denying variance petitions for structure setbacks of less than three feet in light of HCZR § 130.0.B.2.a(2), which requires consideration as to whether the requested variance, if granted, would substantially impair the appropriate use or development of adjacent property or be detrimental to the public welfare. This "neighbor war deterrent" policy is intended to ensure that those property owners seeking a much-reduced setback do not encroach onto the adjacent lot to access, mow, or maintain other areas of their own lots. In cases where potential neighbor wars are not implicated, the Hearing Examiner may approve a lesser setback than requested. In those cases where the adjoining property is not a residential use, the Hearing Examiner may grant the setback subject to the condition that the petitioner install a fence along the lot line to prevent encroachment.

In this case, the HCZR § 130.0.B.2.a(2) test warrants against granting the requested variance because there is substantial credible evidence, based on uncontroverted opposition testimony, going to the shed being partially located on the adjoining property at 3753 Font Hill Drive. Even more, the licensed surveyor who prepared the location survey noted on the plan

that "encroachments may exist." Still more, assuming arguendo one side of the shed sits directly along the side lot line in common with 3753 (hence the requested 0.0 foot setback), a portion of the shed roof overhang, which is part of the structure, extends into the adjoining property, as documented by Opponent Exhibit 1, a photograph of the shed.<sup>1</sup> The Hearing Examiner may not approve a variance for a portion of a structure extending over another property without that property owner's authorization.

## II. Evaluation of the Requested Variance for Compliance with HCZR § 130.0.B.2

The standards for variances are contained in HCZR § 130.0.B.2.a. Pursuant to this section, the Hearing Examiner may grant a variance only if the Petitioner demonstrates compliance with all four variance criteria. Based upon the foregoing Findings of Fact, and for the reasons stated below, the Hearing Examiner finds the requested variance does not comply with §§ 130.0.B.2.a(1) through (4), 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.**

Compliance with this first criterion is a two-part test. 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

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<sup>1</sup> Pursuant to HCZR § 101.0.E, a "building" or "structure" includes any part thereof. HCZR § 103.0 defines a structure" as anything constructed or built.

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 presented no evidence of unique physical condition. While the back yard is sloped, Petitioner testified an adjoining neighbor's property has the same topography. This topographical condition already accommodates a reasonably sized shed, which further defeats any claim of a unique physical condition.

**(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.**

The Hearing Examiner credits the testimony of area neighbors that sheds on neighborhood properties are located in back yards and not generally visible from the street. Additionally, the current location of the shed prevents the adjoining property owner at 3753 Font Hill Drive from constructing a new fence along the common lot line. In the Hearing Examiner's view, as detailed in Part I of these Conclusions of Law, the "proposed" location of the shed alters the essential character of the neighborhood in which the lot is located and substantially impairs the appropriate use or development of adjacent property.

The location is detrimental to the public welfare because it lies within a drainage easement denoted on the "plan." The Hearing Examiner accords no evidentiary weight to Petitioner's testimony that this easement no longer exists or that Zoning told him the easement was not an issue. A drainage easement is a legal right assigned to a person or entity,

which, in this case, the Hearing Examiner believes would have been Howard County. Easements are recorded on subdivision plats, here the subdivision plat for this section of Font Hill Village, and the plat would detail the rights attached to this easement. Had the easement been extinguished or released, the plat – and the licensed land surveyor-prepared location survey – would have been amended to reflect this.

**(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.**

Petitioner testified the Department of Licenses, Inspections and Permits did not advise him of any need for variance approval. In claiming the County failed to provide him with accurate and sufficient information, Petitioner is effectively invoking the doctrine of equitable estoppel to support the variance being granted. In the zoning context, the principle of equitable estoppel holds a local government exercising its zoning powers will be estopped (precluded from taking action) when a property owner, relying in good faith on some act or omission of the government, has made “such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired.” *See Sycamore Realty v. People’s Counsel*, 344 Md. 57, 64 (1996). This is a high bar rarely met.

Petitioner did not detail the cost of constructing the shed. DILP does not exercise zoning powers. There is no evidence of record of Petitioner having discussed the proposed location of the shed within the 10-foot side setback with the department. Therefore, even the predicate of detrimental reliance is absent. Moreover, had he discussed the proposed setback with DILP

and had DILP not apprised him of the need for variance approval, the doctrine of equitable estoppel would not avail him. As Maryland's highest court has held, "[e]veryone dealing with officers and agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled by their acts when done without legal authority." The doctrine of equitable estoppel cannot be invoked because of an error or mistake committed by one of its officers or agents which has been relied on by the third party to his detriment. *See Marzullo v. Kahl*, 366 Md. 158, 783 A.2d 169 (2001) (citations omitted). The Howard County Code does not charge DILP with administration of the HCZR. By function of the Howard County Code, had Petitioner discussed the location of the shed with DILP, DILP by law would have had to refer him to the Department of Planning and Zoning. This is standard operating procedure.

Nor may Petitioner's interaction with DILP be considered a "unique condition" or "unique circumstances" under § 130.0.B.2.a(1) causing the practical difficulty unique to the Property and needed to authorize the granting of the variance sought. *See Cromwell*, 102 Md.App. at 723, 651 A.2d at 440. Petitioner's circumstance is analogous to the property owner's situation in *Cromwell*, the leading case on the law of variances, and which concerned a retroactive height variance petition for an accessory structure for which Baltimore County had issued a building permit that did not clearly denote the structure's height. When county inspectors discovered the building was several feet higher than the 14-foot maximum height, a hearing examiner granted property owner Thomas Ward's variance petition, which the Board of Appeals also granted on appeal by Mr. Cromwell. On final appeal from the circuit court's

affirmation of the Board's decision, the Court of Special Appeals reversed, holding the Board's granting of the variance was not appropriate where the property was not shown to be unusual or unique from surrounding properties; where Mr. Ward's practical difficulty or hardship was self-created, arising from the construction of accessory building before the variance was sought, and; where the county's approval of the building permit was not a unique condition supporting the grant of the variance as a practical difficulty. As the *Cromwell* court stated, it is not the purpose of variance procedures to effect a legalization of a property owner's intentional or unintentional violations of zoning requirements. *Cromwell*, 102 Md.App. at 726, 651 A.2d at 423. Like Mr. Ward, Petitioner's hardship is self-created.

Lastly, Petitioner did not contest the possible encroachment onto the adjoining property. Beyond his testimony about DILP, his main argument for seeking the variance is that he does not want to move the shed or incur the expense associated with relocating it. Financial hardship is not a consideration or a practical difficulty in zoning variances.

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

Because there are other locations available for a shed, and there is no evidence that a smaller shed with a lesser setback could not meet Petitioner's needs, and for the other reasons set forth in this decision and order, the Hearing Examiner concludes the requested variance is not the minimum necessary.

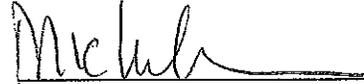
ORDER

Based upon the foregoing, it is this 3<sup>rd</sup> day of April 2017, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Farooq A. Khawaja for a retroactive variance to reduce the accessory structure side setback from 10 feet to 0.0 (zero) feet for a shed in an R-20 (Residential: Single) zoning district is hereby **DENIED**.

Petitioner is on notice that any relocation of the shed must comply with all setback regulations. If the shed is relocated to another area within a setback, variance approval is necessary. Petitioner should consult with the Department of Planning and Zoning before relocating the shed.

HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER

  
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Michele L. LeFavre

Date Mailed: 4/5/17

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.