

IN THE MATTER OF	:	BEFORE THE
GAINES CHAPEL AME CHURCH, INC.	:	HOWARD COUNTY
T/A GAINES AME CHURCH	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 15-010N&V

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DECISION AND ORDER

On June 29, 2015, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the non-conforming use and variance petitions of Gaines Chapel AME Church, Inc., t/a Gaines AME Church (Petitioner), to expand a confirmed nonconforming religious facility structure and use with an addition and a variance to reduce the 20-foot project boundary setback from the adjacent R-A-15 zoned property to zero (0.0') feet in an R-A-15 (Residential: Apartments) Zoning District, filed pursuant to Sections 129.0.E and 130.0.B.2 of the Howard County Zoning Regulations (the Zoning Regulations).

Petitioner certified to compliance with the notice, posting and advertising requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Andrew Robinson, Esquire, represented the Petitioner. No one appeared in opposition to the petition.

A Preliminary Matter

During the hearing, Petitioner amended the nonconforming use expansion and variance plan to show structure distances from property lines (the June 29, 2015 Amended Plan).

Examiner Rule 9.4 requires a petitioner who proposes an amendment during the course of the proceedings to submit the amendment as an exhibit. The Hearing Examiner determined the plan revision was not substantive within the meaning of Hearing Examiner Rule 9.5 and therefore could be admitted as evidence during the hearing.¹ This amendment was introduced as Petitioner Exhibit 1.

FINDINGS OF FACT

Based upon the petitions, plans and technical staff report, the Hearing Examiner finds as follows:

1. Property Identification. The subject property is located in the 1st Election District on the south side of Montgomery Road about 1,500 feet northwest of US 1 (Washington Blvd.) It is identified as Tax Map 38, Grid 2, Parcel 768 and known as 7134 Montgomery Road (the Property).

2. Property Description. The Property is an irregularly shaped parcel located on the south side of Montgomery Road, which has significant curvature along the Property's northerly lot line. The southeasterly lot line generally perpendicular to the Montgomery Road frontage is straight and about 127 feet in length. From this lot line, the southwesterly lot line runs in a

¹ Rule 9.4. Amendments to Petition. If a petitioner proposes to amend a petition during the course of the proceedings, the petitioner must submit the amendment as an exhibit.

Rule 9.5. Substantive Amendments. If the hearing examiner determines that an amendment to a petition is substantive, i.e., the amendment proposes a use that is likely to adversely impact vicinal properties, then the hearing examiner will suspend the hearing for at least three (3) weeks. At least two (2) weeks prior to the rescheduled hearing, the petitioner must send written notice of the amendment and of the date, time, and place of the next hearing to all adjoining property owners, and must file an affidavit of written notification with the clerk. In addition, the petitioner must post the property with notice of the date, time, and place of the next hearing for at least 10 days immediately before the next hearing in accordance with §2.203(b) of the Board's Rules. The hearing examiner may request that DPZ review and make recommendations on the amendment.

northwesterly direction for about 430 feet. The site improvements are located in the central and southeastern portion of the Property. The main religious facility structure is an historic frame church identified as HC Historic Site No. 384 (Primary). The church's vestry and steeple face southeast, and the structure sits about 70 feet at its closest point from the Montgomery Road pavement. According to the June 29, 2015 Amended Plan, the rear corner of the church lies 9.6' from the southwesterly common lot line and the front corner, 21' from this lot line. Behind the church, to the southwest is a freestanding, one-story building used for classes and a social hall. A 15.3' section of this building encroaches 3.2' feet into the adjoining property. A paved entrance running along the southeasterly lot line provides access to an open paved parking and vehicle circulation area to the north, east and southeast of the church. The Property is level, with a slight slope to the southwest and west.

3. Vicinal Properties. The R-ED (Residential: Environmental Development) zoned property to the north, across Montgomery Road, is the site of the ElkrIDGE Elementary School and the ElkrIDGE Landing Middle School off Timberlee Road. Adjoining properties on the south side of Montgomery Road are zoned R-A-15. Parcel 700 to the southeast is improved with a two-story, frame, single-family detached dwelling fronting on Montgomery Road. The largely wooded Parcel 93 to the southwest is the site of two cemeteries identified on the county cemetery inventory as Nos. 38-3 and 38.4, Gaines AME Cemetery. The petition plan identifies this property as "Greenland Cemetery."

4. Roads. Montgomery Road along the Property has two travel lanes and a center turn lane within an existing variable width right-of-way. The estimated sight distance from the

existing driveway is about 400 feet to the northwest and 400 feet to the southeast. Precise sight measurement distance may only be determined through a detailed sight distance analysis, however. There is no current traffic volume data for Montgomery Road west of US 1.

5. Water and Sewer Service. The TSR states the Property is served by public water and sewer facilities.

6. Zoning History. According to the technical staff report (TSR), the Board of Appeals in BOA 05-022N&V confirmed Petitioner Gaines African Methodist Episcopal Church's petition for confirmation and enlargement of an existing religious facility and variance to reduce the 20-foot project boundary to zero (0.0) feet for an addition on October 12, 2005. The approved enlargement and variance approval lapsed because the addition was not constructed.

The BA 05-022N&V found that the church lost property over the years because of inverse condemnation for the widening of Montgomery Road. The nonconforming use petition supplement states the existing buildings and use have been in place prior to the 1948 adoption of zoning in Howard County.

7. General Plan. The Property is designated Established Communities on the Designated Place Types Map of PlanHOWARD 2030 and is designated Institutional on the Department of Planning and Zoning Land Use Map.

8. The Proposed Expansion of the Confirmed Nonconforming Use and Requested Variance (§§ 129.0.E & 112.0.D.4.c.(2)(c)). BOA 05-022N&V (decided October 12, 2005) confirmed a nonconforming use for the religious facility and did not indicate that nothing less than the entire Property was part of the use, so this decision and order formally acknowledges the entire

Property as the extent of the confirmed nonconforming use.

Petitioner is again proposing to enlarge the confirmed nonconforming use by constructing an approximately 20'x24' addition on the southeast side of the existing church as may be permitted by HCZR § 129.0.E. The addition would contain office space and expanded restroom facilities for the religious facility. The existing floor area is about 1,710.54sf and the addition, 480sf, which is about 28 percent of the existing gross floor area.

As proposed, a corner of the addition would sit on the common lot with the adjoining cemetery. The petition supplement states the congregation desperately needs additional space for a church office and restroom facilities. Because HCZR § 112.0.D.4.c.(2)(c) imposes a 20-foot setback from the project boundary (the addition), petitioner is requesting a reduction in the setback to zero (0.0) feet.

9. Nonconforming Use and Property History. The nonconforming use petition supplement provides a brief history of the use and Property. In 1866, James Tyson and his wife conveyed the Property to the AME Church of Elkridge conditioned on it being used only for a church and school under the management of persons of African descent. The cornerstone of the white frame building (now covered by vinyl siding) dates to 1881, and local newspapers reported the structure as completed in the 1890s. The church is an example of a simple 19th century frame Romanesque Revival church. Around the turn of the century, apparently, the name changed from Providence AME to Gaines AME Church. The frame structure is built on a concrete block foundation. It is about 23'x36' in area with an 8'x8' pulpit area. The congregation formerly accommodated a school for African American children in the Odd Fellows Hall adjacent to the

Church and cemetery. The school ceased operation in the 1940s. In 1994, the congregation formally incorporated itself as Gaines Chapel AME Church, Inc. The church is significant to the African American History of Howard County. The petition supplement also discusses the adjoining cemetery, explaining former congregants and black Americans who resided in the community are buried there. Church leaders are the de facto caretakers of the cemetery.

10. Advisory Agency Comments.

Health Department, Bureau of Environmental Health (BEH). BEH issued this April 22, 2015 comment on the petition. "There is no objection to the setback or size variances. However, if the property is served by an onsite sewerage disposal system and/or onsite well, Health Department approval of the building permit for the structure will be contingent on an evaluation of the existing systems. Connection to public water and/or public sewer may be necessary at that time."

Department of Inspections, Licenses and Permits (DILP). DILP issued this June 2, 2015 comment. "The Petitioner is advised that during the review of the Site Development Plan the plans shall show how the building addition will be handicap accessible with such items as handicap parking, ramps/depressed curbs, sidewalk access, etc."

DPZ, Division of Land Development (DLD). DLD advises applicant of the following.

1. The petitions if approved, will require applicant to submit a site development plan (SDP) to DPZ for the site improvements prior to applying for DILP permits.
2. Any variance request approval does not approve an encroachment into the 30' from the cemetery boundary setback imposed by Subdivision and Land Development Regulations § 16.118(c). Any encroachment within the 30' setback requires applicant to apply for a waiver petition (through DLD) prior to submission of the site development plan.
3. Because the property is recognized as an historic site, an advisory meeting with the Historic Preservation Commission is required before SDP submission.
4. The proposed building is to be constructed up to the property line. How does the applicant proposed to maintain the outside of the building without encroaching into the adjoining property?
5. On the plan exhibit, please delineate and label the setback per the Zoning Regulations.
6. On the plan exhibit, please indicate the limit of disturbance.
7. On the plan exhibit, please indicate the required and provided parking spaces.
8. Please be advised, this project will be subject to the Forest Conservation Act. The forest conservation obligation will be reviewed with the SDP application.

11. Petitioner counsel Andrew Robinson proffered that the nearest grave is more than 30 feet from the proposed addition, approximately 75 feet. According to a map included with the petition, there are two grave areas about 120' from the property line and a third, about 105' (30' feet to the southwest of what is identified as an "old collapsed building"). Mr. Robinson stipulated to future compliance with all agency comments. Mr. Robinson also explained the ownership of the cemetery is not easily traced through any heirs, as the Hearing Examiner understood him.

12. The Hearing Examiner discussed her concerns with counsel about the requested variance, explaining her policy of denying variances too close to a property line because of encroachment issues by persons waking around the structure or performing yard work, which could generate zoning complaints and code enforcement actions.

13. Petitioner requested additional time to complete the project because it may need phasing to comply with HCZR parking requirements, per DLD's comment. Pursuant to HCZR § 131.0.I.3.a & .b, the Hearing Examiner approved a seven-year phasing plan, with the proposed addition building permit in Phase I to be obtained within five years and substantial construction in accordance therewith to be completed within seven years from the date of this decision and order.

CONCLUSIONS OF LAW

I. The Requested Variance (§ 112.0.D.4.c.(2)(c))

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 complies with Section 130.0.B.2.a.(1) through (4), and therefore may be granted.

(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.

The first criterion for a variance is that there 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 130.0.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).

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

Gaines Chapel AME Church, Inc., t/a Gaines AME Church

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)

Additionally, HCZR § 128.0.B.2 of the Zoning Regulations permits additions to noncomplying structures through the variance process.

Ordinarily, existing structures may not be considered "unique" features of a property. In this case, however, the existing historic church, which sits 9.5' at its closest point from the nearest lot line, is a noncomplying structure and therefore constitutes a unique physical condition of the Property. Given the location of the noncomplying structure and the proposed request for an addition, practical difficulties arise in complying strictly with the setback regulation. The Property's size and the location of the noncomplying structure are unique conditions causing the Petitioner practical difficulty in complying with the setback requirement.

(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.

With respect to the neighborhood or district, the proposed addition would be located farther back from Montgomery Road. During the hearing, the Hearing Examiner noted her concern about the proposed zero (0.0) foot setback generating encroachment issues into the adjoining property. DLD raised a similar issue in its comments in relation to exterior building maintenance. Adding to the mix is the fact that the adjoining property is a cemetery. By

Petitioner counsel's proffer, the nearest gravesite is about 75 feet from the proposed structure. On this point, DLD noted that notwithstanding any variance approved, the proposed addition is still subject to the 30' cemetery boundary setback imposed by Subdivision and Land Development Regulations § 16.118(c), subject to a setback waiver petition (through DLD) prior to submission of the site development plan.

The Hearing Examiner takes notice that petitioner was granted the same variance for the same proposed addition in BA 05-022N&V. A decision to deny the variance would be arbitrary and capricious absent substantial evidence to support a denial, of which there is none. Though the Hearing Examiner is concerned about encroachment, this concern is speculative, admittedly. Additionally, congregants are the de facto caretakers for the cemetery. The existing church lawfully encroaches into the setback. There also appears to be sufficient room in the triangular area between the addition and property line for maintenance.

(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.

The Petitioner did not create the practical difficulties.

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

The proposed variances are for a reasonably sized addition and therefore the minimum necessary to afford relief.

II. The Enlargement of the Confirmed Nonconforming Use (§ 129.0.E)

Pursuant to Section 129.0.E, the Hearing Authority may authorize the extension or

enlargement of a nonconforming use or the alteration of a structure containing a nonconforming use, with or without conditions, provided the Petitioner demonstrates compliance with five standards. Based on the testimony and evidence, the Hearing Examiner concludes the proposed addition complies with these standards and is therefore granting the petition.

a. That any changes or additions to the activities taking place in connection with the nonconforming use will not change the use in any substantial way;

The proposed addition is for office space and restroom facilities, which would continue the religious facility use of the Property and not change the use in any substantial way, in conformance with § 129.0.E.1.a.

b. That an enlargement may not exceed 100 percent of the gross floor area of structures or 100 percent of the gross acreage in the case of nonconforming land, above that which legally existed at the time the use first became nonconforming;

The existing floor area is about 1,710.54sf and the addition is 480sf, which is about 28 percent of the existing gross floor area. This enlargement does not exceed 100 percent of the gross floor structure area, in conformance with § 129.0.E.1.b.

c. That the outdoor land area occupied by a nonconforming use may be enlarged only to provide additional parking area;

No outdoor land area is proposed. This section is inapplicable.

d. That an enlargement would not cause a violation of the bulk regulations for the zoning district in which the property is located;

This standard is qualified by HCZR § 128.0.B.2, which authorizes variances to conforming structures and uses. As set forth in Part 1 of these Conclusions of Law, Petitioner submitted,

and the Hearing Examiner approved, a variance petition to permit encroachment into the 20-foot project boundary setback. The petition accords with § 129.0.E.1.d.

e. That the extension, enlargement or structural alteration would not cause an adverse effect on vicinal properties.

As evaluated in above in relation to the proposed variance, there appears to be room for maintenance in the triangular area between the proposed addition and the common lot line. Although the Hearing Examiner has some speculative concern about encroachment into the adjoining property line for maintenance, this is not substantial evidence of adverse impact on this site. The petition complies with 129.0.E.1.e.

ORDER

Based upon the foregoing, it is this **25th Day of August, 2015** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the nonconforming use and variance petitions of Gaines Chapel AME Church, Inc., t/a Gaines AME Church, to expand a confirmed nonconforming religious facility structure and use for an addition and a variance to reduce the 20-foot project boundary setback from the adjacent R-A-15 zoned property to zero (0.0') feet for the addition, in an R-A-15 (Residential: Apartments) Zoning District, are hereby **GRANTED**.

Provided, however, that:

1. The expansion of the confirmed Nonconforming Use shall be conducted in conformance with, and shall apply only to the addition as described in the petitions and depicted on the June 29, 2015 Amended Plan and not to any other activities, uses, or structures on the Property.
2. Petitioner shall obtain a building permit for the Phase I addition within five years of the date of this Decision and Order and complete substantial construction within seven years from the date of this decision and order.
3. Petitioner shall comply with all agency and department comments.
4. Petitioner shall obtain all permits.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Date Mailed: 8/25/15

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 calendar 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.