

IN THE MATTER OF	:	BEFORE THE
<b>HOLY TRINITY PARISH</b>	:	HOWARD COUNTY
<b>ST. BARNABAS EPISCOPAL CHURCH</b>	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 11-003C&V

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**DECISION AND ORDER**

On April 18, 2011, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the conditional use petition of Holy Trinity Parish St. Barnabas Episcopal Church (the Petitioner) to convert a residential structure and expand it as a Structure Used Primarily for Religious Activities in an RC-DEO (Rural Conservation: Density Exchange Option) zoning district pursuant to Section 131.N.40. The Petitioner is also seeking a variance to reduce the 75-foot setback from a public street right-of-way (ROW) to 56 feet for a building addition (Section 104.E.4.b.(1)). Additionally, the Petitioner is seeking variances to (1) reduce the 50-foot setback from a public street ROW to five feet for a parking lot expansion; (2) reduce the 30-foot side use setback to 11.8 feet for a parking lot expansion and a retaining wall, and (3) reduce the 30-foot rear use setback to zero feet for a parking lot expansion and retaining wall (Section 104.E.5).

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

Richard Talkin, Esquire, represented the Petitioner. Zach Fisch, Jim Truby and Reverend Earl Mullins testified on behalf of the Petitioner. No one appeared in opposition to the petition.

### **The Amended Plan**

During the proceeding, Petitioner's witness introduced into evidence an amended conditional use plan, and apparently, an amended variance petition. Petitioner's Exhibit 1, dated April 11, 2011, depicts the proposed additional 11 parking spaces to be constructed during Phase 2 as five feet from a public street ROW (Forsythe Road). Witness Zach Fisch testified that the amended plan increases the proposed setback of the parking spaces from three to five feet in response to DPZ staff concerns about whether the three-foot setback could be adequately landscaped in accordance with the Landscape Manual comments.

Because the amended petitions, through the plan, are not substantive, the Hearing Examiner determined it could be introduced into evidence and accepted the exhibit as the amended plan (Petitioner's Exhibit 1) for both petitions, in accordance with Hearing Examiner Rule 9.5. Accordingly, the term "plan" referenced in this decision and order refers to the April 4, 2011 amended plan.

### **FINDINGS OF FACT**

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

1. Property Identification. The subject property is located in the 4<sup>th</sup> Election District on the southeast side of Forsythe Road at its intersection with MD 851 (West Friendship Road)

(the "Property"). The Property is referenced as Tax Map 4, Grid 16, Parcel 52, and is also known as 13125 and 13135 Forsythe Road.

2. Property Description. The irregularly shaped 2.28-acre Property in the triangular intersection of Forsythe and West Friendship Roads is encumbered with a 100-year floodplain. An existing well in this area is to be filled and abandoned. West of this floodplain area is a residential dwelling with a patio on its west side. The dwelling lies within the 75-foot setback from the Forsythe Road public street ROW. A driveway off Forsythe Road provides access. A septic field, tank and pump are located behind the dwelling.

To the dwelling's west is a playground area with a small timber wall on its west side. Further west is a cemetery and then the chapel. A separate smaller portion of the cemetery is located on the west side of the chapel near the walkway entrance. The cemetery is designated on the Howard County Cemetery Map as Site 4-1, the St. Barnabas Episcopal Church Cemetery. The chapel appears on the Howard County Historic Sites Inventory as HO-124, the St. Barnabas Episcopal Church, which notes a construction date of around 1850. Two means of ingress/egress provide access to the chapel parking lot in the Property's western area. The parking area comprises 43 paved and striped parking spaces, fourteen of which are located on adjoining property owned by Maryland DNR. This parking lot is located within the 50-foot Forsythe Road public street ROW.

The Property is generally level in its central area and declines in elevation toward the east. The Property's improved area and the cemetery are open and level. To the east of the

parking lot is an open upward sloping grassed area. The land between the chapel and residence has a significant downward slope.

3. Vicinal Properties. Across Forsythe Road to the northeast is the B-1 (Business: Light) zoned Parcel 54, which is owned by Howard County and is improved with a large storage building and various outbuildings.<sup>1</sup> All other vicinal properties are zoned RC-DEO. Adjoining the south and west side of the Property and extending to the north across Forsythe Road is Parcel 1, a 278+ acre wooded parcel and the site of the state-owned Hugg-Thomas Wildlife Management Area. This parcel is wooded and the topography drops steeply to a ravine where this parcel adjoins the subject property. The closest structure, St. Luke's United Methodist Church across MD 32, is more than 400 feet to the east.

4. Roads. Forsythe Road has two travel lanes within an ultimate 60-foot ROW. The posted speed limit is 30 MPH in the Property's vicinity in the southbound direction and 25 miles in the northbound direction.

5. Water and Sewer Service. The Property is served by private well and septic.

6. The General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as a "Residential Conservation" land use. Transportation Map 2000-2020 of the 2000 General Plan depicts Forsythe Road as a Minor Collector.

7. Zoning History. The TSR notes there is no record of a special exception or conditional use approval in Department of Planning and Zoning (DPZ) records.

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<sup>1</sup> The Hearing Examiner noted during the hearing that this site appeared to be a 2012 capital budget project, the South Branch Park.

8. The Conditional Use and Proposal and Variance Requests. The Petitioner is seeking conditional use approval to expand an existing religious facility and parking lot in two phases. In Phase I, a four-foot macadam walkway with timber steps would be constructed to connect the chapel to the existing residential structure. The structure would be converted for classroom and other accessory religious activities.

9. In the ten-year Phase Two, the Petitioner is proposing to expand the residential structure, increase the number of parking spaces, and construct a retaining wall. The patio on the west side of the existing residential structure would be enclosed as a 682-foot addition and a 16 by 19-foot addition would be constructed to the structure's rear. Because the proposed west addition would encroach 19 feet into the 75-foot structure public street row, the Petitioner is seeking a variance for the encroachment.

Eleven parking spaces and a retaining wall would be added to the western portion of the existing parking lot. Because the parking spaces would encroach into the 50-foot use setback from a public street ROW, the Petitioner is requesting a variance to reduce the setback to five feet. The parking spaces and retaining wall would encroach into the required 30-foot use setback from the west lot line and the Petitioner is therefore seeking a variance to reduce it to 11.5 feet. These same parking spaces would also encroach into the required 30-foot use setback from the rear setback and the Petitioner is seeking a variance to reduce this setback to zero feet. These proposals are represented in the plan, Petitioner's Exhibit 1.

The TSR offers these parking calculations for the use. Based on 100 seats for the chapel and a parking requirement of one parking space per three seats, 34 spaces are required. There

are currently 43 spaces available, 28 on the Property and 15 on adjoining DNR property under a license agreement. With the additional 11 parking spaces proposed, 54 spaces are available for used, 39 of which are on the Petitioner's Property.

According to the petition, the activities on the Property will consist of worship services, church school, offices, meetings and parking in connection with religious activities. Peak hour traffic is expected on Sunday mornings when church services and church school are scheduled. Religious activities will include adult and children's classes between services. On weekdays, two people will be on site, the rector and a secretary. Evening activities will include at least two meetings per week with about ten people attending and two additional monthly meetings with up to 15 people in attendance. These meetings will generally occur between 7:00 p.m. and 8:30 p.m. and may vary from time to time.

10. Technical Staff Report Comments. The TSR reports that the existing chapel and residential structure are legally noncomplying to the structure setback and the existing chapel parking lot is probably noncomplying to the use setback.

11. DPZ's Division of Land Development (DLD) had the following comment about the initial variance petition, which originally proposed a three-foot setback from the Forsythe Road public street ROW setback. "In order to reduce the 50-foot use setback from public street rights-of-way to 3 feet for future parking expansion, the petitioner must demonstrate to the satisfaction of DLD that proposed additional parking in the western portion of the site cannot be located in the DNR grant area and that the proposed parking area can be sufficiently landscaped in accordance with the Landscape Manual requirements."

12. Mr. Fisch introduced into evidence an April 1, 2010 letter to DLD's David Boellner from R. Andrew Berlett, a landscape architect with Exploration Research, Inc. The letter references the DLD concern about the ability of the reduced setback to accommodate the required landscape buffering. Mr. Berlett opines there will be sufficient space for the required shrub and tree plantings.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, I conclude as follows:

#### **II. General Criteria for Conditional Uses (Section 131.B)**

**A. Harmony with the General Plan.** Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

**a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and**

**b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.**

General Plan Policies. The Howard County General Plan designates the area in which the Property is located as a "Rural Conservation" land use. Religious facilities and accessory uses affiliated with a long-existing religious facility are presumptively compatible with this land use.

The Nature and Intensity of the Use. The proposed expanded religious facility uses include religious education and church meetings, which are low intensity uses. The proposal

would not increase the number of sanctuary seats. Although the use would intensify, the religious facility is a long-standing facility and the proposed uses are consistent with other expansions of small religious facilities in the RC-DEO district.

The Size of the Site in Relation to the Use. The existing chapel, built around 1850, and residential structure are legally noncomplying to the structure setback and the TSR reasons the parking lot use is also probably legally noncomplying to the use setback, having been built, apparently, prior to the 1948 enactment of zoning regulations. Additionally, Section 128.B.2 of the Zoning Regulations permits additions to noncomplying structures through the variance process. With the possible exception of the proposed parking encroachment into the Forsythe Road ROW setback, the size of the Property in relation to the use appears adequate, considering the modest physical expansions proposed, subject to the condition that DLD finds acceptable the parking landscaping detailed at the site development plan stage.

The Location of the Site With Respect to Streets Giving Access to the Site. The religious facility will be located on a Minor Collector, which appears adequate to support the increase in vehicle trips to the religious facility.

The Appropriateness of the Conditional Use in Combination with a Permitted Use on the Site. This section is inapplicable, as the sole proposed use of the Site is for the religious facility and accessory use expansions.

**B. Adverse Impacts.** Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under



Section 131.B.2's four "adverse effect" criteria": (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

Inherent in the assessment of a proposed conditional use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment therefore accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed uses would have adverse effects in an RC district. The proper question is whether there are facts and circumstances showing the particular uses proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. People's Counsel for Baltimore County v. Loyola College in Maryland, 406 Md. 54, 956 A.2d 166 (2008); Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981); Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, and as conditioned, the Petitioner has met its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish the proposed uses will not have adverse effects on vicinal properties beyond those ordinarily associated with a structure used primarily for religious activities in the RR district.

**a. Physical Conditions. The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.**

The testimony and evidence indicate the proposed uses will be conducted predominately indoors, and there is no evidence of inordinate noise, significant outdoor lighting, or other physical effects detectable within the neighborhood. The uses will not generate dust, fumes, odors, glare, vibrations, or hazards. Consequently, I conclude the Petitioner has adequately shown that any noise, lighting, or other physical conditions generated by the proposed uses will not be greater than that which is ordinarily associated with a religious facility and accessory uses in the district.

**b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.**

The religious facility has operated on the Property since around 1850 and there is no evidence that its modest expansion, even with multiple variances as conditioned, would have any atypical adverse impact such that it would hinder or discourage the development and development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

The Petitions do not expressly discuss the proposed retaining wall, so the Hearing Examiner must base her conclusions about any adverse effects caused by the retaining wall on the plan. This plan appears to denote the location of the wall at 11.8 feet from the side use setback. Although the TSR and the Petitioner's witness discussed the landscaping required along the proposed expanded parking use, the landscaping would also help screen the retaining wall in this rural area. Subject to the condition that the Petitioner demonstrate to DLD's satisfaction

that the proposed additional parking in the western portion of the site cannot be located in the DNR grant area, that the proposed parking area can be sufficiently landscaped in accordance with the Landscape Manual requirements, and that this landscaping will also screen the retaining wall, the Hearing Examiner concludes the location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such, as conditioned, that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.<sup>2</sup>

**c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.**

Thirty-four spaces are required for the chapel use. There are currently 43 spaces available, 28 are onsite and 15 on adjoining DNR property under a license agreement. With the additional 11 parking spaces proposed, 54 spaces are available for used, 39 of which are on the Petitioner's Property.

The Howard County Landscape Manual requires a Type E landscape edge buffer (Table 2, Page 18), when parking is adjacent to a roadway. The Manual calls for a 20-foot buffer width with a Type E landscape buffer, but the Hearing Examiner recognizes healthy landscape edges can be accomplished in less than twenty feet. The Petitioner presented evidence that the proposed landscaping required to screen the additional parking could be planted within the five-

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<sup>2</sup> The Hearing Examiner here again takes note of the 2012 capital budget project, the South Branch Park, and the

foot area shown on the plan. Because the landscaping is not depicted on the plan, the Hearing Examiner is concerned about whether the five-foot area is adequate to provide the necessary buffering and ensure the health of the plantings. Although the adjacent properties currently existing would not appear to be adversely impacted from a visible parking area, the Hearing Examiner is aware of a capital budget project to establish a park on the Howard-County owned property across Forsythe Road. To mitigate any potential adverse impact on the future park, the Hearing Examiner is again approving the conditional use petition subject to the condition that DLD finds acceptable the parking landscaping detailed at the site development plan stage.

**d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.**

There is no evidence that the long-existing access driveways do not provide safe access and the county would review safe access at the site development stage if required. I conclude the Petitioner has met its burden of demonstrating the existing ingress and egress drives comply with Section 131.B.2.d.

## **II. Specific Criteria for Structures Used Primarily for Religious Activities (Section 131.N.39)**

**a. Lot coverage shall not exceed 25 percent of lot area.**

The total lot coverage is 4.75 percent, according to the conditional use plan, in compliance with Section 131.N.39.a.

**b. Structures used primarily for religious activities may be erected to a greater height than permitted in the district in which it is located, provided that the front, side and rear setbacks shall be increased one foot for each foot by which such structure exceeds the height limitation.**

Section 131.N.39.c does not apply because the petition does not propose any structure higher than permitted.

c. The Hearing Authority may approve parking facilities which are accessory to a religious facility, and are located on a separate lot, but do not meet the location requirements of subsection 133.B.4.D of the parking regulations by being separated from the religious facility by a public street, if the Hearing Authority finds that the accessory parking facility complies with the following criteria:

- (1) The accessory parking facility is not separated from the lot containing the principal use by an arterial highway of any category.
- (2) A pedestrian street crossing connecting the accessory parking facility lot to the principal use lot is provided and is made clearly noticeable to drivers by means of both pavement marking and signs
- (3) The pedestrian street crossing is safe, based upon such factors as, but not limited to: traffic volume at the times(s) of the use of the accessory parking facility; practical traffic speeds; sight distance; length of the crossing; and adequate markings and signage.
- (4) The entire pedestrian pathway from the accessory parking facility to the principal religious facility is a durable, paved, no-step path.

Section 131.N.39.c does not apply because the petition does not propose parking facilities on a lot separated by a public street.

### III. Criteria for Granting a Variance (Section 131.B.2.a)

The standards for variances are contained in Section 130.B.2.a of the Regulations. Pursuant to this section, I 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, I find the requested variance complies with Section 130.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.**

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 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 is long and narrow, and the back section is in wetlands. Based on the evidence of record, I conclude the Site's shape and physical conditions are unique, causing the Petitioner unnecessary hardship in complying with the regulations, in accordance with Section 130.B.2.a(1).

**(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 religious facility use has operated at the Property for some 200 years. The small additions to the residential structure, the walkway, parking spaces and retaining uses will be well separated from vicinal properties by distance. Subject to the condition that DLD finds acceptable the parking landscaping detailed at the site development plan stage, the Hearing

Examiner concludes the variances will not alter the essential character or district, will not impair the use of adjacent property and will not be detrimental to the public welfare. The petition accords with Section 130.B.2.a.(2).

**(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 chapel predates county zoning regulations and the on-site physical conditions were not caused by the Petitioner, in accordance with Section 130.B.2.a.(3).

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

The encroachments are, as conditioned, the minimum necessary for the required additions, the parking spaces and the retaining wall, all of which are very modest in size, in accordance with Section 130.B.2.a.(4).

**ORDER**

Based upon the foregoing, it is this **25<sup>th</sup> day of April 2011**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the conditional use petition of Holy Trinity Parish St. Barnabas Episcopal Church to convert a residential structure and expand it as a Structure Used Primarily for Religious Activities, for a variance to reduce the 75-foot setback from a public street right-of-way (ROW) to 56 feet for a building addition, and for variances to (1) reduce the 50-foot setback from a public street ROW to five feet for a parking lot expansion; (2) reduce the 30-foot side use setback to 11.8 feet for a parking lot expansion and a retaining wall, and (3) reduce the 30-foot rear use setback to zero feet for a parking lot expansion and retaining wall (Section 104.E.5), in an RC-DEO (Rural Conservation: Density Exchange Option) zoning district are hereby **GRANTED**;

**Provided, however, that:**

1. In Phase I, the Petitioner shall construct a four-foot wide macadam walkway with timber steps to connect the chapel to the existing residential structure. In Phase II, the Petitioner shall obtain all necessary permits and approvals for the two proposed additions, the retaining wall, and the parking area, within ten years of the date of the Decision and Order
2. The Petitioner shall not commence using the residential structure for accessory religious uses until it complies with all county laws and regulations for this use.
3. The grant of the conditional use and variance petitions are conditioned on a Department of Planning and Zoning, Division of Land Development determination at the site development



plan stage that the parking landscaping area and plantings comport with the Landscape Manual.


4. The conditional use and variances shall be conducted in conformance with and shall apply only to the Conditional Use for an expansion of a Structure Used Primarily for Religious Activities as described in the petitions and depicted on the amended April 3, 2011 plan and not to any new structures or uses on the Site or any additions thereto.

5. The Petitioner shall comply with all agency comments.

6. The Petitioner shall comply with all applicable federal, state, and county laws and regulations.

7. The Petitioner shall obtain all necessary approvals and permits required.

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**



Michele L. LeFavre

Date Mailed: 4/27/11

**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.