



August 12, 2008

TECHNICAL STAFF REPORT

*Petition Accepted on July 22, 2008
Planning Board Meeting of August 28, 2008
County Council Hearing to be scheduled*

Case No./Petitioner: ZRA-97 – Owen Kelley, Carrigan Homes

Request: Zoning Regulation Amendment to amend the Section 130.B.2.a. criteria for variances to establish a sixth criteria whereby variances of ten percent or less of a bulk requirement would be exempt from the Section 130.B.2.a.(1) and the Section 130.B.2.a.(3) criteria if the need for the variance is because of a “bona fide error.” To amend the Section 130.B.2.e. regulations concerning the Lapse of Variances to extend the validity time for approved variances.

Department of Planning and Zoning Recommendation: DENIAL (Recommended Alternate To Second Requested Amendment.)

I. DESCRIPTION OF PROPOSAL

- The Petitioner proposes two amendments to the Zoning Regulations. Each proposed amendment is generally described as follows:

1. The Petitioner proposes to amend the section of the Zoning Regulations that gives the criteria which are used to evaluate requests for variances from bulk requirements (i.e., minimum setbacks, maximum height, etc.).

The proposed text would establish an exception for cases of bulk requirement infringements that do not exceed 10% of the bulk requirement, and, are cases involving a “bona fide error” in the placement of a building, structure, or use. The exception would be that the variance case would not be subject to the criteria requiring a finding that there is some unique condition of the property that causes a practical difficulty or hardship in complying with the bulk requirement, and would not be subject to the criteria requiring a finding that the practical difficulty was not self-created by the Petitioner (“Amendment No. 1”).

2. The Petitioner proposes to amend the section of the Zoning Regulations that specifies the validity period for approved variances. Currently, an approved variance is subject to the requirements that a building permit must be issued within two years, and substantial construction must be completed within three years, or else the variance is void.

I. DESCRIPTION OF PROPOSAL (continued)

The Petitioner requests an amendment to make the validity period that a building permit must be issued within three years, and substantial construction must be completed within four years. The Petitioner also proposes text whereby projects that have approved variances, that are delayed due to Adequate Public Facilities Ordinance issues would automatically have the variance(s) extended for the period of the delay ("Amendment No. 2").

- **Please refer to the proposed amendment text in the attachment entitled "ZRA 97-Petitioner's Proposed Text" (CAPITALS indicates text to be added; text in [[brackets]] indicates text to be deleted):**

II. EXISTING REGULATIONS

- **The criteria for evaluating variances were established substantially in the current format in the 1975 Comprehensive Zoning Plan. Except for some very minor revisions to the wording since that time, these required criteria have been largely unchanged for approximately 33 years.**

Prior to the 1975 Zoning Regulations, the 1961 Zoning Regulations did require a similar finding that the property for which the variance was requested had some unique physical condition in order to justify the variance. There was not, at that time, a stated criteria requiring a finding that the variance was not a self-created hardship, nor was there a specific maximum validity period given, although it would have been possible for the Board of Appeals to establish such a validity period through conditions on the approved variance.

- **There has never been a provision to exempt certain types of variance cases from the requirement to comply with all the variance criteria, and they have been consistently applied to all variance cases since 1975.**

Even when the regulations were established much later to authorize the Department of Planning and Zoning to hear and decide Administrative Adjustments for relatively minor variance cases, these same criteria have been always been required for the evaluation of such cases.

- **The regulation concerning the Lapse of Variances appears to be unchanged since 1975, and there appears to have never been any specific provisions allowing the extension of an approved variance past the stated deadlines.**

However, it should be noted that approved variances associated with approved Special Exception/Conditional Use cases have been allowed to extend past the Lapse of Variances deadlines, when a Special Exception/Conditional Use case was granted an extension, which are allowed for Special Exception/Conditional Use cases as provided in Section 131.I.3.c. The regulations do not specifically address this practice, but it appears to have been followed for many years.

III. BACKGROUND INFORMATION

A. Scope of Proposed Amendments

- **If Amendment No. 1 were to be adopted as proposed, it could be applied to any type of bulk requirement infringement situation needing a variance or Administrative Adjustment in almost all zoning districts, as long as the bulk requirement infringement was 10 percent or less of the bulk requirement.**

It could not be applied to cases in the NT or MXD districts because bulk requirement adjustments in those districts are decided under different criteria than the Section 130.B.2.a. criteria. Of course, technically it could only be applied in cases involving a "bona fide error", but as noted in more detail below, determining which cases are caused by true errors would be very difficult.

- **Amendment No. 2 would apply to any type of variance case approved by the Hearing Examiner or the Board of Appeals.**

It would not apply to Administrative Adjustment cases, however, because although in such cases the criteria in Section 130.B.2.a are used to evaluate the request, such cases are not subject to the Lapse of Variances regulations. The validity period for an approved Administrative Adjustment is established as a condition in the Decision and Order, so it can be variable.

B. Agency Comments

- **The following agencies had no objections to the proposal:**

1. Department of Recreation & Parks
2. Department of Fire and Rescue Services
3. Department of Inspections, Licenses and Permits

IV. EVALUATIONS AND CONCLUSIONS

A. Relation to the General Plan

- **There are no policies in the General Plan that specifically apply to variance cases or to the criteria for evaluating variance cases, but an aspect of Amendment No. 1 could be contrary to the Community Conservation and Enhancement Policy 5.7 to "Ensure infill development will be compatible with existing neighborhoods."**

Bulk requirements in the various zoning districts are primarily intended to ensure that new development within a district is compatible with existing development within a district. Varying or adjusting the bulk requirements should be limited to instances when there is a hardship or practical difficulty in being able to comply with the bulk requirement that is caused by some unusual characteristic of the property, and when the person requesting the variance did not create this unusual characteristic.

IV. EVALUATIONS AND CONCLUSIONS (continued)

A. Relation to the General Plan (continued)

A basic example of an appropriate variance approval would be for a lot that is exceptionally narrow or that has a very irregular shape in comparison to other lots in the same district, and the person requesting the variance did not create the lot through a subdivision. An inappropriate variance would be one for a lot that is generally the same in size and shape as other lots in the district, or one in which the lot was created by the person requesting the variance.

- **Amendment No. 1 would remove these important tests which are applied equally to all variance requests, and replace them with a determination that the bulk requirement infringement of ten percent or less was caused by a “bona fide error.” Determining what is, and what is not, an error would be difficult to establish factually or to refute factually.**

An example of this is the explanation that is sometimes expressed in Administration Adjustment cases that the bulk requirement infringement was the result of a mistake in locating a lot line marker or foundation marker. It may have been or it may have not been; the event is in the past and just as the applicant is unable to produce actual evidence to prove that it was unintentional mistake, someone in opposition to the request would not be able to produce actual evidence to prove that it was not a mistake. Making a finding on such an issue becomes one of faith, not one based on evidence.

- **For this reason, although cases which really do involve bona fide errors would be more easily corrected with such a provision as proposed, there would always be too much potential for misuse of such a provision by claims of an error when no such error actually occurred, in order to gain additional space.**
- **There are no General Plan policies that are applicable to the validity period for approved variances.**

B. Relation to the Zoning Regulations

- **All the various bulk requirements in all the zoning districts are directly related to one of the most fundamental purposes for zoning regulations that has been expressed in similar terms since the concept of zoning was first created; “To provide adequate light, air and privacy, to secure safety from fire and other danger, and to prevent over-crowding of the land and undue congestion of population.”**

To meet these purposes, the bulk requirements of a particular zoning district are to be strictly applied equally to all properties within that district. To vary from these requirements, (i.e. to grant a variance), is only supposed to allowed when there is an urgent need to do so.

IV. EVALUATIONS AND CONCLUSIONS (continued)

B. Relation to the Zoning Regulations (continued)

This determination of whether there is an urgent need for a variance always follows a two-step evaluation based on the property on which the variance is requested. There must be some unique condition of the property which is unusual or different from other properties, and, this unique condition must affect the property in a manner that is greater than other properties, so that it becomes difficult on a practical basis to comply with the bulk requirement.

- **Allowing variances to be granted without such an evaluation, as the Petitioner proposes, would likely lead to less care in efforts to strictly comply with the bulk requirements, because less care could actually be rewarded rather than penalized.**
- **On the basic issue of Amendment No. 2, the extension of the period for an approved variance, when compared to the procedures that do allow for the extension of Conditional Use approval, the Zoning Regulations seem to be inconsistent.**

When a variance is granted, that means that the basic required findings have been made; the property has a unique feature, this unique feature causes a definite practical difficulty, the applicant didn't create this unique feature, the variance isn't more than is really needed, and the variance won't cause an adverse impact on adjacent properties. Once these findings have been established, they are very unlikely to change over time.

Conditional Use approval is also based on establishing positive findings on a number of criteria, and it is recognized that unless the criteria change, the Conditional Use will still comply over the period of extensions that are allowed. If there are changes to the use, these would be evaluated as part of the extension approval process. If such a process is permitted for Conditional Uses, there seems to be no reason to not allow a similar process for variances.

- **As noted above, even though there is no express authorization for extending a variance that is associated with a Special Exception/Conditional Use, such extensions of variances have been allowed when the Special Exception/Conditional Use is granted an extension.**

This has been done because any variance or variances are part of the Special Exception/Conditional Use plan, so if the validity of the plan is extended as is allowed, the variances automatically extend accordingly.

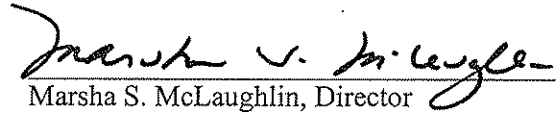
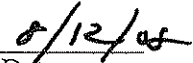
- **Rather than merely extending the validity period for variances for an extra year as proposed by the Petitioner in Amendment No. 2, it is more practical and more appropriate to create a variance extension process that is similar to what is used for Conditional Uses. The Department of Planning and Zoning therefore recommends the denial of Amendment No. 2, and replacing it with the proposal in the attached "ZRA 97 – DPZ Proposed Alternate."**

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V. RECOMMENDATION DENIAL

For the reasons noted above, the Department of Planning and Zoning recommends that ZRA- 97 as proposed by the Petitioner, be **DENIED**, but that the amendment to Section 130.B.2. as proposed in the attached "ZRA 97 – DPZ Proposed Alternate" be **APPROVED**.

 
Marsha S. McLaughlin, Director Date

MM/JRL/jrl
EB

NOTE: The file on this case is available for review at the Public Service Counter in the Department of Planning and Zoning.

ZRA 97 – PETITIONER’S PROPOSED TEXT

Section 130.B.2:

2. Variances

a. The Hearing Authority shall have the authority to grant variances from the parking requirements and bulk regulations established in these regulations, excluding density and minimum lot size requirements, where all of the following determinations are made:

- (1) That there are unique physical conditions, including irregularity, narrowness or shallowness of lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical conditions, 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 variance necessary to afford relief.
- (5) That no variance be granted to the minimum criteria established in Section 131 for conditional uses, except where specifically provided therein or in an historic district. Nothing herein shall be construed to prevent the granting of variances in any zoning district other than to the minimum criteria established in Section 131 except as provided therein.
- (6) **THAT SUBSECTIONS (1) AND (3) SHALL NOT APPLY WHEN THE VARIANCE DOES NOT EXCEED TEN PERCENT (10%) OF THE BULK REQUIREMENT(S) FROM WHICH RELIEF IS SOUGHT AND THE NECESSITY FOR SUCH VARIANCE IS AS A RESULT OF A BONA FIDE ERROR IN THE PLACEMENT OF IMPROVEMENTS FOR WHICH THE NECESSARY PERMIT HAS BEEN ISSUED.**

e. Lapse of Variances

A variance shall become void unless the required ~~[[permits]]~~ **DEVELOPMENT APPROVALS** conforming to plans for which the variance was granted are obtained within ~~[[two]]~~ **THREE** years, and substantial construction in accordance therewith is completed within ~~[[three]]~~ **FOUR** years from the date of the Decision and Order. A variance that is granted to allow recordation of a final plat shall become void unless the plat is recorded in the Land Records of Howard County within three years from the date of the Decision and Order. **THE TIMES PROVIDED FOR HEREIN SHALL BE EXTENDED FOR THE AMOUNT OF TIME THE PLANS MAY BE DELAYED AS A RESULT OF APFO REQUIREMENTS.**

ZRA 97 – DPZ PROPOSED ALTERNATE

Section 130.B.2:

2. Variances

e. Lapse of Variances

- (1) **EXCEPT AS PROVIDED IN SUBSECTION (2) BELOW** a variance shall become void unless the required permits conforming to plans for which the variance was granted are obtained within two years, and substantial construction in accordance therewith is completed within three years from the date of the Decision and Order. A variance that is granted to allow recordation of a final plat shall become void unless the plat is recorded in the Land Records of Howard County within three years from the date of the Decision and Order.
- (2) **THE HEARING AUTHORITY MAY GRANT AS MANY AS TWO EXTENSIONS OF THE TIME LIMITS GIVEN ABOVE. THE EXTENSIONS SHALL BE FOR A PERIOD OF TIME NOT TO EXCEED THREE YEARS EACH, AND MAY BE GRANTED IN ACCORDANCE WITH THE FOLLOWING PROCEDURES:**
 - (A) **A REQUEST FOR AN EXTENSION SHALL BE SUBMITTED BY THE PROPERTY OWNER PRIOR TO THE EXPIRATION OF THE VARIANCE APPROVAL, EXPLAINING IN DETAIL THE STEPS THAT HAVE BEEN TAKEN TO OBTAIN THE REQUIRED PERMITS OR COMPLETE SUBSTANTIAL CONSTRUCTION.**
 - (B) **THE PROPERTY OWNER SHALL CERTIFY THAT A COPY OF THE REQUEST FOR AN EXTENSION HAS BEEN SENT BY CERTIFIED MAIL TO ADJOINING PROPERTY OWNERS AND TO THE ADDRESSES GIVEN IN THE OFFICIAL RECORD OF THE VARIANCE CASE FOR ALL PERSONS WHO TESTIFIED AT THE PUBLIC HEARING ON THE PETITION.**
 - (C) **THE HEARING AUTHORITY SHALL PROVIDE OPPORTUNITY FOR ORAL ARGUMENT ON THE REQUEST AT A WORK SESSION IF REQUESTED BY ANY PERSON RECEIVING NOTICE OF THE REQUEST. IF NO RESPONSE IS RECEIVED WITHIN 15 DAYS OF THE DATE OF THE WRITTEN NOTIFICATION, A DECISION ON THE REQUEST MAY BE MADE BY THE HEARING AUTHORITY WITHOUT HEARING ORAL ARGUMENT.**
 - (D) **THE HEARING AUTHORITY MAY GRANT THE REQUEST IF IT FINDS THAT THE EFFORTS TO OBTAIN THE REQUIRED PERMITS OR TO COMPLETE SUBSTANTIAL CONSTRUCTION ACCORDANCE WITH THE APPROVED VARIANCE PLAN HAS BEEN DILIGENTLY PURSUED. IF ORAL ARGUMENT IS PRESENTED ON THE REQUEST, THE HEARING AUTHORITY MAY DENY THE REQUEST IF ANY OF THE ORAL ARGUMENTS ALLEGE THAT CHANGES HAVE TAKEN PLACE IN THE CIRCUMSTANCES WHICH LED TO THE ORIGINAL DECISION TO APPROVE THE VARIANCE.**