

IN THE MATTER OF : BEFORE THE  
TEN OAKS, LLC : HOWARD COUNTY  
Petitioner : BOARD OF APPEALS  
: HEARING EXAMINER  
: BA Case No. 15-032V

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**DECISION AND ORDER**

On November 9, 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 petition of Ten Oaks, LLC, for variances to reduce three 30' structure and use setbacks to 10.82', 10.77' and 17.33' for a drive-thru lane, reduce the 30' structure and use setback to 5.92' for a dumpster, reduce the 30' structure and use setback to 1.0' for a retaining/screening wall and to 6.33' for parking and reduce the 30' structure and use setback to 5.66' for a building, in B-1 (Business: Local) and B-2 (Business: General) Zoning Districts, filed pursuant to Section 130.0.B.2 of the Howard County Zoning Regulations.

The Petitioner certified to compliance with the advertising and posting requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Sang Oh, Esquire, represented the Petitioner. Robert Vogel testified in support of the petition. Billy Hillmuth, Mary Agnes Lewis, and Sam Hishmeh also testified, but not in opposition to the petition.

**A Preliminary Matter**

Board of Appeals Case No. 14-027V (decided January 5, 2015) granted Ten Oaks, LLC the same variances requested in this case for a fast-food restaurant, an office building and an automotive service garage on the same Property. Subsequent to the issuance of this decision and order, a new tenant was confirmed, resulting in a revision of the variance plan and related site development plan to accommodate the relocation of the automotive service building to the general area of the approved office building, which is eliminated in this variance petition. A pharmacy is now proposed in the general area of the approved automotive service building. There are no changes to the location of the fast-foot restaurant. The same variances granted in BOA Case No. 14-027V are requested in this petition.

This Decision and Order therefore supersedes the BOA Case No. 14-027V decision and order.

**FINDINGS OF FACT**

Based upon the evidence presented at the hearing, the Hearing Examiner finds as follows:

1. Property Identification. The subject property is located in the northwest corner of the intersection of Ten Oaks Road and MD 108 (Clarksville Pike). It is identified as Tax Map 0034, Grid 0012, Parcel A, B-1 & C-1 and Parcel 161 and known as 6375, 6381 and 6389 Ten Oaks Road and 12400 Clarksville Pike (the Property). A small portion of the Property jutting out from along Ten Oaks Road is zoned B-1 (Business: Local). The remainder of the Property is zoned B-2 (Business: General).

2. Property Description. The 3.318-acre Property is irregularly shaped, having nine lot lines. The Property is unimproved. Topography is generally level.

3. Vicinal Properties. To the Property's east/northeast, along Perimeters 2A and 2B, is an RR-DEO (Rural Residential: Density Exchange Option) zoned, undeveloped wooded parcel owned by the State Highway Administration and abutting a MD 32 exit ramp. To the northwest are the RR-DEO zoned single-family detached lots of the Clarksville Manor subdivision. The dwelling on Lot 5 lies about 120 feet from the Property's rear lot line. To the west is Parcel 398, a B-2 zoned shopping center. To the south, across Ten Oaks Road, is Parcel 35, Par. A, which is improved with a bank building with drive-thru lanes.

4. The Variance Requests. Petitioner is requesting six variances. Note: the A1, B1, etc. numbering refers to the perimeters called out on the August 10, 2015 Variance Plan.

A. From § 119.0.D.2.a

A1. Reduce the 30' structure and use setback to 10.82' for a drive-thru lane adjacent to MD 108.

A2. Reduce the 30' structure and use setback to 10.77' for a drive-thru lane adjacent to MD 32.

B. From § 119.0.D.2.b

B1. Reduce the 30' structure and use setback to 17.33' for a drive-thru lane adjacent to a residential zone (the SHA property).

B2. Reduce the 30' structure and use setback to 5.92' for a dumpster enclosure adjacent to a residential zone (the SHA property).

B3. Reduce the 30' structure and use setback to 1.0' for a retaining/screen wall and to 6.33' for parking adjacent to a residential zone (the SHA property).

B4. Reduce the 30' structure and use setback to 5.66' for a building adjacent to a residential zone (the SHA property).

5. Additional Information. The Technical Staff Report explains the Property will be developed with three buildings, associated parking and a drive-through lane and retaining wall

(Ten Oaks Plaza). The development will have one access at Ten Oaks Road near the west property line. Just off the access is a proposed 13,341sf, one-story pharmacy building. A 4,737sf drive-through, fast-food restaurant is proposed in the eastern "arrowhead" corner of the Property. An eight-service bay, one-story, 8,600sf automotive service use is proposed on the northeast, rear section next to the SHA property. Parking is proposed on the south side of the automotive service building, on the northeasterly and southerly sides of the pharmacy, and on the southwesterly side of the fast food restaurant. Additional parking areas are proposed in the interior of the property and along Ten Oaks Road (Perimeter 1B).

6. Robert Vogel, project engineer, testified to the need to locate the access as far from the Clarksville Road/Ten Oaks Road intersection as possible. After discussions with the Department of Planning and Zoning (DPZ), Petitioner purchased the B-1 portion of the Property for the ingress/egress. None of the requested variances affects the required setback from the residential properties to the northeast.

7. In Mr. Vogel's view, the proposed variances will not alter the character of the community because parking is already permitted within 10' of the ROW and the A1, A2 and B1 variances are for a drive-thru lane, which is similar to a parking use. In addition, this area would be enhanced with a masonry or stone wall and landscaping to screen headlights. Most of the variances are up against the wooded SHA property. These variances are unlikely to be noticed due to their location and only visible by traffic on the MD 32 ramp. Landscaping buffers are proposed in the area of the variance requests.

8. Mr. Vogel also testified to having met previously with the adjoining neighbors who had testified in Board of Appeals Case No. 14-027V. He discussed the revisions to the plan with the Selbys, the neighbors to the northwest. In the first petition, the Selbys were concerned about occupants of the second floor of the then proposed two-story office building looking down on them. A six-foot privacy fence had originally been proposed and Mr. Vogel explained to them that a six-foot noise wall/fence could be installed instead. A noise fence/wall is double-sided, which helps capture noise. The proposed automotive service building is farther away than the office building. He has been in contact with the Selbys.

9. Lastly, Mr. Vogel adopted his opinion of the petitioner's compliance with the four standards for granting a petition as set forth in BOA Case No. 14-027V, which was as follows.

Finding #6. Robert Vogel, project engineer, testified to the need to locate the access as far from the Clarksville Road/Ten Oaks Road intersection as possible. On that side, the Property is zoned B-1, which could have been used for structures. None of the requested variances affects the required setback from the residential properties to the northeast. The SHA property is unusual in that it is not part of the MD 32 ramp right-of-way and is not B-zoned. Referring to Petitioner Exhibits 3 & 4, Mr. Vogel explained they show county right-of-way (ROW) dedications, which restrains the buildable area of the Property, as do multiple 30' street setbacks.

Finding #7. In Mr. Vogel's view, the proposed variances will not alter the character of the community because parking is already permitted within 10' of the ROW and the A1, A2 and B1 variances are for a drive-thru lane, which is similar to a parking use. In addition, this area would be enhanced with a masonry or stone wall and landscaping to screen headlights. Petitioner Exhibit 5A-C. Most of the variances are up against the wooded SHA property. These variances are unlikely to be noticed due to their location and only visible by traffic on the MD 32 ramp. Landscaping buffers are proposed in the area of the variance requests. He does not believe the variances will impair the use of the residential properties to the northwest because none are proposed along the common lot line (Perimeter 4 & 5). Moreover, additional landscaping is proposed along these perimeters. In his view, the

variances are the minimum necessary because double stacking eliminates stacking in the parking lot. Having revised the plan to lessen the extent of the drive-thru into the setback, he believes the variances are reasonable.

10. Billy Hillmuth testified to being the operator of an automotive service operation at 12411 Clarksville Pike, which is just west of the Property. He cross-examined Mr. Vogel about his meeting with the Selbys, to which Mr. Vogel replied that he had talked to them at a community meeting, that Mr. Selby had telephoned him 4-5 weeks ago and that Mr. Selby later spoke to the developer's representative. In his direct testimony, Mr. Hillmuth expressed concern that the restaurant had no conditional use and the Hearing Examiner explained it is a permitted use in the B-2 zoning portion of the Property. After Mr. Hillmuth noted his disagreement with the TSR's conclusion that the Property was unique because of its irregular size, there being a rectangular area in the central portion of the site, Mr. Vogel explained the Property is unique because it is nine-sided. Mr. Hillmuth further testified that while he operates an automotive repair shop at 12411 Clarksville Pike, he is concerned only about traffic, which is unbearable in the area. He worries the development will cause a massive traffic problem. Mr. Vogel explained Petitioner recently submitted a site development plan, along with a traffic impact study, to DPZ. The Hearing Examiner noted that the State Highways Administration (SHA) had no objection to the variance request, that an access permit would be required for any work in the ROW and that SHA would like to review the traffic impact study.

11. Mary Agnes Lewis testified to being the owner of the adjoining commercial development to the Property's west. She is concerned about area traffic, including MD 32 ramp

traffic. Mr. Vogel explained an automotive sales use had been approved for the site some time ago, with an access point closer to the intersection. Mr. Vogel also explained that between MD 108 (Clarksville Pike) and Ten Oaks Road, the project would facilitate a dedicated right-turn and a free right, which will help alleviate backups along MD 108. To achieve this, the developer will relocate the traffic signal, the signal poles, widen MD 108 and bring it around MD 32.

12. Sam B. Hishmeh testified to being the owner of 12431 Clarksville Pike, the Clarksville Professional Center. He is also concerned about traffic and public safety in the area. He often sees area drivers violating rights-of-way and legal entrances/exits.

13. The Hearing Examiner explained the public's right to view the site development plan and how to be notified by DPZ as a contact during its processing.

#### **CONCLUSIONS OF LAW**

The standards for variances are contained in HCZR § 130.0.B.2.a of the Regulations. 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 variances comply with §§ 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 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 130.0.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.

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) (italics added).

In this case, the Property’s irregular shape, a nine-sided lot, affects it disproportionately.

In this case the Property’s irregular shape is a unique physical condition causing practical difficulties in complying with the structure and use setbacks.

**(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.**

There is no evidence of the requested variances substantially impairing the appropriate use or development of adjacent property affected by the variance requests and they will not be detrimental to the public welfare. The Variance Plan proposes landscaping along the requested variance perimeters, which adjoin roadways or undeveloped SHA property, across from which are other commercial uses. Additional landscaping is proposed (but not required) along the common lot lines with the residential properties to the northeast. Petitioner has also agreed to install a noise fence/wall along the common lot line with the Selby property.

The Hearing Examiner recognizes neighbors' concerns about traffic and public safety in the area. However, the evaluation of the petition is limited to the four variance criteria. The Hearing Examiner also recognizes the developer's commitment to purchase the B-1 zoned lot to move access as far away from the intersection/traffic signal and to relocate the traffic signal, signal poles and widening of MD 108 to facilitate a right-turn. Additionally, as the Hearing Examiner commented during the proceeding, the broader issue of area traffic management was removed from the draft Clarksville Pike Streetscape Plan and Design Guidelines; i.e., the guidelines make no reference to the traffic improvements contained in the 2014 Sabra Wang traffic study. The County will look at traffic improvements independently of the design guidelines.

**(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 reasonable use of the Property and therefore the minimum necessary to afford relief.

**ORDER**

Based upon the foregoing, it is this **2<sup>nd</sup> Day of December 2015**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

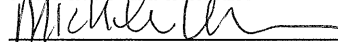
That the Petition of Ten Oaks, LLC, for variances to reduce the 30' structure and use setbacks to 10.82', 10.77' and 17.33' for a drive-thru lane, to 5.92' for a dumpster, to 1.0' for a retaining/screening wall, to 6.33' for parking and to 5.66' for a building, in B-1 (Business: Local) and B-2 (Business: General) Zoning Districts is **GRANTED;**

**Provided, however, that:**

1. This Decision and Order supersedes BOA Case No. 14-027V, decided January 5, 2015.
2. The variances shall apply only to the uses and structures as described in the petition and as depicted on the September 10, 2015 Variance Plan, including the location of the proposed ingress/egress, and not to any other activities, uses, structures, or additions on the Property.
3. Petitioner shall install a six-foot noise wall/fence per the Howard County Design Manual, Vol. IV, Standard Specification's and Details for Constructions, Detail R-9.05, along the common lot line with the Selby property, in the appropriate location.
4. Petitioner shall obtain all required permits, including all State Highway Administration permits.

**HOWARD COUNTY BOARD OF APPEALS**

**HEARING EXAMINER**



**Michele L. LeFaivre**

Date Mailed: \_\_\_\_\_

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.