

IN THE MATTER OF	:	BEFORE THE
TEN OAKS, LLC	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 14-027V

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DECISION AND ORDER

On October 27, 2014, 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. Sandra A. Selby, Danny W. Selby and Rita Patel and Jocelyn O'Neill testified in opposition to the petition.

A Preliminary Matter

At the outset of the hearing, Petitioner introduced into evidence Petitioner Exhibit 1, an amended variance plan modifying a proposed variance (A1) for a drive aisle. As submitted, the

Variance Plan and petition requested a reduction in the 30' structure and use setback to 4.55' and Petitioner is now seeking a lesser variance, to 10.82'. The amendment not being substantive, the Hearing Examiner determined the exhibit could be introduced into evidence in accordance with Hearing Examiner Rules 9.4 and 9.5.¹

Petitioner introduced into evidence the exhibits as follows.

1. Amended variance plan (the Amended Plan), September 17, 2014.
2. Amended Plan, highlighted variance areas in blue
- 3&4. Street dedication plats #18589, June 13, 2006, F-06-192
5. Typical screening, as will be used to screen drive-thru lane

Opposition introduced into evidence the exhibits as follows.

1. Development concerns, Ten Oaks Rd./Rt. 108

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 34, Grid 12, 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).

¹ Under Rule 9.4, when 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 requires the hearing examiner to suspend the hearing for at least three weeks if the amendment is substantive, i.e., the amendment proposes a use that is likely to impact vicinal properties adversely.

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, the B-2 zoned Clarksville Crossing 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 Amended 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 four 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, to the east a 3,825sf retail building and patio are proposed. To the northwest of this building, close to the Clarksville Manor commercial site is a proposed vehicle service use with seven service bays. A three-story, office building with a 7,000sf footprint is proposed on the northwest, rear section next to the SHA property. In the easterly, arrowhead portion of the Property a fast food restaurant and drive-thru are proposed. Parking is proposed on all sides of the retail building (except the north side), along two sides of the vehicle service building. Additional parking is proposed in the interior.

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.

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.

8. Sandra A. Selby testified to residing at 6321 Golden Harvest Court in Clarksville Manor, which adjoins the Property. She cross-examined Mr. Vogel about the percentage of the Property that could not be used without the variances and he explained that the drive-thru area could still be used for parking. Along the SHA property common lot line, no parking could occur without the variances, which would mean the office building would be smaller. In her direct testimony, Ms. Selby testified to having followed development on the Property for several years and having several questions about the project. Trees on the Property were removed, greatly diminishing the use of her property. The use will be further diminished if people on the third floor of the office building, which sits at a higher elevation, can look down on their property. It will take 20 years for the landscaping to grow. She wants some type of restriction and barrier to screen the view and noise from the uses.

9. On cross, Mrs. Selby testified to having moved to her property in 2002. She did not know the Property was commercially zoned when she bought the property because the lot was wooded and improved with an old house and dentist office. She can hear some noise from MD 32, but there is dense tree buffering, which her family planted.

10. Mr. Vogel further explained in reference to Mrs. Selby's questions that a previous developer had removed trees in compliance with county and state forest conservation law, including permits. A site development plan had been approved in 2006 or 2007. He did not prepare this earlier plan. The developers abandoned the project and the required landscaping was never planted. The developer is proposing substantial landscaping along the common lot line with the two adjoining residential uses; although not 40' tall, the height of the removed trees, it will provide a substantial buffer. The trees must be a certain height at planting. He also explained that the site development plan would include a traffic study and address noise issues. Mr. Oh believes the developer is not aware of the neighbors' concerns and he pledged to work with them to the extent that the developer can to lessen impacts on their property rights.

11. Danny W. Selby testified to being concerned about the loss of privacy with the commercial use, especially with a three-story building and attendant noise. He had lots of problems trying to find someone in the county who could explain the meaning of the signs on the Property. The Hearing Examiner explained there is no pre-submission meeting for commercial projects. She also described how to look up information about a project using the code on a hearing notice sign.

12. Jocelyn O'Neil testified to residing in Clarksville Manor and about the traffic at the Ten Oaks Road/MD 108 intersection. She hears the noise from the auto park on the other side of MD 32 and believes the proposed uses will add to noise levels.

CONCLUSIONS OF LAW

The standards for variances are contained in Section 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 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 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. The Hearing Examiner therefore concludes this physical condition is unique and results in 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 Amended 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 line with the residential properties to the northeast.

The Hearing Examiner recognizes neighbors' concerns about commercial development next to their properties. However, the evaluation of the petition under all four variance criteria

is performed wholly in reference to the property adjacent to the requested variance and no variance is requested from the 30' setback from adjoining residential properties.

(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 variance is for a reasonable use of the Property and therefore the minimum necessary to afford relief.

ORDER

Based upon the foregoing, it is this **5th Day of January 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. The variances shall apply only to the uses and structures as described in the petition as depicted on the September 17, 2014 Amended Plan and not to any other activities, uses, structures, or additions on the Property.
2. Petitioner shall obtain all required 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.