

IN THE MATTER OF	:	BEFORE THE
MILLER FAMILY TRUST & SHADY ACRES LANE, LLC	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner	:	Case No. BA 16-036C&V
:.....		

DECISION AND ORDER

The Howard County Board of Appeals (the "Board") convened on December 12, 2019, to hear closing arguments in the above-captioned matter and to deliberate and reach a decision regarding the proposed conditional use and variances sought by Miller Family Trust & Shady Acres Lane, LLC ("Petitioners"). The Petitioner was represented by William E. Erskine, Esq. John Miller, Jacob Miller Myron Katzoff and Paul Sill testified in support of the petitions. Thomas M. Meachum, Esq. represented protestant David Novak. Jim Erbacher, Jason Daigle, Doug Isokait, Ling Jing Eckert and David Novak testified in opposition to the petition and Eugene Ohm and Douglas Isokait served as spokespersons for the Rosemont Homeowners Association residents who opposed the petitions (collectively "Opponents"). The Board also held hearings in this matter on August 23 and 30, December 13, 2018, February 21, April 18, May 30, August 27 and 29 and December 12, 2019.

Members of the Board present at the December 12, 2019 hearing were: Neveen Kurtom, James Howard, John Lederer and William Santos. Board member James Howard presided. Board member Steven Hunt was absent.

The case was heard pursuant to the Board's Rules of Procedure, Section 2.209. The burden of proof is one of a preponderance of the evidence and is on the Petitioner to show, by competent, material and substantial evidence, that Petitioner is entitled to the relief requested and that the request meets all prescribed standards and requirements of the applicable Zoning Regulations.

On preceding hearing nights, the Board received evidentiary presentations from each party. The Board accepted closing arguments in writing and, additionally, on December 12, 2019, the Board heard oral arguments from all parties that were present and wished to be heard.

The notice of the hearing was advertised, and the property was posted as required by the Howard County Code. The Board members indicated that they had viewed the property as required by the Zoning Regulations.

The Howard County Charter, the Howard County Code, the Howard County Zoning Regulations, the various technical staff reports and agency comments, the Department of Planning and Zoning's March 26, 2017 Technical Staff Report recommendation, BA 16-036C&V official file, the General Plan for Howard County, the General Plan of Highways, and the amended conditional use petition and plan were incorporated into the record by reference.

FINDINGS OF FACT

Based upon the testimony and evidence presented at the hearing, the Board makes the following Findings of Fact:

The subject property comprises two parcels. The 2.68 +/-acre Parcel 120 is located at the northern terminus of Shady Acres Lane about 1,230 feet north of Scaggsville Road and is known as 10430 Shady Acres. On this parcel is the principal residential use consisting of a single-family detached dwelling and detached garage. Also on this parcel is the operations area of the existing contractor business proposed as the primary conditional use site. The 0.730 +/-acre Parcel 838 is the private Shady Acres Lane, which provides access to Scaggsville Road. Parcel 838 is proposed as the driveway access portion of the conditional use site. The properties are identified as Tax Map 0047, Grid 0007, Parcels 120 and 838 (the "Property"). The 2.99 +/-acre Property is known as 10430 Shady Acres Lane.

Miller Family Trust & Shady Acres Lane, LLC petitioned for retroactive approval of an existing Home-Based Contractor use consisting of an office, storage of equipment and materials within an existing 42.2-foot by 52.2-foot metal-sided garage (“Contractor Garage”), an existing 11.6-foot by 47.1-foot block shed (“Block Shed”), an existing 11.8-foot by 32.3-foot existing tarp covered storage area (“Tarp Area”), an existing 442+/-square foot and 20-feet tall cantilever rack (“Cantilever Rack) and a 7,797-square foot outdoor gravel-surfaced area. Petitioners will maintain a maximum of five employees and three commercial vehicles on site. No customers or vendors will visit the Property. Petitioners’ business involves masonry which is the art and craft of building and fabricating in stone, brick or concrete block. The proposed hours of operation are:

Load and Unload Trucks: 9 am – 6 pm Monday – Saturday

12 pm – 2 pm Sunday

Arrival and Departure from Site: All Hours Daily

Office Work: All Hours Daily.

The proposed changes to the site are the relocation of the existing Cantilever pipe rack located west of the garage to comply with the setback requirements. The Petitioners also propose to modify the Cantilever Rack by reducing its height from 20-feet to 12-feet and paint it brown. The Petitioners propose the construction of a six-foot board-on-board fence on the west side of the parking and storage area and to plant White Spruce trees along the rear lot line and a portion of the south side lot line. The Petitioners propose to plant Leyland Cypressess in the area to the southeast of the garage.

The Petitioners request a variance to reduce the 20-foot use setback to 0 feet for the existing driveway and from 20 feet to 9 feet for a portion of a parking area located to the north of the Contractor Garage, labeled as a gravel parking area on the Conditional Use Plan.

In support of its petition, Petitioners presented testimony from several witnesses, including an engineer, as well as offering many exhibits which were admitted into evidence. Opponents offered testimony from witnesses and numerous exhibits which were admitted into evidence. Protestants from the Rosemont Homeowners Association assert that site conditions are such that for much of the year their members will have a clear view of the construction yard, since proximal Rosemont properties are higher, and in some cases significantly higher, than the construction operation. As described in the TSR at page 3: “The residential lots to the southwest of the property are at a significantly higher elevation than the areas surrounding the Contractor Garage on the Property. The areas around this garage are approximately 340 to 342 feet in elevation, while the residential lots to the southwest range from 370 to 390 feet in elevation.” The Protestants make a case that seven of the Rosemont residents look down on the construction site, gaining a clear visual and auditory experience.

In light of the totality of the credible evidence offered by the parties and admitted into evidence during the course of the hearings, the Board is not persuaded that the Conditional Use and Variance petitions of Miller Family Trust & Shady Acres, LLC for approval of a Home-Based Contractor use meets certain provisions of the zoning regulations.

ANALYSIS

The Petitioner bears the burden to demonstrate by a preponderance of the evidence that each of the criteria in the Zoning Regulations, including those specific to the Home-Based Contractors, would be met if its conditional use were granted.

Howard County Zoning Regulations – The Petition must comply with the following applicable Regulations:

- § 131.0.B – General Standards Required for Approval; and
- § 131.0.N.28 – Specific Conditional Use Criteria for Home-Based Contractors; and

§ 130.0.B.2 – Variance Standards

The driveway proposed for access cannot be used because it requires a variance and the variance does not meet the criteria for a variance under Section 130.0.B.2. of the Zoning Regulations. The Petitioners propose to use the driveway it currently uses to access Scaggsville Road. In order to use the driveway, it must receive a variance from the 20-foot use setback in the R-20 zoning district. The Petitioner's witness stated that its request meets the legal test because the driveway is only 20 feet wide and not wide enough for use without a variance. In essence, Petitioners reason that a variance is needed because the use of this driveway for the Home-Based Contractor Conditional Use activates the 20-foot use setback.

The Board's authority in a variance petition hearing is limited to the petitioners' compliance with the four standards set forth in HCZR §130.0.B.2.a., which gauge the impact of the requested relief from certain bulk regulations and dimensional standards in the applicable zoning district such as setbacks, lot coverage and building height. Pursuant to HCZR §130.0.B.2.a., the Board may grant a variance only if the Petitioner demonstrates compliance with all four variance criteria.

(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 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 necessary to afford relief.

For the reasons stated below, the Board finds that the requested variance does not comply with Section 130.0.B.2.a(1) and therefore must be denied.

2. 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.B.2.(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” thusly:

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 Petitioner has not shown that the Property is in any way unique such that

the use setback of Section 108.0.D.4.c.(2) will disproportionately impact it. The Board finds that the use-in-common driveway for 15 lots and the existing use setback requirements are not unique physical characteristics of the Property. As stated in *North*, “uniqueness” does not refer to the extent of improvements upon the property.

Unique physical characteristics of the property, not the desires of, or conditions personal to the applicant, must prevent the applicant from developing in compliance with the zoning ordinance.

Unless there is a finding that the property is unique, unusual, or different, the process stops here, and the variance is denied without any consideration of practical difficulty or unreasonable hardship. *Cromwell*, 102 MD. App. At 694-695, 651 A.2d at 426. In this case, the Petitioner has not produced sufficient evidence to pass the first prong of the variance test; that is, it has not shown that the Property has unusual or unique characteristics that cause the use setback restriction to disproportionately impact upon it. For this reason, the variance request fails to comply with Section 130.B.2.a(1). Petitioner failed to identify any unique physical conditions of any lot; all that is referenced is the private road itself that serves as a use-in-common driveway for 15 lots, including the Petitioners. There was no evidence about any unique physical condition of Parcel 838 or 120. There is nothing unique about a driveway being 20 feet wide and no testimony was provided that it was different from other driveways in the community. The fact that the Petitioner needs the driveway to be wider in no way satisfies the requirement that there must be a unique physical condition peculiar to the particular lot.

With regard to the variance request for the gravel parking area, the TSR at page 4 states “The existing gravel parking area may have existed prior to the creation of Parcel 1022, however, there are no unique physical conditions that warrant a variance to maintain this use area. There is

approximately 14 feet between the Contractor Garage and the use setback line, which is wider than the driveway and there is ample space to the south of the Contractor Garage for vehicle circulation.” This Board agrees and concludes that Petitioners failed to establish any unique physical conditions peculiar to the lot and the variance for the parking use cannot be granted.

Next, the Board finds that the Cantilever Rack is not compatible in appearance and scale with other residential structures in the vicinity as required by Section 131.0.N.28.k. specific criteria for a Home-Based Contractor. A “structure” is defined in the Zoning Regulations Section 103 as “anything constructed or built.” The Cantilever Rack meets the definition of structure. The Cantilever Rack is not compatible with other residential structures in appearance. No evidence was presented by the Petitioners of any residential structures this rack is compatible with. The construction yard rack which holds supplies is not compatible with other residential structures in appearance.

Section 131.0.N.28.h. specific criteria does not permit the outside storage of non-natural supplies. Jon Miller testified that the wire and pipe stored on the Cantilever Rack are used within his masonry products. Unlike the scaffolding stored at this location that is used to support workers performing their job, this wire and pipe are strictly supplies. Since they are not made of natural material, they cannot be stored outside; they must be stored inside. The wire and pipe supplies on the Cantilever Rack cannot be approved because they are not natural materials. This section on home-based contractors does not permit the outside storage of non-natural supplies. They are not permitted with screening, they are prohibited entirely.

Section 131.0.B.3.a. General Standards requires Petitioners to prove that the adverse impacts from this use at this location will not be above and beyond those adverse impacts typically associated with a Home-Based Contractor use.

This home-based contractor use is sufficiently different in use from other home-based contractors where the adverse impacts are greater.

This proposed use has a construction yard. This is not a situation where employees come to the site and drive the company vehicles away. In this proposed use there is loading activity and constant on and off traffic during the day per David Novak's video of the site. There is a greater amount of noise, including traffic coming and going at all hours of the early morning.

Furthermore, the adverse impacts from this use will be greater at this location because the Petitioners did not locate this yard close to his house. A review of the plan shows plenty of space to establish this use between the Contractor Garage and his home. Instead, Petitioners established the use at the part of the property farthest away from his residence, closest to Mr. Novak's home and other Rosemont homeowners.

Section 131.0.N.28.f. specific criteria requires that the Board find that "The location and design of the operation be such that the use will not be a nuisance to residents of neighboring properties due to noise, dust or fumes. Particular consideration shall be given to the location of the loading areas, parking and circulation areas, and driveways, in relation to neighboring properties." The Board finds the location of the loading areas and parking and circulation areas constitute a nuisance due to noise generated from the proposed use. The use itself is located as close to Mr. Novak and the Rosemont community as possible. Trees and fencing will not attenuate the noise from a seven day a week operation involving the loading and unloading of trucks.

CONCLUSIONS OF LAW

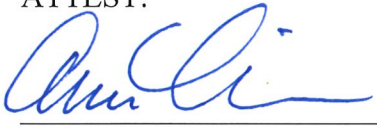
The Petitioner has not met its burden to show that its conditional use, as proposed, would satisfy the applicable Zoning Regulations.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is this 22 day of February, 2021, by the Howard County Board of Appeals, ORDERED:

That the Conditional Use and Variance petitions of Miller Family Trust & Shady Acres Lane, LLC (Petitioners) for retroactive approval of a Home-Based Contractor use in an R-20 (Residential: Single Family) zoning district, are hereby **DENIED**.

ATTEST:


Ann Nicholson, Secretary


HOWARD COUNTY BOARD OF APPEALS


Neeven Kurtom, Chairperson


William Santos, Vice-Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
GARY W. KUC
COUNTY SOLICITOR


James Howard


Barry M. Sanders
Assistant County Solicitor

Did Not Vote
Steven Hunt

Term Expired
John Lederer