

IN THE MATTER OF	:	BEFORE THE
SRINIVAS & SAI	:	HOWARD COUNTY
MALLAMPALLI	:	BOARD OF APPEALS
Petitioners	:	HEARING EXAMINER
	:	BA Case No. 16-013V

DECISION AND ORDER

On August 11, and November 7, 2016, 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 Srinivas & Sai Mallampalli (Petitioners) for retroactive variances to reduce the 7.5-foot (7 & ½ foot) side setback to 1.0 feet and to reduce the 25-foot rear setback to 15 feet for a multi-level deck in an R-ED (Residential: Environmental Development) zoning district, filed pursuant to § 130.0.B.2 of the Howard County Zoning Regulations (the HCZR).

The Petitioners certified to compliance with the notice and posting requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Thomas Coale, Esq., represented the Petitioners. Mrs. Mallampalli testified in support of the petition. No one appeared in opposition to the petition.

A Preliminary Matter

At the outset of the November 7, 2016 continuation hearing, Petitioners introduced two exhibits. Exhibit 2 adds the square footage of the deck to the variance plan. Exhibit 3 depicts the dimensions of all deck areas. Exhibits 2 and 3 are referred to in this decision and order as the

Amended Variance Plan (with a November 7, 2016 date). The Hearing Examiner determined the amendments were not substantive within the meaning of Hearing Examiner Rule 9.5 and therefore could be admitted as evidence during the hearing.

Petitioners submitted into evidence the exhibits as follows.

1. Aerial photograph
2. Variance plan depicting the square footage of the decks
3. Variance plan depicting the dimensions of the decks
4. Photograph of rear patio area converted to deck

FINDINGS OF FACT

Based upon the evidence of record, the Hearing Examiner finds as follows:

1. Property Identification. The subject property is located on the west side of the terminus of Edith Court about 297 feet west of Nelson House Road. It is located in the 2nd Election District, identified as Tax Map 0024, Grid 0018, Parcel 255, Lot 22, and is known as 3917 Edith Court (the Property). The Property is part of The Woods of Tiber Branch subdivision.

2. Property Description. The 8,620sf, five-sided Property is located on a cul-de-sac bulb. Because the front lot line is narrow, the location of the single-family detached dwelling was set back into the site to meet the 50-foot minimum lot width at the building restriction line imposed by HCZR § 107.0.D.3.a and to accommodate, apparently, a walk-out basement. Owing to the five-sided shape of the Property, there are two lot lines behind the dwelling. The approximately 83-foot long, westerly lot line (Lot Line 4) is designated as a side lot line for which there is a 7.5-foot (7 & ½ foot,) setback. The approximately 41-foot northerly lot line (Lot Line 5) is designated

as the rear lot line. Sidewalks on both sides of the dwelling provide rear access. A driveway on the easterly section of the Property provides access.

Before Petitioners constructed the multi-level decks which are the subject of this variance petition, a portion of the lower level opened out to a large concrete, ground level patio. Based on Petitioner's Exhibit 4, a photograph depicting a section of the concrete patio, the patio was constructed about 1.0 feet from the side lot line (in violation of the HCZR). There are sidewalks on both sides of the dwelling providing access to the rear of the dwelling.

Open Space Lot 35 adjoins Lot Lines 4 & 5. Lot 35 is owned by the Howard County Department of Recreation and Parks and is encumbered with a Forest Conservation Easement. Beyond the forested area is the Tiber Branch (Cat Rock Run) and associated buffers and floodplains. Owing to the location of the Property, its topography drops in elevation toward Lot Lines 4 & 5. Two retaining walls run along Lot Lines 4 & 5.

3. Other Adjacent Properties. Adjacent properties are also zoned R-ED. The northerly and southerly lots in the subdivision are each improved with a single-family detached dwelling.

4. The Requested Retroactive Variances. Petitioners are requesting retroactive approval to reduce the 7.5-foot (7½ foot) side setback from Lot Line 4 imposed by HCZR § 107.0.D.4.d.(1)(b) to 1.0 (1.0) feet from Lot Line 4 and to reduce the 25-foot rear setback from Lot Line 5 imposed by HCZR § 107.0.D.4.d.(1)(c) to 15 feet for a multi-level deck with connecting stairs.

- According to Exhibit 2, the upper deck is 228sf and the lower deck is 542sf.
- According to Exhibit 3, the upper deck, excepting the stairs, is 20 feet wide against the dwelling and 15 feet at its deepest section; hence the requested variance for a ten-foot

setback. The lower deck at its deepest is 17 feet. A section of this deck has a corner area located 1.0 feet from Lot Line 4; hence the requested variance for a 1.0' setback. The rear of the ground level deck has a 21-foot section and a 13-foot section. The deck along the house is 23.3 feet wide.

The petition states the Property is unique because it is smaller than area lots and the configuration of Lot Lines 4 & 5 preclude construction of a complying deck.

5. The Department of Planning and Zoning issued Petitioners a Notice of Violation for construction of the deck within the setbacks.

6. Mrs. Mallampalli testified the deck was comparable in size to others in the neighborhood and that Petitioners have building permit approval for the multi-level deck. She also testified to her homeowners' association approving the multi-level deck.

7. Petitioners introduced into evidence Exhibit 4, a photograph of the underlying concrete, ground level patio, over which the lower deck had been constructed. Portions of the edge of the concrete are eroded. There are retaining walls in front of the concrete by Lot Lines 4 and 5.

8. The Hearing Examiner described her site visits. I could not access Edith Court during my first visit on August 1, 2016, owing to roads being closed off as a result of the July flash flood in Ellicott City, discussed supra. During the August 8, 2016 site visit, I observed a stormwater drain in front of the Property with stenciled lettering stating the water "drains to Patapsco River." I then viewed the rear of the property and observed that Petitioners, apparently, had cleared/mowed several feet into Open Space Lot 35. I further observed that the deck was considerably larger than any deck in the neighborhood and that the foundation section of the

deck where it sits 1.0' from the lot line did not appear stable. A small portion of this area is visible in Exhibit 3, a photograph of the ground level deck located above the old concrete patio.

CONCLUSIONS OF LAW

I. Background

At the August 11, 2016 hearing, the Hearing Examiner described several problems homeowners face in subdivisions developed under the R-ED district regulations. This is the purpose of the R-ED district:

[T]o accommodate residential development at a density of two dwelling units per net acre in areas with a high proportion of sensitive environmental and/or historic resources. Protection of environmental and historic resources is to be achieved by minimizing the amount of site disturbance and directing development to the most appropriate areas of a site, away from sensitive resources. To accomplish this, the regulations allow site planning flexibility and require that development proposals be evaluated in terms of their effectiveness in minimizing alteration of existing topography, vegetation and the landscape setting for historic structures.

A consequence of this objective is the routine creation of residential lots with topography that lowers in elevation toward the rear of these lots when they adjoin Open Space Lots where sensitive environmental resources like streams and associated floodplains are located. Occasionally, retaining walls traverse the rear yard, as with the subject property. While this grade change is not "steep" within the meaning of the Subdivision and Land Development Regulations (although waivers may have been granted to allow grading of steep slopes when the subdivision was approved), the practical result is that the grade of these rear yards cannot easily accommodate back yard activities. Consequently, the Hearing Examiner routinely grants setback variances for reasonably sized back yard decks to would allow some functional use of the yard.

When considering variances for decks in these situations, the Hearing Examiner carefully evaluates the proposed deck for compliance with HCZR § 130.0.B.2.a.(2), which requires consideration as to whether the variance, if granted, would substantially impair the appropriate use or development of adjacent property or be detrimental to the public welfare. The Hearing Examiner therefore consistently denies variance petitions proposing a setback less than 4 feet from a property line (with limited, site specific exceptions) to ensure property owners do not encroach onto the adjoining, environmentally sensitive areas. When a lesser setback is granted, the Hearing Examiner requires property owners to construct a fence along the common lot line with the Open Space Lot. In this case, Petitioners have already constructed a deck that sits 1.0' from the common lot line with Open Space Lot 35.

II. Variance Standards

The standards for variances are contained in HCZR § 130.0.B.2.a. 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, as conditioned.

(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 combination of a smaller lot size and the configuration of Lot Lines 4 & 5 are unique physical conditions causing practical difficulty in complying with the setback 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.

There is no evidence of the requested 15-foot setback altering the essential character of the neighborhood or district in which the lot is located, substantially impairing the appropriate use or development of adjacent property, or being detrimental to the public welfare.

The gravamen of this case is whether the granting of the variance for a 1.0' setback from Open Space Lot 35 for a very large deck would be detrimental to the public welfare. On July 30, 2016, a 1000-year storm dumped six inches of rain in portions of Howard County within a very brief time in Old Ellicott City's Main Street just down the road from Petitioners' property, causing flash flooding, loss of life, and massive property damage. There was also significant flooding along Old Columbia Pike closer to Main Street. Edith Court is accessed from Old

Columbia Pike. The Tiber River watershed, which includes the Tiber Branch running through Open Space Lot 35, failed to function hydrologically and hydraulically.

Petitioners' property is located within this watershed. The stormwater drain in front of the Property alerts residents that stormwater in their neighborhood drains into the Patapsco River. Still, Petitioners cleared a large area beyond their Property on Open Space Lot 35 and constructed a multi-level deck that in one section sits only one foot from the common lot line with Open Space Lot 35. In no other variance petition for a property subject to the R-ED regulations has the Hearing Examiner observed encroachment into an Open Space Lot. It was in part because of my concerns about persistent encroachment into Open Space Lot 35 that I continued the hearing and asked Petitioners to evaluate reducing the deck in size so that a three-foot setback could be maintained. Secondly, during the hearing I noted that the deck was larger than any for which I approved a setback variance in *any* zoning district. My third reason for requesting Petitioners to evaluate reducing the encroaching section was my observation that the lower deck footing construction along the former concrete patio edge looked unstable. If it were necessary to reconstruct this section, then the deck structure could be reduced in size to a reasonable size at the same time.

Petitioners' Exhibit 3, a photograph of a portion of the ground level deck foundation, is intended to show that the deck could not be reduced in size to create a 3-foot setback from Lot Line 4, which is established as a 7.5-foot side setback. Additionally, the land between the side lot line and dwelling functions as a back yard. For this reason, the Hearing Examiner concludes the 1.0-foot setback comports with § HCZR § 130.0.B.2.a, subject to two conditions of approval.

First, Petitioners shall install a HCZR-compliant vinyl, wrought iron or metal fence along the entirety of the 83.07-foot Lot Line 4 and it must be located on Petitioners' Property. Petitioners shall affix a permanent metal sign on the fence stating "Forest Conservation Area beyond this fence. No clearing, grading, or mowing. No site disturbance." Second, Petitioners shall submit a revised or new building permit application and scaled plot plan based on existing in-ground markers or a new boundary/stake survey and accurately depicting the approved setbacks and the size of the multi-level deck.

(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 practical difficulty in complying strictly with the setback regulations arises from the irregular shape of the Property and was not created by Petitioners.

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

The variances allow Petitioners to retain the deck constructed in violation of the HCZR.

ORDER

Based upon the foregoing, it is this **28th day of November 2016**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Srinivas & Sai Mallampalli for retroactive variances to reduce the 7.5-foot (7½ foot) side setback to 1.0 feet and to reduce the 25-foot rear setback to 15 feet for a multi-level deck in an R-ED (Residential: Environmental Development) zoning district is hereby **GRANTED**;

Provided, however, that:

1. The variances shall apply only to the multi-level composite deck depicted on the Amended Variance Plan (Exhibits 2 and 3) and as detailed in Finding of Fact No. 4 (the requested retroactive variances) and not to any other activities, uses, structures, or additions on the Property.
2. Petitioners shall install a Howard County Zoning Regulations-compliant, vinyl, wrought iron or metal fence along the entirety of the 83.07-foot lot line from which a one-foot setback is granted. The fence shall be located wholly on Petitioners' Property, not on the common lot line.
3. Petitioners shall affix a permanent metal sign on the fence stating "Forest Conservation Area beyond this fence. No clearing, grading, or mowing. No site disturbance."
4. Petitioners shall submit a revised building permit application package or, if necessary, a new building permit application package, as determined by the Department of Inspections, Licenses and Permit. The building permit plot plan shall be based on existing in-ground markers, the location of which shall be denoted on the plot plan. If there are no existing in-ground markers, the plot plan shall be based on a boundary/stake survey. The plot plan shall be accurately scaled and shall depict the approved size of the deck, including dimensions and square footage, and shall also accurately depict the approved setbacks and the location of the fence.
5. The plot plan shall contain a note reciting these 8 conditions of approval.
6. Petitioners shall obtain all permits, including any permit required for the fence and sign.

7. Petitioners shall install the fence and sign no later than 45 calendar days from the date of this decision and order.

8. Petitioners are on notice that any encroachment into Open Space Lot 35 or failure to comply with these conditions of approval may result in code enforcement action by the Department of Planning and Zoning or the Department of Recreation and Parks.

It is **FURTHER ORDERED** that the requested variances are **DENIED** if the deck to be located one foot from the 83.07-foot lot line is determined to be actually located less than one foot from this lot line based on the building permit plot plan's depiction of existing in-ground markers or a boundary/stake survey.

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 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.