IN THE MATTER OF	:	BEFORE THE
GP NORTH, LLC	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 18-018V

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DECISION AND ORDER

On October 15, 2018, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the variance petition of GP North, LLC (Petitioner) to reduce the 30-foot project boundary setback for "structures in single-family detached developments" to 7.5 feet for a single-family detached dwelling and to reduce the 50-foot project boundary setback for "other structures and uses" to 4 feet for a use-in common driveway in an R-ED (Residential: Environmental Development) zoning district, filed pursuant to § 130.0.B.2 of the Howard County Zoning Regulations (HCZR).

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. Thomas Coale, Esq., represented the Petitioner. Jakob Hikmat testified in support of the petition. Kimberly Moran, Sean Maloney, Elaine Xifo, Ronald Xifo , Steven Elkins, and Michael Hoffman testified in opposition to the petition.

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 1st Election District on the southeast side of the Pebble Creek Drive and Deborah Jean intersection. It is identified as Tax

Map 0037, Grid 0011, Parcel 698 and known as 7209 Pebble Creek Drive (the Property).

2. Property Description. The irregularly shaped Property is 6.84-acres. It is improved with a water drainage/stormwater management system. A stream and associate floodplain runs from the northwesterly to the southwesterly section of the Property. The Property is somewhat claw shaped because it wraps around the private Pebble Creek Drive access to Deborah Jean Drive. Pebble Creek Drive serves the age-restricted Fairway Overlook community to the southwest.

3. Vicinal Properties. The R-20 (Residential: Single Family) zoned properties to the north and east are each improved with a single-family detached dwelling. To the south is the R-20 zoned age-restricted Fairway Overlook residential development. To the west is a PEC (Planned Employment Center) zoned golf course.

4. The Variance Requests (§ 107.0.D.4.c(2) & c(3)). Petitioner is requesting variances to reduce two project boundary setbacks: a reduction in the "structures in single-family detached developments" setback from 30 feet to 7.5 feet for a single-family detached dwelling, and a reduction in the "other structures and uses" setback from 50 feet to 4 feet for a use-in common driveway.

5. Jakob Hikmat, project engineer, testified about the proposed development, Douglas Woods, a 5-lot subdivision(4 residential lots and 1 open space lot), to be located in the northern section of the Property. The development would abut Pebble Creek Drive, which bisects the Property.

6. It was his testimony that the Property is "extremely unique" due to the Property's

shape, the presence of floodplains, an easement for Deborah Jean Drive, and a sewer easement. If the 50-foot setback were met, only one lot would be possible.

7. He further testified that the requested variances were for a reasonable use of the Property because fewer lots are requested. In his view, about 8 lots would be possible or 13 if the Property were "clean," meaning without the 2.5 acres of floodplain, the stormwater management system, the easement, and its bisection by Pebble Creek Drive.

8. On cross-examination by Kimberly Moran about who created the practical difficulty, Mr. Hikmat testified that in BA 02-046V (5072 Property, LLC, decided December 13, 2002) the hearing examiner granted variance to reduce the then R-20 zoned, 20-foot use setback to 16 feet for a private road (Pebble Creek Drive) and to 7 feet for a sidewalk. Concerning the size of the proposed residential lots compared to adjoining Lot 106, which Ms. Moran stated were about half the size, Mr. Hikmat testified the HCZR permit smaller lots on R-ED zoned properties and the subdivision would be an appropriate transitional use between the single-family dwellings to the north and the age-restricted units to the south.

9. On cross-examination by Seam Maloney as to whether any house in the neighborhood (within a ¼-½ mile) has a structure setback like that requested (7.5 feet), Mr. Hikmat testified the side setback for principal structures in the R-ED district is 7.5 feet and there is no setback for a shared driveway in the R-20 district, the dominant zone in the neighborhood.

10. On cross-examination by Steve Elkins about the impact of the variances on the community, which would bring the driveway to 4 feet from the age-restricted community, Mr. Hikmat testified the proposed subdivision would function as a transition between the larger lots

to the north and the age-restricted community to the south. In Mr. Hikmat's view, fewer lots means less or no impact.

11. Kimberly Moran testified to the proposed variances implicating an extreme safety issue for her age-restricted community due to the number of vehicles on Pebble Creek Drive. On cross-examination, she testified to her concern being the proximity of the houses to this drive. She believes the houses should be larger, like those along Deborah Jean Drive.

12. Sean Maloney expressed concern about the development on wildlife and the project's impact on the stream.

13. Elaine Xifo testified to being concerned about road safety on Pebble Creek Drive and Deborah Jean Drive. She spoke to Councilman Ball about these roads and she and several neighbors met with him.

14. Steven Elkins testified that the requested variances would change the character of the area because they are significant reductions. The curve around Deborah Jean Drive in this area is dangerous, being a blind curve.

15. Michael Hoffmann testified that the reduction in the 50-foot property boundary to 4 feet is excessive. He is the adjacent homeowner on Lot 106 and believes the closer, smaller houses will interfere with his enjoyment of his property.

16. Ronald Xifo testified that the private Pebble Creek Drive is maintained by the Fairway Overlook HOA. He is concerned that small children in the Douglas Woods subdivision might use and damage the private road.

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.

(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.

(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.

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. 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 such 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) (emphasis added.)

In this case, the Petitioner has not shown the Property is so unique as to cause the applicable setbacks to impact it disproportionately. The petition identifies and Mr. Hikmat testified to two unique physical characteristics: the presence of water drainage, stormwater management facilities or easements and a steep grade terminating in a stormwater development pond and the Properties' bisection by a private road.[1] Mr. Hikmat also testified to the shape of the Property being unique.

As a first matter, the presence of the easements for structures or uses for water/sewer drainage and stormwater management may not be considered "unique" characteristics because they relate to *improvements* or uses of the Property, which the *North* Court instructs us is not an inherent characteristic. Thus, in BA 9-046V, the Board of Appeals denied petitioner's requested variance where the asserted unique physical condition was the "intertwined combination of the irregular shape of the Property and the existence of the stormwater management facility."[2] The Board rejected petitioner's argument that the building envelope on the POR-zoned was uniquely constrained, where

[1] These improvements and easements were part of the development of the Marshalee Woods subdivision. The abutting Lot 106 to the north is part of this development.
[2] Hearing Examiner and BOA decisions and orders are available at https://cc.howardcountymd.gov/Zoning-Land-Use.

petitioner presented no probative evidence by which to compare the actual building envelopes of other POR lots to that of the Property. As the Board concluded, "[b]ased soley on the record, it would appear that other POR zoned lots in the generalized area are all irregular in shape and of differing sizes."

Second, the difficulty and near impossibility of proving a specific R-ED zoned property is unique is owed to the fact that the R-ED zone is applied to properties that already display unique physical characteristics. This is the purpose statement for the R-ED District.

> The R-ED District is established to 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.

HCZR § 103.0 defines a "net acre" as "[a]n acre of land that includes no land in the 100-year floodplain and no steep slopes existing at the time of subdivision." All R-ED zoned properties therefore contain a high proportion of some of, or all, of these sensitive resources: steep slopes, floodplains, streams, wetlands, stream or wetland buffers and tree cover. Secondly, given the geographical location of the R-ED zoned properties they are irregularly-shaped as a general rule, the lot lines following natural features, not surveyor lines. Some are improved with historic structures and their attendant landscape setting.

In this case, other than Mr. Hikmat's assertion that the Property was "extremely unique," Petitioner presented no evidence of the uniqueness of the R-ED zoned Property in this case compared to other R-ED zoned properties, such that the building envelope is uniquely

constrained. The building envelopes for all R-ED zoned properties are already constrained in order to protect sensitive and historic resources; for this reason, density is based on net acreage and the minimum lot size for a single-family dwelling is reduced to 6,000sf. Furthermore, assuming arguendo a specific RE-D zoned property may have inherent characteristics different from other RE-D zoned properties, a petitioner must produce probative evidence to suggest a nexus between these characteristics and/or the shape of the property and the practical difficulty warranting consideration of the requested variances.

In this case, Petitioner produced no probative evidence that the unique shape of the northern section of the Property - or the shape of the entire un-subdivided bisected Property - causes practical difficulty in complying with the applicable setbacks. Although Pebble Creek Drive "bisects" the Property, RE-D zoned properties are commonly bisected or otherwise constrained by streams, floodplains, and their associated buffers running through them. It is only because Petitioner proposes to subdivide the northern section of the Property into 4 buildable lots and one open space lot that a "practical difficulty" arises. The Hearing Examiner takes note here that the variance plan does not appear to indicate any use of the southern section of the Property as part of the 5-lot subdivision. In short, Petitioner, by virtue of creating five lots, is creating the difficulty of which it complains.

The Maryland Court of Appeals has addressed this very circumstance. In *Richard Roeser Professional Builder, Inc. v. Anne Arundel County*, 368 Md. 294, 793 A.2d 620 (2002), the Court cited *Randolph Hills, Inc. v. Montgomery County Council,* 264 Md. 78, 285 A.2d 620 (1972) in concluding that the re-subdivision of land is among those types of acts by an owner that are to

be considered self-created hardships.[3] Quoting from *Randolph Hills*, the Court said:

> For engineering reasons, economic reasons, or for some other reason the applicant, in laying out the subdivision, left as an outlot the particular ground which is the subject of this … petition…
>
> Its use for R-60 residences is precluded at this time because the applicant chose to lay out its subdivision in the particular manner that it did.
>
> **……** What is important is that the use of the particular ground in question is restricted because the applicant chose to develop as it did.
>
> The applicant has said, in effect, that although it was entitled to use this ground in question under the zoning code for R-60 development it chose not to do so, it now wants the County to permit the use of this land for some other purpose.

Id. at 316. In line with *Roeser*, the Hearing Examiner in BA 15-012V and 13-004V denied petitioners' requested setbacks because the proposed subdivision would cause either the resultant lot or dwelling to be to noncomplying to the HCZR, a self-created hardship.

In one instance only has the Hearing Examiner approved variances as part of a proposed subdivision and only on R-ED zoned property, because an exception may be made for "uniqueness" and practical difficulty caused by historical significance or unique architectural aspects, which the Court in *North* concluded is an inherent characteristic. In BA 14-020V, therefore, the Hearing Examiner granted structure and use variances related to a proposed subdivision to protect the view to and landscape setting of an historic structure on R-ED zoned property. In granting the variances, the Hearing Examiner was guided by the recommendations of the Historic Preservation Commission and the Department of Planning and Zoning (DPZ) (Exhibits 2 & 3), which were concerned the structures on several lots would be visible and

[3] While the *Randolph Hills* decision concerned a rezoning case, the Roeser Court found the same "act of commission" applies to variance cases.

encouraged the petitioner to reconfigure the lots to retain the historic barn. The variance plan submitted with the petition therefore showed an additional lot, for which DPZ recommended variances in order to protect the barn and the setting of the main historic house.

Also factoring into this decision is the Hearing Examiner's consistent practice of granting variances on individual properties to protect historic sites or structures. See, for example, BA 15-040V and BA 17-017V. The protection of historic site and resources is an express public policy in the HCZR, and one reason for the creation of the R-ED zoning district. In support of this policy, the Hearing Examiner does not set in hearings for properties requiring Historic Preservation Commission review until the completed review is provided to the Hearing Examiner.

In the last instance, Petitioner's testimony going to compliance with the 4 standards for granting a variance is inherently a fruitless exercise, when the requested variances are intended to support a five-lot subdivision. Hence, the strained logic of Mr. Hikmat's testimony going to compliance with the 4 variance standards. On the matter of compliance with the second, "neighborhood compatibility" test, Mr. Hikmat testified the reduced setbacks would not alter the essential character of the neighborhood or district in which the lot is located or substantially impair the appropriate use or development of adjacent property; or be detrimental to the public welfare by equating the proposed reduction in the 30-foot project boundary setback to 7.5 feet to the 7.5 foot side setback for a structure on an individual lot. However, the purpose of the 30-foot project boundary is to impose neighborhood compatibility through geographical distance and a transition between the flexible design afforded a small lot development on RE-D zoned property (hence the § 107.0.F-required Planning Board approval of a preliminary equivalent

sketch plan in a public meeting) and the immediate neighborhood. Assuming arguendo the law of variances might somehow apply to a subdivision, surely the combined setback reductions from 30 feet to 7.5 and 50 feet to 4 feet would be a major and unacceptable impact on the neighborhood.

Equally strained is Mr. Hikmat's testimony that a variance was granted for that portion of Pebble Creek Drive abutting the property, which he opined supported his testimony that the reduced setback for the driveway would not alter the essential character of the neighborhood, impair the use of adjacent property or be detrimental to the public welfare. Proof of compliance with the standards for granting variances is site-specific and factually based. The Hearing Examiner notes here that the Pebble Creek Drive variances were granted based in part on Finding No. 3, which identified the property to the north (the subject property) as improved with a barn and generally wooded. In like manner, he testified the proposed 5-lot subdivision is a reasonable use because many more lots were possible but for the improvements, existing uses, stormwater management, and floodplain.

This is an impermissible comparison. Pursuant to HCZR § 107.0, the number of lots in R-ED district is a net density calculation restricting the buildable area of R-ED zoned properties to protect sensitive environmental features. Additionally, there is no variance standard requiring the Hearing Examiner to consider gross versus net density when gauging Petitioner's proof that the requested variance is the minimum necessary to afford relief, and which would be an impermissible economic consideration.

Again, it all comes down to the zoning principle underlying the law of variances to accommodate reasonable use**.** The Hearing Examiner has accordingly granted variances for *individual* lots/properties in the R-ED district when the petitioner has demonstrated compliance with the four standards due to a property's irregular shape, size or topography. In BA 10-034V, for example, the Hearing Examiner granted a variance for a rear deck where the sloping topography of the rear yard and the small size of the RE-D zoned lot compared to others in the development made it impossible to build a deck elsewhere.

Were the Hearing Examiner to grant variances to this petitioner to fulfill its desire to subdivide the Property as a 5-lot development, the Hearing Examiner must do so for every similarly situated property owner desiring to subdivide their land regardless of the underlying zoning. Under such a system, variances would become the rule and the HCZR regulations, and as they particularly apply to R-ED zoned properties, would be rendered meaningless.

ORDER

Based upon the foregoing, it is this **8th Day of November 2018**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of GP North, LLC for variances to reduce the 30-foot project boundary setback for "structures in single-family detached developments" to 7.5 feet for a single-family detached dwelling, and to reduce the 50-foot project boundary setback for "other structures and uses" to 4 feet for a use-in common driveway in an R-ED (Residential: Environmental Development), is **DENIED.**

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

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Michele L. LeFaivre

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.

In accordance with C.B. 51-2016, § 1 (HCC Sec. 22.902 - Computation of time), if the deadline to appeal is a Saturday, Sunday, or holiday, or if the County offices are not open, the deadline shall be extended to the end of the next open County office business day.