

IN THE MATTER OF : BEFORE THE  
**PATRICK FINGLES** : HOWARD COUNTY  
Petitioner : BOARD OF APPEALS  
: HEARING EXAMINER  
: BA Case No. 15-039V

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**DECISION AND ORDER**

On December 7, 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 Patrick Fingles (Petitioner) for a variance to reduce the 30-foot structure and use setback for accessory structures 200sf or greater to 8 feet for a swimming pool and equipment in an RC-DEO (Rural Conservation-Density Exchange Option) Zoning District, filed pursuant to §130.0.B.2 of the Howard County Zoning Regulations (HCZR).

The Petitioner certified to compliance with the notice and posting requirements of the Howard County Code. The Petitioner was not represented by counsel. Patrick Fingles testified in support of the petition. Dr. Vladimir Doroshenko testified in opposition to the petition. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure.

Petitioner introduced into evidence the exhibit as follows.

1. Swimming pool construction drawing

Opposition introduced into evidence the exhibit as follows.

1. A December 7, 2015 letter explaining why the petition does not comport with the standards for granting a variance. Attached to the letter are five photographs.

**A Preliminary Matter**

At the conclusion of the hearing, the Hearing Examiner orally approved the variance petition, noting that pursuant to Hearing Examiner Rule. 10.6, the decision is not final until made in writing and delivered to the clerk. The Hearing Examiner made the oral decision based on Petitioner's testimony that there is no other reasonable location for the proposed swimming pool, owing to unique physical conditions and required sewerage and septic setbacks.

Upon further consideration of Opponent Vladimir Doroshenko's testimony that the subject property has no unique characteristics and a review of county sewerage and septic setbacks, the Hearing Examiner has determined to deny the petition. Petitioner has not met his burden of proof to produce evidence of physical uniqueness to support a showing of practical difficulty arising in complying strictly with the bulk provisions of these regulations.

**FINDINGS OF FACT**

Based upon the petition, the variance plan and the evidence presented at the hearing, the Hearing Examiner finds as follows:

1. Property Identification. The subject property is located on the west side of Underwood Road about 1,475 feet south of Old Frederick Road. It is located in the 3<sup>rd</sup> Election District, identified as Tax Map 0009, Grid 0014, Parcel 0341, Lot 3 and also known as 1734 Underwood Road (the Property).
2. Property Description. The 3.470-acre pipestem Property has four primary lot lines of irregular length. It is improved with a single-family detached dwelling and detached garage connected by a carport. These improvements are located in the northeasterly corner of the

Property. The Property is accessed from a long driveway off Old Frederick Road. The dwelling and garage have a north/south orientation, with their fronts oriented in a southerly direction. There is an upper deck attached to the rear of the dwelling. To the east of the deck is a patio and to the patio's east, a paved basketball court. Except for a cleared area for the residence, the Property is wooded. The improvements are located on the Property's higher elevation and from here the Property declines in elevation toward the west and south. On the westerly portion of the Property lines is a 20' drainage utility easement and a 25' wetlands buffer.

3. Adjacent Properties. Adjoining properties are zoned RC-DEO. To the north, Lot 1 of Parcel 341 is improved with a single family dwelling located about 230 feet from the proposed swimming pool and fronting Underwood Road. To the east, Lot 2 of Parcel 341 is also improved with a single family dwelling fronting on Underwood Road. Parcel 98, to the south and west, is a farm and ALPP property (property subject to a county preservation easement).

4. The Requested Variance (HCZR § 104.0.E.4.a.(3)(c)1). Petitioner is requesting a reduction in the lot line setback for accessory structures 200sf or greater in size from 30 feet to 8 feet for a swimming pool.<sup>1</sup> The pool would be located behind the dwelling next to the raised wood deck. It would be 36 feet in length and 18 feet wide. The pool would be accessed from a flagstone deck,

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<sup>1</sup> During the proceeding, the Hearing Examiner observed that the requested eight-foot variance measured only the distance from the actual pool structure (an accessory structure) but not the related equipment, which included an automatic cover located about five feet from the pertinent property line and a filter located two or three feet from this same lot line. However, the RC zoning district bulk regulations from which Petitioner seeks a variance applies to structures only, not accessory uses. Pursuant to HCZR § 104.0.E.5, the minimum use setback requirements for "[a]ll uses (other than structures) *not accessory* to farming or single-family detached dwellings shall be at least 50 feet from public street rights-of-ways and 30 feet from all other lot lines." (Emphasis added.) Swimming pool equipment is a use accessory to a single family detached dwelling. Therefore, no variances for these accessory uses are required.

which is not part of the variance petition.

5. Agency Comments. The Health Department's Bureau of Environmental Health submitted comments through Jeff Williams, Program Supervisor for the Well and Septic Program on November 18, 2015. The Health Department noted no objection to the variance, with the understanding that the pool location must meet all Health Department setbacks to the well and sewage disposal system/area for Health approval of the building permit. Mr. Williams further noted that the pool location shown on the variance exhibit meets all Health Department setbacks.

The Department of Planning and Zoning Development Engineering Division (DED) submitted comments through Chad Edmondson, the Bureau Chief, on October 21, 2015. DED noted the requested variance appears to have no adverse engineering impact on the adjacent properties, and that all improvements must comply with current Howard County design criteria, including APFO requirements and stormwater management.

6. Patrick Fingles testified to having investigated alternative sites for the proposed swimming pool because he did not want to go through the variance process. However, existing topography and the location of the septic reserve area prevented the pool from being located to the west side of the dwelling. He does not want to put the pool on the front lawn area. He introduced in evidence Petitioner Exhibit 1, a construction drawing for the swimming pool.

7. Vladimir Doroshenko testified to being the adjoining property owner of Lot #1, 1722 Underwood Road, which lies to the north of the proposed swimming pool. Dr. Doroshenko introduced Opposition Exhibit 1, a letter explaining why the requested variance is noncompliant

to the four standards for granting a variance and which Dr. Doroshenko read into the record. In his opinion, the Property has a nearly square shape—it is neither shallow nor irregularly shaped—and it has only a weak to moderate slope. He does not believe the Property is any different from surrounding properties, as even his own property has a weak to moderate slope on its western edge. Importantly, the proposed pool would be well observed from his property, which has trails laid out along the common lot line with Mr. Fingle's property. He also believes the pool could be reoriented or re-sized so as not to require a variance. The five photographs attached to Opposition Exhibit #1 depict the following.

- #1. The view from Mr. Doroshenko's property to the proposed location.
- #2. Another view from Mr. Doroshenko's property to the proposed location and showing the existing topography. At this point, the proposed location of the pool, the grade begins to slope moderately to the west.
- #3. The sloping grade in the area of the proposed pool, just beyond the dwelling's western façade.
- #4. The view from a shed on Mr. Doroshenko's property toward Mr. Fingle's residence.
- #5. The view from an upslope point on Mr. Doroshenko's property toward Mr. Fingle's residence.

8. In response to the Hearing Examiner's concern about potential trespass onto the adjoining property from residents or guests walking around the swimming pool, Mr. Fingles agreed to install a fence and landscaping along the rear property line.

9. The Hearing Examiner engaged in a spirited colloquy with Messrs. Fingles and Doroshenko about alternative locations and a reduced swimming pool size. Mr. Fingles contended the proposed location was the only viable site because of topographical conditions, setbacks from the existing septic area and the presence of propane tanks to the west of the house. He does not want to tear up the existing patio. The well is located in the northwest corner of the Property, just to the west of the basketball court. Mr. Fingles also discussed the variance petition assertion

of uniqueness based on the location of the dwelling in the back portion of the lot and the narrowness of the backyard.

### **CONCLUSIONS OF LAW**

The standards for variances are contained in HCZR § 130.0.B.2.a. This section authorizes the Hearing Examiner to grant a variance only if all of the following determinations are made. Based upon the foregoing Findings of Fact, and for the reasons stated below, the Hearing Examiner finds the requested variance does not comply with § 130.0.B.2.a.(1) and must therefore be denied.

**(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 standard is a two-part test. First, the property must manifest some unique physical condition, e.g., irregularity of shape, narrowness, shallowness, or peculiar topography. Second, 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 pipestem lot has irregular lot line lengths. As a rule, when the Hearing Examiner finds a Property has irregular lot lengths, this irregularity imposes a constraint on the buildable area, and this constraint creates practical difficulty. In this case, however, the irregular lot lengths have no bearing on the buildable area resulting in practical difficulties. The Property is neither narrow nor shallow. Additionally, as Dr. Doroshenko testified, and as seen in the photographs contained in Opposition Exhibit 1, the Fingles property has only a moderate slope and this topography is shared by the Doroshenko property. There are no unique topographical conditions causing practical difficulty.

Mr. Fingle's alternatively alleges the "narrow" backyard is a unique condition. However, the dwelling is set back more than 60 feet from the lot line and the rear deck, some 37 feet. This is not a narrow backyard. Rather, any alleged backyard "narrowness" is caused by the substantial improvements on this side of the dwelling—a deck, a basketball court and a patio. Importantly, the 'unique' aspect of a variance requirement may not refer to the extent of improvements upon the property, or upon neighboring property. *Id.* at 502, 638 A.2d 1175.

Mr. Fingles also claimed there was no other viable site due to well and septic setbacks, which, not being bulk regulations, are not grounds for a finding of uniqueness in support of

practical difficulty. Furthermore, upon review of the pertinent county setbacks for well and septic imposed by the Howard County Code, § 3.808, there appears to be alternative sites on the Property for a compliant swimming pool.<sup>2</sup>

Additionally, no practical difficulty can be found when a reasonable use can be made of property. Petitioner may continue to make reasonable use of the Property as his residence, which includes such substantial backyard features as a rear deck, a patio and a basketball court. This conclusion is consistent with the line of cases interpreting "practical difficulty" or "unnecessary

<sup>2</sup> HOWARD COUNTY CODE, § 3.808 (C). DISTANCES. The following minimum well and septic related distances shall be observed in locating the various components of the on-site sewage disposal system and any required replacement areas:

WELL TO SEPTIC TANK/SYSTEM/SEPTIC EASEMENT 100 FEET
WELL TO NEW FOUNDATIONS 30 FEET
WELL TO POOL 20 FEET
WELL TO DECK 10 FEET
WELL TO ROADS 15 FEET
WELL TO DRIVEWAYS 10 FEET
WELL TO LOT LINES 10 FEET
WELL TO ABOVE GROUND LIQUID PROPANE TANK 10 FEET
WELL TO BELOW GROUND LIQUID PROPANE TANK 100 FEET
WELL WATER LINE TO SEPTIC TANK/SYSTEM/EASEMENT 10 FEET
WELL WATER LINE TO POOL 10 FEET
WELL TO TENNIS COURT 10 FEET
SEPTIC EASEMENT TO HOUSE/SUNROOM 20 FEET
SEPTIC EASEMENT TO POOL 20 FEET
SEPTIC EASEMENT TO GARAGE 20 FEET
SEPTIC EASEMENT TO DECK/PATIO 5 FEET (NOT BUILT ON A FOUNDATION)
SEPTIC EASEMENT TO LIQUID PROPANE TANK 5 FEET
SEPTIC EASEMENT TO TENNIS COURT 10 FEET
SEPTIC EASEMENT TO LOT LINES 10 FEET
SEPTIC TANK TO HOUSE WITHOUT BASEMENT 10 FEET
SEPTIC TANK TO HOUSE WITH BASEMENT 20 FEET
SEPTIC TANK TO POOL 10 FEET
SEPTIC TANK TO GARAGE 10 FEET
SEPTIC TANK TO DECK 5 FEET
SEPTIC TANK TO LIQUID PROPANE TANK 5 FEET
SEPTIC TANK TO TENNIS COURT 5 FEET
STORM WATER INFILTRATION DEVICE TO WELL 100 FEET
STORM WATER NON-INFILTRATIVE DEVICE TO WELL 50 FEET
STORM WATER MANAGEMENT TO SEPTIC EASEMENT 25 FEET



hardship" as a denial of reasonable use standard. See *Belvoir Farms Homeowner Association, Inc. v. North*, 355 Md. 259, 734 A.2d 227 (1999) (discussing the interpretation of variance standards). See also *Citrano v. North*, 123 Md. App. 234, 717 A.2d 960 (1997) (holding board of appeals properly denied variance for a deck accessory structure in a 100-foot critical area, finding no unwarranted hardship where property was already developed with a single family dwelling and related improvements), citing *North v. St. Mary's County*, 99 Md.App. 502, 638 A.2d 1175 (1994) ("If reasonable use exists, generally an unwarranted hardship would not.")

There is no evidence supporting any features peculiar to the Property. The sole reason Petitioner desires to locate the pool within the 30-foot setback is for personal convenience. Variances may not be granted when the reason for the alleged practical difficulty is convenience. *North v. St. Mary's County*, 99 Md. App. 502, 513-515, 638 A.2d 1181. The petition does not comport with § 130.B.2.a.(1).

**(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.**

Because the requested variance is noncompliant to HCZR § 130.O.B.2.a.(1), the Hearing Examiner necessarily concludes the requested variance, if granted, would alter the essential character of the neighborhood or district in which the lot is located and substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare. The petition does not comport with HCZR § 130.B.2.a.(2).

**(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.**

There being no finding of practical difficulty caused by unique physical conditions, the Hearing Examiner is unable to make a finding as to compliance with HCZR § 130.B.2.a.(3).

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

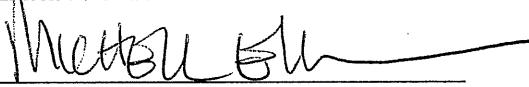
The proposed swimming pool is a reasonable size. Because it can be located elsewhere without need for a variance, the requested variance is not the minimum necessary to afford relief, contrary to HCZR § 130.B.2.a.(4).

**ORDER**

Based upon the foregoing, it is this **8<sup>th</sup> Day of January 2016**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Patrick Fingles for a variance to reduce the structure and use setback for accessory structures 200sf or greater from 30 feet up to 8 feet for a swimming pool and equipment in an RC-DEO (Rural Conservation-Density Exchange Option) Zoning District, is **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**

  
Michele L. LeFaivre

**Date Mailed:** 1/8/16

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.