IN THE MATTER OF	:	BEFORE THE
AMERICAN PAVING FABRICS, INC.	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 12-019V

DECISION AND ORDER

On January 7, 2013, 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 American Paving Fabrics, Inc., for variances to reduce the 50-foot structure and use setback from a public street right-of-way to 6.9 feet for an existing building and to zero ("0") feet for existing parking in an M-2 (Manufacturing: Heavy) Zoning District, filed pursuant to Section 123.D.2.a of the Howard County Zoning Regulations (the "Zoning Regulations").[1]

The Petitioner certified to compliance with Howard County Code notice and posting requirements. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure.

David Carney, Esquire, represented the property owner. Robert Vogel and Shawn McGrath testified in support of the petition. No one appeared in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

[1] The Technical Staff Report notes the petition's use of the term "trailer parking" with respect to the zero-foot variance request, which may imply only a 30-foot parking setback. Whether the requested relief is from the 50-foot use setback for equipment and material storage or for a 30-foot parking setback, the requested variance is for zero feet.

A. Enlarged map depicting easements relating to Transit Oriented Development (TOD) Zoning Board Case 1086M
B. Tax Map depicting subject property, proposed TOD site and O'Connor Drive
C. PlanHoward 2030 Functional Road Classification Map (Map 7-3)
D. Title documents for 6910 O'Connor Drive, May 7, 1999
E. Recorded Deed conveyed to Percontee Sand & Gravel Co. Inc., March 2, 1963
F. Recorded Termination of Easement, September 29, 1989
G1-6. Photographs of subject property
H. Decision and Order, Zoning Board Case No. 1086M (TOD rezoning), September 13, 2010
I. Letter from Margaret Brownley, 6930 O'Connor Drive
J. Site photographs
K. Equipment and vehicle list

FINDINGS OF FACT

Based upon the petition, the Technical Staff Report (TSR) and evidence presented at the hearing, the Hearing Examiner finds as follows:

1. Background Information. The TSR states DPZ issued the property owner a notice of zoning violation (CE 11-171) for development and landscaping not in compliance with approved Site Development Plan 88-070, including structure and uses within the 50-foot structure and use setback from an external street right-of-way. SDP 88-070 depicts two buildings on the site, what appears to be the existing office building and a future one-story building. According to the TSR, Buildings A (including the pole building addition) C and D were constructed. There are no recorded building permits for Buildings A, C, D (described in Finding No. 3) and the addition to Building A. Mr. Vogel testified the owner engaged him to prepare a new site development plan for the property after he visited the site with the property owner's counsel, Mr. Carney. This proposed site development plan is the Variance Plan submitted with the petition.

2. Property Identification. The subject property is situated on the south side of

O'Connor Drive about 450 feet north of MD 100. It is located in the 1st Election District and is identified as Tax Map 44, Grid 1, Parcel 1 and is also known as 6910 O'Connor Drive (the Property).[2]

3. Property Description. The 2.99-acre, generally rectangular Property is about 297 feet wide along the front property line, 418 feet deep along the northerly side lot line, 296 feet wide along the rear property line and 442 feet deep along the southerly side lot line. It is the site of a paving fabric contracting operation, which comprises a maintenance facility and truck, equipment and vehicle parking. It is improved with four buildings. A 77-foot by 25-foot metal storage building sited partially within the public street right-of-way (ROW) connects to Building A, a one-story, 32-foot by 55-foot metal storage building (the pole building) located in the southwesterly portion of the Property. A portion of the pole building will be removed such that it will be located 6.9 feet from the ROW. There are 12 parking spaces behind Building A. Beyond these parking spaces are a 24-foot by 60-foot building (Building C), and an 80-foot by 60-foot maintenance garage (Building D). These structures and uses are sited close to the southerly, side property line. Building B is a 28-foot by 48-foot office building located just to the northeast of the 12 parking spaces. A small shed behind Building A will be relocated or removed.

The Property is accessed via an approximately 40-foot wide curbed and gated driveway located about 60 feet from the southwesterly corner of the Property. A Howard County prescriptive ROW terminates about 35 feet north of the entrance driveway. From the driveway entrance, O'Connor Drive becomes a narrow, compacted dirt and gravel surface that runs

[2] The evidentiary exhibits variously refer to "O'Conner Road," "O'Conner Drive" and "O'Conner Lane."

generally parallel to the railroad tracks. Beyond the northern curb of the driveway entrance and running along the west (front) property line is a permeable surface parking area and the site of two proposed stormwater management areas.

4. Vicinal Properties. Adjoining properties are zoned M-2. The southern Parcel 7 is a one-acre lot improved with a residential structure. On the south side of Parcel 7, Parcel 2 is a 2-acre lot improved with a contracting operation. On the Property's north side is a large wooded parcel owned by the Baltimore and Ohio (B&O) Railroad. Parcel 4 on the rear side is an unimproved wooded lot owned by the State of Maryland. To the west, across O'Connor Drive, are the tracks of the CSX railroad. These tracks are elevated about 10 feet above the grade of the Property. According to Mr. Vogel, only CSX uses the dirt and gravel "road" surface beyond the entrance, for railroad maintenance.

5. Roads. O'Connor Drive has about 20 feet of paving within an existing 30-foot Howard County prescriptive ROW and an ultimate 50-foot ROW.

6. Water and Sewer. The Property is served by public water and sewer.

7. General Plan. PlanHOWARD 2030 designates the Property as a Growth and Revitalization Area on the Designated Place Types Map.

8. The Variance Requests. The Petitioner is requesting two retroactive variances from the 50-foot structure and use O'Connor Drive ROW setback, to 1) 6.9 feet for a portion of the existing pole building and 2) zero ("0") feet for existing trailer parking.

9. Mr. Vogel testified to the county's approval of an Environmental Site Plan for the Property. A site development plan for which there were no comments, except for the need for

the variances, has been submitted. The Variance Plan depicts a 30-foot Howard County prescriptive ROW from Deep Run to where it is located on the Plan, within the area of the Property frontage. The proposed landscaping along the frontage is also located within the ROW and in front of the parking area for which the zero-foot setback variance is requested.

10. In Mr. Vogel's opinion, the Property is unique for several reasons. The CSX railroad tracks are located about 40 feet from the front property line and there is a railroad spur just north of the Property. The Howard County prescriptive ROW easement also contributes to the Properties uniqueness. The imposition of new stormwater management regulations, which reduces the usable area of the Property by .55 acres, is also a basis for a finding of uniqueness. The property owners did not create the practical difficulties, because they had hired others to erect the buildings.

11. Through counsel, Petitioner introduced into evidence several documents intended to respond to the TSR's recommendation that the requested variances be denied, in part, owing to an anticipated need to extend O'Connor Drive to a 111-acre Transit Oriented Development (TOD) to the north in order to provide access to the Dorsey Marc Station on the other side of O'Connor Drive and south of the subject property. This TOD also has an access easement to O'Connor Drive, according to the TSR.[3]

12. Mr. Vogel does not believe TSR's statement of general need for the ROW is a valid

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3 The TSR makes this evaluation in response to a petition statement that O'Connor Drive ends at the sole entrance to the Property, there being no properties beyond that utilize the road for access. The TOD land area was a Coca Cola site intended to be used as a regional bottling site until the industry went downhill, according to Mr. Vogel.

basis for denying the requested variances. As he elaborated, Exhibit A, an enlarged map derived from the TOD (Oxford Square) rezoning application (ZB1086M), denotes three existing ROWs, but there is no ROW easement for the three properties (the subject Property, the Brownley property and Otter Point Investment) between the TOD development and the proposed pedestrian stair (or tunnel) access to the Dorsey MARC Station platform. At one time there was an easement, as represented by Exhibit E, a March 2, 1963 deed to Contee Sand and Gravel, referencing a right of a prior owner to use a 30-foot ROW of the then B&O Railroad, but this easement was terminated because the Brownleys did not want trucks running past their property. Exhibit F is the recorded easement termination (September 29, 1989). Mr. Vogel also stressed the absence of pedestrian access approval from either the Maryland Department of Transportation or the CSX Railroad. Additionally Mr. Vogel pointed out that the Zoning Board approved the TOD rezoning, without a mandate that there be pedestrian access between the TOD site and the MARC station access. He read into the record the Board's acknowledgement of the uncertainties relating to the feasibility and utility of the O'Connor Drive easement or an alternative easement between the subject property and the MARC station platform, as well as the uncertainties as to future Maryland Transit Authority or CSX approvals to permit pedestrian access across the railroad tracks. For this reason, he explained, the Board approved the rezoning subject to the condition that the Petitioner provides shuttle service to and from the MARC station via an alternative route. Zoning Board Decision and Order, ZB1086M (Page 29). Lastly, Mr. Vogel explained there is nothing in the Capital Plan pertaining to O'Connor Drive and no requirement to provide a ROW or extend the road in PLANHoward 2030, which would

provide some basis for the TSR's comments about the future need for the ROW.

13. Shawn McGrath testified that his brother acquired the Property in 1999. Before the company acquired the Property, it was an open field with a contractor's office. Mr. McGrath is a partner in business with his brother. The company does road rehabilitation and tar and chip work. The company works in several states and Maryland counties. The company was created to address a need in the road construction business and has been operating for some 20 years. The company employs about 60 persons and prior to the economic turndown, about 75 persons. At first, the company rented various storage spaces, which the business outgrew. It then rented about an acre from the previous property owner, and later purchased the entire property outright. Over time, the company hired subcontractors to construct the Quonset hut, the pole building used to house materials, the office, and the maintenance shop used for equipment and vehicle repair. Mr. McGrath, who has no experience with zoning matters or site development plans, assumed the subcontractors would take care of everything and obtain any needed permits. The company has never developed property. The buildings went up during the busy season, when the owners were not around.

14. Mr. McGrath discussed the intense use of the Property owing to the need to store, park and accommodate the loading of a broad array of vehicles, trucks, tractors, and hauling platforms. Exhibit K identifies 133 items of equipment and vehicles. Employees park some 25-30 personal vehicles on site. Some vehicles (trucks and truck bodies) have trailers attached and need special parking arrangements. Exhibits F, G and J. He disagreed with the TSR's comment that the Petitioner could use what it described as a large unimproved area to accommodate the

Pole Building and the trailer parking area. This area is not available because it is used in the winter when all the equipment comes in. During the work season, trucks use the area to swing around and load/unload tractor-trailers. The company already needs every inch of the site and the SWM/landscaping requirements will eat into this needed space.

CONCLUSIONS OF LAW

The standards for variances are contained in Section 130.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, I find the requested variances do not comply with Section 130.B.2.a.(1) through (4), and therefore must 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.

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).

In this case, Petitioner mounts its claim of uniqueness on the Property's proximity to the CSX railroad tracks, the rail spur to the Property's north, its location at the end of a road that will not be extended, and, as stated in the supplement to the petition, on the consequent isolated condition of the Property.[4] The supplement avers there is no need to have a 50-foot ROW due to these unique conditions. These circumstances, however, are external to the Property. Further, by Mr. McGrath's own admission, the operation already needs every inch of the site (less the land required for stormwater management and landscaping), which suggests to the Hearing Examiner that the need for the variances are driven by unique circumstances but by the size of the successful business.

To demonstrate uniqueness in Howard County, a petitioner must not only adduce evidence that the property *itself* has an inherent characteristic not shared by other properties in the area, with the result that practical difficulties or unnecessary hardships arise from the application of the bulk regulations. Here, there no evidence of record as to some special circumstance of the property itself. Nor has the Petitioner averred any alleged hardship or practical difficulty arising from the application of the bulk regulation(s) to some unique physical condition, such the regulations have a different impact on it than on adjoining property.

Because the Petitioner has not met its burden of demonstrating uniqueness, the Hearing Examiner cannot find a practical difficulty or unnecessary hardship created for the Petitioner. Further, as discussed in relation to the third standard, the actual hardship imposed, the existing encroachment into 50-setback is a traditional self-created hardship situation.

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[4] Zoning Board Decision and Order, ZB1086M, Finding No. 4.b states the railroad spur is unused (Pg. 4).

(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.

Mr. Vogel testified to the challenge of proving compliance with this criterion, owing to Property's isolation and the few developed adjacent properties. The TSR similarly recognizes the challenge of evaluating the requested variances for compliance with this standard. It also points to the absence of evidence that existing structures encroach into road setbacks, observing that the structures on these properties are set back further from O'Connor Drive than those on Petitioner's property.

Petitioner defined the neighborhood as bounded by the CSX railroad tracks, Route 100 and by the CSX, B&O, and State of Maryland properties. The only developed properties within this neighborhood are the southerly Brownley residence and the contracting operation, where the structures are set back further from O'Connor Drive than those on Petitioner's Property. Petitioner presented no evidence that any structure or use on the two adjacent properties is located within the ROW setback.

In the Hearing Examiner's view, authorizing the requested 6.9 and zero foot setbacks from the O'Connor Drive ROW would not appear to have an appreciable effect on the character of the neighborhood. On the other hand, the Hearing Examiner concludes the granting of the variances has the very real potential to impair the appropriate use or development of adjacent property and be detrimental to the public welfare. The adjoining M-2 zoned Brownley property is currently in residential use, but given the character of the neighborhood, it is highly unlikely to be used as such in the future. This conclusion finds support in the fact that PlanHOWARD

2030 designates the "neighborhood" as a Growth and Revitalization Area. Were I to grant the variances, the future development of this property could be impaired. The petition does not comply with Section 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.**

The "self-created hardship" rule commonly applies when an owner has already constructed something on the property in violation of the applicable zoning regulations, then requests relief from the regulation in order to avoid the hardship of removing the structure. See Cromwell v. Ward, 102 Md. App. 691, 651 A.2d 424 (1995); Evans v Shore Communications, 112 Md. App. 284, 685 A.2d 4554 (1996); and Ad+Soil, Inc. v. County Commissioners of Queen Anne's County, 307 Md. 307, 513 A.2d 893 (1986). Because the practical difficulty in these cases arose from actions of the Appellant and landowner, and not because of the disproportionate impact of the zoning regulations on the particular property, the cases failed the test for variances.[5] Whether the hardship was inflicted intentionally or unintentionally is irrelevant; if it was the result of the owner's action, the variance must be denied. Salisbury Board of Zoning Appeals v. Bounds, 240 Md. 547, 214 A.2d 810 (1965); Cromwell, 651 A.2d at 441.

In this case, to the Petitioner's detriment, the circumstances generating the need for the two variances are self-created. Although there was testimony that the Petitioner and property

[5] The self-created hardship rule, while listed as the third variance criteria in the Section 130.B.2.a, is actually a complement to the first criterion. If the hardship is self-created, then it is not the result of a unique physical condition of the land and therefore fails the test of Section 130.B.2.a.(1) as well.

owner did not create the situation, the offending improvements were done on their behalf, and under their control.

The Hearing Examiner recognizes that correcting the encroachments may be a greater financial undertaking than if the Petitioner were allowed to maintain them within the setbacks, but I may not take the cost of the work into consideration. "Hardship is not demonstrated by economic loss alone. It must be tied to the special circumstances [of the land], none of which have been proven here. Every person requesting a variance can indicate some economic loss. To allow a variance anytime any economic loss is alleged would make a mockery of the zoning program." Cromwell v. Ward, 102 Md. App. 691, 715, 651 A.2d 424 (1995), quoting Xanthos v. Board of Adjustment, 685 P.2d 1032, 1036-37 (Utah 1984).

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

The testimony indicates that a portion of the pole building will be removed to minimize encroachment into the setback. The parking/use setback must be zero feet to accommodate the difficult truck maneuvering. The petition accords with Section 130.B.2.a.(4).

ORDER

Based upon the foregoing, it is this **6th day of February 2013,** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of American Paving Fabrics, Inc., for variances to reduce the 50-foot structure and use setback from a public street right-of-way to 6.9 feet for an existing building and zero ("0") feet for existing parking in an M-2 (Manufacturing: Heavy) Zoning District, is **DENIED**.

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.