

IN THE MATTER OF : BEFORE THE
JOSHUA ANDERSON : HOWARD COUNTY
Petitioner : BOARD OF APPEALS
 : HEARING EXAMINER
 : BA Case No. 17-017V

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DECISION AND ORDER

On September 25, 2017 and February 23, 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 petition of Joshua Anderson (Petitioner) for variances to reduce the required 75-foot setback from an external public street right-of-way imposed by HCZR § 107.0.D.4.a to 15 feet and the required 7.5-foot side setback imposed by HCZR § 107.0.D.4.d(1)(c) to 4.7 feet for a proposed single-family detached dwelling 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.

David A. Hall, Esq. represented the Petitioner. Joshua Anderson testified in support of the petition. No one appeared to testify in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

1. Amended residential variance petition
2. Amended variance plan, February 14, 2018

A Preliminary Matter

The Historic Preservation Commission (HPC) has approval or advisory jurisdiction over certain "development" applications in an historic district, a structure listed on the historic sites inventory, and other historic resources, per Howard County Code § 16.600 et seq.¹ The Hearing Examiner has jurisdiction to grant variances from certain zoning district bulk regulations, per HCZR § 130.0.B.2. No law or regulation, however, controls which authority reviews an applicable proposed development first.

Consequently, when the Hearing Examiner hears a variance petition for property in a historic district or involving an historic structure resource before HPC review, Protestants routinely oppose the petition because of historic preservation concerns, which are beyond the Hearing Examiner's jurisdiction. Additionally, the Hearing Examiner may grant a variance petition, but the HPC may then ask the petitioner to redesign the development project. A redesign might obviate the need for the approved variance or require the petitioner to seek new variances.

Even more, HCZR § 130.0.B.2(a)(1)'s threshold "uniqueness" standard bars the Hearing Examiner from granting a variance when the property itself has no unique physical characteristics, but Maryland common law recognizes a limited qualification to this uniqueness test for properties of historical significance and for structures with unusual architectural characteristics, as discussed in the Conclusions of Law section below. Thus, a positive HPC

¹ The Hearing Examiner here uses the HCZR § 103.0 definition of "development": Develop or Development: This term refers to the establishment of a principal use on a site; a change in a principal use of a site; or the improvement or alteration of a site by construction, enlargement, or relocation of a structure, the provision of storm water management or roads, the grading of existing topography, the clearing or grubbing of existing vegetation, or any other non-agricultural activity that results in a change in existing site conditions.

decision or advisory comment may provide factual support on common law "uniqueness grounds" for the granting of a requested variance.

In the Hearing Examiner's view, the vagaries of this administrative review and permit process are inefficient and ill-serve petitioners. Late in 2016, then, the Hearing Examiner adopted an internal administrative policy requiring petitioners to appear before the HPC first, when applicable, and to provide the HPC decision or advisory comments before or at the Hearing Examiner hearing. This policy applies to all applications over which the Hearing Examiner has jurisdiction (including conditional uses, expansion of nonconforming uses, etc.)

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 on the south side of Old Columbia Pike about 910 feet northwest of Hunter Road. It is identified as Tax Map 0025A, Grid 0013, Parcel 261, and the address is 3825 Old Columbia Pike (the Property). By letter of October 6, 2008, Department of Planning and Zoning (DPZ) Public Service and Zoning Administration Division Supervisor Bob Lalush informed Petitioner the Property was a valid buildable lot for which it would grant authorization on a single-family-detached dwelling permit subject to the structure being compliant with all bulk regulations.

2. Property Description. The triangular-shape, 0.079-acre Property is located in the Ellicott City Historic District. It is improved with a small granite dwelling with a second-story front porch located in the northeast corner of the lot close to Old Columbia Bike. On the northerly side of the dwelling is an "L" shape retaining/foundation wall, steps, walkway, and outdoor

patio/fireplace under construction.

3. Vicinal Properties. The RE-D zoned Parcel 133 to the north across Old Columbia Pike is improved with a single-family detached dwelling. The R-VH (Residential: Village Housing) Parcel 260 to the northeast is the site of an historic house. The southern, RE-D zoned Parcel 39 is also the site of an historic house.

4. Historic Preservation Commission Review. The HPC on November 2 and December 7, 2017, convened a hearing on Mr. Anderson's HPC Case 17-76 application for a certificate of approval for new construction, as amended. On February 1, 2018, the HPC issued a decision and order approving alternate design "Scheme C." Staff recommended the revised, and now angled, proposed dwelling side porch be squared off. Staff asked Mr. Anderson "if he had considered requesting a variance from the Hearing Examiner for the 7.5 feet rear/side setback in order to create a more regular building shape and roofline and he said that did not think that he could prove hardship in the matter" (Part "C" Staff Report, pgs. 4-5.) On staff recommendation, the HPC approved Scheme C subject in part to the porch being squared off or removed (pg. 6).

5. The Revised Variance Requests.² At the February 23, 2018 continuation hearing, Petitioner introduced into evidence a revised petition and variance plan dated February 14, 2018 (the Revised Plan.) The Revised Plan shows the HPC-approved squared off side porch, for which

² The revised petition and plan requested a variance from the 20,000sf minimum lot size imposed by HCZR § 107.0.D.2. DPZ, however, confirmed the substandard sized lot as a legal buildable property. Without this confirmation, HCZR § 130.0.B.2 would have barred the development of the property because this section expressly prohibits variances from minimum lot size requirements. Additionally, the original petition and plan requested a reduction in the 25-foot rear setback imposed by § 107.0.D.4.d(l)(c) to 7.5 feet. The triangular lot having no rear lot line, Petitioner in consultation with the county set a 25-foot setback line from the back corner of the lot, which indicated no variance relief from this section was necessary.

Petitioner is requesting a new variance. Petitioner is therefore requesting two variances to construct a single-family detached dwelling on the Property.

- Reduce the required 75-foot setback from an external public street right-of-way imposed by HCZR § 107.0.D.4.a to 15 feet for a single-family detached dwelling. This setback is similar to nearby dwellings.
- Reduce the required 7.5-foot side setback imposed by HCZR § 107.0.D.4.d(1)(c) to 4.7 feet for a side porch per HPC.

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 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 requests comply with HCZR §§ 130.0.B.2.a.(1) through (4), and therefore may be granted.

(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.

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. 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” 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) (emphasis added.)

In this case, the Property has a triangular shape and is located in the Ellicott City Historic District. The Hearing Examiner concludes these are unique conditions resulting in practical difficulties in complying with the front and side setbacks.

(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.

The two requested variances will be in character with the neighborhood and zoning district, where historic dwellings sit closer to the road. The porch variance is in keeping with the architectural characteristics of other historic dwellings in the Ellicott City Historic District. The variances will not substantially impair the appropriate use or development of adjacent property or 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.

Petitioner did not create the practical difficulties or hardships.

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

The requested variances are for a reasonably sized dwelling in an historic district and are therefore the minimum necessary to afford relief.

ORDER

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

That the petition of Joshua Anderson for variances to reduce the required 75-foot setback from an external public street right-of-way imposed by HCZR § 107.0.D.4.a to 15 feet and the required 7.5-foot side setback imposed by HCZR § 107.0.D.4.d(1)(c) to 4.7 feet for a proposed single-family detached dwelling in an R-ED (Residential: Environmental Development) zoning district is **GRANTED**.

Provided, however, that:

1. The variances shall apply only to the uses and structures as described in the revised petition and as depicted on the revised, February 14, 2018 Variance Plan and not to any other activities, uses, structures, or additions on the Property.
2. Petitioner shall obtain all required permits.
3. Petitioner shall comply with all state and local laws and regulations.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER



Michele L. LeFavre

Date Mailed: March 13, 2018

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.