

IN THE MATTER OF : BEFORE THE
DORSEY OVERLOOK, LLLP : HOWARD COUNTY
Petitioner : BOARD OF APPEALS
: HEARING EXAMINER
: BA Case No. 18-004V

.....
DECISION AND ORDER

On May 7, 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 Dorsey Overlook, LLLP (Petitioner) for variances to reduce the 30-foot use setback from an arterial public street right-of-way (ROW) to 11.25 feet for a private road and to reduce the 50-foot setback from the project boundary to 20 feet for a proposed apartment building in an R-APT (Residential: Apartments) zoning district, filed pursuant to § 130.0.B.2.a of the Howard County Zoning Regulations (HCZR).

The 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. Tom Coale, Esquire, represented the Petitioner. Robert Vogel testified in support of the petition. No one appeared in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

1. Concept Plan showing site design revisions in response to Design Advisory Panel recommendations

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 2nd Election District on the north side of Old Route 108, about 480 feet southwest of Old Annapolis Road. The multi-property site is identified as Tax Map 0030, Parcels 51, 52, 53, 54, 67, 266, and Lots 12-34 and known as 9562, 9566, 9570, 9580, 9584, 9590, and 9598 Old Route 108 (the Property).

2. Property Description. The 4.649-acre irregularly shaped Property is currently improved with single-family detached dwellings and other uses and structures located along Old Route 108. Access to the Property is provided from Old Route 108 via Old Annapolis Road. Old Route 108 runs in a southerly direction and turns to the west, paralleling (new) Route 108 (Clarksville Pike). A concrete retaining wall runs along the south side of Old Route 108 parallel to Clarksville Pike. There is currently also a separate means of access for the westernmost lot abutting Columbia Road. In the northern portion of the Property is an intermittent stream, woodlands, and associated wetlands.

3. Vicinal Properties. The Property is relatively isolated. Parcel 65 to the north is the site of Dorsey Crossing, a townhouse development zoned R-A-15 (Residential: Apartments). Immediately adjoining the Property's northern lot lines on Parcel 65 is the Dorsey Crossing stormwater management facility (SWMF). Further east, Parcel 65 is a heavily landscaped, wooded area. To the north of this landscaped area are the residences of Dorsey Crossing closest to the proposed development. A small section of Parcel 65 also runs along the Property's eastern lot line and is here a Dorsey Crossing Open Space Lot. Parcel 65's eastern lot line abuts Old Route 108. To the south is MD Route 108. To the west is Columbia Road.

4. The Variance Requests (§§ 112.D.4). The proposed use underlying this variance

petition is a 4-story 133-unit age-restricted apartment complex in an R-APT zoning district, where the use is permitted as a matter of right. The Design Advisory Panel reviewed the project on April 11, 2018. Mr. Vogel testified to Petitioner redesigning the "L-shaped" structure to a "U-shape" and making other site changes in response to DAP comments and a subsequent meeting with the Department of Planning and Zoning. Petitioner Exhibit 1. However, this redesign does not alter the variance plan submitted with the petition, so the requested relief is unchanged.

Variance 1. Reduce the 30-foot use setback from an arterial public street ROW imposed by § 112.0.1.D.4.a(2) to 11.25 feet for a private road use. This setback concerns the conversion of the now-public Old Route 108 to a private road. Howard County has requested the closing of this section of a public road.

Variance 2. Reduce the 50-foot project boundary setback imposed by § 112.0.1.D.4.c.(2)(a) to 20.0 feet for an apartment building. This setback applies to the 20-foot setback along the east side boundary.

5. Agency Comments. By county law, the Department of Planning and Zoning (DPZ) does not issue a technical staff report or make recommendations for variance petitions on residentially zoned property. Agency comments are generally advisory and pertain to post-Hearing Examiner decision stages of development, except where the comments bear on compliance with the HCZR. The Hearing Examiner did not receive comments on this petition before the hearing.

CONCLUSIONS OF LAW

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 variance complies with §§ 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. Section 130.0.B.2.a.(1). 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. *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).

Here, the presence of a stream and associated wetlands and buffers, together with the 40' fall in the northern section of the Property and its irregular shape are unique physical conditions causing practical difficulty in complying with the zoning district's bulk regulations. The extent of these physical conditions compel the need for the retaining wall variance and push the building envelope to the south and east. The petition accords with § 130.0.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.

The closest residence in Dorsey Crossing is some 100 feet from the nearest unit in the proposed development. There is no evidence that the requested variances would alter the essential character of the neighborhood or district or impair the use of development of adjacent property, the variances will increase the public welfare. The petition complies with § 130.0.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 Petitioner did not create the practical difficulties, which are attributable to unique physical conditions. The petition complies with § 130.0.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 variances are for a reasonable use of the Property, an apartment complex. The petitioner complies with § 130.0.B.2.a(4).

ORDER

Based upon the foregoing, it is this **9th Day of May 2018**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Petition of Dorsey Overlook, LLLP, for variances to reduce the 30-foot use setback from an arterial public street ROW to 11.25 feet for a private road use and to reduce the 50'-foot project boundary setback to 20.0 feet, for an apartment building in an R-APT (Residential: Apartments) zoning district, is **GRANTED;**

Provided, however, that:

1. The variances shall apply only to the uses and structures as described in the petition as depicted on the Variance Plan and not to any other activities, uses, structures, or additions on the Property.
2. The Petitioner shall obtain all required permits.

**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.