

IN THE MATTER OF	:	BEFORE THE
ELECTRIC GUARD DOG, LLC	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 18-024V

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DECISION AND ORDER

On January 22, 2019, 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 Electric Guard Dog, LLC (Petitioner) for two fence variances in an M-2(Manufacturing: Heavy) zoning district, filed pursuant to § 130.O.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 Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Cindy Williams testified in support of the petition. No one appeared in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

1. Department of Inspections, Licenses and Permits commercial electric permit

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 Dorsey

Run Road, about 500 feet west of Sharewood Drive. It is located in the 6th Election District, identified as Tax Map 0048, Grid 003, Parcel 5, and known as 8005 Dorsey Run Road (the Property).

2. Property Description. The 2.46-acre Property is generally rectangular except for the modestly acute northerly lot line. The Property is the site of a metal recycling business comprising an office/warehouse building and outdoor storage areas along the southern side of the Property. A shared driveway off Dorsey Run Road provides access and leads to a 22-space paved parking lot to the west and southwest of the building. A 6-foot high chain link perimeter fence runs along the northwesterly Dorsey Run Road lot line, the north/southeasterly lot line, just inside the tree line along the southerly lot line, and along the southwesterly entrance/parking areas. Some 12 inches in from this perimeter chain link fence is the 10-foot high wire electric security fence for which Petitioner is seeking retroactive variances.

3. Vicinal Properties. Adjacent properties are also zoned M-2 and are improved with commercial/office uses.

4. Roads. Dorsey Run Road has two travel lanes and the speed limit is 35mph. According to the Howard County Police Department, traffic enforcement section traffic volume on Dorsey Run Road from Rt. 32 to Waterloo Road was 10,264 annual average daily traffic trips as of 2018.

5. The Requested Variances. Petitioner is requesting two variances.

Variance #1. A reduction in the 50-foot minimum structure setback from a public street ROW imposed by HCZR § 123.0.D.2.a up to zero (0.0) feet and along the Dorsey Run Road ROW.

Variance #2. A reduction in the 30-foot minimum structure setback for fences adjoining parking spaces imposed by HCZR § 123.0.D.2.a to 10 feet at the location of three parking spaces in the southwesterly corner of the Property (the Dorsey Run Road/shared driveway intersection area.)

The petition states the variances are necessary because "[t]he location of the property and the high value targets secured in the yard are open invitation to the criminal class. The only system that PREVENTS crime and break-ins is the Electric Guard Dog security fence." In the section explaining what the requested variances are the minimum necessary to afford relief, the petition states as follows.

....other security measures have been tried without success. The zoning code requirement that the height be limited to 6' feet or 50' feet back will compromise the security of the business allowing the business to be victimized all over again with unsustainable losses and damages. The height must be ten feet to be an effective deterrent.

The business at this location is a metal recycler with highly desirable supplies, inventory and equipment which attract thieves. Other security measures have not kept out the thieves. The security fence system is the only proved, effective deterrent. For the security system to be the effective deterrent. It must be 10 feet in height. Lower heights have been tried but they do not keep out the thieves.

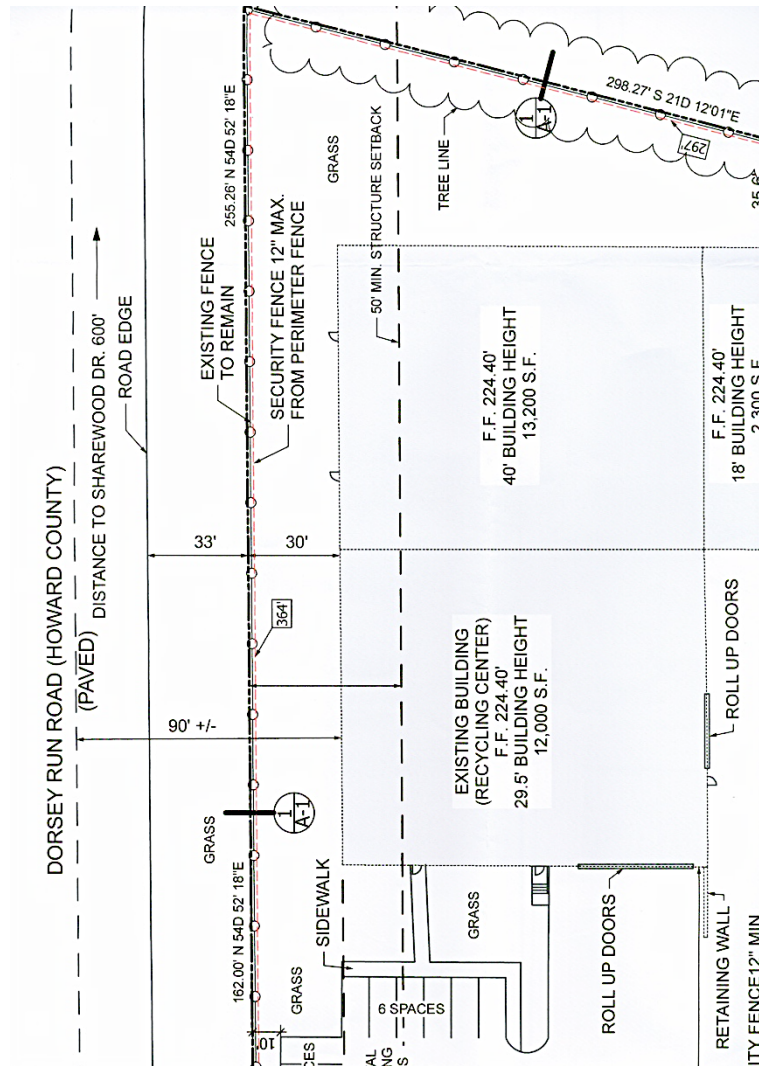
6. Cindy Williams testified to the TSR incorrectly identifying the fence variance petition as a request to replace the existing 6-foot chain link fence with a 10-foot fence. As the Hearing Examiner understood Ms. Williams' testimony in reference to Exhibit 1, the Department of Inspections, Licenses, and Permits (DILP) issued the Property Owner a permit for a commercial condominium/ low voltage fence charger, with the understanding that the permit was just to electrify the existing chain link fence. However, when a DILP inspector performed an on-site review of the "charger," the county determined the addition of a wholly separate electrified, 10-foot tall "charger" was a "fence structure" located within certain M-2 setbacks; hence the instant variance petition. She also testified that DPZ staff informed her DILP should not have issued the permit because the 1986 approved site plan would first have to be updated through the red-line

process before the issuance of the building permit. Lastly, she explained the security fencing is needed because the business has problems with thieves.

7. The Hearing Examiner takes notice that Ms. Williams introduced into evidence a second exhibit, but inadvertently forgot to hand it to the Hearing Examiner after questioning. This exhibit was a photograph of the existing fencing, the combined chain link/10-foot electric fence, the details of which are shown on the Variance Plan.

8. The Hearing Examiner's Rule of Procedure 10.4 Referral to DPZ. During the proceeding, the Hearing Examiner realized the Variance Plan showed the 50-foot structure setback running through the existing structure, an indication that this section of Dorsey Run Road might have been widened after DPZ had approved the site development plan (SDP) for the Property and if so, may bear on the Hearing Examiner's consideration of the variance petition, which Technical Staff recommended be denied. Technical staff made no reference to the setback location in its report. The location of this setback is shown on pg. 5. After the hearing, the Hearing Examiner reviewed the 1986 SDP for the Property (SDP-86-255), which showed the building sitting directly on the 50-foot minimum structure setback from a public street ROW imposed by now HCZR § 123.0.D.2.a. Consequently, pursuant to Hearing Examiner Rule 10.4, the Hearing Examiner on February 27, 2018 requested DPZ to update the record of this case regarding: 1) the accuracy of the variance petition plan's placement of the 50-foot structure setback from an external public street right-of-way and 2) if the road was widened, whether any resultant

noncompliance supported the grating of the variance.¹



The Existing Location of the 50-foot Setback

¹ Rule 10.4. Referral to DPZ. The hearing examiner may at any time before making a decision refer an issue in a case to DPZ for the purpose of clarifying or updating the record. DPZ's response will be in writing. Before making a decision, however, the hearing examiner will afford all parties an opportunity to comment on or challenge DPZ's response.

DPZ in its March 11, 2019 response stated the petition property lines and setbacks are correct, that a 25-foot wide portion of the property along Dorsey Run Road was dedicated to Howard County in 1986, and that the road was widened (unknown date). It also stated the principal building met the 50-foot setback when approved through SDP-86-255; that under HCZR § 128.0.B, this building is a noncomplying structure but that the existing recycling center, an M-2 permitted use is not a nonconforming use. DPZ further stated the 10-foot high fence was constructed without approval in 2018 and is not a noncomplying structure. A building permit for the fence is pending on the variance petition.

Petitioner Electric Guard Dog, through Donald McLellan, stated in its March 12, 2019 response to DPZ that the county had changed its years-long process building permit process as applied to the fence, which in the past required only a low voltage electrical permit with a final inspection at the end of the job/installation. Petitioner obtained a permit before starting work. After completing the installation, an inspector on final inspection informed the fence company it had not followed the "correct process" and, consequently, no building permit should have been issued based on the "new process" i.e., proceeding first through a red-line revision process before any issuance of a building permit. The submitted red-line revision was rejected due to noncompliance with the setbacks; hence the variance petition.

CONCLUSIONS OF LAW

I. Background Issues

A. The Matter of the Department of Inspections, Licenses & Permits Having Issued a Permit

In Ms. William's view, the fact of DILP having issued a permit for the structure – even in error - supports the granting of the variance. It does not. The Hearing Examiner explained during the proceeding that Ms. Williams through this argument is effectively invoking the legal principle of an "equitable estoppel affirmative defense." The Hearing Examiner discussed this legal defense principle in BA 596-D (September 10, 2007) as applied to the property owners' appeal from a notice of violation (NOV) concerning a six-board wooden fence for which DPZ code enforcement staff issued the owners an NOV, concluding it was a "closed" fence under then HCZR § 128.A.9.b and therefore encroaching into the applicable setback, even though DILP had issued a permit for the fence.² During the BA 596-D appeal hearing, the property owners argued their fence contractor had performed due diligence to determine no permit was required for a fence less than six feet tall (without discussing the design of the fence) and that the NOV should be dismissed and the fence be allowed to remain in its location because they relied on DILP's issuance of the permit. In denying/dismissing the petition, the Hearing Examiner found that the affirmative defense equitable estoppel principle does not apply to a DILP permit being issued in error. (BA 596-D, pgs. 6-7).

In claiming the County provided their contractors and themselves with inaccurate and insufficient information, the Appellants are effectively invoking the doctrine of equitable estoppel as an affirmative defense. In the zoning context, the principle of equitable estoppel holds a local government exercising

² County law no longer authorizes appeals from a notice of zoning violation.

its zoning powers will be estopped (precluded from taking action) when a property owner, relying in good faith on some act or omission of the government, has made "such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired." See *Sycamore Realty v. People's Counsel*, 344 Md. 57, 64 (1996). The Appellants would argue that under this doctrine, the County should not enforce the zoning violation because they relied on the County's act of omitting to inform them about the relevant regulations.

In this case, however, an equitable estoppel defense is not available to the Appellants. As Maryland's highest court has held, "[e]veryone dealing with officers and agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled by their acts when done without legal authority." In other words, the doctrine of equitable estoppel "cannot be... invoked to defeat the municipality in the enforcement of its ordinances, because of an error or mistake committed by one of its officers or agents which has been relied on by the third party to his detriment." See *Marzullo v. Kahl*, 366 Md. 158, 783 A.2d 169 (2001) (citations omitted).

For this same reason, the issuance of a DILP permit for the subject fence structure does not support the granting of any relief from the HCZR bulk regulations requirement through a variance request.

DPZ's and the Petitioner's reference to the status of the DILP permit in their Rule 10.4 responses are likewise legally irrelevant to the Hearing Examiner's evaluation of the petition for compliance with HCZR § 130.B.2.a.(1)-(4). In legalese, "relevant evidence" is evidence and testimony that relates directly to the Petitioner's need to prove compliance with HCZR § 130.B.2.a.(1)-(4). To be "relevant" the testimony and evidence must directly relate to these four standards.

Furthermore, the Petitioner did not act in good faith when applying for the permit because it represented to DILP in its commercial electrical permit scope of work description (Exhibit 1) that the permit was for a "commercial condominium/install *low voltage fence charger*," not a 10-foot high fence (emphasis added.)

B. The Matter of a Need for an Approved Red-Line SDP Revision

Although Ms. Williams testified about the "red-line SDP revision" issue and DPZ and the Petitioner both referenced the predicate need for the revision in their responses to the Hearing Examiner's Rule 10.4 request, it, too, is not an evidentiary factor to be considered in a variance petition.

C. The Matter of a Relocated Property Line & Shifting ROW Setback

The sole background legal issue in this petition, then, is whether the altered property line, and hence, the new location of the 50-foot ROW setback, and, if pertinent, its effect on the parking space setback, bears on the evaluation of the variances for compliance with the four standards contained in HCZR § 130.0.B.2.a. It does. The Hearing Examiner's recent BA-028V decision and order explains why.

The subject property in BA 17-028V, an M-2 zoned property further down the road from 8005 Dorsey Hall Road, sits at the intersection of Dorsey Run Road and Montevideo Road. Here, the widening of Dorsey Run Road along the subject property's frontage caused the 50-foot setback to shift to the center of the Property. The Hearing Examiner granted the requested variance petition to reduce the 50-foot ROW setback from Dorsey Hall Road because the road widening reduced the lot size and usable buildable area on an already small lot, a unique condition causing practical difficulty because no use or structure could be located on half of the subject property. Technical staff also recommended denial of this petition without considering the effect of the altered property line on the 50-foot setback. For this same reason, as evaluated

in Part II, the new location of the 50-foot setback or the parking space setback results in a unique condition causing practical difficulty in complying with the HCZR.

II. Evaluation of the Requested Variances

The standards for variances are contained in HCZR § 130.B.2.a. Pursuant to this section, I 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 comply with §§ 130.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.

Compliance with this first criterion is a two-part test. 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, the loss of land area along Dorsey Run Road for the otherwise generally rectangular Property, reduced the square footage of a property that is smaller than the vicinal properties that were consolidated or redeveloped with modern industrial uses. For this reason,

a variance would be needed for any new use or structure along this section of Dorsey Run Road.

The petition accords with § 130.B.2.a(1). The Hearing Examiner notes here that the property owner's interest in deterring theft is not cause for granting the variances.

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.

There is no evidence of the variances altering the essential character of the neighborhood or district in which the lot is located, substantially impairing the appropriate use or development of adjacent property, or being detrimental to the public welfare in accordance with § 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 Petitioner/property owner did not create the practical difficulties or hardships, in accord with § 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 requested variances are for a reasonably-sized, wired, open, unobtrusive perimeter fence, and therefore the minimum necessary to afford relief. The petition accords with § 130.B.2.a(4).

ORDER

Based upon the foregoing, it is this **25th Day of March 2019**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Electric Guard Dog, LLC, for variances to reduce the 50-foot minimum structure setback from a public street up to zero (0.0) feet and to reduce the 30-foot minimum structure setback for fences adjoining parking spaces to 10 feet, in an M-2(Manufacturing: Heavy) zoning district, are hereby **GRANTED**.

Provided, however, that:

1. The variances shall apply only the structures described in the petition and shown on the variance plan.
2. Any red-line site development plan revision shall contain a note referencing what this decision and order approved. This note shall also list these four approval conditions.
3. Petitioner shall obtain all required permits.
4. Petitioner shall comply with all federal, state, and county laws and regulations.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



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.