

IN THE MATTER OF	:	BEFORE THE
<b>Alejandro Rodriguez</b>	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 23-012V

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**DECISION AND ORDER**

On August 15, 2023, 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 Alejandro Rodriguez (Petitioner) for (1) a variance to reduce the minimum front yard structure and use setback, on lots less than 3 acres in size, on the northern property boundary, from 50' to 21', a reduction of 29', to legalize a full court basketball court, (2) a variance to reduce the minimum side yard accessory structure and use setback, on lots less than 3 acres in size, on the eastern boundary, from 5' to 0', a reduction of 5', to construct a 10-12' in height board-on-board fence on the property line, and (3) a variance to reduce the minimum rear yard accessory structure and use setback, on lots less than 3 acres in size, on the southern boundary, from 10' to 0', a reduction of 10', to construct a 10-12' in height board-on-board fence, in Council

District 5, Election District 4, at Tax Map 13, Grid 16, Parcel 284, Lot 1, also identified as 3202 Florence Road, Woodbine, Maryland, in the RC-DEO (Rural Conservation) (Density Exchange Option) Zoning District, filed pursuant to §130.0.B.2 of the Howard County Zoning Regulations (the HCZR) for a variance from §104.0.E.4.b.(3)(c).2., from §104.0.E.4.b.(4)(c), and from §104.0.E.4.b.(2).

The Petitioner certified to posting the required sign in accordance with the Howard County Code. Your Hearing Examiner viewed the property in accordance with the Hearing Examiners Rules of Procedure. Alejandro Rodriguez (Petitioner) testified in support of the Petition. Ms. Joan Becker, Esq. represented the adjoining property owners in opposition, Scott (Licensed Landscape Architect and Land Planner) and Jung Munroe, who both testified in opposition.

Petitioner introduced the following Exhibit:

- (1) August 10, 2023, letter from the County Department of Public Works stating that the portion of the basketball court constructed within the County's public right-of-way has been removed but the Property is still in violation for failing to obtain a grading permit.

Opposition introduced the following Exhibits:

- (1) July 20, 2023, letter of violation from the County Department of Public Works ordering Petitioner to remove the fence illegally installed across the 25-foot pipe stem portion of 3206 Florence Road which is in the County's public right-of-way.

- (2) June 6, 2023 Notice of Violation from the County Department of Public Works regarding Petitioners construction of the basketball court partially within the County's public right-of-way and Petitioners failure to obtain a grading permit for the basketball court.
- (3) Aerial overlay with Eagle Eye View and CAD identifying topography, setbacks, and alternative basketball locations.
- (4)(a)-(k) Photos of the southern property boundary with existing fence and landscaping and existing fencing in the neighborhood.

### **FINDINGS OF FACT**

Based upon the evidence of record, the Hearing Examiner finds as follows:

1. Property Identification and Description. The approximately 2.7-acre Property is located on the south side of Florence Road, west of its intersection with Ed Warfield Road, and east of its intersection with Jennings Chapel Road. The subject Property lies in Council District 5, in the 4th Election District, Tax Map 13, Grid 16, Parcel 284, Lot 1 and is identified as 3202 Florence Road, Woodbine, Maryland (the Property). The Property is developed with a single-family detached dwelling, an in-ground swimming pool, and a full court basketball court.

2. Adjacent Properties. The Property is located in an area of RC-DEO zoning and is adjacent on the west with forest, on the south with a single-family detached dwelling (the Munroe's), and on the east with County public right-of-way and a pipestem accessing single-family detached dwellings.

3. Water and Sewer Service. The Property is located outside of the Metropolitan District and the Planned Service Area for water and sewer.

4. Agency Comments. Most County Departments and agencies had no comments on the Petition. The Development Engineering Division took no exception to the Petition and the Department of Recreation and Parks requested that the Petition be resubmitted in accordance with the required checklist and that the Petition comply with the rural character requirements.

5. The Requested Variances. Petitioner is proposing (1) a variance to reduce the minimum front yard structure and use setback, on lots less than 3 acres in size, on the northern property boundary, from 50' to 21', a reduction of 29', to legalize an existing full court basketball court which was illegally constructed in the public right-of-way, in the front yard setback, and without required permits, (2) a variance to reduce the minimum side yard accessory structure and use setback, on lots less than 3 acres in size, on the eastern boundary, from 5' to 0', a reduction of 5', to construct a 10-12' in height board-on-board fence on the Property line, and (3) a variance to reduce the minimum rear yard accessory structure and use setback, on lots less than 3 acres in size, on the southern boundary, from 10' to 0', a reduction of 10', to construct a 10-12' in height board-on-board fence on the Property line.

6. Opposition Testimony. Both Scott and Jung Munroe testified as to the topography of the Property, having a grade differential of 600 feet in the front of the Property along Florence Road dropping 6% to the southwest corner of the Property, 590 feet, a very insignificant decrease in grade. The property is roughly rectangular in shape. Mr. Munroe produced an exhibit showing the myriad of locations for the basketball court which would not encroach in the required setbacks. Every application Petitioner has filed contains a different measurement for the basketball court and there is no indicia of reliability in the applications.

There is an existing historic wood "horse" fence (4') along the shared 400' southern property boundary between the Property and the Munroe property. This mutual boundary is heavily landscaped with 1 35" mulberry tree, 2 35-40' cedar trees, 4 15-20' eastern redbud trees, 1 15' magnolia, 3 20' peach trees, 2 15' apple trees, 6 25' spruce trees, and various shrubs and perennials ranging from 12" to 4'. The proposed 10-12' board-on-board fencing on the Property boundaries is not in keeping with the character of the neighborhood which has 4' board "horse" fences.

Petitioner failed to obtain a property survey before beginning construction, resulting in construction in the public right-of-way and in the front yard setback. The Munroe's obtained a property survey, including the pipe stem, and Petitioner removed the stakes. The illegal basketball court has resulted in sediment control and stormwater management issues flowing onto the Munroe's property. The Munroe's are additionally concerned about the liability issues arising from the proposed 10-12' fence on their



property line should the fence fall on their property in a storm and destroy their landscaping and solar panels from which the Munroe's receive all their electricity. They are also concerned should the 10-12' fence fall across their pipestem, preventing them from utilizing their only ingress/egress to their property. The 10-12' fencing will not deter water and sediment runoff and will simply rot the foundation of the fence resulting in additional liability issues. Erection of the 10-12' fence along their mutual boundary will injure the existing mature trees and will create maintenance issues as Petitioner will have to come on the Munroe's property to both erect and maintain the fence.

### **CONCLUSIONS OF LAW**

The standards of variances are contained in HCZR Section 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 fails to comply with Section 130.0.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.**

Compliance with the 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).

As shown on the Variance Exhibit, the lot is roughly rectangular in configuration. There is no evidence of steep slopes or constraining environmental features. There are no “unique physical conditions” that give rise to practical difficulties. Petitioner argues that the 50’ front yard setback is a physical condition. A required setback is not a “unique physical condition” of a property. The Courts in Maryland have opined that a required setback cannot form the basis for a finding of “unique physical condition” of a property for a variance. Petitioner has failed to provide any evidence of a unique physical condition of the Property which results in a hardship. Therefore, the Petition does not meet the requirements of Section 130.0.B.2.a.(1) as to any of the 3 variance requests.

- (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 Property is located in a primarily developed single family residential neighborhood. The predominate fencing in the neighborhood is 4' wooden "horse" fencing. The request for 10-12' fencing along the Property boundaries will alter the character of the neighborhood and will be detrimental to the public welfare by creating health, safety, and liability issues and will result in the destruction of mature trees and landscaping. Petitioner has failed to meet its burden of proof for all variance requests as required by Section 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 practical difficulty in complying strictly with the bulk regulations requiring a 50-foot front yard building and use setback is the result of Petitioners failure to obtain a property survey, obtain all required permits, and construct in accordance with the property survey and grading, stormwater management and sediment and erosion control permits. As a direct result of Petitioners failure to proceed in accordance with the law, he constructed an impervious surface, both in the public right-of-way and in the required front yard setback, which resulted in storm water management and sediment and erosion control issues created by the failure to grade properly. These actions directly resulted in water and sediment flowing onto the Munroe's property. Thus, the situation giving rise to the variance request for the basketball court is a self-created hardship. Since Petitioner has failed to meet the requirements of §130.0.B.2.a.(1) there is no need to discuss the requested fence variances. Petitioner has failed to meet its burden of proof as required by Section 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 29' variance sought from the 50' front yard structure and use setback from a residential zone, for a basketball court, is not needed to permit the reasonable use of the Property. The 5' and 10' variance requests from the side and rear yard setbacks for accessory structures in order to construct 10-12' fences are also not needed to permit reasonable use of the Property. Petitioner has also failed to meet its burden of proof as required by Section 130.0.B.2.a.(4) for all of the variance requests.

- (5) That no variance be granted to the minimum criteria established in Section 131.0 for Conditional Uses except where specifically provided therein or in an historic district. Nothing herein shall be construed to prevent the granting of variances in any zoning district other than to the minimum criteria established in Section 131.0.**

The instant Petition is for variances from the bulk regulations and is not a conditional use application; this Section is not relevant.

**ORDER**

Based upon the foregoing, it is this 16th day of August, 2023, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Petition of Alejandro Rodriguez for (1) a variance to reduce the minimum front yard structure and use setback, on lots less than 3 acres in size, on the northern property boundary, from 50' to 21', a reduction of 29', to legalize an existing full court basketball court, (2) a variance to reduce the minimum side yard accessory structure and use setback, on lots less than 3 acres in size, on the eastern boundary, from 5' to 0', a reduction of 5', to construct a 10-12' in height board-on-board fence on the property line, and (3) a variance to reduce the minimum rear yard accessory structure and use setback, on lots less than 3 acres in size, on the southern boundary, from 10' to 0', a reduction of 10', to construct a 10-12' in height board-on-board fence, in Council District 5, Election District 4, at Tax Map 13, Grid 16, Parcel 284, Lot 1, also identified as 3202 Florence Road, Woodbine, Maryland, in the RC-DEO (Rural Conservation) (Density Exchange

Option) Zoning District, also identified as 3202 Florence Road, Woodbine, Maryland, be and is hereby **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS**  
**HEARING EXAMINER**

  
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**Joyce B. Nichols**

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.