

MUKESH KUMAR

: BEFORE THE

AND

: HOWARD COUNTY

AGILA SUNDARAM

: BOARD OF APPEALS

Appellants

: HEARING EXAMINAR

v.

HOWARD COUNTY DEPARTMENT OF

: BA Case No. 819D

PLANNING AND ZONING IN WP-25-045

Appellee

.....
.....
DECISION AND ORDER

On July 31, 2025, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal of Mukesh Kumar and Agila Sundaram (Appellants). Appellants are appealing the Department of Planning and Zoning's May 5, 2025 letter attaching the Alternative Compliance Final Decision Action Report (Department of Planning and Zoning (DPZ), Department of Public Works, and Office of Community Sustainability) denying WP-25-045, Appellants request for Alternative Compliance to §16.116(a)(2)(ii) for Mitchell Greens at 3956 Old Columbia Pike, Ellicott City, Maryland. The appeal is filed pursuant to §130.0.A.3 of the Howard County Zoning Regulations (HCZR).

The Appellants 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. Mr. Sang Oh, Esq. appeared on behalf of Appellants. Samer Alomer, civil engineer, testified on behalf of the Appellants. Mark and Erika Ragonese testified in opposition.

Appellants presented the following Exhibits:

- Ex. 1. Application for Alternative Compliance
- Ex. 2. Supplemental Plan
- Ex. 3. Address Points and Property Boundaries Overlay

BACKGROUND

The approximately 1.04-acre property is located on the south side of Main Street, west of its intersection with Old Columbia Pike, east of its intersection with Church Road, and east of Md Rt 29, also identified as 3956 Old Columbia Pike, Ellicott City, Maryland (the Property). The Subject Property is improved with a single family detached dwelling with access drive onto Old Columbia Pike, and lies in Council District 1, the 2nd Election District, and is identified as Tax Map 25, Grid 13, Parcel 134, in the R-ED (Residential: Environmental Development) Zoning District.

On August 6, 2024, the Appellants requested Alternative Compliance from §16.116(a)(2)(ii) of the Howard County Code in accordance with §16.116(d). Section 16.116(a)(2)(ii), Protection of wetlands, streams, and steep

slopes, requires **that** grading, removal of vegetative cover and trees, paving, and new structures shall not be permitted within the 75-foot perennial stream bank buffer.

On May 5, 2025, by cover letter from DPZ, WP-25-045 was unanimously denied, stating that "On April 24, 2025, and pursuant to Section 16.116(d), the Director of the Department of Planning and Zoning, Director of the Department of Public Works, and Administrator of the Office of Community Sustainability considered and **denied** your request for a variance with respect to **Section 16.116(a)(2)(ii)** of the Subdivision and Land Development Regulations to grade within the stream bank buffer." The Alternative Compliance Final Action Report found "that the applicants criteria justifications have not met the unreasonable hardship or practical difficulty threshold. After considering the alternative compliance application and the items required to be addressed pursuant to Section 16.116(d), they find enforcement of this subtitle would not result in unreasonable hardship or practical difficulty and agreed unanimously to **DENY** the request for a variance with respect to **Section 16.116(a)(2)(ii)** of the Subdivision and Land Development Regulations.". By Administrative Appeal Petition dated June 4, 2025, Appellants appealed the denial of the request for Alternative Compliance to grade within the 75-foot stream buffer bank.

JURISDICTION

WP-25-045 is a request for Alternative Compliance to grade within the 75-foot perennial stream buffer bank filed pursuant to §16.116, Subtitle 1, Subdivision and Land Development Regulations, Article 2. Design Guidelines and Regulations. Section 16.116 Protection of wetlands, streams and steep slopes, provides

The Director of the Department of Planning and Zoning, the Administrator of the Office of Community Sustainability and the Director of the Department of Public Works may grant waivers which allow for alternative compliance to this Section if the applicant can demonstrate in sufficient detail through evidence that the project meets the criteria set forth in section 16.104 and the following additional criteria:.....

By letter dated May 5, 2025 the Department of Planning and Zoning informed the Appellants that on April 24, 2025 "the Director of the Department of Planning and Zoning, Director of the Department of Public Works, and Administrator of the Office of Community Sustainability considered and **denied** your request...". Appended to this letter is the Alternative Compliance Final Decision Action Report signed by Lynda Eisenburg, AICP, Director, Department of Planning and Zoning, Yosef Kebede, Director, Department of Public Works, and Timothy Lattimer, Administrator, Office of Community Sustainability.

STANDARD OF REVIEW

The right to appeal an administrative decision is wholly statutory.

Howard County v. JJM, Inc., 301 Md. 256, 261, 482 A.2d 908, 910 (1984) (citing Maryland Bd. V. Armacost, 286 Md. 353, 354-55, 407 A.2d 1148, 1150 (1979); Criminal Injuries Comp. Bd. V. Gould, 273 Md. 486, 500, 331 A.2d 55, 64 (1975); Urbana Civic Ass'n v. Urbana Mobile VIII, Inc., 260 Md. 458, 461, 272 A.2d 628, 630 (1971)).

Pursuant to Howard County Code §16.105, appeals to the Board of Appeals of decisions made pursuant to the Director of Planning and Zoning's administrative decision-making authority shall be heard in accordance with the Board of Appeal's Rules of Procedures. Subtitle 2.-Rules of Procedure of the Board of Appeals, Section 2.210 provides that administrative appeals such as the instant appeal are *de novo* and the burden of proof is on the appellant to show that the action taken by the Administrative Agency was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law. Per Howard County Code § 16.302(a) Jurisdiction of Hearing Examiner), when a matter is authorized to be heard and decided by the Board of Appeals, the matter will first be heard and decided by a Hearing Examiner. Hearing Examiner Rule of Procedure 10.2(c) assigns the burden of proof in an appeal from an administrative agency decision of showing by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law. See also, Hearing Examiner Rules of Procedure, Rule 10.2.(c)

In a *de novo* (meaning as new) appeal, the role of the Hearing Examiner is akin to a trial court, and the appeal may be a contested case, in which the evidence is adduced, and the Hearing Examiner is the trier of fact awarded

deference on appellate review as the Examiner saw the witnesses and the evidence firsthand. Appellants burden of proof is to provide substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

APPLICABLE LAW

Sec. 16.104. - Waivers

(a) *Authority to Grant.*

(1) So that substantial justice may be done and the public interest secured, the Department of Planning and Zoning may grant waivers of the requirements of this subtitle, except as prohibited in subsection (d), in situations where the Department finds that unreasonable hardship or practical difficulties may result from strict compliance with this subtitle and for requests to waive or alter the requirements in article II and article III of this subtitle all of the following criteria are met:

- (i) Strict conformance with the requirements will deprive the applicant of rights commonly enjoyed by others in similar areas;**
- (ii) The uniqueness of the property or topographical conditions would result in practical difficulty, other than economic, or unreasonable hardship from strict adherence to the regulations;**
- (iii) The variance will not confer on the applicant a special privilege that would be denied to other applicants; and**
- (iv) The modification is not detrimental to the public health, safety or welfare or injurious to other properties.**

(d) *No Waivers of Floodplain, Wetland, Stream, Forest Conservation, or Steep Slope Regulations in the Tiber Branch Watershed.* The Department may not grant waivers of any requirement of section 16.115 or section 16.116, or variances under section 16.1216 of this title, for any property located in the Tiber Branch Watershed unless the waiver:

- (1) Is necessary for the reconstruction of existing structures or infrastructure damaged by flood, fire, or other disaster;**

- (2) Is necessary for the construction of a stormwater management or flood control facility as part of a redevelopment project;**
- (3) Is necessary for the retrofit of existing facilities or installation of new facilities intended solely to improve stormwater management or flood control for existing development;**
- (4) Is requested as part of a development proposal and the Director of the Department of Public Works, or his designee acting as Floodplain Administrator, finds that upon completion of construction of the development, which may include off-site improvements within the Tiber Branch Watershed, there will be improvement to flood control in the Tiber Branch Watershed at least ten percent more than what would otherwise be required by law;**
- (5) Is necessary for the construction of an addition, garage, driveway, or other accessory use improvement of an existing residential structure on property located within the Tiber Branch Watershed that increases the square footage of the impervious surfaces on the property by no more than 25 percent over the square footage of impervious surfaces that existed on the property prior to the effective date of this bill;
or**
- (6) Is requested to use the limit of disturbance to calculate the 'net tract area' as defined in section 16.1201(v); or**
- (7) Is necessary for the removal of trees that a licensed forester, licensed landscape architect, or a certified arborist determines to be diseased, damaged, dead, or declining in a way that creates a hazard to people or property.**

Sec. 16.116. - Protection of wetlands, streams, and steep slopes.

(a) *Streams and Wetlands:*

- (1) Grading, removal of vegetative cover and trees, paving, and new structures shall not be permitted within 25 feet of a wetland in any zoning district.**
- (2) Grading, removal of vegetative cover and trees, paving, and new**

structures shall not be permitted within:

- (i) Fifty feet of an intermittent stream bank;**
- (ii) Seventy-five feet of a perennial stream bank for Use I streams as classified by the Maryland Department of the Environment in residential zoning districts and residential and open space land uses in the NT, PGCC, and MXD districts;**

(d) *Waivers.*

- (1) The Director of the Department of Planning and Zoning, the Administrator of the Office of Community Sustainability and the Director of the Department of Public Works may grant waivers which allow for alternative compliance to this Section if the applicant can demonstrate in sufficient detail through evidence that the project meets the criteria set forth in section 16.104 and the following additional criteria:**
 - (i) Any area of disturbance is returned to its natural condition to the greatest extent possible;**
 - (ii) Mitigation is provided to minimize adverse impacts to water quality and fish, wildlife, and vegetative habitat; and**
 - (iii) Grading, removal of vegetative cover and trees, or construction shall only be the minimum necessary to afford relief and to the extent required to accommodate the necessary improvements. In these cases, the least damaging designs shall be required, such as bridges, bottomless culverts or retaining walls, as well as environmental remediation, including the planting of the areas where grading or removal of vegetative cover or trees has taken place, utilizing best practices for ecological restoration and water quality enhancement projects.**
- (2) To determine if the waiver is warranted, the Departments may request an alternatives analysis, that may include different plan concepts and that clearly demonstrates that no other feasible alternative exists and that minimal impacts will occur as a result of granting the modification.**
- (3) Waivers under this subsection shall be reported by the**

Department of Planning and Zoning in the same manner as required under subsection (c)(5) applicable to necessary disturbance exceptions.

- (4) The Department of Public Works shall recuse itself from consideration of any capital projects seeking waivers.**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) Section 16.104(d)(1) The Director of the Department of Planning and Zoning, the Administrator of the Office of Community Sustainability and the Director of the Department of Public Works may grant waivers which allow for alternative compliance to this Section if the applicant can demonstrate in sufficient detail through evidence that the project meets the criteria set forth in section 16.104 and the following additional criteria:**

- (i) Any area of disturbance is returned to its natural condition to the greatest extent possible;**

Appellants do not propose to return the area of disturbance to its natural condition.

- (ii) Mitigation is provided to minimize adverse impacts to water quality and fish, wildlife, and vegetative habitat;**

Appellants argue that by providing a larger stormwater management facility through grading and removal of vegetation and specimen trees the water quality will be improved. These actions are apposite to this required finding.

- (iii) Grading, removal of vegetative cover and trees, or construction shall only be the minimum necessary to afford relief and to the extent required to accommodate the necessary improvements. In these cases, the least damaging designs shall be required, such as bridges, bottomless culverts or retaining walls, as well as environmental remediation, including the planting of the areas where grading or removal of vegetative cover or trees has taken place, utilizing best practices for ecological restoration and water quality enhancement projects.**

The large stormwater management facility being proposed is to facilitate the development of another dwelling on land to be subdivided from the Subject Property. The Subject Property is experiencing no access, utility or water issues.

- (2) Sec.16.104. So that substantial justice may be done and the public interest secured, the Department of Planning and Zoning may grant waivers of the requirements of this subtitle, except as prohibited in subsection (d), in situations where the Department finds that unreasonable hardship or practical difficulties may result from strict compliance with this subtitle and for requests to waive or alter the requirements in article II and article III of this subtitle all of the following criteria are met:**

- (i) Strict conformance with the requirements will deprive the applicant of rights commonly enjoyed by others in similar areas;**

Appellant argues that the requirement for additional stormwater management in the Tiber Branch Watershed, which results in a larger stormwater management facility would deprive Appellants of rights commonly enjoyed by others in similar areas. Projects in the Tiber Branch and Plum Tree Branch Watersheds are required to provide stormwater management controls to meet the storm of record as outlined in Design Manual Volume I Chapter 5. Any development in the same watershed is required to meet the same stormwater management requirements. This is not a condition unique to this property that would create an unnecessary hardship. The scale of the proposed improvements for the development of one home on the site as proposed by the minor subdivision is not reasonable.

(ii) The uniqueness of the property or topographical conditions would result in practical difficulty, other than economic, or unreasonable hardship from strict adherence to the regulations;

This finding requires the Appellants to satisfy both the uniqueness prong of the variance test and the practical difficulty or unreasonable hardship test. Maryland cases have used the terms 'unique,' 'unusual,' and 'peculiar' to describe [the uniqueness] step in the variance analysis." *Dan's Mountain Wind Force, LLC v Allegany Cnty. Bd. of Zoning Appeals*, 236 Md. App. 483,494 (2018).

The uniqueness prong of the variance test requires the Applicants to prove, and the Directors to find, that the alleged special conditions on the Subject Property are not shared by other nearby properties - that "the plight of the owner [is] due to unique circumstances and not to general conditions in the neighborhood." *Marino v. City of Balt.*, 215 Md. 206, 219 (1957). "It must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood." *Easter v. Mayor and City Council of Baltimore*, 195 Md. 395,400 (1950). "[T]he property whereon structures are to be placed (or uses conducted) [must be] - in and of itself - unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provisions to impact disproportionately upon that property." *Cromwell v. Ward*, 102 Md. App. 691, 694 (1995); see also *Dan's Mountain Wind Force, LLC v. Allegany Cnty. Bd. of Zoning Appeals*, 236 Md. App. 483,492 (2018).

The Appellants allege that the Subject Property is unique because it has limited road frontage, the shape of the property, the existing topography of the site, and because the Subject Property is located within the Tiber Branch Watershed. However, the Appellants failed, in both their Alternative Compliance Justification (which the Directors used as the basis of their Final Decision Action Report), and later during the evidentiary hearing, to actually analyze properties nearby as required by §16.104(a)(ii).

The Appellants failed to compare the Subject Property with any other property and thus failed to demonstrate that the alleged special conditions are in fact unique or peculiar to the Subject Property. Therefore, the Directors' decision to deny the requested variance is in accordance with law because nothing in the record satisfies the proposition that the special conditions identified by the Applicants are unique or peculiar conditions compared to surrounding properties.

The Appellants' state that their justification for the requested variance is to provide legal access and water to facilitate the development of a parcel to be

subdivided for development from the Subject Property and to provide additional stormwater management to the Tiber Branch Watershed. The proposed design exceeds the disturbance necessary to develop a two-lot subdivision on the Subject Property. The Subject Property has legal access to the continued use of the property and has sufficient water and utilities.

Appellants argue that their location within the Tiber Branch Watershed requires a larger stormwater management facility than projects not located within the Tiber Branch Watershed. Any development in the Tiber Branch and Plum Tree Branch are required to meet the same stormwater management requirements. This is not a condition unique to the Subject Property.

The uniqueness prong of the variance test is designed to determine whether a property, due to inherent characteristics of the land itself, will be impacted differently by the County's ordinances than other properties nearby. When many properties share the same constraints, the properties are not unique, and any variance request must be denied. Here, the evidence failed to demonstrate that the conditions identified by the Applicants are unique to the Subject Property but are not shared by other properties in the area. Therefore, as a threshold matter, the Directors' decision was in compliance with law because the Subject Property has not been demonstrated to be in fact unique.

Assuming *arguendo* the shape of the Subject Property, the topography, the access and the location within the Tiber Branch Watershed were nominally "unique," the Appellants would still have not have met their burden of proof because nothing on in the record satisfies the proposition that those conditions have a meaningful nexus to

the relief sought. As the Court opined in *Dan's Mountain*:

[T]he unique aspect of the property must relate to-have a nexus with- the aspect of the zoning law from which a variance is sought. Without the nexus requirement, a motivated sophist could always find similarities or differences between any two properties so as to defeat or support a uniqueness finding. Every property is similar to every other property in some respect (for example, "there are some living things on this property"). And every property can be distinguished from every other property in some other respect (for example, "this property contains exactly x number of trees and y number of woodrats"). Rather than semantic tricks, the proper question is whether the property is unique in the way that this particular aspect of the zoning code applies to it.

236 Md. App. at 496. A unique aspect of a property is only unique in the context of a variance application if that particular unique aspect is what is preventing adherence to the ordinance.

Where a property's physical peculiarities do not cause the landowner to suffer disproportionately due to application of the zoning enactment in question, the property is not "unique" in the law of variances. For example, if a property has physical characteristics that might justify variance relief from drainage or sewage regulations, those attributes probably would have no bearing on how the property is affected by an ordinance establishing the maximum height for a fence.

Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, 407 Md. 53, 82 (2008). A variance needs a nexus between the relief sought and the unique aspect. In this case, such a nexus does not exist for the proposed grading denuding of vegetation, and removal of specimen trees within the 75-foot stream bank buffer.

The Appellants assert that they must have the grading, removal of vegetation,

and removal of specimen trees within the 75-foot stream buffer due to Appellants desire to subdivide and build an additional home on the to be subdivided parcel. However, the desire to subdivide off a currently accessible parcel in order to create an additional landlocked building lot is not a characteristic of the land.

Even assuming *arguendo* that the Appellants could have satisfied the uniqueness prong of the variance test, a variance cannot be approved unless the Appellants demonstrate that they would experience an unwarranted hardship (which is stricter than the practical difficulties test) if the variance is not granted. §16-104(a)(ii).

The phrase "unreasonable hardship" requires an applicant demonstrate that "unless [its] application is granted, it will be 'impossible to make reasonable use of [its] property.'" See *Montgomery Cnty. v. Rotwein*, 169 Md. App. 716, 728-29; see also *Belvoir Farms Homeowners Ass'n, Inc. v. North*, 355 Md.259,282 (1999).

Here, the evidence on the record demonstrates clearly that the Appellants have other economically viable options for using the Subject Property that would not require grading, removal of vegetation, and removal of specimen within the 75-foot stream bank buffer on the Subject Property. Therefore, the Directors' determination that the Appellants would not face an unreasonable hardship is in accordance with law because the only alleged hardship is an inability to maximize density and profit on the site and the Appellants have other economically viable options available.

- (iii) **The variance will not confer on the applicant a special privilege that would be denied to other applicants;**

The granting of a waiver of the requirements of the Tiber Branch

Watershed would grant a special privilege that is not available to all the other properties in the Tiber Branch and the Plum Branch Watersheds. Appellants presented no evidence to the contrary.

- (iv) **The modification is not detrimental to the public health, safety or welfare or injurious to other properties.**

Appellants failed to provide any evidence that the grading for a large stormwater management facility which denudes the vegetation and removes specimen trees within the 75-foot stream bank buffer is not detrimental to other properties in the Tiber Branch and Plum Branch Watersheds.

(3) Section 16-104(d). *No Waivers of Floodplain, Wetland, Stream, Forest Conservation, or Steep Slope Regulations in the Tiber Branch Watershed.* The Department may not grant waivers of any requirement of section 16.115 or section 16.116, or variances under section 16.1216 of this title, for any property located in the Tiber Branch Watershed unless the waiver:

- (i) **Is necessary for the reconstruction of existing structures or infrastructure damaged by flood, fire, or other disaster;**
- (ii) **Is necessary for the construction of a stormwater management or flood control facility as part of a redevelopment project;**
- (iii) **Is necessary for the retrofit of existing facilities or installation of new facilities intended solely to improve stormwater management or flood control for existing development;**
- (iv) **Is requested as part of a development proposal and the Director of the Department of Public Works, or his designee acting as Floodplain Administrator, finds that upon completion of construction of the development, which may include off-site improvements within the Tiber Branch Watershed, there will be improvement to flood control in the Tiber Branch Watershed at least ten percent more than what would otherwise be required by law;**
- (v) **Is necessary for the construction of an addition, garage, driveway, or other accessory use improvement of an existing residential structure on property located within**

the Tiber Branch Watershed that increases the square footage of the impervious surfaces on the property by no more than 25 percent over the square footage of impervious surfaces that existed on the property prior to the effective date of this bill; or

- (vi) Is requested to use the limit of disturbance to calculate the 'net tract area' as defined in section 16.1201(v); or**
- (vii) Is necessary for the removal of trees that a licensed forester, licensed landscape architect, or a certified arborist determines to be diseased, damaged, dead, or declining in a way that creates a hazard to people or property.**

Appellants failed to produce any evidence required to meet these criteria.

CONCLUSION

The Alternative Compliance Final Decision Action Report, dated May 5, 2025, which denied WP-25-045, is in accordance with law, and the evidence presented during the evidentiary hearing made clear that Appellants failed to meet their threshold burden of proof as required by §16-104(a) and (d) and §16.116(d)(c)(1).

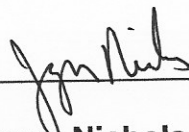
ORDER

Based upon the foregoing, it is this 4th day of August, 2025, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That Appellants' appeal of the May 5, 2025 letter from the Department of Planning and Zoning attaching the Alternative Compliance Final Decision Action Report denying Alternative Compliance for grading within the 75-footstream bank buffer for WP-25-045, at 3956 Old Columbia Pike, Ellicott City, Maryland, in the R-ED (Residential: Environmental Development) Zoning District, Council District 1, Election District 2, Map 25, Grid 13, Parcel 134, be and is hereby **DENIED**.

HOWARD COUNTY

HEARING EXAMINER



Joyce 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.