

IN THE MATTER OF : BEFORE THE
ANGEL'S TOUCH, INC. : HOWARD COUNTY
Petitioner : BOARD OF APPEALS
: HEARING EXAMINER
: BA Case No. 17-037C&V

.....
DECISION AND ORDER

On May 1, 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 Angel's Touch, Inc. (Petitioner) for a Nursing Home and Residential Care Facility conditional use, specifically a 16-bed assisted living facility, and a related variance to reduce the 30-foot use lot line setback to 3.5 feet for a driveway, in an RC-DEO (Rural Conservation: Density Exchange Option Overlay) zoning district pursuant to §§ 130.0.B.5 and 131.0.B.2.a 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 subject property as required by the Hearing Examiner Rules of Procedure. Thomas Coale, Oh, Esq., 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. Revised Conditional Use/Variance Plan, May 1, 2018

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, the Hearing Examiner finds the following facts:

1. Property Identification. The subject property is located in the Third Election District on the north side of Frederick Road, approximately 697 feet west of Buttercup Court. It is identified as Tax Map 0015, Grid 0010, Parcel 237, Lot 1 and known as 12900 Frederick Road (the Property). The Property is Lot 1 of the 1978 Buttercup Estates subdivision.

2. Property Description. The 5.20-acre pipestem Property is improved with a 3,905sf one-story single-family detached dwelling. The 52-foot wide pipestem driveway with a 16-foot wide asphalt drive provides access to the dwelling, which is located in the central portion of the main Property. A wide path system partially circles the west, north, and east sides of the dwelling. The remainder of the Property consists of heavy vegetation.

3. Vicinal Properties. The northeastern POR (Planned Office Research) property is in agricultural use. The other vicinal properties are zoned RC-DEO. The southeastern property on Lot 4 of the Buttercup Estates subdivision is improved with an assisted-living facility. Lot 3 is improved with a single-family detached dwelling. These lots are accessed from a cul-de-sac to the east of the Property's pipestem driveway. The southwestern and northwestern properties are in agricultural use and subject to an ALPP (agricultural land preservation program) easement.

4. Roads. Frederick Road has two travel lanes and approximately 35 feet of paving within a variable width right-of-way (ROW). The speed limit is 50MPH. The Department of Planning and Zoning (DPZ) reports the estimated sight distance from the existing driveway entrance is greater than 800 feet to the southeast and northwest. According to State Highway Administration data, the traffic volume on Frederick Road between MD 97 to MD 32 was 3,624 AADT (Annual Average Daily Traffic) as of 2016.

5. Water and Sewer. The proposed development will be served by private well and septic.
6. The General Plan. PlanHOWARD 2030 designates the Property as "Rural Resources" on the Designated Pace Types Map. The Plan's Functional Road Classification Map depicts Frederick Road as a Minor Arterial.
7. Zoning History. There is no record of any Board of Appeals, Zoning Board, or DPZ zoning case for the Property.
8. The Conditional Use Proposal. Pursuant to HCZR § 131.0.N.38, the Petitioner is seeking conditional use approval for a 16-bed assisted living facility by enlarging the existing 3,905sf one-story single-family detached dwelling to 8,747sf. The enlargement shown on the revised conditional use /variance plan includes a one-story addition to the west side of the building, a two-story addition to the east side, and an expansion of the existing attached pavilion on the north side. The petition includes architectural elevations for the additions showing fenestration, roof pitch, height, and exterior materials similar to the residential buildings in the vicinity. Additionally, the Petitioner proposes two, one-story accessory equipment buildings, a parking lot, two propane tanks, a trash receptacle enclosure to the southwest of the expanded structure, and paved driveway extensions. The paved portion of the driveway would be widened to 20 feet and include pull-offs. The facility would operate 24 hours a day, with employees working in three shifts. Five employees will work the 7:00am to 3:00pm shift. Fewer employees will work other shifts. The Petitioner estimates there may be up to two visitors per day. Other anticipated vehicle trips will consist of weekly food delivery by a mini-van, and monthly propane deliveries.
9. The Requested Variance. Because the proposed 16-foot pipestem driveway does not

comport with the 30-foot use setback imposed by HCZR § 104.0.E.5, Petitioner is requesting a variance to reduce the setback to 3.5 feet.

10. Reported Agency Comments.

Maryland State Highways Administration. No objections to the variance. The Administration advises Petitioner the access point to Frederick Road (a state highway) must be reconstructed to commercial standards to the ROW line and requests inclusion on any county required traffic impact study scoping/review.

Health Department.

1. The Health Department has not yet approved a design plan to expand the sewage disposal system to accommodate a proposed assisted living facility. It is not yet clear whether the approved sewage disposal area is adequate to accommodate the proposed number of beds.
2. Prior to Health Department approval of any building permit for the proposed facility, the applicant must submit a sewage disposal system design plan for approval and install any required upgrades to the system.
3. The proposal shown on the exhibit indicates two propane tanks near the existing well to remain. These tanks are located within the 100' minimum setback distance from a propane tank to a well. The tanks or well must be relocated prior to Health Department approval of a building permit.

DPZ Development Engineering.

1. The request appears to have no adverse engineering impact on the adjacent properties.
2. All improvements must comply with current Howard County design criteria including APFO requirements and stormwater management.

Fire Department. The Fire Department requests the drive be widened to 20 feet, with adequate room for apparatus to turn around. This nursing care facility will be required to be protected with an appropriate automatic sprinkler protection system, pursuant to NFPA 13.

11. Robert Vogel, project engineer, testified to the conditional use plan being revised in response to Technical Staff Report comments. The changes include a commercial entrance, paved driveway width increase to 20 feet, and relocated propane tanks.

CONCLUSIONS OF LAW

I. General Criteria for Conditional Uses (§ 131.0.B)

Based upon the foregoing Findings of Fact, the Hearing Examiner concludes as follows:

1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use.

The Howard County General Plan designates the area in which the Property is located as "Rural Resources." The conditional use/variance plan is harmonious with General Plan Policy 9.4 to "[e]xpand housing options to accommodate the County's senior population who prefer to age in place and people with special needs."

2. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site are such that the overall intensity and scale of the use(s) are appropriate for the site.

HCZR § 131.0.B.2 is an on-site evaluation of the proposed Conditional Use. The 5.20-acre Site will be accessed from Frederick Road, a Minor Arterial, which can accommodate the proposed modest increase in traffic associated with a 16-bed Nursing Home and Residential Care Facility, a low-intensity residential/institutional use. Landscaping and distance will separate and buffer the Facility from the adjacent uses. The 5.2-acre Property exceeds the one-acre minimum lot size requirement and meets all setbacks, except for the encroachment of the existing driveway in the pipistem portion of the lot, for which the Hearing Examiner is granting the requested variance to reduce the use setback to allow this encroachment. The nature and intensity of the use, the size of the Property in relation to the use, and the location of the site, with respect to streets that provide access, are such that the overall intensity and scale of the use are therefore appropriate.

3. The proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. In evaluating the proposed use under this standard, the Hearing Authority shall consider whether or not:

Unlike §§ 131.0.B.1 and 2, which concern the proposed use's harmony or compatibility with the General Plan and the on-site characteristics of the proposed use, compatibility with the neighborhood is measured under § 131.0.B.3's six "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading; (4) access; (5) impact on environmentally sensitive area, and; (6) impact on the character and significance of historic sites. These six adverse impact tests gauge the off-site effects of the proposed conditional use.

Inherent in the assessment of a proposed conditional use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment therefore accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would have adverse effects in an RC district. The proper question is whether there are facts and circumstances showing the particular uses proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception [conditional] use irrespective of its location within the zones. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, and as conditioned, the Petitioner has met its burden of presenting sufficient evidence under HCZR § 131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a Nursing Home and Residential Care Facility conditional use development in the RC zoning district.

a. The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.

There is no evidence of record regarding atypical adverse effects on vicinal properties from dust, fumes, and odors, noise, intensity of lighting, or hazards.

b. The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

No walls or fences are proposed. Existing and proposed buildings and structures comply with all setbacks/height requirements in the RC District to occupy 4.7% of the Property. The facility will be centrally located and screened from adjacent properties by existing and proposed vegetation/landscaping. The agricultural uses to the north are unlikely to be affected, and the use will be buffered from the similar assisted-living facility on adjoining Lot 4 and the dwelling on the adjoining Lot 3. There is no evidence of the 16-person residential facility hindering or discouraging the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

HCZR § 133.0 requires 8 parking spaces and 15 are proposed. These spaces will be located to the front and side of the expanded structure and will be centrally located and buffered/screened from adjacent public roads and residential uses by landscaping and distance. The proposed trash receptacle to the southwest of the expanded structure will be buffered by distance and existing/proposed landscaping/vegetation.

d. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.

The proposed conditional use will be accessed from Frederick Road. DPZ reports the sight distance appears to provide reasonable access. There is no shared driveway access.

e. The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

DPZ identifies a small pond on Lot 2 some 500 feet from the proposed improved area on the Property. In the Hearing Examiner's view, a pond is not an environmentally sensitive area. There are no environmentally sensitive areas in the vicinity.

f. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

Mount View (HO-916) lies more than 1,100 feet to the southwest of the non-pipestem portion of the Property, across Frederick Road. There is no evidence of the use having a greater potential for diminishing the character and significance of a vicinal historic site in the vicinity than elsewhere.

II. Specific Criteria for Nursing Homes and Residential Care Facilities (§ 131.0.N.38)

A Conditional Use may be granted in the RC, RR, R-ED, R-20, R-12, R-SC, R-SA-8, R-H-ED, R-A-15, R-APT, R-MH, R-VH, CAC and TNC Districts for nursing homes and residential care facilities, provided that:

a. The facility shall have 16 or fewer beds.

Sixteen beds are proposed, in compliance with § 131.0.N.38.a.

b. The minimum lot size for a new facility is one acre. An existing facility does not have to comply with this criteria.

The Property is 5.2 acres, in compliance with § 131.0.N.38.b.

c. The design of new structures or additions to existing structures will be compatible in scale and character with residential development in the vicinity, as demonstrated by architectural elevations or renderings that shall be submitted with the petition.

The petition includes architectural elevations for the additions showing fenestration, roof pitch, height, and exterior materials similar to the residential buildings in the vicinity, including multi-pane windows and stone/brick facades, in compliance with § 131.0.N.38.c.

d. Buildings, parking areas and outdoor activity areas will be at least 50 feet from adjoining residentially-zoned properties other than public road right-of-ways.

The conditional use/variance plan shows all buildings, parking areas, and outdoor activity areas sited at least 50 feet from adjoining residentially-zoned properties other than public road right-of-ways, in compliance with § 131.0.N.38.d.

e. At least 20% of the area within the building envelope shall not be used for buildings, parking areas or driveways. The building envelope is formed by the required structure and use setbacks of the Zoning Regulations for the zoning district and the Subdivision and Land Development Regulations.

Based on the CUP, the building envelope area is 102,126sf. Therefore, 65,287sf, or 63.9% of the building, is not used for buildings, parking areas, or driveways, in compliance with § 131.0.N.38.e.

III. Compliance with the Specific Standards for Variances

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. 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).

In this petition, the pipistem portion of the Property is long and narrow, and is therefore a unique physical condition of the Property causing practical difficulty in complying strictly with the setback regulation, in accordance with HCZR § 130.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 requested variance is for a proposed 20-foot paved driveway located within a 52-foot wide pipistem portion of the Property. As DPZ explained in the TSR, driveways are exempt from all structure setbacks, but remain subject to use setbacks. Consequently, an existing residential pipistem driveway would rarely comply with the 30-foot use setback. The width of the pipistem is therefore a practical difficulty. Additionally, the driveway's width dates back to 1978 and is long-existing. There is therefore no evidence the requested variance would alter the essential character of the neighborhood or district or impair the use or development of adjacent property.

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, in accordance 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 variance is for a reasonable use of the Property, in accordance with § 130.0.B.2.a(4).

ORDER

Based upon the foregoing, it is this **30th day of May 2018**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petitions of Angel's Touch, Inc. for a Nursing Home and Residential Care Facility conditional use, specifically a 16-bed assisted living facility, and a related variance to reduce the 30-foot use lot line setback to 3.5 feet for a driveway in an RC-DEO (Rural Conservation: Density Exchange Option Overlay) zoning district are hereby **GRANTED**.

Provided, however, that:

1. The conditional use and variance shall be conducted in conformance with and shall apply only to the proposed use described in the petition and depicted on the revised Plan and not to any new structures or uses on the Site or any additions thereto.
2. Petitioner shall obtain all required permits.
3. Petitioner shall comply with all federal, state, and local laws and regulations.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFaivre

Date Mailed: 5-31-18

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.