

IN THE MATTER OF : BEFORE THE

HONG TAO MA : HOWARD COUNTY

Petitioner : BOARD OF APPEALS

: HEARING EXAMINER

: BA Case No. 15-012V

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DECISION AND ORDER

On June 22, 2015, 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 Hong Tao Ma (Petitioner) for a variance to reduce the 75-foot structure and use setback from an external street right-of-way (ROW) to 40 feet for a single-family detached dwelling in the proposed four-lot, Old Columbia Crossing subdivision, in an R-12 (Residential: Single) Zoning District, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (HCZR).

The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Brett Dieck, Esquire, represented Petitioner. Charles Crofton testified in support of the petition. David Neilson and Thelma Grimes testified in opposition to the petition.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, I find as follows:

1. Property Identification. The subject property is located on the north side of Old Columbia Pike about 660 feet northeast of Hunter Road. It is officially identified as Tax Map 25, Grid 13, Parcel 262, Lot 9 and is also known as 3832 Old Columbia Pike (the Property).
2. General Property Description. The 3.0624-acre Property has approximately 178

frontage feet. At about 170 feet into the Property, the site widens to about 350 feet. The rear lot line is about 600 feet in length, according to Charles Crofton, project engineer.

The Property is improved with a multi-story, single-family detached dwelling sitting 400± feet from the ROW shown on the Variance Plan. To the west of the dwelling are two sheds. Behind the dwelling in the northeasterly section of the Property is a wooded area with wetlands and a stream buffer. A paved driveway in the central portion of the Property provides access to a large parking pad in front of the dwelling. Excepting a few stands of trees, the front and side yards are open lawn.

3. Adjacent Properties. Parcel 132 to the northeast of the Property is zoned R-VH (Residential: Village Housing) and improved with what appears to be multi-family development. Adjacent properties on the north side of Old Columbia Road are zoned R-ED and are each improved with a single-family detached dwelling. Several dwellings are located close to Old Columbia Pike. Across Old Columbia Pike to the southeast is a property improved with a large dwelling. The area to the south is wooded and the properties are each improved with a single-family detached dwelling.

4. Agency Comments. The Department of Planning and Zoning (DPZ) Division of Public Service and Zoning Administration comments in the technical staff report (TSR) as follows. "[T]he lot [Lot 3] does not currently exist as it is only part of a proposed four-lot subdivision of the Property, and it could not be created as proposed unless the 75-foot setback requirement is reduced. However, a three lot subdivision of the Property would result in the creation of a new

lot that could comply with the 75-foot setback requirement."

5. The Requested Variance. Petitioner is seeking to develop the Property as a four-lot subdivision comprising a 1.5409-acre Open Space Lot 4 behind the existing dwelling and three residential lots. The current driveway would be removed and a new driveway running along the western lot line would provide access to the three residential lots. The proposed 0.62868-acre Lot 1 in the middle portion of the Property would contain the existing dwelling and sheds. Two additional lots are proposed in the front section of the Property. The 0.4208-acre Lot 2 on the south side of Lot 1 would contain a single-family detached dwelling facing the western lot line. The 0.4325-acre Lot 3 would also contain a single-family detached dwelling facing the western lot line and the dwelling would be located 40 feet from the Old Columbia Pike ROW. Because the proposed dwelling on Lot 3 is subject to the 75-foot structure and use setback from an external street ROW (the Old Columbia Pike) imposed by HCZR § 107.0.D.4.a, Petitioner is seeking a variance to reduce the setback to 40 feet.

6. Charles Crofton testified that the shape of the Property is a unique characteristic, as is the topography, which decreases in elevation in the rear section toward Tiber Run and its stream valley walls. He further testified that the location of the house on Lot 3 is compatible with the location of other dwellings in the area. He further testified that the Howard County Historic District Commission had reviewed the proposed subdivision. They did not like the dwellings fronting the western lot line, which would result in their sides being visible from the road. Petitioner redesigned the dwellings with wrap-around porches along the side facades facing Old

Columbia Pike.

7. David Neilson, the owner of 3850 Old Columbia Pike on the west side of the Property, testified to being opposed to the variance because it will increase the intensity of use on the Property. He is also concerned about safe access. Mr. Neilson cross-examined Mr. Crofton about potential flooding related to the development and Mr. Crofton explained how stormwater would be managed on site.

8. Thelma Grimes testified to being a former owner of what the Hearing Examiner understood to be the adjoining property to the west. She questioned Mr. Crofton about old wells on the Property and the Historic District Commission's concerns.

CONCLUSIONS OF LAW

The standards for variances are contained in § 130.B.2.a of the Regulations. That section provides a variance may be granted only if all of the following determinations are made. Based upon the foregoing Findings of Fact, and for the reasons stated below, the Hearing Examiner concludes the requested variances do not comply with §§ 130.B.2.a.(1) and (3) 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.

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.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. 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, Petitioner argues the Property is unique of its shape and topography. The Property, however, is larger than most in the area and its narrowest width, about 175 feet, is wider than many area properties. Nor are its topographical features unique, as many area properties share similar topographical characteristics owing to their location relative to Tiber Run. Importantly, there is no any evidence of record as to how these physical conditions in the rear of the Property burden the Property such that they cause practical difficulties or unnecessary hardships in complying strictly with the 75-foot external street ROW setback. To Petitioner's detriment, these conditions are not unique physical conditions.

Significantly, Petitioner's need for the variances arises not from any unique physical quality of the Property. It is only because Petitioner proposes to subdivide the Property into multiple lots that a difficulty arises. Pursuant to HCZR § 130.0. B.2.a.(3), the practical difficulty in complying with the bulk regulations may not be created by the petitioner. This limitation has in

at least two prior cases caused the Hearing Examiner to deny petitioners' requested variances because they failed to show the property was physically unique, and that it was only through their desire to subdivide the property that practical difficulties arose. In BOA Case No. 05-035V, the Hearing Examiner denied petitioner's variance request to reduce minimum lot sizes for a yet to be created three-lot subdivision. More recently in BOA Case No. 13-004V, the Hearing Examiner denied petitioner's request for front and rear principal structure setback variances for existing dwellings as they related to a proposed subdivision. In this case, Petitioner proposes to subdivide the Property in a manner that will cause the dwelling on proposed Lot 3 to be noncomplying to the HCZR. This circumstance is a self-created hardship, i.e., the Petitioner is creating the very practical difficulty from which he seeks relief, a hardship caused by an affirmative act of commission.

Moreover, there is no unnecessary hardship where Petitioner may continue to make reasonable use of the Property as his residence and still be able to create one additional lot that conforms to the HCZR. This conclusion is consistent with the line of cases interpreting "practical difficulty" or "unnecessary hardship" as a denial of reasonable use standard. See *Belvoir Farms Homeowner Association, Inc. v. North*, 355 Md. 259, 734 A.2d 227 (1999) (discussing the interpretation of variance standards). See also *Citrano v. North*, 123 Md. App. 234, 717 A.2d 960 (1997) (holding board of appeals properly denied variance for a deck accessory structure in a 100-foot critical area, finding no unwarranted hardship where property was already developed with a single family dwelling and related improvements), citing *North v. St. Mary's County*, 99 Md.App.

502, 638 A.2d 1175 (1994) ("If reasonable use exists, generally an unwarranted hardship would not.") North v. St. Mary's, 99 Md. App. at 517-18, 638 A.2d 1175. The petition does not comply with § 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 Property is located in the Ellicott City Historic District. The majority of dwellings along this section of Old Columbia Pike face the street. Petitioner seeks to mitigate the impact of the variance on the character of the historic neighborhood through a wraparound porch on the side of the dwelling facing the street. The evidence of record does not convince the Hearing Examiner that the variance would not alter the essential character of the neighborhood or district in which the lot is located; not substantially impair the appropriate use or development of adjacent property; and not be detrimental to the public welfare. The petition does not comply 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.

As evaluated under § 130.B.2.a.(1), the owner has created the practical difficulties or hardships. The petition does not comply 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.


Because the Hearing Examiner is denying the petition, this section does not apply.

ORDER

Based upon the foregoing, it is this **29th Day of July 2015**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Hong Tao Ma for a variance to reduce the 75-foot structure and use setback from an external street right-of-way (ROW) to 40 feet for a single-family detached dwelling in the proposed four-lot, Old Columbia Crossing subdivision, in an R-12 (Residential: Single) Zoning District, is hereby **DENIED**.

**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 calendar 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.