

**INTER-OFFICE MEMORANDUM
PRINCE GEORGE'S COUNTY, MARYLAND**

ZONING HEARING EXAMINER OFFICE
County Administration Building, Room L200
Upper Marlboro, Maryland 20772
(301) 952-3644
(301) 951-5178 Fax

TO: Jackie Brown, Director
Planning, Housing, and Economic Development Committee

FROM: Maurene Epps McNeil,
Chief Zoning Hearing Examiner

DATE: March 16, 2021

RE: CB-16-2021

Thank you for the opportunity to comment on the above referenced bill which revises the criteria to be followed by the District Council, the Zoning Hearing Examiner, the Planning Board, and the Board of Appeals in their respective decisions to grant or deny a variance request.

I am not aware of the genesis for the proposed revisions. Accordingly, I can only offer the following comment on the new language and apologize if it does not fully address the sponsors' concerns:

(1) Paragraph 1 on page 2, lines 10-12, revises the current paragraph 1. The revised language adds "different from the nature of surrounding properties" and deletes "or other extraordinary situations or conditions". I would suggest that the current Paragraph 1 be retained since: the land cannot be perceived to have exceptional narrowness, etc., unless the finder of fact considers other nearby properties (making the revised phrase unnecessary); caselaw holds that uniqueness in comparison to other properties must be considered (See, James L. Mills v. Ronald Godlove, 200 Md. App. 213, 26 A. 3d 1034 (2011); Dan's Mountain Wind Force. LLC v. Allegany County Board of Zoning Appeals, 236 Md. App. 483, 182 A. 3d 252 (2018)); and, there have been occasions in the past where a variance was needed due to "extraordinary situations or conditions".

(2) Paragraph 2 on page 2, lines 13-14, expands upon the existing language on lines 6-7 and deletes “or exceptional or undue hardship upon”. I would first note that the language on lines 6-7 is succinct and less subject to differing interpretations. The removal of the “exceptional or undue hardship” language may be in recognition of the longstanding position that use variances are not permitted (although that is expressly stated in Section 27-229(b)), since that language is the standard used to grant such variances. While I don’t think the language must be deleted (since there is caselaw recognizing its use solely for area variances and not use variances) I see no impediment to its removal if that is the sponsors’ desire.

(3) I would recommend that the new language in Paragraph 3, lines 16-17, be revised to “Such variance is the minimum reasonably necessary to grant the requested relief” since the exceptional physical conditions are not “overcome” – rather a setback or other bulk regulation is adjusted to allow development despite such condition.

(4) I suggest that Paragraph 4 be revised in two places. The “and” on line 19 after “purpose” should be changed back to “or” since “or” is defined in the Zoning Ordinance to allow the connected items to be applied singly or in combination, while “and” is defined to require they be considered in combination. I would also suggest that “duly adopted and approved area” be deleted prior to “master plan” since the latter is defined as a plan “approved” for “a particular planning area” or “combination of areas”, making the new language redundant.

(5) Paragraph 5, lines 21-22, should also be revised. While other jurisdictions may use similar language it would be draconian to require a landowner to satisfy all of the other provisions in the bill in order to allow a permitted use to be developed, and also require that the use not be detrimental to adjoining properties as well as properties some further distance away (“neighboring properties”). I would suggest that the Council consider language similar to “Such variance will not result in substantial injury to the public health, safety and general welfare” to avoid variances being granted/denied by plebiscite.

(6) Finally, the language in Paragraph 6, lines 23-24, should be revised to a standard usually associated with land use (rather than “self-inflicted harm”). Perhaps the Council could use similar language to that set forth in Section 27-230 concerning Chesapeake Bay variances – “The variance request may not be granted if based upon conditions or circumstances which are the result of the applicant’s actions.”