

PRINCE GEORGE'S COUNTY COUNCIL

COMMITTEE REPORT

2021 Legislative Session

Reference No.: CB-016-2021

Draft No.: 2

Committee: COMMITTEE OF THE WHOLE

Date: 09/16/2021

Action: FAV(A)

REPORT:

Committee Vote: Favorable as amended, 9-0 (In favor: Council Members Hawkins, Anderson-Walker, Dernoga, Franklin, Glaros, Harrison, Ivey, Taveras and Turner)

The Committee of the Whole convened on July 13, 2021 and September 16, 2021 to consider CB-16-2021. As presented on March 2, 2021, the legislation amends the Zoning Ordinance concerning the approvals of appeals involving variances to comport with recent changes to Maryland law.

At the July 13, 2021 Committee worksession, the Planning, Housing and Economic Development Committee Director summarized the purpose of the legislation and informed the Committee of written comments received on referral. Council Member Dernoga, the bill sponsor, informed the Committee that CB-16-2021 amends the Zoning Ordinance, as recommended by the Principal Counsel to the District Council, to clarify variance law to conform with State law. Mr. Dernoga commented that there was no intention to vote on the legislation during the July 13 worksession, but to provide an opportunity for agency partners and the public to review and comment on proposed revisions.

The Planning Board opposed CB-16-2021 (DR-1) and provided the following analysis by letter dated March 11, 2021 to Council Chair Hawkins:

“The proposed language on page 2, lines 10 through 12, limits variances to only situations where a parcel of property has exceptional narrowness, shallowness, shape, or topographic conditions. Under current law, other extraordinary situations or conditions can also be considered in determining whether a parcel of property has a unique or unusual condition. For example, under the proposed amendment, the District Council could not consider conditions such as sub-surface issues, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions), or other similar restrictions no matter how unique, unusual, or extraordinary the condition might be.

In addition, requiring that the unique or unusual condition be different from surrounding properties will present challenges in certain areas of the County, especially older neighborhoods. Lots in older communities often share a similar exceptional narrowness because the lots were

developed under old zoning regulations. Such homeowners would not qualify for variances under the proposed legislation.

The proposed language on page 2 lines, 13 through 15, limits variances to only situations where the impact will cause a peculiar or unusual practical difficulty for the property owner. Under current law, the District Council can also grant a variance if the impact is causing an exceptional or undue hardship on the property owner. “Practical difficulty” is generally only a test for dimensional variances, so it appears that the legislation intends to prohibit all other types of variances.

On line 21, the words “detrimental to the use and enjoyment of adjoining properties” should be expanded upon.” The words use and enjoyment are open to broad interpretation which could result in inconsistent application of the County’s variance standards.

On line 24, the phrase “self-inflicted hardship” is more appropriate under land use law than “self-inflicted harm.” It would also be helpful to further define or clarify what the District Council intends by the term which presumably refers to a property owner intentionally or unintentionally creating the unique or unusual condition.

It should also be noted that applications for area variances within the Chesapeake Bay Critical Area Overlay Zones (CBCA) already must comply with seven specific conditions under Section 27.01.12.04 of the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays. As a result, the Planning Board believes the proposed bill, which requires compliance with six additional and potentially conflicting requirements, will have the effect of making it essentially impossible to grant area variances in the CBCA.”

The Zoning Hearing Examiner submitted a March 16, 2021 memorandum to the PHED Committee Director indicating that as drafted, CB-23-2021 (DR-1), “which revises the criteria to be followed by the District Council, the Zoning Hearing Examiner, the Planning Board, and the Board of Appeals”, raised the following 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.”

The Board of Appeals provided the following comments by memorandum dated March 17, 2021 to the PHED Committee Director:

(1) A specific parcel of land is physically unique and unusual in a manner different from the nature of surrounding properties with respect to exceptional narrowness, shallowness, shape, or exceptional topographic conditions.

- a. This proposed section eliminates the existing clause “or other extraordinary situations or conditions”.
- b. This clause has historically at times provided the necessary judicial room in deciding unusual cases of the request for variances that do not neatly fit in the other exceptional categories outlined in this section.

(3) Such variance is the minimum reasonably necessary to overcome the exceptional physical conditions;

- a. in Prince George's County, we believe the Board should continue to have discretion on a case-by-case basis in determining the reasonableness of a variance consistent with the

provisions of the Zoning Ordinance. While the Board generally strives to provide the “minimum” relief warranted, circumstances may be protested where such a measuring standard would provide injustice to the property owner.

b. Minimum reasonable is often debatable.

(5) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties.

a. We do not believe that *McLean v. Soley*, 270 Md. 208, 213, 310 A.2d 783 (Md. 1973) requires a mandatory “will not be detrimental to the use and enjoyment for adjoining and neighboring properties” standard as related to the application of the requirements of practical difficulty or unreasonable hardship’ in granting in use variances.

Indeed, the court in establishing three-prong criteria, included also the following standards: “(2) Whether a grant of the variance applied for would do substantial justice to an applicant as well as other property owners in the district or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other owners. (3) whether relief can be granted in such a fashion that the spirit of the ordinance will be observed, and public safety and welfare secured.

b. We believe that to be effective, the Board of Appeals, must have judicial reflexivity by at times in matters in which the balancing interests, particularly those of adjoining parties, must be closely sorted out and a decision rendered consistent with the provisions of Section 270.

c. The proposed section would essentially give veto power to an adjoining property owner over any request for a use variance based solely on the assertion and unnecessary imposition of the subjective “use and enjoyment” standard now being considered.

d. The Board of Appeals already consistently considers, and indeed strongly encourages, at the hearings the testimony of all persons, including adjoining property owners, in adducing conflicting evidence in reaching a determination consistent with the provisions and spirit of Section 270.

e. This proposed section would effectively eliminate the decision-making role of the Board of Appeal in contested matters or issues that are debatable.

f. The County consists of a wide diversity of petitioners with property appeals over which the Board deliberates on a case-by-case basis. The delicate interests, no matter how large or small, of everyone is given considerable consideration by the Board at every hearing.

g. It is unclear what the word “use” pertains to in the proposed language of the section.

The Committee reviewed a Proposed Draft-2 (DR-2) containing amendments requested by the bill sponsor to address certain agency comments. Proposed DR-2 included amendments as follows:

Sec. 27-230. Criteria for granting appeals involving variances.

(a) A variance may only be granted when the District Council, Zoning Hearing Examiner, Board of Appeals, or the Planning Board as applicable, finds that:

[(1) A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;]

[(2) The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property; and]

[(3) The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan.]

(1) A specific parcel of land is physically unique and unusual in a manner different from the nature of surrounding properties with respect to exceptional narrowness, shallowness, shape, or exceptional topographic conditions, OR OTHER EXTRAORDINARY CONDITIONS PECULIAR TO THE SPECIFIC PARCEL (SUCH AS HISTORICAL SIGNIFICANCE OR ENVIRONMENTALLY SENSITIVE FEATURES):

(2) The particular uniqueness and peculiarity of the specific property causes a zoning provision to impact disproportionately upon that property, such that strict application of the provision will result in peculiar and unusual practical difficulties to the owner of the property;

(3) Such variance is the minimum reasonably necessary to overcome the exceptional physical conditions;

(4) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any ~~duly adopted and approved~~ area master plan, SECTOR PLAN, OR TRANSIT DISTRICT DEVELOPMENT PLAN affecting the subject property; and

(5) Such variance will not ~~be detrimental to~~ SUBSTANTIALLY IMPAIR the use and enjoyment of adjoining or neighboring properties.

(6) Notwithstanding any other provision of this Section, a variance may not be granted if the practical difficulty ~~results from self-inflicted harm~~ IS SELF-INFLICTED BY THE OWNER OF THE PROPERTY.

The Office of Law reviewed CB-16-2021 Proposed DR-2 and found it to be in proper legislative form with no legal impediments to its adoption. Terry Bell, County Executive's Liaison to the County Council, informed the Committee that the County Executive is in

support of the legislation.

Rana Hightower, representing the Planning Board, addressed the Committee summarizing the Planning Board comments in support of Proposed DR-2 as provided in a letter dated June 24, 2021 to Council Chair Hawkins:

“The Planning Board previously voted to oppose CB-16-2021 (DR-1). As previously drafted, the legislation significantly limited the conditions under which a variance could be granted. The proposed legislation was much stricter than current law and not equivalent to surrounding jurisdictions.

The revised version of the bill addresses many of the concerns raised by the Planning Board. CB-16-2021 (Proposed DR-2) revises the conditions under which a variance can be granted to better conform with existing law. The additional language allows a variance to also be granted when there are other extraordinary conditions peculiar to the specific parcel and further requires conformance with sector and transit district development plans.

The revised language provides additional protection to neighboring property owners from the impact of the variance and clarifies that the owner’s actions cannot be the reason a variance is being requested. The provisions reflect current case law and substantially mirror similar requirements in neighboring counties.

The Planning Board believes clarification of the meaning and intent behind the terms “use and enjoyment” would assist with future interpretations since the words have a broad meaning.

The Planning Board believes the revised version of the bill is an improvement.”

During the July 13, 2021 Committee worksession, the following individuals testified in support of the legislation: Miller Einsel, Carol Boyer, Michael Bridges, Janet Gingold (Sierra Club), Valencia Campbell, Gary Allen, Henry Cole, Maureen Fine, Milly Hall, Michael Brown, and Ron Weiss.

On September 16, 2021, when the Committee resumed discussion of CB-16-2021, the Council’s Zoning and Legislative Counsel summarized an additional revision on page 3, in a Proposed DR-2A as follows:

SECTION 2. BE IT FURTHER ENACTED that the provisions of this Ordinance shall be applicable for variance applications filed after December 31, 2021.

The Board of Appeals Administrator and the ZHE commented on remaining concerns with the terminology “substantially impair the use and enjoyment of adjoining or neighboring properties” included in the revised drafts.

Mary Cook testified in support of the legislation and Nate Forman, representing the Maryland Building Industry Association, addressed the Committee summarizing the Association’s position as provided in a letter to Chair Hawkins received on September 15, 2021. An excerpt of the letter states:

“We expressed to staff and the sponsors our concerns with CB-16, and in latest version we remain concerned with the additional elements promulgated by the bill for variance approval, but we do appreciate the revisions that were made in response to concerns from the industry. The addition of “or other extraordinary conditions peculiar to the specific parcel element (1) is a welcome improvement over the previous draft. One additional question, although ‘or other extraordinary conditions peculiar to the specific parcel’ is subject to interpretation and must be considered on a case-by-case basis, would it apply to an existing building that currently meets the setback requirements despite having been lawfully constructed prior to expansion of the Regional District or in conformance with setback requirements promulgated under a previous zoning ordinance?”

Finally, there remains some concern over the requirement that the variance will not ‘substantially impair the use and enjoyment of adjoining or neighboring properties.’ Although this is preferable to the phrase ‘not be detrimental to’, it remains inherently subjective. We are concerned that a variance application, despite having met all other requirements, could be denied because a sufficient number of neighbors are opposed to it.”

On a motion by Council Member Dernoga and second by Council Member Glaros, the Committee voted favorable, 9-0, on CB-16-2021 DR-2A with an additional amendment in subparagraph (5) on page 2, lines 22-23, to change “will not substantially impair the use and enjoyment of adjoining or neighboring properties” to “will not substantially impair the use and enjoyment of adjacent properties.”