
CITY OF BALTIMORE

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January 23, 2023

Honorable President and Members
of the City Council of Baltimore
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Attn: Natawna B. Austin,
Executive Secretary

Re: City Council Bill 23-0439 – Zoning - Variance - Side Yard - 6709 Western
Run Drive

Dear President and City Council Members:

The Law Department reviewed City Council Bill 23-0439 for form and legal sufficiency. The bill would grant a variance from certain side yard regulations in the R-1E Zoning District for the expansion of a residential dwelling on the property known as 6709 Western Run Drive (Block 4250, Lot 016).

The variance sought by this bill was the subject of an application by the owners of 6709 Western Run Drive to the Zoning Administrator who denied issuing a permit for the variance. That decision was appealed on March 13, 2023, to the Board of Municipal and Zoning Appeals (“BMZA”) in case BMZ2023-00078. A hearing on the appeal was held on May 16, 2023. The BMZA issued its decision denying the appeal and the requested variance on June 20, 2023. The property owners did not appeal the BMZA’s denial of the request.

A) Under the Zoning Code § 5-305 (c), the City Council may not grant a major variance where the same variance was previously denied by the BMZA.

The Council may only introduce an ordinance for a major variance. See Art. 32, § 5-201(a)(1). In its decision, the BMZA did not address whether the owner’s request was for a minor or major variance. But assuming that this request is for a major variance, the City Zoning Code, Art. 32 (the “Zoning Code”), § 5-305 provides the standards for review and the procedure before the BMZA. Section 5-305(b) states that if the Council refers a bill to the BMZA to approve the requested variance by ordinance, **before the BMZA has rendered a written decision on the requested variance**, then the proceedings before the BMZA cease and the application to the BMZA is deemed to be voluntarily withdrawn. In this case, however, the BMZA rendered a written

decision on the requested variance in June 2023. Accordingly, § 5-305(c) is the applicable provision. This section states:

(c) Legislative limitation.

No legislation may be introduced to approve a major variance after the Board of Zoning Appeals has rendered a written decision on an application involving the same subject matter.

Thus, because the BMZA previously issued a written decision denying the variance, the Zoning Code does not allow the City Council to reconsider this determination pursuant to this bill.

B) The owners may reapply to the BMZA for the same variance after waiting a year or within one year if there is substantial new evidence in support of the request.

Notwithstanding § 5-305 (c), the Zoning Code does allow a property owner to reapply for the same variance after a waiting period of one year from the BMZA's denial. See Art. 32, § 5-205 (a). Moreover, a property owner may submit a subsequent application within one year if the request is either "substantially different" or there is "substantial new evidence that justifies its consideration." See Art. 32, § 5-205 (b).

The Law Department notes that currently the City Council is considering separate legislation, Council Bill 23-0435, that would substantively amend the reason for the BMZA's earlier denial of the variance request. In its denial, the Board explained that in accordance with its reading of § 18-403 of the Zoning Code the expansion of an already existing nonconforming structure, even by way of variance, was precluded when the expansion would increase the degree of nonconformity. The structure at issue in this matter was built in 1953 and already extends into the 10-foot required side yard setback rendering the structure nonconforming. The Board viewed the requested variance as increasing the degree of nonconformity since the planned one-story addition would also extend into the 10-foot required side yard.

Council Bill 23-0435 proposes to amend current Zoning Code § 18-403 to clarify that a variance could be approved in such a circumstance. If the amendment is approved, the property owners would have the right to resubmit their application based on this change.

C) This request highlights an ambiguity in Zoning Code § 5-302 that the Council may wish to address as to whether the requested variance constituted a minor or major variance.

The BMZA decision does not note whether the requested variance is a major or minor variance. The decision is based instead on whether the requested variance would increase the degree of nonconformity in the existing structure. The Law Department notes that the BMZA decision contains the following statement:

As a matter of policy, the Board has interpreted § 18-403 [Subtitle 4 Nonconforming Structures] to mean that any additional portion of a building that does not comply with the required setbacks is a new nonconformity. Though this project would maintain the same

nonconforming setback line that has already been established, it would still increase the amount of the building that is nonconforming.

Separate from the issue of whether a variance can be granted for a nonconforming structure, an ambiguity exists in Zoning Code § 5-302 as to whether this request would qualify as a minor or major variance. On the one hand, the requested variance in CB 23-0439 meets the definition of a major variance in Art. 32, § 5-302(c)(1) since the amount of the requested variance for a side yard setback exceeds 10%. See § 5-302(b)(1)(ii). On the other hand, the requested variance may qualify as a minor variance under § 5-302(b)(1)(v).

In rendering its decision to deny the variance, the BMZA noted that the structure at 6709 Western Run Drive is a lawful, nonconforming structure. The BMZA decision notes that the structure at issue was built in 1953. There is no discussion in the decision of the provision in Art. 32, § 5-302(b)(1)(v). Section 5-302(b)(1)(v) states that the following constitutes a minor variance:

a variance to bulk or yard regulations if:

- (A) the parcel of land is improved with a nonconforming structure that has been in existence for at least 50 years;
- (B) the variance would not permit more than a 10% cumulative increase in the bulk and density of a structure that has been in existence for 50 or more years; and
- (C) in the opinion of the Zoning Administrator, the application complies with all applicable approval criteria for variances.

There is no analysis in the BMZA decision regarding whether the requested variance would fit within this definition in § 5-302(b)(1)(v), thus rendering it a minor variance. The existing above ground square footage of the structure is 3,881 sq. ft. With the proposed addition, the above ground square footage of the structure would be 4,166 sq. ft. Thus, it appears that the request would qualify as a major variance under § 5-302(b)(1) (ii) but could also qualify as a minor variance under § 5-302(b)(1)(v). The Law Department suggests that the City Council consider this apparent conflict as to the distinction between minor and major variances and clarify the ambiguity.

D) Conclusion

The BMZA has rendered a written decision on an application involving the same subject matter under consideration in Council Bill 23-0439. Therefore, Council Bill 23-0439 violates the prohibition in § 5-305(c). Accordingly, because of the provision in Art. 32, § 5-305(c), the Law Department cannot approve this bill for form and legal sufficiency.

Despite this, the Council now has the opportunity through pending Council Bill 23-0435 to pass an amendment to Zoning Code § 18-403 which provision caused the BMZA to not even consider whether the variance should be approved under the relevant standards. If the Council passes this amendment, such a change would provide a basis for the property owners to reapply to the BMZA and, if they satisfy the relevant standards for the grant of a variance, obtain their request. In addition, the Council now also has the opportunity to address the above-described ambiguity in §

5-302(b)(1) regarding the difference between a minor and major variance as part of its consideration of the same legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "Michele M. Toth", with a horizontal line extending to the right.

Michele M. Toth
Assistant Solicitor

cc: Ebony Thompson
Nina Themelis
Tiffany Maclin
Elena DiPietro
Hilary Ruley
Ashlea Brown
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