
CITY OF BALTIMORE

BRANDON M. SCOTT
Mayor



BOARD OF MUNICIPAL
AND ZONING APPEALS

REBECCA WITT, EXECUTIVE DIRECTOR
417 E. FAYETTE STREET, SUITE 922
BALTIMORE, MD 21202

MEMORANDUM

To: The Honorable President and Members of the Baltimore City Council
c/o Natawna Austin, Executive Secretary

From: Rebecca Witt, Executive Director, BMZA

Date: January 9, 2024

Re: City Council Ordinance 23-0435 Zoning Code – Modifications

The Board of Municipal and Zoning Appeals (BMZA) staff and Board members have reviewed City Council Ordinance 23-0435 for the purpose of amending provisions of the Baltimore City Zoning Code relating to variances to conform to relevant State law; making modifications to the process of granting variances; clarifying provisions of the Zoning Code relating to nonconforming structures; providing for a special effective date; and generally relating to the zoning and land-use laws of the City of Baltimore.

If enacted, Council Ordinance 23-0435 would update, by repealing and re-ordaining, with amendments, the Baltimore City Zoning Code, enacted June 5, 2017, related to the application process for: non-conforming structures, minor variances, and property ownership authorization.

Amendment 1 – p2, line 9:

Currently, there is some confusion under the existing Code and existing practice about whether, when an agent files a zoning appeal on behalf of a property owner, the BMZA needs to collect a statement in writing from the owner of the property saying that they approve of the agent's filing of the application.

To solve this issue, the proposed amendment moves the phrase "in writing" to another portion of the subsection.

The Law Department recommends that this phrase "in writing" be removed entirely from this section, which may align better long-term with the city's near-term plans to make the entire process electronic, in which case the words "in writing" may not be helpful anymore anyway.

BMZA agrees with the Law Department's recommendation and is not opposed to the proposed amendment in the bill.

Amendment 2 – p2, line 17:

In a previous revision, passed in 2022, the Code was amended to require that appellants file certain kinds of appeals with BMZA (conditional uses, conditional signs, negative appeals) and others (variances) with the Zoning Administrator. However, in practice, this switch from filing all appeals with the Zoning Administrator to filing certain appeals directly with BMZA has not taken place; mostly, this is because the city's permitting system is antiquated and doesn't allow BMZA staff to originate appeals. Therefore, every appeal (variance, conditional use, etc.) is still being filed with the Zoning Administrator and being forwarded to BMZA, as of January 2024.

This bill would require that appellants file major variances with BMZA and minor variances with the Zoning Administrator. The problem with this is that most appellants do not understand the process and do not know whether their project involves a major variance or a minor variance. This amendment is an attempt to help sophisticated appellants (i.e.,

attorneys and other professional consultants) to skip a step that feels unnecessary to them but it is perhaps at the expense of the everyday appellant, who won't know where to file their appeal without further help from the Zoning Administrator's Office or other city employees. This seems to undermine the One-Stop Shop permitting model; we are creating Multiple Stops to Multiple Shops, which will likely cause confusion. The unrepresented everyday appellant makes up probably more than half of overall appellants.

Amendment 3 – p2, line 24:

This amendment would remove the phrase “unnecessary hardship” from the variance standard. BMZA supports this change, as this is in keeping with the zoning caselaw in Maryland on variances; the “unnecessary hardship” standard only applies to use variances, which we do not have in Baltimore City; therefore, the removal of this standard will help clarify the Code and bring it into compliance with existing case law.

The BMZA therefore supports this amendment.

Amendment 4 – p3, lines 1-11:

This bill would broaden the application of the variance mechanism. Currently, the Code specifically excludes signs from the variance process.

As this is a policy matter, BMZA has no position on this proposed amendment.

Amendment 5 – p3, lines 17-34; p 4, lines 1-8:

This bill would broaden the application of the minor variance mechanism; minor variances are approvable by the Zoning Administrator.

As this is a policy matter, BMZA has no position on this proposed amendment.

Amendment 6 – p4, lines 10-24:

This bill proposes to change the variance approval standards, presumably with the goal of creating a less onerous test. The bill removes existing subsection 5-308(b)(1) which requires that the Board find that the conditions on which a variance application is based are unique to the property and not generally applicable; however, it adds in that those conditions must be “peculiar to the property” under subsection 5-308(a). The bill also adds an alternative test to the peculiarity requirement, in the case of “exceptional circumstances related to the specific structure or land involved.”

BMZA does not oppose these proposed changes to the variance approval standards.

However, as a legal matter, it is difficult to imagine how these amendments will lead to any change in the Board's variance decision-making, if that is their goal.

(1) Peculiarity.

First, Maryland caselaw makes clear that “unique” and “peculiar” are essentially synonyms.¹ The State Land Use Article uses the term “peculiar” in its definition of a variance,² which is perhaps why it is being proposed here and the uniqueness

¹ “Maryland cases have used the terms ‘unique,’ ‘unusual,’ and ‘peculiar’ ... more or less interchangeably.” [Dan’s Mt. Wind Force, LLC v. Allegany Cty. Bd. of Zoning Appeals](#), 236 Md. App. 483, 494 (2018).

² “‘Variance’ means a modification only of density, bulk, dimensional, or area requirements in the zoning law that is not contrary to the public interest, and where, owing to conditions peculiar to the property and not because of any action taken by the applicant, a literal enforcement of the zoning law would result in unnecessary hardship or practical difficulty, as specified in the zoning law.” [Md. Code Ann., Land Use § 1-101\(s\)](#).

clause removed. This will make the Zoning Code more consistent with the Maryland Land Use Article in its wording but will make no difference to the legal standard that the Board must apply.

(2) Exceptional circumstances.

Second, the proposed “exceptional circumstances related to the specific structure or land involved” language has been borrowed from the Anne Arundel County zoning ordinance. The only caselaw available which interprets this phrase is not applicable to Baltimore City variances, because the cases are in reference to “time variances” in Anne Arundel County (variances of a particular time limit in the Code), which Baltimore City does not have. (Instead, we have extension requests, which have a very generous “good cause” standard; we do not apply the variance standard to time limits.) There is no caselaw that would help the Board apply this new “exceptional circumstances” test to a particular appeal. Therefore, if it is adopted, the Board will have to interpret the Code under its plain language. The amendment still requires that the circumstances that serve as the basis of the variance be exceptional or unusual (or, one could say, peculiar or unique?) in some way and they must still be related to the structure or land, not the inhabitant(s) or user(s) of that structure or land.³

The Zoning Code can seem very abstract and theoretical until it is applied to a set of facts; therefore, as an illustration of the process that the Board follows during a typical variance case, an example has been included of a variance request which the Board denied in 2023: BMZ2023-076, 3003 Elm Avenue. (See attachment 1 and 2 for the submitted site plans and the Board’s resolution in this case.)

In BMZ2023-076, 3003 Elm Avenue, the Appellant (an owner-occupant) proposed a rear yard addition to his home which would require variances from the maximum lot coverage and minimum rear yard requirements of the R-7 zoning district, found in Table 9-401 of the Zoning Code.⁴ Per the Table, the district’s maximum lot coverage is 50% and the minimum rear yard is 25 ft. The appellant told the Board that he wanted to make his home more comfortable for himself and his elderly parents, who live with him. He proposed an addition which would create a lot coverage of 67% and a rear yard of 15 ft 10 in.

3003 Elm Avenue is a rowhouse, essentially identical to the rest of the houses on the block. The Board held unanimously that there was no uniqueness to the property that would justify a variance to these bulk and yard regulations.

Under the proposed amendments, then, would the Board be able to approve the requests under a “peculiarity” standard rather than uniqueness? All decisions are up to the Board, but almost certainly they would not, because peculiarity and uniqueness are synonyms.

Were there any “exceptional circumstances related to the specific structure or land” in this matter that could justify a variance? Again, this is a question for the Board, but since “exceptional” is essentially a synonym for peculiar and unique, the Board would be very hard pressed to approve the variances under the proposed standard and the facts presented.

A recent Maryland case gives three reasons for the uniqueness/peculiarity requirement in the variance approval standards:

- (1) “If the allegedly restrictive effect of the zoning law is not unusual and a characteristic is shared by many properties, the problem ought to be addressed by legislation, not variances.” Quoting a New York case, the Maryland Court of Special Appeals added that “[i]f there be a hardship, which ... is common to the whole neighborhood, the remedy is to seek a change in the zoning ordinance itself.”⁵
- (2) “A granted variance cannot act as a precedent in an application regarding another property. If the effects of the zoning law operate similarly to the way in which they operate on a separate applicant property, the uniqueness requirement is likely not satisfied” and therefore a variance should not be granted.⁶

³ Zoning case law is very clear that variances and uses must be related to the physical characteristics of the land itself, not to any particular inhabitant or user of the land. People with disabilities may seek reasonable accommodations for their disability from the Zoning Administrator’s Office under the Americans with Disabilities Act (ADA); this process already exists and is completely separate from the zoning process.

⁴ [Link to the Zoning Code](#); Table 9-401 can be found on pages 461-463.

⁵ *Dan’s Mt. Wind Force, LLC*, *supra* note 1, at 494.

⁶ *Id.* at 495.

- (3) “Uniformity of the application of zoning laws – accomplished in part by requiring that properties exempt from those laws be unique – performs a ‘critically essential function’ by ‘protect[ing] the landowner from favoritism towards certain landowners within a zone by the grant of less onerous restrictions than are applied to others within the same zone.”⁷

Academics agree that “variances are intended to be exceptions granted sparingly and not a routine component of the development process.”⁸ In addition, “an overreliance on variances creates costly delays, significant uncertainty, and distrust.”⁹

The actual source of the issue, to the extent that the City Council disagrees with the outcomes from the BMZA, can be found in the bulk and yard regulations of the Code, located in the Zoning Tables at the very end of Article 32, not in the variance standard.

Every ordinance has underlying values and goals, whether they are explicitly or implicitly stated. The bulk and yard regulations that exist today were largely drafted by the Planning Department and legislators over the course of several years in the 1960s in preparation for the major Zoning Code overhaul that eventually went into effect in 1971. From discussions with today’s Planning Department, these regulations seem to have been drawn to match the structures that were already present in each zoning district. For example, if most rowhouses in the R-8 zoning district had a 20-foot rear yard, then the rear yard regulations were written to require this of all properties. The 2017 Transform zoning rewrite may have tweaked a few of these regulations if they seemed to be inconsistent with the existing structures in a particular district but seems to have left them mostly intact.

Drawing the bulk regulations to match what already exists, from a policy perspective, in the context of zoning caselaw, means that the Zoning Code exists to protect the status quo of the 1960s and to prevent exactly the kinds of expansions that many council members seem to want the Board to approve.

Perhaps, after nearly sixty years of relative stasis, it is time for the City Council to examine whether these regulations are serving the public health, safety and welfare of the public in the year 2024. The City Council is the entity that is empowered to make these sorts of policy decisions, weighing the relative importance of different goals and values, not the BMZA. The BMZA will continue, in good faith, to enforce whatever regulations are passed by the Council, in the light of the Maryland zoning case law.

Amendment 7 – p5, lines 7-29:

This amendment would allow appellants more time to get their construction or use permits after the BMZA approves their appeal. The BMZA supports this amendment.

Amendment 8 – p6, lines 6-11:

This amendment grants the BMZA the ability to approve a variance for a nonconforming structure. As it currently stands, the Code prohibits BMZA from granting a variance for an existing structure that is nonconforming. This is a policy decision; therefore, BMZA takes no position on this amendment. However, if nonconforming structures are treated identically to conforming structures, it is unclear what the purpose of the nonconforming/conforming distinction is in the Code.

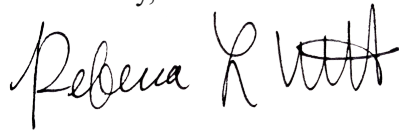
CONCLUSION: The BMZA does not oppose this bill, with the amendments proposed by the Planning Commission and Law Department.

⁷ *Id.*

⁸ John J. Infranca and Ronnie M. Farr, *Variances: A Canary in the Coal Mine for Zoning Reform?*, 50 *Pepp. L. Rev.* 443, 504 (2023) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4188013.

⁹ *Id.*

Sincerely,





A handwritten signature in black ink, appearing to read "Rebecca K Witt". The signature is written in a cursive style with a large initial "R" and a stylized "Witt".

Becky Lundberg Witt
Executive Director, BMZA

LOT INFORMATION:

- ZONE = R-8
- MAP = 0013
- GRID = 0000
- PARCEL = 0000
- SECTION = 12
- BLOCK = 3504E
- LOT = 008
- BUILDING CLASSIFICATION = RESIDENTIAL
- BUILDING USE = S.F.D (SINGLE FAMILY DWELLING)
- LOT SIZE = 14'-6" x 84'-10" (1,230.08 SQFT)
- EX. BUILDING LOT COVERAGE = VARIES (628.16 SQFT)
- PRO. BUILDING LOT COVERAGE = VARIES (834.62 SQFT)
- PROPERTY BUILT = 1880
- EXISTING BUILDING HEIGHT = 23' +/-
- EX. ENCLOSED BUILDING = 1,140 SQFT
- PRO. ENCLOSED BUILDING = 1,500 +/- SQFT

LEGEND

-  - EXISTING BUILDING (2-STORY) TO REMAIN
-  - EXISTING BUILDING (1-STORY) TO REMAIN
-  - NEW 2-STORY ADDITION (14'-6" x 10') x (4'-2" x 14'-9")
-  - NEW 1ST FLOOR REAR LANDING (5' x 3') w/ STEPS TO EXISTING GRADE

SCOPE OF WORK

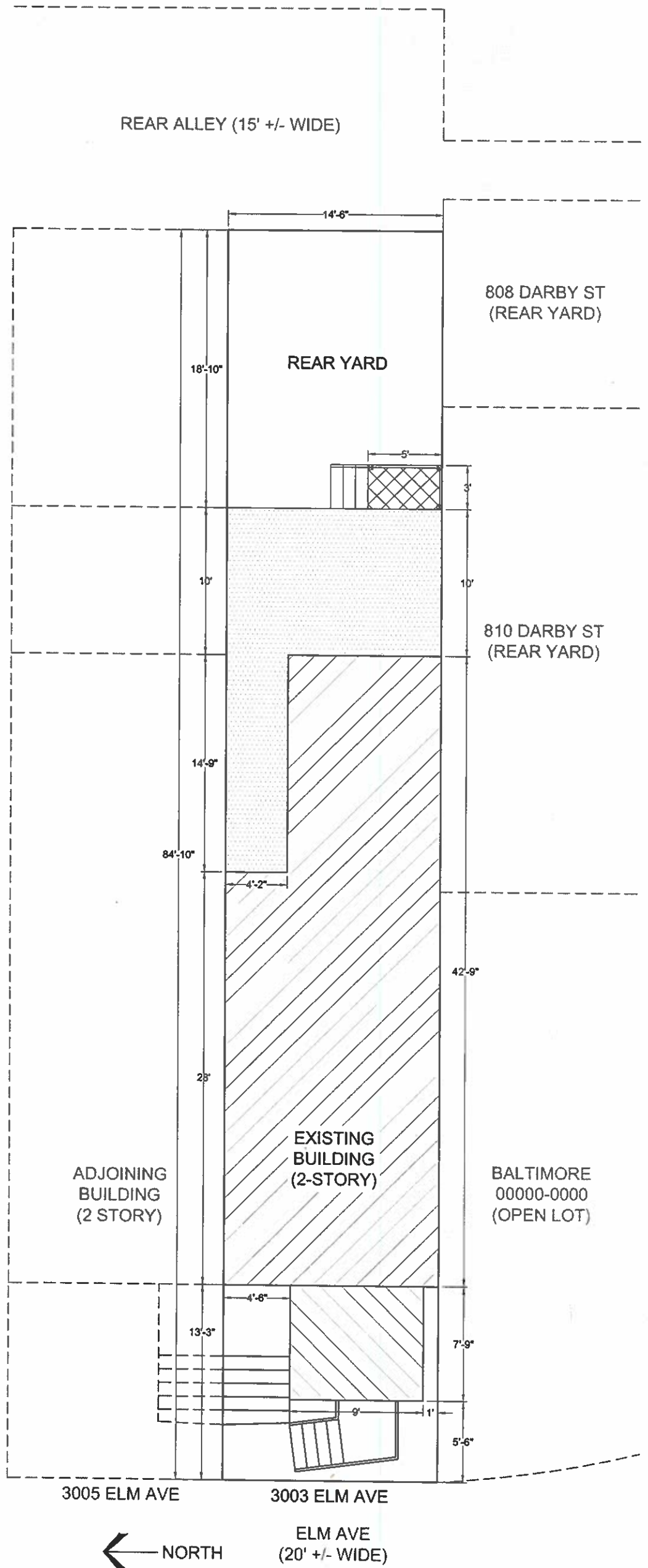
- NEW 2-STORY ADDITION (14'-6" x 10') x (4'-2" x 14'-9") (206.45 SQFT)
- NEW 1ST FLOOR REAR LANDING (5' x 3') w/ STEPS TO EXISTING GRADE
- NEW INTERIOR BUILD-OUT, INCLUDING BUT NOT LIMITED TO: (STAIRCASE, FLOOR / ROOF JOISTS, STUD WALLS, DRYWALL, ETC.)

**PERMIT DESCRIPTION
(NW2 ENGINEERS OFFICE USE ONLY)**

Demo Work: Category 2 Demo (500 SF) of Bearing & Non-Bearing Stud Walls, Stairs, Plaster, Trim, Insulation, Flooring / Roofing & Debris. New Floor & Roof Joists Per Plans

New Interior Work: Framing (1,000 SF) w/ Stud Walls, Staircase (7-3/4"Riser, 11"Tread, 3"Wide) w/ Hangers, Drywall, Trim, Insulation (R-20 Walls, R-49 Roof), Doors (X).

New Exterior Work:
New 2-Story Addition (14'-6" x 10') x (4'-2" x 14'-9") (206.45 SqFt),
New 1st Floor Rear Landing (5' x 3') w/ Steps To Existing Grade,
New Exterior Doors (X), Windows (X),
As Per Plans, As Per Code.



A-1

SHEET

CERTIFICATION

3003 ELM AVE

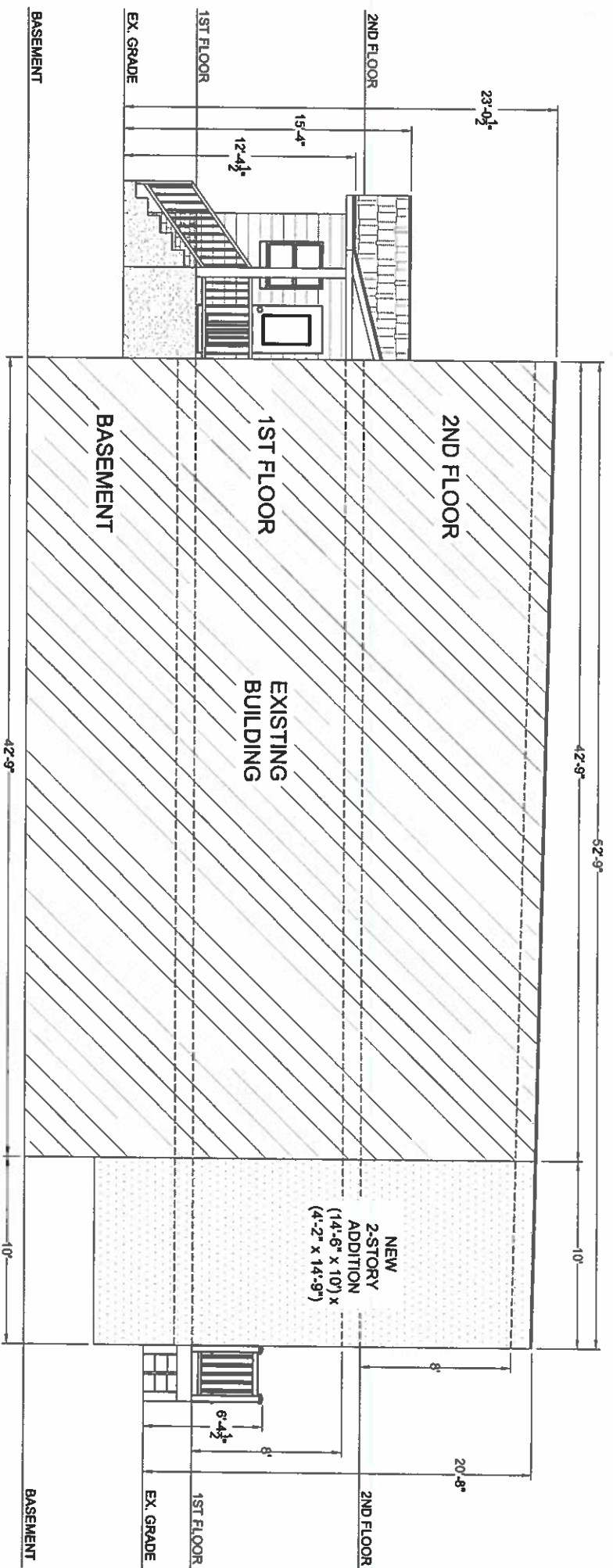
SITE

DATE: 2/21/23

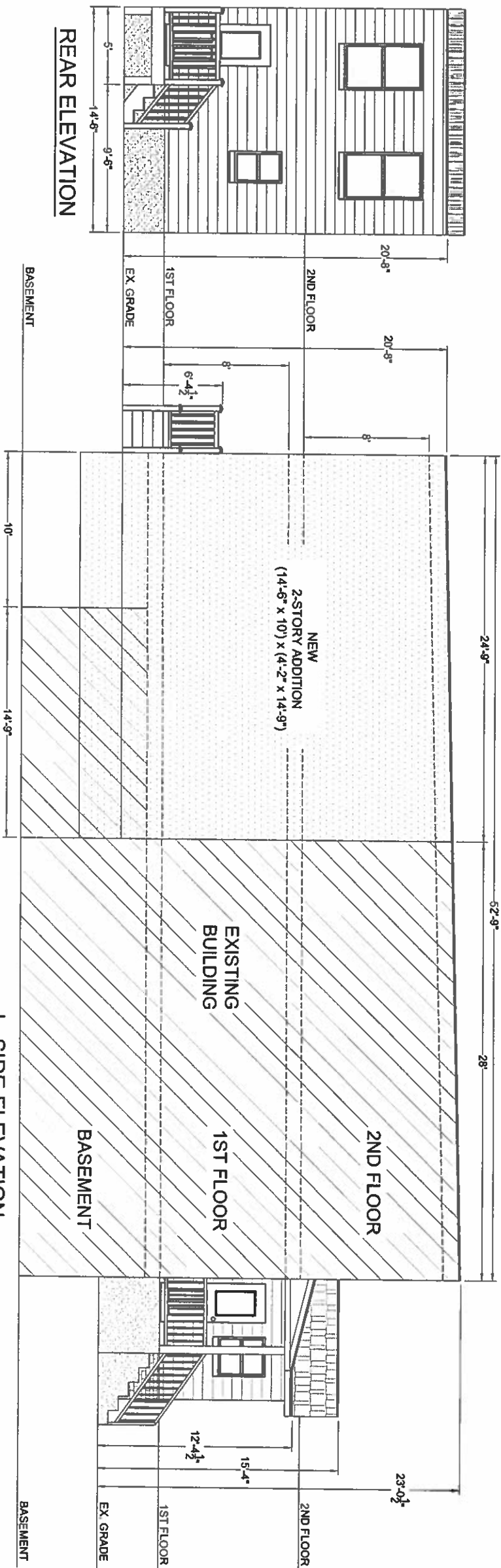
SCALE: 1/8"=1'-0"



NW2 ENGINEERS
819 LIGHT ST
BALTIMORE, MD 21224
(P)410.209.0587
(F)410.431.8970

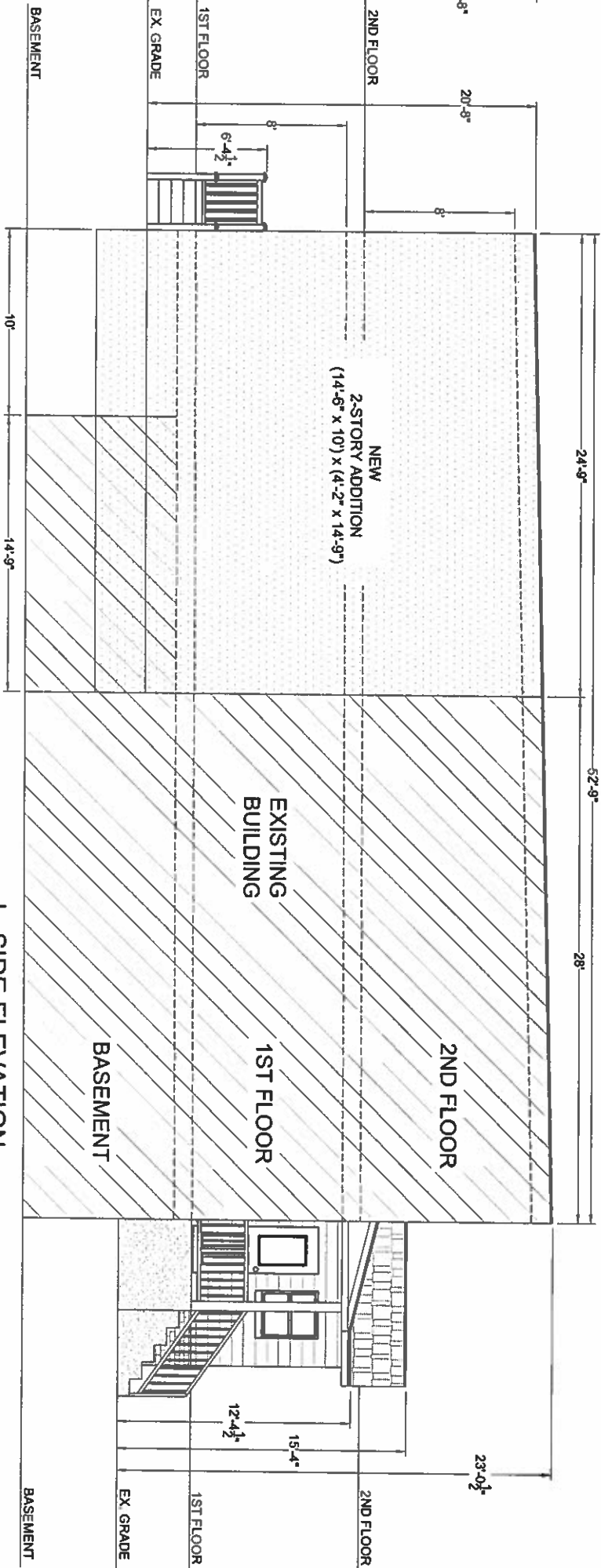


R. SIDE ELEVATION



L. SIDE ELEVATION

REAR ELEVATION



3003 ELM AVE

ELEVATIONS

DATE: 2/21/23

SCALE: 1/8"=1'-0"

NW²
 NW2 ENGINEERS
 819 LIGHT ST
 BALTIMORE, MD 21224
 (P)410.209.0587
 (F)410.431.8970

CERTIFICATION

SHEET

A-2

IN THE MATTER OF THE
PETITION OF: DARRIN BREWER

Baltimore City Board of Municipal
& Zoning Appeals

3003 Elm Ave
(BLOCK 3504E, LOT 008)



Rebecca Witt
Executive Director
417 E. Fayette Street, Room 922
Baltimore, MD 21202
Phone: 410-396-4301

Appeal No. 2023-076
Hearing Date: May 16, 2023

RESOLUTION

Background

This matter comes before the Baltimore City Board of Municipal & Zoning Appeals (“Board”) on appeal from the Zoning Administrator for Baltimore City denying the application of Darrin Brewer (“Appellant”) to construct a two-story rear addition requiring minimum lot coverage and rear yard variances at 3003 Elm Ave (“Property”).

Appellant filed this appeal to the Board on March 17, 2023 and appeared for a public hearing on May 16, 2023. Board staff prepared a memorandum evaluating the appeal. Following deliberations and for the reasons set forth below, the Board voted, 4-0, to deny Appellant’s request to construct a two-story rear addition requiring minimum lot coverage and rear yard variances.

Facts

The Property is located in an R-7 Zoning District, improved with a two-story brick/frame rowhouse constructed in 1880, with 1,140 sq ft of above-grade floor area. The last authorized use of the premises is as a single-family rowhouse dwelling.

In his statement of justification for his variance requests, Appellant stated that his Property is unique because it is an end of unit rowhouse, with a vacant lot next door. There are properties that adjoin his side yard at a ninety-degree angle. Appellant also stated in his application that he has been slowly renovating his property for many years, with the ultimate goal of building rear additions to increase the interior space of the home. He argued that not being able to build the additions would create a financial hardship, because all the other work he has done has been with these rear additions in mind. Appellant represented himself at the hearing and told the Board that he has lived in this house with his parents for many years and he wants to be able to expand the house for more living space and to make it more comfortable.

Standard of Review

Under City Code, Article 32, § 5-305(a), the Board must evaluate the request for a variance based on the evidence presented at a public hearing in accordance with City Code, Article 32 § 5-308. Under City Code, Article 32 § 5-308, to grant a variance, the Board must find that because of the particular physical surroundings, shape, or topographical conditions of the specific structure or land involved, an unnecessary hardship or practical difficulty, as distinguished from a mere inconvenience, would result if the strict letter of the applicable requirement were carried out.

To grant a variance under City Code, Article 32 §5-308(b), the Board must also find that: (1) the conditions on which the application is based are unique to the property for which the variance is sought and are not generally applicable to other property within the same zoning classification; (2) the unnecessary hardship or practical difficulty is caused by this article and has not been created by the intentional action or inaction of any person who has a present interest in

the property; (3) the purpose of the variance is not based exclusively on a desire to increase the value or income potential of the property; (4) the variance will not: (i) be injurious to the use and enjoyment of other property in the immediate vicinity; or (ii) substantially diminish and impair property values in the neighborhood; (5) the variance is in harmony with the purpose and intent of this Code; (6) the variance is not precluded by and will not adversely affect: (i) any Urban Renewal Plan; or (ii) the City's Comprehensive Master Plan; (iii) any Historical and Architectural Preservation District; and (7) the variance will not otherwise: (i) be detrimental to or endanger the public health, safety, or welfare; or (ii) be in any way contrary to the public interest.

Under City Code, Article 32 §5-306(a), before approving any variance, the Board may impose on the establishment, location, construction, maintenance, or operation of the variance any condition, restriction, or limitation that is considers necessary or desirable to: (1) reduce or minimize the effect of the variance on other properties in the neighborhood; (2) secure compliance with the standards and requirements of this Code; and (3) better carry out the intent and purpose of this subtitle.

Discussion

After a thorough review of the file, evidence and testimony submitted in support of this application, the Board evaluated this application under the variance approval standards found in City Code Article 32 and Maryland law.

The variance standard found in Article 32 § 5-308, as interpreted by Maryland caselaw, requires a threshold finding of uniqueness of the Property. In this case, the Board found by a preponderance of the evidence that Appellant's Property is not unique. There are many other very similar properties in this same zoning district that are end of group rowhomes with the other attributes listed by Appellant.

Furthermore, the Board held that the aspects of the Property presented by the Appellant have no logical nexus with the bulk regulations from which Appellant is seeking a variance. The fact that the Property is an end of group rowhouse with a vacant lot and two neighboring properties adjoin the side yard of the Property does not have any connection with any reason why Appellant cannot comply with the minimum rear yard and maximum lot coverage bulk regulations.

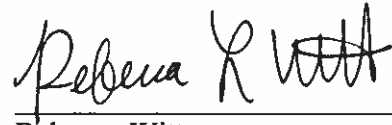
Conclusion

For the reasons set forth above, and after giving public notice, reviewing the zoning records, holding a public hearing, considering all data submitted, and by authority of City Code Article 32, it is this **20th day of June, 2023**, by the Baltimore City Board of Municipal and Zoning Appeals, hereby:

RESOLVED, that the Board has not found sufficient evidence in the record to support Appellant's application to to construct a two-story rear addition requiring minimum lot coverage and rear yard variances; and it is further,

RESOLVED, that Appeal No. 2023-076 is **DENIED**.

DO NOT START WORK OR USE THE PROPERTY UNTIL YOU OBTAIN A BUILDING OR A USE & OCCUPANCY PERMIT FROM THE DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT. YOU HAVE ONE YEAR FROM THE DATE OF THIS RESOLUTION TO OBTAIN A BUILDING PERMIT OR A USE & OCCUPANCY PERMIT.



Rebecca Witt
Executive Director

