

**DECISION
OFFICE OF THE ZONING HEARING EXAMINER
CITY OF CINCINNATI**

DATE OF DECISION: APRIL 29, 2021

**APPLICANT: MANLEY BURKE, LPA
225 W. COURT STREET
CINCINNATI, OH 45202**

**OWNER: R2 PARTNERSHIP; L&D REAL ESTATE HOLDINGS, LLC; L&D
REAL ESTATE PROPERTIES, LLC
PO BOX 9833
CINCINNATI, OH 45209**

**CASETYPE: USE VARIANCE, VARIANCE, SPECIAL EXCEPTION, URBAN
DESIGN OVERLAY, HILLSIDE OVERLAY**

CASE NO.: ZH20210018, ZHUV210003

PROPERTY: 1009, 1011, 1013, 1015 DELTA AVENUE

SUMMARY OF REQUEST:

R2 Partnership, L&D Real Estate Holdings LLC, and Linwood Real Estate Holdings (“Owners”) own the properties commonly known as 1009, 1011, 1013, and 1015 Delta Avenue Cincinnati, OH (“Property”). Manley Burke, LPA (“Applicant”) is requesting a use variance, variances, special exceptions, Urban Design Overlay District permission, and Hillside Overlay District permission to construct a new 27-unit multi-family development on the Property.

SUMMARY OF DECISION:

The Owner’s application for relief is **APPROVED**.

PUBLIC HEARING:

After reviewing the application and materials submitted by the Applicant and other concerned persons, and visiting the Property and surrounding area, David Sturkey, the Zoning Hearing Examiner, conducted a public hearing on the application, prior notice of the time and place of the hearing having been published in *The City Bulletin* and mailed to the Applicant and all abutting property owners and other interested parties.

The hearing was held on March 31, 2021 at 11:00 am. A recording was made of the hearing and is available for review and transcription.

THE RECORD:

1. Application and Written Statements
2. Applicant's supplemental letter dated 2/23/2021
3. Applicant's supplemental letter dated 3/30/2021
4. Site Plan and Drawings
5. Testimony of Berry Rosenberg
6. Testimony of Paul Schirmer
7. Testimony of Seth Oakley
8. Testimony of Craig Abercrombie
9. Testimony of Sari Lehtinen
10. Testimony of Wes Munzel
11. Testimony of Elizabeth Stoehr
12. Testimony of Laura Whitman
13. Testimony of Brian Spitler
14. Letter in opposition from Mt. Lookout Community Council dated March 26, 2021
15. Slide presentation from Mt. Lookout Community Council
16. Letters from Sean Suder – Counsel for Mt. Lookout Community Council dated February 25, 2021 and March 22, 2021
17. Email from Sean Suder – Objection on behalf of Mt. Lookout Community Council to submission of additional information
18. Department of Buildings and Inspections Staff Report
19. Recording of Hearing held on March 31, 2021

FINDINGS OF FACT:

1. The Property is located in a CN-P (Commercial Neighborhood-Pedestrian) Zoning District in the Mt. Lookout neighborhood and in the Mt. Lookout Urban Design Overlay District.¹ The parcel at 1015 Delta Avenue is also located within a Hillside Overlay District and therefore Hillside Overlay regulations apply to all of the parcels on the Property.²
2. The Property consists of four primary parcels on Delta Avenue that each contain an existing structure. The Applicant's project includes the construction of a four-story 27-unit multi-family development with one level of parking (the "Structure").
3. The Applicant is requesting several forms of relief outlined below:
 - a. Special Exception – The Applicant is proposing 5 recesses of 170 square feet for a total of 850 square feet of recesses for the five townhomes that front Delta Avenue. The CN-P Zoning District limits the space created by an articulated façade to one square foot of space per linear foot of building width.

¹ Cincinnati Municipal Code 1400-17 and Map 1400-17.

² Cincinnati Municipal Code 1433-05.

- Thus, the Applicant is requesting a special exception to complete this portion of the project.
- b. Special Exception – The Applicant is proposing an access driveway in the rear of the Property that abuts an RM Zoning District. When the CN-P Zoning District abuts a RM Zoning District a 10 feet wide bufferyard is required. Thus, the Applicant is requesting a special exception to complete this portion of the project.
 - c. Variance – The Applicant is proposing articulation along the front façade of the building to allow for courtyards in front of the 5 townhomes along Delta Avenue. The CN-P Zoning District requires the entire façade of a building to be located at the 0 feet front lot line of the street frontage and thus the Applicant is requesting a variance to complete this portion of the project.
 - d. Variance – The Applicant is proposing a variance of .58 feet from the maximum/minimum zero-foot front yard setback requirement to allow a front yard setback of .58 feet.
 - e. Urban Design Overlay District Review (New Construction) – The Applicant is proposing to demolish four existing structures and construct a new building on the Property and thus requires Urban Design Overlay approval for new construction.³
 - f. Use Variance – The applicant is proposing to demolish four existing structures within the Urban Design Overlay District. Upon review of a previous application submitted by the Owner, the Zoning Board of Appeals determined that the proper standard of review for demolition of existing structures within an Urban Design Overlay District is the use variance standards established in Section 1445-16 of the Cincinnati Municipal Code. Thus, the Applicant is requesting a use variance to complete the demolition on the Property.
 - g. Hillside Overlay District Review - When a property is located in a Hillside Overlay District, development must comply with the Hillside Overlay District's base development requirements.⁴ The Hillside Overlay District limits retaining walls to a maximum height of 8 feet.⁵ The Applicant proposes a retaining wall height of +/-11 feet. As such, the Applicant requires permission to complete construction of the proposed retaining wall. Another base development requirement of the Hillside Overlay District limits excavation and fill to a maximum of 8 feet. The Applicant proposes an excavation and fill of +/-30 feet and thus requires Hillside Overlay permission to complete the project.⁶
4. The Applicant presented a detailed argument explaining why the requested relief was appropriate. The Applicant's argument is outlined within the application materials and the Applicant's supplemental letters. The Applicant also introduced several witnesses during the hearing to provide testimony.

³ Cincinnati Municipal Code 1437-09.

⁴ Cincinnati Municipal Code 1433-07.

⁵ Cincinnati Municipal Code §1433.19 (d).

⁶ Cincinnati Municipal Code §1433.19 (g).

- a. Berry Rosenberg – Representative of the Owner/Developer. Mr. Rosenberg gave an overview and background of the project including changes to the design of the project.
 - b. Paul Schirmer – Development Consultant. Mr. Schirmer gave an overview of the changes to the new design including a reduced height of the Structure, a smaller cut into the hillside, and the economic viability of the project.
 - c. Seth Oakley – Architect. Mr. Oakley provided an overview of the project and testified that the new design is smaller and maintains the dense urban character of Mt. Lookout Square.
 - d. Craig Abercrombie – Site Engineer. Mr. Abercrombie testified that the new design resulted in a lower retaining wall and that the Owner intends to maintain as much vegetation as possible in the bufferyard.
 - e. Sari Lehtinen – Architect. Ms. Lehtinen testified that the existing structures on the Property do not comply with the Urban Design Overlay District regulations. She testified that the project substantially conforms to the Mt. Lookout Design Plan, that the new design further brings the project into harmony with the neighborhood, and she outlined the design elements that bring the project into conformity. She also testified that there is no prevailing architectural style in Mt. Lookout Square.
5. Several property owners and members of the Mount Lookout Community Council (“MLCC”) testified in opposition to the Applicant’s project. Arguments from members of the community in opposition to the project are detailed in letters, emails, and oral testimony from the hearing and included as an official part of this record. Among other detailed arguments in the record, the representatives from the MLCC testified that this project should be denied for the following reasons:
- a. The project is inconsistent with the Mt. Lookout Urban Design Plan. The new design for the proposed structure still far exceeds the limits for bulk, shape, massing, scale and form that have been established in the Mt. Lookout Urban Design Overlay District.
 - b. The architectural style of the proposed structure is not consistent nor compatible with its surroundings or the vision for the community.
 - c. Approval of the new design will still cause harm to the community by setting a precedent for all future development within this Urban Design Overlay District.
6. Sean Suder, attorney for the MLCC, argued that Zoning Hearing Examiner lacked jurisdiction to review the present application based on res judicata because a previous application filed by the Applicant at the same location is currently under appeal in the Hamilton County Court of Common Pleas.
7. The Department of Buildings and Inspections provided a staff report on the Owner’s application for zoning relief and recommended approval of all the requested relief.

CONCLUSIONS OF LAW:

Res Judicata

Case law in Ohio concerning the general doctrine of res judicata has long ago established the general principle that material facts or questions which were in issue in a former suit and were judicially determined by a court of competent jurisdiction, are conclusively settled by a judgment therein so far as concerns the parties to that action and persons in privity with them. *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St. 3d 193 (1983). The main legal thread which runs throughout the determination of the applicability of res judicata, inclusive of the adjunct principle of collateral estoppel, is the necessity of a fair opportunity to fully litigate and to be "heard" in the due process sense. Accordingly, an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action. *Id.*

The MLCC failed to demonstrate that the present application is identical to the previous application and involves identical issues. As discussed further below, the present application includes substantial changes to the application currently under appeal. Any development on the Property will involve some overlap of the type of relief that is necessary. For these reasons, the MLCC's motion to dismiss is **DENIED**.

Standards for Zoning Relief

1. Under the Zoning Code, a property owner seeking a special exception, conditional use or variance must make two showings. First, regardless of the relief requested, the property owner must demonstrate that its project conforms to all applicable laws, ordinances and regulations, and is in the public interest. The determination is made after weighing the factors established by the Zoning Code.⁷ The second showing is specific to the form of relief requested.
2. Those seeking a special exception must demonstrate that that the special exception is appropriate in the proposed location.⁸ This requires evidence that the proposed development:
 - a. Is consistent with the purposes of the Zoning Code and the applicable zoning district;
 - b. Will not substantially diminish or impair the value of property within the neighborhood in which it is located;
 - c. Will not have an adverse effect on the character of the area or the public health, safety, and general welfare, and will be constructed, arranged, and operated to be compatible with the use and development of neighboring properties in accord with applicable district regulations; and

⁷ Cincinnati Municipal Code 1445-13.

⁸ Cincinnati Municipal Code 1445-19.

- d. Complies with all other standards imposed on it by Zoning Code.
3. Those seeking a variance must then demonstrate that the variance is neither contrary to the intent and purpose of the Zoning Code and the underlying zoning district, nor detrimental or injurious to the public health, safety, and general welfare.⁹ This requires evidence that:
 - a. the condition giving rise to the need for a variance was not created by the property owner or its predecessors; and
 - i. in light of the condition giving rise to the need for a variance, the strict application of the provisions or requirements of the zoning code is unreasonable and would result in practical difficulties; or
 - ii. a variance is necessary for the preservation and enjoyment of a substantial property right possessed by owners of other properties in the same district or vicinity.
 4. Those seeking a use variance must demonstrate that the property owner will suffer unnecessary hardship if strict compliance with the terms of the Zoning Code is required.¹⁰ This requires clear and convincing evidence that:
 - a. The property cannot be put to any economically viable use under any of the permitted uses in the zoning district;
 - b. The variance requested stems from a condition that is unique to the property at issue and not ordinarily found in the same zone or district;
 - c. The hardship condition is not created by actions of the property owner;
 - d. The granting of the variance will not adversely affect the rights of adjacent property owners or residents;
 - e. The granting of the variance will not adversely affect the community character, public health, safety or general welfare;
 - f. The variance will be consistent with the general spirit and intent of the Zoning Code; and
 - g. The variance sought is the minimum that will afford relief to the property owner.
 5. This decision first addresses whether Applicant's project conforms to all applicable laws, ordinances, and regulations, and is in the public interest. It then addresses whether the Applicant has satisfied the criteria specific to special exceptions,

⁹ Cincinnati Municipal Code 1445-15.

¹⁰ Cincinnati Municipal Code 1445-19.

variances, and use variances. Finally, this decision will discuss whether Hillside Overlay District and Urban Design Overlay District permission is appropriate.

The Public Interest

6. The Applicant demonstrated that the project conforms to all applicable laws, ordinances, and regulations, and, weighing the factors below, is in the public interest. Aside from the zoning regulations implicated in this matter, no evidence demonstrates that the project violates any applicable law, ordinance, or regulation.

Spirit and Intent of the Zoning Code and Neighborhood Compatibility (Cincinnati Municipal Code 1445-13(a and h)).

The Applicant's proposal is compatible with the intent and purposes of the underlying CN-P Zoning District which encourages a mix of pedestrian oriented commercial and residential uses. The project is compatible with the general intent and purposes of the Zoning Code. The proposed project will create new modern residential dwellings. The project is designed to prevent any adverse traffic effects and the variance request allows for façade articulation on the townhomes that reduces the impact of the massing along the Delta frontage. The proposed project is also compatible with the prevailing land use in the area. The new design reduces the overall height and scale of the Structure and also reduces the maximum cut in the hillside and height of the retaining wall.

Economic Benefits, Guidelines, Tax Evaluation, Public Benefits and Private Benefits (Cincinnati Municipal Code 1445-13(l, b, n, o and p)).

The project will provide important public and private benefits. In addition to the obvious benefits the owner would enjoy by constructing the project, the owner's investment in the Property would bring economic benefits to the neighbors and the public by increasing the value of the neighbors' homes and the resultant property tax receipts.

Traffic, Blight and Adverse Effects (Cincinnati Municipal Code 1445-13(d, k and j)).

The project will not create significant adverse effects. The new size and scale of the Structure is larger than some buildings in the neighborhood but has been significantly reduced. The Applicant presented persuasive evidence that traffic and parking concerns have been meaningfully addressed and will not present any foreseeable adverse effects for the community. No significant sonic or odorous impacts are expected as result of the Applicant's project.

Special Exception Analysis

7. The Applicant demonstrated that the proposed project complies with the underlying zoning district purposes, will not substantially impair property value, that the development complies with all other standards imposed on it by the Zoning Code and that there will be no adverse impacts.¹¹

¹¹ Cincinnati Municipal Code 1445-19.

Compliance with Code and District Purposes.

As discussed above, the Applicant demonstrated that the project is generally consistent with the purposes of the Zoning Code and the CN-P Zoning District. While the proposal does not strictly meet the requirements of the code, the bufferyard deviation will enhance the residential character of the Structure and façade articulation is a desired feature in the Mt. Lookout Urban Design Plan.

No Substantial Impairment of Property Value.

The Applicant demonstrated that the project will not substantially diminish or impair the value of property within the neighborhood in which it is located.

No Undue Adverse Impact.

The Applicant demonstrated that the project will not have an adverse effect on the character of the area or the public health, safety and general welfare. The project will be constructed and arranged to be generally compatible with the land use and development patterns of surrounding properties.

Compliance with Other Standards.

The project complies with all other standards imposed on it by the Zoning Code.

Variance Analysis

8. The Applicant satisfied the criteria for variances by demonstrating that the variance request is neither contrary to the intent and purposes of the Zoning Code and the CN-P zoning district, nor detrimental or injurious to the public health, safety, and general welfare. The Applicant satisfied those criteria by demonstrating that owing to special circumstances not created by the Owner or his predecessors, the strict application of the provisions or requirements of the Zoning Code are unreasonable and would result in practical difficulties.¹²

Strict adherence to the Zoning Code would require a 0 feet front yard setback. The CN-P zoning district prohibits recessed facades while the Urban Design Overlay District encourages patterns that indicate façade articulation, structural bays, and avoiding long unrelieved expanses of wall. It is this contradiction in the Zoning Code that created the special circumstances that require relief. The Applicant made specific design changes to the façade of the townhomes in order to respond to community concerns and enhance the appearance. The variance request is insubstantial, is compatible with the spirit and intent of the Zoning Code and cannot be obviated without a variance. For these reasons, the variance request is appropriate.

Urban Design Overlay District Permission

9. Upon review of Case No. Z-4053-2020, the ZBA held that a use variance standard as described in Cincinnati Municipal Code Section 1445-16 may be considered when the

¹² Cincinnati Municipal Code 1445-15.

standards of the Urban Design Overlay District cannot be met. Similar to the proposed development in the prior case before the ZBA, the Urban Design Overlay District demolition standards cannot be met in this case because the Demolition has not been ordered by the Director of Buildings and Inspections for reasons of public health and safety. Therefore, the analysis in this decision must shift to the use variance standards to determine whether demolition is appropriate. The Applicant provided clear and convincing evidence that supports the criteria required for a use variance.¹³

No Economically Viable Use. The evidence submitted clearly and convincingly demonstrates that the four existing structures lack the appropriate parking, design and floor layout to be rented at anything but the low end of the market range. The four structures were originally built as detached single-family homes in 1916. The Applicant submitted proformas with cash flow analysis that demonstrate that the existing structures as office and residential units generate a negative return on the owner's investment and the demand to rent these properties is low.

Unique Condition and Hardship. The evidence clearly and convincingly demonstrates that the Applicant's request for a use variance stems from a unique condition of the Property that was not created by the Owner's actions. The four existing structures are set significantly back from the road and are unlike any other building within the Urban Design Overlay District. It would be extremely difficult to significantly improve these structures and adhere to the UDO standards and the underlying Zoning District regulations without demolishing them.

Impact on Community Character and Adverse Effects. The evidence clearly and convincingly proves that a use variance will not adversely affect the community character, public health, safety, or general welfare, or the rights of adjacent property owners or residents.

Consistent with Spirit and Intent of Zoning Code. As discussed above, the evidence clearly and convincingly shows that the proposed use will be consistent with the spirit and intent of the Zoning Code.

Minimum Relief Necessary. Finally, the evidence clearly and convincingly demonstrates that a use variance is the minimum necessary relief to afford to the Owner. As stated above, demolition of the existing structures is the only economically viable way to develop the Property.

Urban Design Overlay District Permission

10. The specific purposes of Urban Design Overlay Districts are to protect and enhance the physical character of the district, prevent the deterioration of property and blighting conditions, encourage private investment to improve and stimulate the economic vitality and social character of the district, and ensure that infill development does not adversely affect the physical character of the area.¹⁴

¹³ Cincinnati Municipal Code 1445-16.

¹⁴ Cincinnati Municipal Code 1437-01.

New Construction Review

New construction in an Urban Design Overlay District must satisfy certain conditions.¹⁵ These conditions include:

- a. New buildings shall be compatible with their surroundings. Architectural style, bulk, shape, massing, scale and form of new buildings, and the space between and around buildings shall be consistent with the area, and should be in harmony with neighboring buildings;
- b. New buildings shall respond to the pattern of window placement in the district. The designs of new buildings shall avoid long unrelieved expanses of wall along the street by maintaining the rhythm of windows and structural bays in the district. The preferred pattern of ground floor windows is open show windows, with inset or recessed entryways; and landscaping, lighting and other amenities equivalent to those existing in the district; and
- c. Buildings shall de-emphasize secondary rear or side door entrances to commercial space, unless the entrances are associated with public parking areas.

The *Mt. Lookout Neighborhood Business District Urban Design Plan* (1998) (“ML Plan”) adds additional standards for new development within the Mt. Lookout Urban Design Overlay District that include:

- The linear continuity of the street and of the square should be preserved by planning primary building facades parallel to the street and constructed to the property line, except for minor variations needed to create pedestrian open spaces.¹⁶
- The front façade of a building should relate to neighboring buildings as much as possible. These relationships must take into account height, setbacks, materials, and architectural styles.¹⁷

Taking all of these standards into consideration, the Applicant demonstrated that the new design of the project satisfies the base development requirements of the Mt. Lookout Square Urban Design Overlay District. The new design of the proposed development has made significant reductions in the height, massing, width, roofline and scale of the Structure and it now meets the standards in the Urban Design Overlay District for bulk, shape, massing, and scale. The window pattern, materials, and façade articulation are compatible with the Urban Design Overlay District guidelines. There is no prevailing architectural style within the Urban Design Overlay District, but the style of the new design relates to other buildings within the Urban Design Overlay District. The Applicant’s argument that the architectural style of the Structure does

¹⁵ Cincinnati Municipal Code 1437-09(h).

¹⁶ Mt. Lookout Neighborhood Business District Urban Design Plan (1998), 37.

¹⁷ *Id.*

not have to match other buildings within the Urban Design Overlay District in order to be compatible with those buildings is well taken. The new design is compatible and harmonious with the Urban Design Overlay District guidelines.

Hillside Overlay District Permission

11. To receive Hillside review approval under the City of Cincinnati Zoning Code, the Zoning Hearing Examiner must consider both the Base Development Requirements of the Hillside District included in Cincinnati Municipal Code 1433-19 and the Hillside Development Standards included in Cincinnati Municipal Code 1433-23 to ensure harmonious relationships with adjacent buildings and the hillside environment. The standards included in Section 1433-23 are as follows:
 - i. Avoid cuts in the hillside if they would leave cliff-like vertical slopes and excessively high retaining walls.
 - ii. Design buildings to fit into the hillside rather than altering the hillside to fit the buildings.
 - iii. Hillside development should be designed to minimize excavation required for foundations, parking and access drives.
 - iv. Cluster new development to retain surrounding tree cover and minimize alterations to the existing topography.
 - v. Maintain a clear sense of the hillside brow by locating buildings back from the brow of the hill.
 - vi. Site buildings so as to respect views from public viewing places within the HS District identified in a community plan or other documentation approved by the City Planning Commission.
 - vii. Where applicable, consider the guidelines contained in the "Cincinnati Hillside Development Guidelines" report to evaluate development applications.
12. Taking into consideration the base development requirements of the Hillside Overlay District, the district's additional hillside development standards, and the Cincinnati Hillside Development Guidelines, the Applicant demonstrated that the proposed project is in harmony with the hillside environment.¹⁸

The Applicant demonstrated that strictly applying the Zoning Code to the proposed retaining wall and excavation plans is unreasonable and will result in practical difficulties. The Applicant's updated retaining wall and excavation plans exceed Hillside Overlay District regulations, but the plans are necessary to build on the

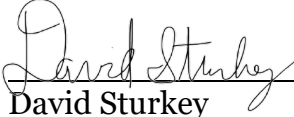
¹⁸ Cincinnati Municipal Code 1433-23.

Property due to the steep topography of the site that slopes up from the street level. Further, the excavation is necessary to reduce the overall height of the development and to provide for adequate parking beneath the structure. The retaining wall allows for an access drive in the rear of the Property that provides for access to the parking garage and the proposed surface parking in the rear. The Hillside Overlay District requests for relief are reasonable and help meet some of the MLCC's concerns about height, traffic and parking. The requested relief substantially complies with the base development requirements of the Hillside Overlay District and the additional hillside development standards. For these reasons, the requested Hillside Overlay District permission is appropriate.

DECISION:

1. The Applicant's request for a special exception to allow 5 recesses on the front façade of 170 square feet each for a total of 850 square feet of recessed area for the five townhomes on the Property is hereby **APPROVED**.
2. The Applicant's request for a special exception to waive the 10 feet bufferyard requirement at the location where the Property abuts an RM zoning district is hereby **APPROVED**.
3. The Applicant's request for a variance from the requirement that the building must be located on the front lot line of the street frontage on the Property is hereby **APPROVED**.
4. The Applicant's request for a variance of .58 feet from the maximum/minimum zero-foot front yard setback requirements to allow a front yard setback of .58 feet on the Property is hereby **APPROVED**.
5. The Applicant's request for a use variance to allow the demolition of the four existing structures on the Property is hereby **APPROVED**.
6. The Applicant's request for Urban Design Overlay District permission for new construction to construct the proposed development on the Property is hereby **APPROVED**.
7. The Applicant's request for Hillside Overlay District permission to construct a retaining wall on the Property at a height of +/-11 feet is hereby **APPROVED**.
8. The Applicant's request for Hillside Overlay development permission for a cumulative excavation and fill of +/-30 feet on the Property is hereby **APPROVED**.

ORDERED THIS 29th day of April, 2021.



David Sturkey
Zoning Hearing Examiner

APPEALS:

This decision may be appealed to the Zoning Board of Appeals, pursuant to Chapter 1449 of the Zoning Code. Appeals must be filed within 30 days of the date of the mailing of this decision.

TRANSMITTED this 29th day of April 2021, by regular mail to:

**MANLEY BURKE, LPA
225 W. COURT STREET
CINCINNATI, OH 45202**

TRANSMITTED this 29th day of April 2021, by interdepartmental mail to Rodney Ringer at the Permit Center.