

DECISION
OFFICE OF THE ZONING HEARING EXAMINER
CITY OF CINCINNATI
DATE OF DECISION: JULY 22, 2020

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

OWNER: L&D REAL ESTATE HOLDINGS, LLC; LINWOOD REAL ESTATE HOLDINGS, LLC; CENTER FOR CHANGE ON DELTA, LLC
PO BOX 9833
CINCINNATI, OH 45209

CASETYPE: VARIANCE, SPECIAL EXCEPTION, URBAN DESIGN OVERLAY

CASE NO.: ZH20200030, ZH20200031

PROPERTY: 1009 - 1015 DELTA AVENUE, 3152 LINWOOD AVENUE

SUMMARY OF REQUEST:

L&D Real Estate Holdings LLC, Linwood Real Estate Holdings, and Center for Change on Delta LLC (“Owners”) own the properties commonly known as 1009-1015 Delta Avenue Cincinnati, OH and 3152 Linwood Avenue Cincinnati, OH (“Property”). Manley Burke, LPA (“Applicant”) is requesting variances, special exceptions, Urban Design Overlay District permission, and Hillside Overlay District permission to construct a new 36 unit multi-family development on the Property.

SUMMARY OF DECISION:

The Owner’s application for relief is **DENIED in part** and **APPROVED in part**.

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 May 28, 2020 at 1:30 pm. A recording was made of the hearing and is available for review and transcription.

THE RECORD:

1. Application and Written Statements
2. Site Plan and Drawings
3. Applicant's Exhibits 1-15
4. Testimony of Berry Rosenberg
5. Testimony of Paul Schirmer
6. Testimony of Seth Oakley
7. Testimony of Craig Abercrombie
8. Testimony of Sari Lehtinen
9. Testimony of Eric Russo
10. Testimony of Pat Knoll
11. Testimony of Peter Riddle and Exhibit - PDF slide presentation
12. Testimony of Elizabeth Stoehr and letter of opposition
13. Testimony of Laura Whitman
14. Testimony of Brian Spitter
15. Testimony of Emily Ahouse
16. Testimony of Dan Prevost
17. Letter from Drew McAvoy
18. Letter from Laure Quinlivan
19. Letter from Steve Massie
20. Letter from Annie Bogenschutz Bolf
21. Letter from Anthony Raabe
22. Letter from Jane Welling
23. Email in opposition Christine Lefever
24. Letter in opposition and Exhibit - PDF slide presentation from Mt. Lookout Community Council
25. Department of Buildings and Inspections Staff Report
26. Recording of Hearing held on May 28, 2020

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 encroaches into a small portion of the property at 3152 Linwood Avenue and therefore that parcel is also included in the application. The Applicant's project includes the construction of a five level 36-unit multi-family development with two levels of parking and three residential levels and five two-story townhomes fronting Delta Avenue.

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

² Cincinnati Municipal Code 1433-05.

3. The Applicant is requesting several forms of relief outlined below:
- a. Special Exception – The Applicant is proposing 5 recesses of 60 square feet for a total of 300 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. Thus, the Applicant is requesting a special exception to complete this portion of the project.
 - b. Special Exception – The Applicant is proposing a 90 feet long access driveway in the rear of the Property that abuts an RM zoning district. CN-P zoning districts that abut RM zoning districts require a 10 feet wide bufferyard. 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. Urban Design Overlay District Review (Demolition and 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 demolition and new construction.³
 - e. Hillside Overlay District Review - When a property is located in a Hillside Overlay District, development of the property must comply with the Hillside Overlay District’s base development requirements.⁴ One of the base development requirements of the Hillside Overlay District is that a new structure may not exceed the maximum building envelope.⁵ The maximum building envelope is determined by averaging the setbacks and heights of the structures that abut the property and are on the same street as the property. If no abutting structure(s) exists, the regulations of the underlying zoning district control.⁶ The Property does not have an abutting structure to the south and thus the underlying CN-P zoning regulations control. The Applicant proposes a .87 feet front yard setback. The CN-P district regulations require a 0 feet front setback. Thus, the Applicant is requesting Hillside Overlay District permission to construct the development with a .87 feet front yard setback. The Hillside Overlay District limits retaining walls to a maximum height of 8 feet.⁷ The retaining walls along the north and west side of the access driveway

³ Cincinnati Municipal Code 1437-09.

⁴ Cincinnati Municipal Code 1433-07.

⁵ Cincinnati Municipal Code 1433-19.

⁶ Cincinnati Municipal Code 1433-17.

⁷ Cincinnati Municipal Code §1433.19 (d).

proposed by the Applicant would be a maximum height of +/-13 feet. As such, the Applicant requires permission to complete construction of the proposed retaining walls. Another base requirement of the Hillside Overlay District limits excavation and fill to a maximum of 8 feet. The Applicant proposes excavation of +/-19 feet to allow for construction of the development. Consequently, the Applicant requires permission to complete this portion of the project.⁸

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 letter. The Applicant also introduced several witnesses during the hearing to provide testimony.
 - a. Berry Rosenberg – Representative of the Owner/Developer. Mr. Rosenberg gave an overview and background of the project including attempts by the developer to work with the Mt. Lookout Community Council ("MLCC") to incorporate community input into the design of the project.
 - b. Paul Schirmer – Development Consultant. Mr. Schirmer testified that the developer used community input to help design the project, that the project meets the Urban Design Overlay District requirements, that there are examples of demolitions in Urban Design Overlay Districts in Hyde Park and Oakley that did not have demolition orders from the Department of Buildings.
 - c. Seth Oakley – Architect. Mr. Oakley provided an overview of the project and some of the architectural considerations.
 - d. Craig Abercrombie – Site Engineer. Mr. Abercrombie testified that the project was designed to have as little cut as possible to develop the site. He summarized ODOT data for driving safety and concluded that the project will be a net benefit for traffic in the area.
 - e. Sari Lehtinen – Architect. Ms. Lehtinen testified that the existing structures on the Property do not have zero feet setbacks and each have individual driveways which is not in line with the Urban Design Overlay District regulations. She testified that the project substantially conforms to the Mt. Lookout Design Plan and outlined the design elements that bring the project into conformity. She also testified that there is no prevailing architectural style in Mt. Lookout.
5. Several property owners and members of the 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 proposed structure far exceeds the limits for bulk, shape, massing, scale and

⁸ Cincinnati Municipal Code §1433.19 (g).

- 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 project will irreparably harm the community by setting a precedent for all future development within this Urban Design Overlay District.
 - d. The developer did not meaningfully engage with the community to help guide the design of the project.
6. 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 except for the Urban Design Overlay District demolition review based on certain conditions outlined in its report.

CONCLUSIONS OF LAW:

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.⁹ 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.¹⁰ 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
 - 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

⁹ Cincinnati Municipal Code 1445-13.

¹⁰ Cincinnati Municipal Code 1445-19.

detrimental or injurious to the public health, safety, and general welfare.¹¹ 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. 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 and variances. Finally, this decision will discuss whether Hillside Overlay District and Urban Design Overlay District permission is appropriate.

The Public Interest

5. 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, including the Urban Design Overlay District and Hillside Overlay District review which require a separate evaluation, no evidence demonstrates that the project violates any applicable law, ordinance, or regulation. It is important to note that while this project has not met the standards of the Urban Design Overlay District review, section 1445-13 weighs a number of different factors and based on a review of all of the factors below, the project satisfies 1445-13.

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, but it does differ in terms of building and structure patterns in the area.

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

¹¹ Cincinnati Municipal Code 1445-15.

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. However, as discussed below, the project does not conform to all of the standards for the Mt. Lookout Square Urban Design Overlay District.

Traffic, Blight and Adverse Effects (Cincinnati Municipal Code 1445-13(d, k and j)).
The project may create some adverse effects. The size and scale of the project are out of character for the neighborhood and may detract from the appearance of the Urban Design Overlay District. However, 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

6. The Applicant demonstrated that the proposed project complies with the underlying zoning district purposes and will not substantially impair property value. However, the Applicant failed to demonstrate that the development complies with all other standards imposed on it by the Zoning Code and that there will be no adverse impacts.¹² All of these standards must be met to grant a special exception and it is for these reasons that the proposed special exceptions are denied.

Compliance with Code and District Purposes.

As discussed in a previous section of the decision, the Applicant demonstrated that the project is generally consistent with the purposes of the Zoning Code and the CN-P Zoning District.

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.

As discussed above and further explained below, the Applicant failed to demonstrate that the project will not have an adverse effect on the character of the area.

Compliance with Other Standards.

The Applicant failed to demonstrate that the project substantially complies with all other standards imposed on it by the Zoning Code. In particular, the Applicant failed to demonstrate that the project substantially complies with the Mt. Lookout Urban Design Overlay District standards.

¹² Cincinnati Municipal Code 1445-19.

Variance Analysis

7. 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.¹³

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

8. 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

Demolition Review

The Applicant proposes the demolition of four existing structures on Delta Avenue which requires Urban Design Overlay District approval. The Applicant must demonstrate that:

- a. Demolition has been ordered by the Director of Buildings and Inspections for reasons of public health and safety AND:
 - i. The structure does not contribute to the architectural quality of the district;
 - ii. The demolition is necessary to accomplish the construction of a building which would meet the guidelines contained in the urban design plan;
 - iii. The demolition is necessary to provide parking and/or other uses in a manner specified in the urban design plan;
 - iv. The owner has endeavored in good faith to find a use for the structure and is unable to obtain a reasonable rate of return on the property; or

¹³ Cincinnati Municipal Code 1445-15.

¹⁴ Cincinnati Municipal Code 1437-01.

- v. The demolition has been ordered to remove blight.

The Applicant correctly acknowledged that the first prong of this standard has not been met, but argued that this deprived the Owner of certain due process rights, that there are examples of similar demolitions throughout the City of Cincinnati that lacked a demolition order and that from a public policy perspective enforcing this standard would make it almost impossible to meaningfully improve and develop most of the City's neighborhoods. While the Applicant's argument is persuasive and quite compelling, it is simply not enough to ignore the plain and unambiguous language of the statute which explicitly requires a demolition order before the Applicant can obtain Urban Design Overlay District permission for demolition. For this reason, the Applicant's request for Urban Design Overlay District permission to demolish the four existing structures on the Property is denied.

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:

- A new or remodeled building should reinforce the existing pattern of small storefronts facing the street.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

¹⁵ Cincinnati Municipal Code 1437-09(h).

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

¹⁷ *Id.*

Taking these standards into consideration, the Applicant failed to demonstrate that the project satisfies the base development requirements of the Mt. Lookout Square Urban Design Overlay District. The proposed development does not meet the standards in the Urban Design Overlay District for bulk, shape, massing, and scale. The MLCC is strongly opposed to the project and presented a detailed argument addressing the proposed development's lack of conformity with the ML Plan. The development would be 153% taller than the average height of all buildings in the Urban Design Overlay District. The development would be 224% wider than the average of all buildings in the Urban Design Overlay District and more than double the average width of the 10 widest buildings. The footprint of the development is approximately 320% larger than the average of all buildings in the Urban Design Overlay District. The sheer size and scale of the building leave it out of harmony with neighboring buildings in the Urban Design Overlay District. The location of the development on top of a hillside only further highlights this disparity. Evidence introduced at the hearing also demonstrated that the development lacks cohesion and harmony with the architectural character, style, scale and proportion of some of Mt. Lookout's landmark buildings that are touted in the ML Plan. To ignore the standards articulated in the ML Plan and disregard the MLCC's recommendations would render the ML Plan useless and set a risky precedent for future development. It is for these reasons that the Applicant's request for Urban Design Overlay District permission is denied.

Hillside Overlay District Permission

9. 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:
 - iii. Avoid cuts in the hillside if they would leave cliff-like vertical slopes and excessively high retaining walls.
 - iv. Design buildings to fit into the hillside rather than altering the hillside to fit the buildings.
 - v. Hillside development should be designed to minimize excavation required for foundations, parking and access drives.
 - vi. Cluster new development to retain surrounding tree cover and minimize alterations to the existing topography.
 - vii. Maintain a clear sense of the hillside brow by locating buildings back from the brow of the hill.

- viii. 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.
 - ix. Where applicable, consider the guidelines contained in the "Cincinnati Hillside Development Guidelines" report to evaluate development applications.
10. 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 front yard setback and the proposed retaining wall and excavation plans is unreasonable and will result in practical difficulties. The 0 feet setback requirement of the underlying CN-P zoning district is generally intended for a structure with a commercial space on the first floor and it is reasonable to expect that an exclusively residential building will be set back from the right of way. The distance the Applicant proposes is small, reasonable and provides a transition space for the Property. The Applicant's retaining wall and excavation plans exceed hillside district regulations, but the plans are necessary to build on the 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 levels beneath the structure. The retaining walls allow for an access drive in the rear of the Property that provides for access at two points to the parking garage below the structure. 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 60 square feet each for a total of 300 square feet of recesses for the five townhomes on the Property is hereby **DENIED**.
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 **DENIED**.
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**.

¹⁸ Cincinnati Municipal Code 1433-23.

4. The Applicant's request for Urban Design Overlay District permission to demolish the four existing structures on the Property is hereby **DENIED**.
5. The Applicant's request for Urban Design Overlay District permission for new construction to construct the proposed development on the Property is hereby **DENIED**.
6. The Applicant's request for Hillside Development Permission to construct the development on the Property with a front yard setback of .87 feet is hereby **APPROVED**.
7. The Applicant's request for Hillside Development Permission to construct retaining walls on the north and west sides of the Property at a height of +/-13 feet is hereby **APPROVED**.
8. The Applicant's request for Hillside development permission for excavation and fill of +/-19 feet at the rear northwest corner of the Property is hereby **APPROVED**.

ORDERED THIS 22nd day of July, 2020.



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 22nd day of July 2020, by regular mail to:

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

TRANSMITTED this 22nd day of July 2020, by interdepartmental mail to Rodney Ringer at the Permit Center.