

DECISION
OFFICE OF ZONING HEARING EXAMINER
CITY OF CINCINNATI
DATE OF DECISION: MARCH 31, 2020

APPLICANT: MADISONVILLE PHASE III LLC
5801 MADISON ROAD
CINCINNATI, OHIO 45227

OWNER: MADISONVILLE PHASE III LLC
5801 MADISON ROAD
CINCINNATI, OHIO 45227

CASE TYPE: VARIANCE & USE PERMIT

CASE NO.: ZHUV200002

PROPERTY: 4930 WHETSEL AVENUE

SUMMARY OF REQUEST:

Madisonville Phase III LLC. (“Owner”) owns the property commonly known as 4930 Whetsel Avenue, Cincinnati, Ohio (“Property”). Madisonville Phase III LLC. (“Applicant”) requests several variances, use permits and a use variance to develop a 4-story mid rise building type that includes mixed use of apartment units, parking spaces, and various commercial uses, including cafes and outdoor eating and drinking areas.

SUMMARY OF DECISION:

The Applicant’s requests are **APPROVED** subject to the conditions provided below.

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 to abutting property owners and other interested parties.

The hearing was held on March 4, 2020 at 12:00 pm. A recording was made of the hearing and is available for review and transcription.

THE RECORD:

1. Application Materials and Written Statement
2. Site Plans and Drawings
3. MSD Comment- No Objection
4. Testimony of Dobbs Ackermann
5. Testimony of Casey Ward
6. Testimony of Bob Beetsch
7. Testimony of Chris Breda
8. Testimony of Kate Botos
9. Testimony of Henry Sheldon
10. Department of Buildings and Inspections Staff Report
11. Hearing Sign-In Sheet
12. Recording of Hearing Held on March 4, 2020

FINDINGS OF FACT:

1. The Property is located in a T5MS (Main Street) and T5MS-O (Main Street-Open) and T4N.SF (Neighborhood Small Footprint) Transect Zones in the Madisonville neighborhood.¹
2. The Property consists of multiple parcels comprising approximately 95% of the block bounded by Madison Road to the north, Whetsel Avenue to the west, Prentice Street to the south, and Ward Street to the east. The Property currently contains several buildings along Madison Road and Whetsel Avenue. Most of the Property lies in the T5MS and T5MS-O transects.
3. This project is the third phase of the Owner's multi-phase project to add mixed use of apartment units on the upper three floors and various commercial uses on the ground floor. A second structure consistent with the form of a Main Street Mixed-Use building type, is proposed to the east of the larger building along the Madison Road frontage.
4. The Applicant requests the following relief for the proposal:
 - A numeric variance to allow more than one building type on the same parcel.²
 - A dimensional variance of 116 feet from the requirement that Mid-Rise floors 1-2 require 150 feet maximum depth to allow 266 feet proposed depth.³
 - Dimensional variances of 5 feet from the requirement that Mid-Rise floors 3+ require 65 feet maximum depth to allow 70 feet proposed depth on the Madison Road side of the building and the Whetsel Avenue side of the building.⁴

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

² Cincinnati Municipal Code 1703-2.80

³ Cincinnati Municipal Code 1703-3.160(C).

⁴ *Id.*

- A dimensional variance of 92.84 feet from the requirement that a Mid-Rise building type have a maximum lot width of 200 feet to allow a proposed lot width of 292.84 feet.⁵
- A dimensional variance of 21.54 feet, 6.26 feet, and 5.25 feet from the requirement that principal structures must be built to Line/ROW, to allow a 21.54 feet setback off the Whetsel Avenue frontage, a 6.26 feet setback off the Madison Road frontage, and a 5.25 feet setback off the Madison Road Street frontage for the Main Street mixed-use building.⁶
- Dimensional variances of 13.21, 18, and 1.6 feet from the required 50 feet maximum distance between entries to ground floor uses to allow doors that are 63.21, 68, and 51.6 feet from each other.⁷
- A dimensional variance of 2.33 feet from the requirement that the ground floor finish level may be 6 feet maximum above street center line to allow a maximum finish level of 2.83 feet.⁸
- A dimensional variance of 36 feet from the requirement that parking lots have a minimum setback of 40 feet to allow a 4 feet setback along the Prentice Street frontage of the double frontage parcel.⁹
- A variance from the requirement that parking lots adjacent to T4 districts have a 6 feet screen fence or evergreen hedge to allow a deciduous tree canopy and an understory of 127 evergreen shrubs in lieu of the requirement.¹⁰
- A dimensional variance of 8.17 feet from the requirement that parking lots larger than one-quarter acre shall be divided into smaller parking areas with planted landscape areas with a minimum width of 15 feet between them to minimize the perceived scale of the total field of stalls to allow a landscape area with a width of 6.83 feet.¹¹
- A use variance to allow proposed Office Use on the Madison Road frontage of the Main Street Mixed-Use building where such use is not allowed on the ground floor, except when located behind an allowed ground floor use.¹²

⁵ Cincinnati Municipal Code 1703-2.80(C).

⁶ Cincinnati Municipal Code 1703-2.80(E).

⁷ Cincinnati Municipal Code 1703-2.80(D).

⁸ *Id.*

⁹ Cincinnati Municipal Code 1703-2.80(F).

¹⁰ Cincinnati Municipal Code 1703-5.50(F)(7)(b)

¹¹ Cincinnati Municipal Code 1703-5.50(F)(9).

¹² Cincinnati Municipal Code 1703-2.80(I)

- A use permit permitting Alcoholic Beverage Sales at several potential tenant spaces in both of the proposed buildings.¹³
 - A use permit permitting an Outdoor Eating and Drinking Area within 100 feet of a T3 or T4 zone.¹⁴
 - A use permit permitting Outdoor Entertainment within 500 feet of a T3 or T4 zone.¹⁵
5. The Applicant's representative, Dobbs Ackermann, testified that the goal of the project is to stimulate the commercial district while creating business growth and increasing the housing market in the Madisonville neighborhood. Mr. Ackermann testified that the project has been in planning for 10 years and has been community focused.
 6. The Applicant's representative, Chris Breeda, along with Mr. Ackermann, testified in detail why each individual variance request was necessary for the project.
 7. Henry Sheldon, a Plans Examiner in the Cincinnati Zoning Department, testified that the Applicant's plans for parking capacity for the project conform to the requirements in the Zoning Code.
 8. Bob Beetsch, from the Community and Economic Development division of the City of Cincinnati, testified that he was in favor of approving the project. He testified that the existing buildings on the Property were demolished and the Applicant was selected through a competitive RFP process to develop the Property.
 9. Mr. Ackermann stated it is necessary to include an outdoor space, outdoor entertainment and ability to serve alcohol to make the project successful. He stressed that it would set the tone for the Property and will encourage a downtown environment.
 10. Kate Botos, a representative of the Madisonville Community Council, testified in opposition to the project. Ms. Botos testified that the parking capacity was inadequate and that there was an earlier agreement with the Applicant to allow more public parking that is not satisfied under this plan.
 11. The Department of Buildings and Inspections provided a staff report on the Applicant's application for zoning relief and recommended approval of the application based on several conditions contained in the report.

CONCLUSIONS OF LAW:

¹³ *Id.*

¹⁴ Cincinnati Municipal Code 1703-5.100(I).

¹⁵ *Id.*

Standards for Zoning Relief

1. Under the Zoning Code, a property owner seeking a variance or a use permit must make two showings. First, 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.¹⁶
2. Those seeking a variance must 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.¹⁷ This requires evidence that:
 - a. A 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 by owners of other properties in the same district or vicinity.
3. Those seeking a use permit must then demonstrate that:
 - a. A proposed use is listed in the applicable zoning district use regulations;
 - b. The proposed use is appropriately located, designed, and configured; and
 - c. Any adverse impacts on the surrounding area have been minimized.¹⁸
4. To show it is entitled to a use variance, a property owner must demonstrate that it will suffer unnecessary hardship if strict compliance with the terms of the Zoning Code is required.¹⁹ 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;

¹⁶ Cincinnati Municipal Code 1445-13.

¹⁷ Cincinnati Municipal Code 1445-15.

¹⁸ Cincinnati Municipal Code 1445-05 and 1445-21.

¹⁹ Cincinnati Municipal Code 1445-19.

- 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 the Applicant's project conforms to all applicable laws, ordinances, and regulations, and is in the public interest. It then addresses whether the Applicant satisfied the criteria specific to variances, use permits, and a use variance.

The Public Interest

6. The Applicant demonstrated that the project conforms to all applicable laws, ordinances, and regulations, and 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. Further, taking into consideration the relevant factors, the project is designed to maximize the public interest and private benefits.

The proposal is compatible with the intent and purposes of the T5MS and T5MS-O Transect Zones and the general intent and purposes of the Form Based Code. The Applicant accomplished the transect zones' goals by substantially improving the Property with development specifically targeted at supporting the surrounding residential population with new residential and commercial uses. The project fits the character of the neighborhood and blends well with the many other types of commercial and residential uses present in the area. While the project requires zoning relief, the relief is necessary to satisfy off-street parking requirements and to meet the unique challenges of the Form Based Code that primarily focuses on new construction on smaller lots between existing buildings and does not contemplate large-scale projects like the proposal submitted by the Applicant.

The project creates no foreseeable adverse effects for the community, and it will hopefully serve as a catalyst for new construction in the neighborhood. While the concerns of Ms. Botos may be valid, the Applicant's have met the requirements under the code regarding parking capacity. The scope of Ms. Botos concerns appeared to focus on a disagreement with the Applicants that was not directly related to the specific zoning variances that the Applicants are now requesting. Thus, she provided inadequate evidence and testimony to deny any one variance request.

While the proposal is not expected to cause issues with traffic, parking, or public services, the proposal will provide important public and private benefits. In addition to the obvious benefits the Applicant will enjoy from the project, the Applicant's investment in the Property will bring economic benefits to its neighbors and the public by creating jobs for local neighborhood residents and by increasing the value of neighboring properties and the resultant property tax receipts. Most importantly, the project revitalizes the Property and puts the Property, which is located in the heart of the Madisonville Business District, into productive use while providing important new residential and commercial options for residents.

Variance Analysis

7. The Applicant also satisfied the criteria for variances by demonstrating that the requested variances are neither contrary to the intent and purposes of the Form Based Code and the T5MS or T5MS-O Transect Zones 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 it or its predecessors, the strict application of the provisions or requirements of the Zoning Code are unreasonable and would result in practical difficulties.²⁰ The Applicants thoroughly outlined why each variance is necessary and satisfies the criteria below.
 - a. *Hardship*. The Applicant met the first variance criterion by demonstrating that the conditions requiring relief in this matter were not created by the Owner or its predecessors. The Applicant cannot reactivate the Property in an effective matter without relief and satisfy off-street parking requirements due to the Property's unique size and shape.
 - b. *Unreasonable Application and Practical Difficulties*. The Applicant also demonstrated that strictly applying the Zoning Code to the project is unreasonable and will cause it practical difficulties. Weighing the applicable factors articulated by the Ohio Supreme Court leads to the conclusion that the requested variances are justified because although they are substantial, the Applicant cannot obviate the predicament without relief, the project complies with the spirit and intent of the Zoning Code, will not substantially alter the character of the neighborhood or cause adjoining properties to suffer a substantial detriment.²¹
 - i. *Spirit and Intent of the Form Based Code and Neighborhood Character*. As discussed in the previous section of this decision, the proposal complies with the spirit and intent of the Form Based Code and the character of the Madisonville neighborhood.
 - ii. *Owner's Ability to Obviate the Predicament without a Variance*. The Applicant cannot reactivate the Property in an effective manner without

²⁰ Cincinnati Municipal Code 1445-15.

²¹ *Duncan v. Middlefield*, 23 Ohio St.3d 83(1986).

relief and satisfy off-street parking requirements due to the Property's unique size and shape.

- iii. *Substantial.* While the variances sought are substantial, the proposal will play an important role in the future development of the Madisonville neighborhood by providing valuable infill development to the area that will attract new residents and customers to this important business district in the City.
- iv. *Detriment to Adjoining Properties.* The project will not impose a substantial detriment on adjoining properties. Instead, the project will reactivate vacant land in the heart of Madisonville with new construction that will increase the value of neighboring properties and attract new residents and customers to the business district.

Use Permit Analysis

8. The Applicant demonstrated that it is entitled to the requested use permits by demonstrating that the requested uses are listed in the applicable Transect Zones use regulations; the uses are appropriately located, designed, and configured; and any adverse impacts on the surrounding area have been minimized.

Listed in the Transect Zones Regulations. The Applicant demonstrated that the requested uses qualify as uses that require use permits under the applicable Transect Zones use regulations.²²

Appropriately Located, Designed, and Configured. The Applicant demonstrated that the proposed project is appropriately located, designed, and configured. The project will help rejuvenate the neighborhood with new restaurants with outdoor dining and drinking options and entertainment. The restaurant use will support neighborhood residents as well as local office, retail and commercial businesses. Most importantly, the project will reactivate a strategically located Property in the Madisonville Business District.

Minimization of Adverse Effects. The Applicant demonstrated that the proposed project is designed to limit adverse effects on surrounding properties. While the establishment does not create any foreseeable adverse effects for the community, it will benefit the community by reactivating a vacant property, creating jobs for the neighborhood and by providing an additional social option for local residents and businesses.

²² Cincinnati Municipal Code 1703-2.80(I).

Use Variance Analysis

9. The Applicant provided clear and convincing evidence that supports the criteria for a use variance.
 - a. *No Economically Viable Use.* The evidence submitted clearly and convincingly demonstrates that the Property cannot be put to any economically viable use under any of the permitted uses in the T5MS or T5MS-O Transect Zone, and that the only economically viable use option is to use the Property for Mixed-Use commercial and residential apartments. The Owner has done significant due diligence as to the economic viability of the Property and the development. Casey Ward, a representative of Midland Retail, testified at length about the research and investment to ensure that this project is tailored to become an economically viable development. Further, the Applicants have aggressively marketed the Property to potential restaurant and retail tenants for approximately 6 months, however, due to the early stages of redevelopment, most businesses have been reluctant to sign leases on the Property. Without the Applicant's significant investment and design of the project, the Property would likely not be able to be put to productive use.
 - b. *Unique Condition and Hardship.* The evidence clearly and convincingly demonstrates that the Applicant's request for a use variance stems from the unique condition of the Property that was not created by the Owner's actions. The current market conditions limit what uses would be economically feasible on the site. Specifically, the retail market study that was performed shows a vacancy rate in the retail trade area above 50%. This condition, not the Owner's actions, gives rise to the use variance request as permitted uses may not be economically viable for the Property.
 - c. *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 right of adjacent property owners or residences. Instead, granting relief should positively affect the community by activating the building, lifting the Property's value and lifting the value of neighboring properties. There was testimony presented at the hearing that this project may increase the strain on street parking in the immediate area. However, there was also evidence presented that the Applicants own or can acquire several alternative parking options within 600 feet of the development. Further, although street parking for nearby residents was raised as a concern at the hearing, the Applicant's satisfied all parking capacity requirements under the Zoning Code.
 - d. *Consistent with Spirit and Intent of Zoning Code.* The evidence clearly and convincingly shows that the requested use variance is consistent with the spirit and intent of the Form Based Code. Although the use on the ground floor of the building will be for residential apartments, the building will be occupied. Having the building occupied will help to draw potential retail and restaurant tenants as

well as members of the community to the Property and the Madisonville neighborhood.

- e. *Minimum Relief Necessary.* Finally, the evidence clearly and convincingly demonstrates that a use variance is the minimum necessary to afford relief to the Owner. Without a use variance, the building on the Property may become vacant making it more difficult to attract potential retail and restaurant tenants to the Property.

DECISION:

1. The Applicant's request for a numeric variance to allow more than one building type on the same parcel is hereby **APPROVED**.
2. The Applicant's request for a dimensional variance of 116 feet from the requirement that Mid-Rise floors 1-2 require 150 feet maximum depth to allow 266 feet proposed depth is hereby **APPROVED**.
3. The Applicant's request for dimensional variances of 5 feet from the requirement that Mid-Rise floors 3+ require 65 feet maximum depth to allow 70 feet proposed depth on the Madison Road side of the building and the Whetsel Avenue side of the building is hereby **APPROVED**.
4. The Applicant's request for a dimensional variance of 92.84 feet from the requirement that a Mid-Rise building type have a maximum lot width of 200 feet to allow a proposed lot width of 292.84 feet is hereby **APPROVED**.
5. The Applicant's request for a dimensional variance of 21.54 feet, 6.26 feet, and 5.25 feet from the requirement that principal structures must be built to Line/ROW, to allow a 21.54 feet setback off the Whetsel Avenue frontage, a 6.26 feet setback off the Madison Road frontage, and a 5.25 feet setback off the Madison Road Street frontage for the Main Street mixed-use building is hereby **APPROVED**.
6. The Applicant's request for dimensional variances of 13.21, 18, and 1.6 feet from the required 50 foot maximum distance between entries to ground floor uses to allow doors that are 63.21, 68, and 51.6 feet from each other is hereby **APPROVED**.
7. The Applicant's request for a dimensional variance of 2.33 feet from the requirement that the ground floor finish level may be 6 feet maximum above street center line to allow a maximum finish level of 2.83 feet is hereby **APPROVED**.
8. The Applicant's request for a dimensional variance of 36 feet from the requirement that parking lots have a minimum setback of 40 feet to allow a 4 feet setback along the Prentice Street frontage of the double frontage parcel is hereby **APPROVED**.

9. The Applicant's request for a variance from the requirement that parking lots adjacent to T4 districts have a 6 feet screen fence or evergreen hedge to allow a deciduous tree canopy and an understory of 127 evergreen shrubs in lieu of the requirement is hereby **APPROVED**.
10. The Applicant's request for a dimensional variance of 8.17 feet from the requirement that parking lots larger than one-quarter acre shall be divided into smaller parking areas with planted landscape areas with a minimum width of 15 feet between them to minimize the perceived scale of the total field of stalls to allow a landscape area with a width of 6.83 feet is hereby **APPROVED**.
11. The Applicant's request for a use variance to allow proposed Office Use on the Madison Road frontage of the Main Street Mixed-Use building where such use is not allowed on the ground floor, except when located behind an allowed ground floor use is hereby **APPROVED**.
12. The Applicant's request for a permit permitting Alcoholic Beverage Sales at several potential tenant spaces in both of the proposed buildings is hereby **APPROVED**.
13. The Applicant's request for a use permit permitting an Outdoor Eating and Drinking Area within 100 feet of a T3 or T4 zone is hereby **APPROVED**.
14. The Applicant's request for a use permit permitting Outdoor Entertainment within 500 feet of a T3 or T4 zone is hereby **APPROVED**.

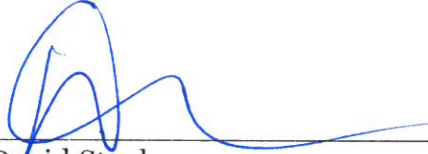
SUBJECT TO THE FOLLOWING CONDITIONS:

The foregoing decision is subject to the following conditions which are found to be in the public interest and necessary to mitigate any harmful effects:

1. The Applicant must note the zoning hearing case number from this decision on any building permits concerning the project.
2. The project shall be constructed in accordance with the plans stamped FINAL APPROVED PLAN by the Zoning Hearing Examiner and forwarded to the Business Development and Permit Center.
3. All building permits necessary for the prosecution of work shall be obtained within two years from the date of this decision.
4. The project must meet all applicable codes and regulations of the City of Cincinnati.

5. Except as otherwise provided in this decision, the project shall be constructed, configured and operated consistent with the testimony, representations and stipulations of the Applicant, the Owner and any person acting on his behalf at the hearing on this matter.
6. If the Applicant and the Owner do not meet all of the conditions required by this decision within the timeframes provided, this decision shall have no further force or effect. If no timeframe is provided for meeting a condition, the condition must be met prior to the time that all building permits issued in connection with the development are closed.

ORDERED THIS 31st day of March 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 31st day of March 2020., by regular mail to:

**MADISONVILLE PHASE III LLC.
5801 MADISON ROAD
CINCINNATI, OHIO 45227**

TRANSMITTED THIS 31st day of March 2020., by interdepartmental mail to Rodney Ringer at the Permit Center.