

IN THE MATTER OF	:	BEFORE THE
KENNETH & ROSALIE CAULDER	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 15-043V

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DECISION AND ORDER

On February 29, 2016, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Kenneth and Rosalie Caulder (Petitioners) for retroactive variances to reduce lot line setback for accessory structures greater than 200sf from 30 feet to 7.7', 22.4' and 19.8' for three existing accessory farm structures located in the RC-DEO (Rural Conservation: Density Exchange Option) Zoning District, filed pursuant to § 130.0.B.2 of the Howard County Zoning Regulations (HCZR).

Petitioners certified to compliance with the advertising and posting requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure.

Adam Baker, Esq., represented Petitioners. James Hurt, Esq., represented himself as an adjoining property owner and as counsel to Gerald Hurt. Ken Caulder and Brian Collins testified in support of the petition. James Hurt also testified, but not in opposition to the petition.

Preliminary Matters

A. The Revised Variance Petition. During the proceeding, Petitioner amended the

Variance Plan to denote existing and proposed uses, structure floor areas and structure heights (the Amended Plan). Hearing Examiner Rule 9.4 requires a petitioner proposing an amendment during the course of the proceedings to submit the amendment as an exhibit. The Hearing Examiner determined the plan revisions were not substantive within the meaning of Hearing Examiner Rule 9.5 and therefore could be admitted as evidence during the hearing. The February 29, 2016 Amended Plan was introduced as Petitioner Exhibit 2.

B. The Draft Agreement. Petitioner's counsel proffered to his clients having come to an understanding with adjoining property owners to the north and south, wherein these property owners would support the petition, subject to the following: 1) the relocation of the encroaching driveway as shown on the Amended Plan and treatment of the soil with a sub-soiler; 2) the removal of a tree located along the common lot line with Parcel 19, and 3) a temporary easement to allow a surveyor on the Property to define the actual lot lines. With the agreement of all parties, the Hearing Examiner held the record open to allow the Agreement to be memorialized in writing, and which would be identified as Petitioner Exhibit 3.

Petitioner introduced into evidence the exhibits as follows.

1. Brian K. Collins, resume
2. February 29, 2016 amended variance plan
3. Agreement, March 10, 2015

FINDINGS OF FACT

Based upon the evidence presented at the hearing, the Hearing Examiner finds as follows:

1. Property Identification. The subject property is located in the 3rd Election District on the north side of Old Frederick Road, about 1,300 feet west of the intersection of Old Frederick Road and Route 32. It is identified as Tax Map 0009, Grid 0003, Parcel 20 and known as 12690 Old Frederick Road (the Property).

2. Property Description. The 3.025-acre irregularly shaped Property is about 130 feet wide at the Old Frederick Road lot line and about 1,105 feet deep. The Property runs in a southwesterly/northeasterly direction. It is improved with a two-story, single-family detached dwelling located in the front section of the property. To the rear of this dwelling are eight accessory farm structures. For ease of identification in this decision and order, the Hearing Examiner numbered the accessory structures on Petitioner's Amended Plan (Exhibit 2).

- Structure #1. A one-story, 11.6' high, 1,017sf block and frame structure located 7.7' from the westerly lot line in common with Parcel 19
- Structure #2. A one-story, 10.7' high, 346sf frame structure behind the dwelling located 48.9' from the easterly lot line in common with Parcel 156
- Structure #3. A 14.6' high, 1,200sf metal barn located 22.4 from the easterly lot line in common with Parcel 156
- Structure #4. A 7.0' high, 130sf shed located 17.2' from the easterly lot line in common with Parcel 156
- Structure #5. A 7.0' high, 50sf chicken coop located 30.9' from the easterly lot line in common with Parcel 156
- Structure #6. A 7.0' high shed located 17.0' from the easterly lot line in common with Parcel 156
- Structure #7. A 7.0' high shed located 15.3' from the easterly lot line in common with Parcel 156. The combined square footage of Structures 6 and 7 is 159sf.
- Structure #8. An 11.6' high, 2,180sf covered frame greenhouse located 19.8' from the easterly lot line in common with Parcel 156

The Property is the site of Breezy Willow Farm and has been in agricultural use since the 1940s.

The structures have been in their current location since 1941, with additions erected in 2004,

2009 and 2012. The Property is also the site of a community supported agriculture use operating without a Department of Planning and Zoning permit.

3. Vicinal Properties. All vicinal properties are zoned RC-DEO. The Hurt Living Trust-owned Parcel 19 is unimproved and fronts on Old Frederick Road. The unimproved Parcel 290, Lot 2, to the north has pipestem access to Old Frederick Road. Also to the north is Parcel 339, improved with a single-family dwelling with access to Old Frederick Road through Parcel 290. The eastern Parcel 156 is improved with a single-family dwelling fronting on Old Frederick Road. Also to the east is Parcel 21, improved with a single-family detached dwelling accessed from Route 32.

4. The Variance Requests (HCZR § 104.0.E.4.a.(3)(c)(1)). Because this section imposes a 30-foot lot line setback for accessory structures greater than 200sf, Petitioner is requesting variances for these three structures.

- Structure #1. A 1,017sf, one-story, block and frame structure to be set back 7.7' from the westerly lot line in common with Parcel 19
- Structure #3. A 1,200sf metal barn to be set back located 22.4' from the easterly lot line in common with Parcel 156
- Structure #8. A 2,180sf covered frame greenhouse to be set back 19.8' from the easterly lot line in common with Parcel 156

5. Ken Caulder testified to Breezy Willow Farm being a community supported agricultural (CSA) operation where he grows crops and sells farm products paid for in advance by consumer memberships. Members come to the Property once a week to pick up their farm products. The farm donates products to area foodbanks.

6. The Hearing Examiner asked Mr. Caulder if he has a Department of Planning and

Zoning CSA permit, as required by HCZR § 128.0.1.6. When he responded that he does not, the Hearing Examiner informed him any variance approval would be conditioned on him obtaining a CSA zoning permit.

7. Brian Collins testified to Petitioner Exhibit 2 being the February 29, 2016 amended variance plan (the Amended Plan) depicting three existing farm structures encroaching into the 30-foot lot line setback for accessory structures. The variances are necessary because the Property is long and narrow. He further testified to the Amended Plan showing a small portion of the existing 12'-wide gravel driveway encroaching onto the western adjoining Parcel 19 and its proposed relocation wholly on the Property. An existing tree partly or entirely on Parcel 19 and just to the south of the encroaching driveway would also be removed.

8. James Hurt, testifying as an adjoining property owner and speaking as counsel for Gerald Hurt, a trustee under the Hurt Living Trust, the Parcel 19 owner, agreed to accept the verbal draft of the Agreement to be memorialized in writing as Petitioner Exhibit 3.

CONCLUSIONS OF LAW

I. The Agreement

Petitioners Exhibit 3 is the March 10, 2016 Agreement between Kenneth E. Caulder and Rosalie J. Caulder (Caulder) and Gerald Hurt and Kendra L. Hurt, as Trustees under the Hurt Living Trust for Parcel 19 (the Trust), and James P. Hurt, owner of Parcels 290 and 339 (Hurt). The Agreement sets out a series of conditions and limitations agreed to by and between Caulder, Hurt and the Trust regarding the removal of the tree located along the common lot line with Parcel 19

and the gravel driveway encroaching onto Parcel 19. The Agreement includes Exhibit A (Page 7), a reproduction of the Amended Plan and redlined to depict the existing driveway encroachment on Parcel 19 and the tree.

In consideration of the mutual promises contained in the Agreement, Hurt and the Trust agreed to support the petition before the Hearing Examiner and not appeal any petition approval. The parties consented at the hearing to the Hearing Examiner incorporating the Agreement into any approval order as findings and making compliance with the Agreement a condition of approval in the Decision and Order granting the requested variances.

II. Evaluation of the Request Variances (HCZR § 130.0.B.2.a)

Pursuant to this section, the Hearing Examiner may grant a variance only if the Petitioner demonstrates compliance with all four variance criteria. Based upon the foregoing Findings of Fact, and for the reasons stated below, the Hearing Examiner finds the requested variances comply with HCZR §§ 130.0.B.2.a.(1) through (4), and therefore may be granted.

(1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.

The first criterion for a variance is that there must be some unique physical condition of the property, e.g., irregularity of shape, narrowness, shallowness, or peculiar topography that results in a practical difficulty in complying with the particular bulk zoning regulation. Section 130.0.B.2.(a)(1). This test involves a two-step process. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this

unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A “practical difficulty” is shown when the strict letter of the zoning regulation would “unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974).

With respect to the first prong of the variance test, the Maryland courts have defined “uniqueness” thus.

In the zoning context, the ‘unique’ aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. ‘Uniqueness’ of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to characteristics as unusual architectural aspects and bearing or party walls. *North v. St. Mary’s County*, 99 Md. App. 502, 514, 638 A.2d 1175 (1994).

In this case, the 130' x 1015'± Property is irregularly shaped, being long and narrow. Additionally, the petition states the three encroaching accessory structures are lawfully non-compliant to the HCZR, having been constructed in their current location in 1941, before the enactment of county zoning regulations in 1948, with later additions. HCZR § 128.0.B.2 authorizes variances for additions to such non-complying structures.

The Hearing Examiner concludes the Property's irregular shape is a unique physical condition. When considered together with the noncomplying status of the three structures, these conditions result in practical difficulties in complying with the accessory structure lot line setback.

(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

The three accessory structures were originally constructed in 1941. The later additions appear to have not altered the essential character of the neighborhood or district. There is no evidence of the requested variances for the accessory structures substantially impairing the appropriate use or development of adjacent property. The granting of the variances will not be detrimental to the public welfare.

(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

Petitioners did not construct the original accessory structures. Petitioners did not create the practical difficulties or hardships.

(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

The retroactive variance requests are for reasonably sized accessory structures on a working farm and a reasonable use of the Property. The requests are therefore the minimum necessary to afford relief.

ORDER

Based upon the foregoing, it is this **19th Day of April 2016**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Kenneth and Rosalie Caulder for variances to reduce the 30-foot lot line setback for accessory structures greater than 200sf to 7.7', 22.4' and 19.8' for three existing accessory farm structures located in the RC-DEO (Rural Conservation: (Density Exchange Option) Zoning District is **GRANTED**.

Provided, however, that:

1. The March 10, 2016 Agreement, submitted as Petitioner Exhibit 3, is hereby adopted and incorporated into this Decision and Order as is set forth herein in its entirety, and that, subject to the terms and conditions of the Agreement, the requested variances are granted.
2. The variances shall apply only to the uses and structures as described in the petition and as depicted on the Amended Plan and not to any other activities, uses, structures, or additions on the Property.
3. Petitioners shall obtain a CSA zoning permit as required by HCZR §§ 128.0.I. Petitioners shall apply for the permit no later than 45 calendar days from the date of this Decision and Order. The Department of Planning and Zoning may change this submission date for good cause.
4. Petitioners shall comply with all state and county laws and regulations applicable to the CSA permit.
5. Petitioners shall obtain all additional permits, including any required grading permit.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

Michele L. LeFaivre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 calendar days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.

AGREEMENT

This Agreement (the "Agreement"), made this 10th day of March, 2016 by and between Kenneth E. Caulder and Rosalie J. Caulder, husband and wife (collectively, "Caulder"), and Gerald F. Hurt and Kendra L. Hurt, as Trustees under the Hurt Living Trust, dated 5-19-2003 (the "Trust") and James P. Hurt ("Hurt").

WITNESSETH:

Whereas, Caulder is the fee simple owner of all that property situate, lying, and being in the 3rd Election District of Howard County, State of Maryland, and more particularly described in the Deed dated August 24, 1984, and recorded among the land records of Howard County in Liber 1282, folio 224 (the "Caulder Property");

Whereas, the Trust is the fee simple owner of all that property situate, lying, and being in the 3rd Election District of Howard County, State of Maryland, and more particularly described in the Deed dated December 16, 2013, and recorded among the land records of Howard County in Liber 15397, folio 465 (the "Trust Property");

Whereas, Hurt is the fee simple owner of that property situate, lying, and being in the 3rd Election District of Howard County, State of Maryland, and more particularly described in the Deed dated November 6, 1991, and recorded among the land records of Howard County in Liber 2907, folio 189 (the "Hurt Property").

Whereas, Caulder filed a Petition with the Howard County Board of Appeals, Case Number BA-15-043V, seeking a Variance from Section 104.0.E.4.a(3)(c)1 of the Howard County Zoning Regulations to permit side yard setbacks of 7.7', 22.4' and 19.8' for three existing structures in lieu of the required 30' (the "Petition").

Now Therefore, in consideration of the mutual promises contained herein, the sufficiency of which is hereby acknowledged, the parties agree as follows:

1. The Petition.

In exchange for Caulder performing the obligations outlined in Sections 2 and 3 of this Agreement with regard to the tree and the gravel driveway, Hurt and the Trust agree to support the Petition before the Hearing Examiner of Howard County and agree not to file any appeals of the approval of the Petition. Should Caulder fail to perform the obligations described in Sections 2 and 3 hereunder, Hurt and the Trust shall be relieved of their pledge to support the Petition and refrain from filing any appeals of the approval of the Petition.

2. Tree.

There is an existing tree which is located along the common property line between the Caulder Property and the Trust Property, as shown on the site plan attached hereto as **Exhibit A**. Caulder

agrees to arrange and pay for the removal of the tree and either the removal of the stump or grinding the roots to below the level of the soil. Caulder shall perform the obligations as described in this section within thirty (30) days of the date of this Agreement.

3. Gravel Driveway.

There is a gravel driveway on the Caulder Property which encroaches onto the Trust Property as shown on Exhibit A. Caulder agrees to relocate the gravel driveway so that it no longer encroaches onto the Trust Property and agrees to remove the existing gravel from the driveway on the Trust Property and replace it with top soil. Caulder further agrees to treat the soil in the location of the gravel driveway encroachment with a sub-soiler. Caulder shall perform the obligations as described in this section within thirty (30) days of the date of this Agreement.

4. Enforcement.

Prior to any party initiating any legal proceeding or mediation arising out of this Agreement, the initiating party shall provide thirty (30) days prior written notice of any alleged dispute. Immediately upon receiving notice of any alleged dispute, the parties shall attempt to amicably resolve any such dispute. If such dispute is not resolved, the parties agree to participate in a mediation session with the mediator mutually agreed upon, such agreement not to be unreasonably withheld. The mediation session must be held within thirty (30) days after notice of any alleged dispute. The parties may extend the thirty (30) day period within which the mediation session must occur by mutual agreement. Each party shall pay one-half (1/3) of the mediator's fee, and shall bear their own additional mediation costs.

In the event that mediation fails to resolve any dispute, any party may institute legal action to enforce this Agreement. The prevailing party at litigation will be entitled to reimbursement of all reasonable attorney's fees together with all other reasonable costs associated with the prosecution of the action, including but not limited to expert witnesses' fees and the costs of depositions.

Damages shall not be deemed adequate compensation for any breach or violation of any provision hereof. The non-breaching party shall be entitled to enforce any provision hereof by way of injunction as well as any other available relief either at equity or law, including but not limited to specific performance, or injunctive relief. The requirements of this paragraph shall exist in perpetuity.

5. Binding.

This Agreement shall bind the parties, their successors, heirs and assigns.

6. Notice.

Any notification required by this Agreement shall be hand-delivered to the persons and addresses listed below. Any change to the names and addresses shall be in accordance with this paragraph.

If to Caulder: Mr. & Mrs. Kenneth E. Caulder
12690 Old Frederick Road
Sykesville, Maryland 21784

With a copy to: Adam D. Baker, Esq.
8830 Stanford Boulevard, Suite 400
Columbia, Maryland 21045

If to the Trust: Mr. Gerald Hurt
1688 Sam Ryder Road
Arnold, Maryland 21012

If to Hurt: Mr. James Hurt
12700 Old Frederick Road
Sykesville, Maryland 21784

7. Counterparts.

The parties agree that this Agreement may be executed in counterparts.

[signatures appear on following page]

WHEREFORE, the parties execute this Agreement as of the day and year first above written.

ATTEST:

CAULDER

Kenneth E. Caulder (Seal)

Rosalie J. Caulder (Seal)

ATTEST

HURT LIVING TRUST, DATED 5-19-2003

*State of Maryland, County of Anne Arundel, on March 10, 2016
personally appeared before me, Margaret E. Wein, a notary public were
Gerald F. Hurt and Kendra L. Hurt*

Margaret E. Wein
MARGARET E. WEIN
Notary Public
Anne Arundel County
Maryland
My Commission Expires Aug. 09, 2017

Gerald F. Hurt (Seal)
Gerald F. Hurt
Trustee

Kendra L. Hurt (Seal)
Kendra L. Hurt
Trustee

ATTEST

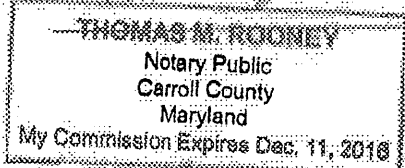
HURT

James P. Hurt (Seal)

WHEREFORE, the parties execute this Agreement as of the day and year first above written.

ATTEST:

CAULDER



Kenneth E. Caulder (Seal)
Kenneth E. Caulder

Rosalind J. Caulder (Seal)
Rosalind J. Caulder

ATTEST

HURT LIVING TRUST, DATED 5-19-2003

_____ (Seal)
Gerald F. Hurt
Trustee

_____ (Seal)
Kendra L. Hurt
Trustee

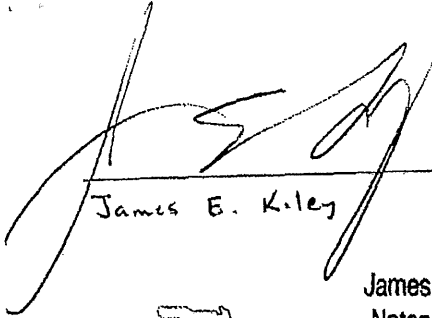
ATTEST

HURT

_____ (Seal)
James P. Hurt

ATTEST

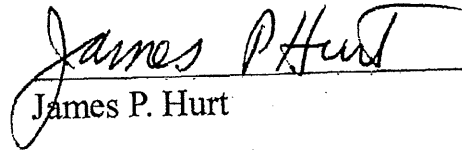
HURT


James E. Kiley



James E. Kiley
Notary Public
State of Florida
My Commission Expires 05/18/2019
Commission No. FF 232038

2191018


James P. Hurt (Seal)

