

IN THE MATTER OF	:	BEFORE THE
STEPHEN KLEIN & ASSOCIATES, LLC	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 13-029V

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DECISION AND ORDER

On December 12, 2013, December 16, 2013, December 19, 2013, January 30, 2014 and February 27, 2014, 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 Stephen Klein & Associates, LLC, t/a River Hill Garden Center, for variances to 1) reduce the structure and use setback from a public street right-of-way (ROW) from 30 feet to 7 feet for a 7-foot high retaining wall and 2) reduce the structure and use setback from a residential district other than a public street ROW from 30 feet to 7 feet for a parking use (egress lane) in an B-1 (Business: Local) Zoning District, filed pursuant to Section 130.0.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations").

The subject property is located in the 5th Election District on the south side of MD 108 (Clarksville Pike). It is identified as Tax Map 35, Grid 1, Parcel 1 and is also known as 12161 and 12171 Clarksville Pike (the Property).

The Petitioner 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

Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure.

William Erskine, Esq. represented the Petitioner. Andrea LeWinter, Esquire, represented opponent Linden Linthicum Chapel Cemetery. Stephen Klein, Melvin Charles Beall, Mark Keeley, Ryun Wauls, Nicole Woodam and Hank Alinger appeared for the Petitioner and testified. Richard Warfield, Richard Draper, Wanda Barth, James Ronald Shaw, Rong Guo, Frank Cockrell, Richard Raver, Gayle Annis-Forder, Marji Arnheim, Sanjay D. Goel, Robert Runser, Dipper Wettstein, Shawn Robansek, Frank Nezu, Robert Forman, Craig Owens. Robert Bena, Richard Smith, Melissa Perdue, David Elsasesser, Lauren Marcus, Gary Mechtel, Phyllis Kelley, Karen Yoder, Gary Smith, Laura Erwin and Gary Miller appeared and testified in opposition to the petition. Richard Smith, a community resident, voluntarily coordinated Opponent cross-examination and testimony, excepting the cemetery. Sign language interpreters Meg Klein and Michele Lawson signed for the audience upon being duly sworn in.

I. The Requested Variances

Petitioner's variance petition and variance plan (dated September 9, 2013) accepted by the Department of Planning and Zoning (DPZ) on October 9, 2013, requested the four variances as follows.

- 1) a reduction in the structure and use setback from a public street right-of-way (ROW) from 30 feet 7 feet for a 7 foot high retaining wall (the Front Setback variance)

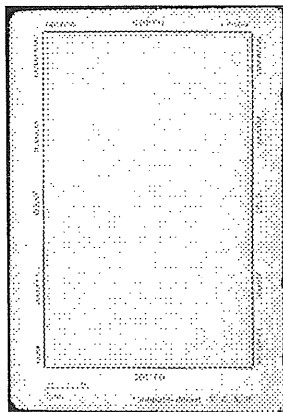
3) a reduction in the structure and use setback from a residential district (relating to the easterly property lot line) other than a public street ROW from 30 feet up to 11 feet for parking uses (the first Side Setback variance) .

4) a reduction in the structure and use setback from a residential district (relating to the southerly property lot line) other than a public street ROW from 30 feet up to 9.5 feet for parking uses (the second Side Setback variance)

DPZ issued its technical staff report (TSR) on October 14, 2013 recommending approval of the Front Setback and Egress variances and denial of the two Side Setbacks. DPZ reasoned the two Side Setback variances relate to the amount of parking required for two restaurants proposed in the redevelopment plan being proposed and not to some unique characteristic of the Property. In response to the recommended denials, Petitioner amended the variance plan (the Amended Variance Plan) and submitted it to DPZ on November 4, 2013, along with a supplemental narrative. The narrative states Petitioner is withdrawing the two DPZ-opposed Side Setback variances, as they concern the Petitioner's desire to achieve a more reasonable use and utilization of the Property, and not for public safety- related reasons, which underlies the request for the Front and Egress setback variance requests.

The pertinent plan in this Decision and Order is therefore the Amended Variance Plan.

II. Findings of Fact and Conclusions of Law: The Hunting of the Plan



The Bellman's Map¹ from
Lewis Carroll, "The Hunting of the Snark" (1874-1876)

For the reasons discussed herein, as based on the evidence of record, the Hearing Examiner is compelled to deny the requested variances because the petition and variance plan,

¹ As described in the Bellman's Speech (From Fit the Second).

He had bought a large map representing the sea,
Without the least vestige of land:
And the crew were much pleased when they found it to be
A map they could all understand.

"What's the good of Mercator's North Poles and Equators,
Tropics, Zones, and Meridian Lines?"
So the Bellman would cry: and the crew would reply
"They are merely conventional signs!

"Other maps are such shapes, with their islands and capes!
But we've got our brave Captain to thank:
(So the crew would protest) "that he's bought us the best--
A perfect and absolute blank!"

The Bellman deployed the map to aid the hunting party in their search for the Snark. At the conclusion of the poem, the Baker calls out that he has found a Snark, but when the others arrive, the Snark has mysteriously disappeared, leading the narrator to explain: "For the Snark was a Boojum, you see." In other words, the Snark was a creature with unknown attributes.

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even as amended, are fatally defective and unripe for adjudication. Contrary to Howard County non-residential variance petition requirements and the law of area variances, the petition and variance plan fail to propose any specific use of the property, such omission precluding any evaluation of the requested variances under the four criteria set forth in Zoning Regulations Section 130.0.B.2.a.² Equally important, Petitioner impermissibly predicates the need for the requested variances on traffic congestion, traffic safety and general public safety concerns and not, as statutory and case law mandate, on practical difficulties arising from the operation of the Zoning Regulations consequent to the Property's uniqueness.

A. Variance Petitions and Plans: A Primer**1. The Petition.**

The filing of a variance petition in Howard County commences with the completion and submission of a DPZ variance petition form document, in this case, a non-residential district variance petition (the petition). The petition instructs petitioners to answer/address/complete

² Pursuant to Section 130.0.B.2.a, the Hearing Authority may grant a variance only if the Petitioner demonstrates compliance with all four variance criteria.

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

(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.

(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.

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

all 10 parts of the petition, two of which, Parts 6 and Part 7, are germane to this Decision and Order.

Part 6. At the top of Page 2 of the petition appear the words "PLEASE READ CAREFULLY" and "DATA TO ACCOMPAY PETITION." Part 6 then instructs petitioners to draw the plan to scale and include the items listed below:

- (a) Courses and distances of outline boundary lines and the size of the property
- (b) North arrow
- (c) Zoning of subject property and adjoining property
- (d) Scale of plan
- (e) Existing and proposed uses, structures, natural features and landscaping
- (f) Location and surface material of existing and proposed parking spaces, driveways, and points of access; number of existing and proposed parking spaces
- (g) Location of all building and use restriction lines
- (h) Same as (a) through (g) above, of any adjoining, confronting and vicinal properties as necessary for proper examination of the petition, or, if applicable, a copy of the subdivision plat for the community
- (i) Location of well and private sewerage easement area, if property is to be served by private water and sewer
- (j) Election District in which the subject property is located
- (k) Tax Map and parcel number on which the subject property is located
- (l) Name of local community in which the subject property is located or name of nearby community
- (m) Name, mailing address, telephone number (and e-mail address, if any) of the petitioner
- (n) Name, mailing address, telephone number (and e-mail address, if any) of attorney, if any
- (o) Name and mailing address of property owner
- (p) Floor area and height of structures, setback distances from property lines, and other numerical values necessary for the examination of the petition
- (q) Location of subject property in relation, by approximate dimension, to the center line of nearest intersection of two public roads
- (r) Ownership of affected roads
- (s) A detailed description of all exterior building materials for all proposed structures
- (t) Any other information as may be necessary for full and proper consideration of the petition

This 20-item list serves a two-fold purpose, being a checklist intended to assist petitioners in submitting a complete petition and a guide to DPZ staff during petition intake.

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Part 7. Part 7 on pages 3 and 4 of the petition has nine subsections (A-I), which provide as follows.

- A) Describe why the application of the Zoning Regulations in question to your particular property would result in practical difficulties or unnecessary hardships in complying strictly with the bulk requirements:
 - 1. The physical character of the property is different from the character of the surrounding properties because of its () narrowness, () shallowness, () shape, () topography, () other; explain:
 - 2. The uniqueness of the property prevents me from making a reasonable use of the property because:
- B) The intended use of the property, in the event the petition is granted:
- C) Any other factors which the Petitioner desires to have considered:
- D) Explain why the requested variance is the minimum necessary to afford relief:
- E) If the requested variance is granted, would it increase traffic to or from the site? Y N ; if yes, explain:
- F) Describe in detail all means of vehicular access onto the site (i.e. width, type of paving, etc.):
- G) Describe the topography of the site:
- H) Will the existing or proposed structure be visible from adjacent properties? Y N ; if yes, describe any proposed buffering or landscaping:
- I) Describe any existing buffering or landscaping:

Part 7 likewise serves a two-fold purpose. It enables petitioners to describe—to use the petition's term—their need for the variance consistent with the legal standards for variances contained in Section 130.0.B.2.a of the Regulations. This same description informs the drafting of the TSR.

B. The River Hill Garden Center Petition and Plan

Petitioner Stephen Klein & Associates, LLC, t/a River Hill Garden Center, submitted its variance petition on September 20, 2013. All 20 items on the Part 6 petition form checklist are checked, an indication that the variance plan includes these items. Of import to this case are four items on the checklist.

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- (e) Existing and proposed uses, structures, natural features and landscaping
- (g) Location and surface material of existing and proposed parking spaces, driveways, and points of access; number of existing and proposed parking spaces
- (p) Floor area and height of structures, setback distances from property lines, and other numerical values necessary for the examination of the petition
- (s) A detailed description of all exterior building materials for all proposed structures

The act of checking off these items indicates their presence on both the variance plan submitted with the petition and Amended Plan. The pertinent plan in this case, the Amended Plan, appears to depict existing and proposed uses, the number and location of existing and proposed parking spaces, driveways and structure/use setback distances from property lines. However, it was Mr. Klein's direct testimony that such structures and uses as depicted on the plan are only potential uses, "placeholders," in his words. As he explained, there are no actual proposed tenants, because the intent of the variance petition is to apply to whatever tenant mix he might have in the future. It was his further testimony that the variance plan (the Amended Plan) reflected the county's request for a worst-case land use scenario for the traffic study. The variance plan is therefore maxed out, depicted to the site's full development potential, with no real use proposed. He hoped something like a Panera would generate enough revenue so that other uses such the bank depicted on the Amended Plan would not be needed to support the garden center.

In a similar vein, Mark Keeley, the transportation engineer who prepared a preliminary traffic impact study for the petitioner, testified concerning the possible uses that could be constructed on site. He did not look at any particular use (no programmed development), but instead looked at uses that could generate the highest traffic volumes during peak hours.

As is customary for non-residential variance petitions, Petitioner attached a "Narrative" to the petition rather than complete Part 7 of the River Hill Garden Center petition by answering in the response areas provided. (It is also customary that such supplemental narratives address Part 7's nine subsections.) Pages 3-5 set forth Petitioner's responses to Part 7 (A)-(D). Looking at Petitioner's response to Part 7(B), which instructs petitioners to describe the intended use of the property in the event the petition is granted, the narrative states as follows.

In the future, the Petitioners intend to consolidate the existing on-site garden center operations into a smaller footprint while simultaneously introducing new complementary businesses to the garden center site. In order to achieve this, certain structures currently supporting the garden center's operations will be removed from the site. Some but not all of the area currently occupied by these structures would be replaced with other yet to be determined business uses as permitted or as may be approved in the B-1 zoning district. For purposes of this application, the Petitioners have for planning and design purposes proposed a bank and two restaurants for the site. To be perfectly clear however, there are no firm plans for any particular bank or any specific restaurant to locate on the garden center property. It is therefore conceivable that the ultimate uses on the property may be different from what was initially proposed. Further, once the initial tenants are selected and the initial improvements constructed, it is also possible that the business uses may change from time to time as the tenant mix changes over time.

The narrative goes on to premise the need for the variances on the installation of a traffic control signal at the nearby intersection of Sheppard Lane and MD 108, asserting that the traffic pattern resulting from the signal's installation stops traffic, which queues back from the signalized intersection past the current entrance to the garden center. The narrative concludes this circumstance has created an unsafe traffic condition, traffic safety, traffic congestion, and public safety concerns, which the proposed variances would relieve. Upon the introduction of the Amended Plan at the December 12, 2013 hearing, Petitioner, through counsel also introduced a "Supplemental Narrative" to accompany the Amended Plan. The BA 13-029V

Supplemental Narrative stresses the compelling public safety need for the requested relief "irrespective of the property's potential future use."

C. Analysis

The law of variances in Maryland recognizes that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances. *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995) (internal citations omitted). The need to justify the variance must be urgent. See *Carney v. City of Baltimore*, 201 Md. 130, 137, 93 A.2d 74, 77 (1952) (citing *Mayor and City Council of Baltimore v. Byrd*, 191 Md. 632, 638, 62 A.2d 588 (1948) ("allowing exceptions for reasons that are not substantial and urgent would have a tendency to cause discrimination and eventually destroy the usefulness of the ordinance."))

In Howard County, perforce of these elemental prerequisites, petitioners must demonstrate their urgent need for a variance through the submission of a particular plan in a particular location. So axiomatic is this "particular plan/particular location" tenet of variance law that the Hearing's Examiner's exhaustive case law search on the issue produced but one decision addressing this principle, *Evans v. Shore Communications, Inc.*, 685 A.2d 454, 112 Md.App. 284 (1996). The Evans case concerned a Talbot County Board of Appeals decision to deny a petition for a variance to increase the height of antenna towers, which the petitioner claimed was needed, in part, to avoid future variance requests. On the petitioner's unsuccessful final appeal of the Board's action, the Court of Special Appeals noted the irrelevancy of petitioner's argument that the Board should have granted the variance so the petitioner would not need a taller tower. The Court reckoned "[a] variance administrative proceeding, like a special exception proceeding,

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involves a particular applicant's request for administrative authorization to engage in a specific activity at a specific location; it "determines the rights and obligations of the applicant with respect to the utilization of a parcel of property owned by him, and the effects of that utilization upon certain others who may be aggrieved." (quoting *Mossburg v Montgomery County*, 329 Md. 494, 620 A.2d 886 (1992)). Extending the logic of this principle, the court further reasoned that "deviations from zoning restrictions [may not] find their justification in hypothetical situations."

This is the very situation before the Hearing Examiner. As Messrs. Klein and Keeley testified, the uses and structures depicted on the variance plan are "placeholders," a "worst-case land use scenario"—hypothetical situations. Moreover, these speculative uses/structures do not support the variance request; rather, they are intended to generate the highest traffic volumes during peak hours for a preliminary traffic study.

What we are presented with, then, through the petition and variance plan are circumstances analogous to those frowned upon by the Court of Special Appeals, which in *Cromwell v. Ward* noted the practice of zoning authorities to consider first whether a practical difficulty or unreasonable hardship exists in order to create a unique and unusual situation. *Cromwell v. Ward*, 102 Md. App. 691, 695, 651 A.2d 424, 426. In this case, however, rather than zoning authorities, it is the petitioner who relies on off-site traffic congestion and traffic safety concerns arising from the installation of a traffic light and a variance plan driven by a preliminary traffic study to support the requested variances, in lieu of the basic requisite of a variance plan, specific activity at a specific location.

Lastly, to its detriment, Petitioner misrelies on off-site traffic conditions as the principal ground for the hypothetical variance plan in this case, again a plan prepared for a preliminary traffic study. The variance process is not meant to be the primary means of regulating traffic or reducing traffic congestion. Although traffic congestion is an element which a zoning board of appeals should consider when deciding whether to grant a variance, it is not necessarily controlling. See *Marino v. City of Baltimore*, 215 Md. 206, 137 A.2d 198 (1957). Section 100.0.A.3 of the Zoning Regulations, in fact, established that one underlying purpose of the Regulations is "[t]o promote the most beneficial relationship between the uses of land and structures, and the road system which serves these uses, having particular regard for the potential amount and intensity of such land and structure uses in relationship to the traffic capacity of the road system, so as to avoid congestion in the streets and roadways, and to promote safe and convenient vehicular and pedestrian traffic movements appropriate to the various uses of land and structures throughout the County." Traffic congestion and safety considerations guide the Zoning Regulations; they are not variables independent of the statutory variance criteria.³

³The tacking of these issues onto the variance criteria effectively creates a fifth criterion. The Hearing Examiner's research found no instance of case involving the approval or disapproval of an area variance based on off-site traffic conditions.

ORDER

Based upon the foregoing, it is this **25th day of March 2014**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Stephen Klein & Associates, LLC, t/a River Hill Garden Center, for variances to 1) reduce the structure and use setback from a public street right-of-way (ROW) from 30 feet to 7 feet for a 7-foot high retaining wall and 2) reduce the structure and use setback from a residential district other than a public street ROW from 30 feet to 7 feet for a parking use (egress lane) in an B-1 (Business: Local) Zoning District, filed pursuant to Section 130.0.B.2 of the Howard County Zoning Regulations is **DENIED**.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER



Michele L. LeFavre

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.