

IN THE MATTER OF	:	BEFORE THE
JASON VAN KIRK, T/A ELM ST.	:	HOWARD COUNTY
DEVELOPMENT, INC.	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 08-020V

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DECISION AND ORDER

On June 9, 2008, 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 Jason Van Kirk, T/A Elm St. Development, Inc. for variances to reduce the 50-foot setback from a public street right-of-way to 44 feet for an existing barn and to reduce the 10-foot setback for a retaining wall to 3 feet to protect an existing 48-inch wide tree in an R-20 (Residential: Single Family) Zoning District, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioners provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

The Petitioner was not represented by counsel. Jason Van Kirk testified in support of the petition. No one testified in opposition to the petition.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, I find as follows:

1. The 8.134-acre, irregularly shaped property is located on the north side of Furrow Avenue, west of Mt. Hebron Drive. It lies in the 2nd Election District and is identified as Tax Map 17, Grid 10, Parcel 250 (the "Property"). The Property has no current street address.

2. The Property is being developed as the Mt. Hebron Subdivision, Section 24, P-08-005. It is improved by an existing barn situated on Lot 8 of the Subdivision on the south side of the proposed Calvin Circle road extension.

3. The topography is severely sloping. The petition states the proposed Calvin Circle road extension cannot be raised because the driveways would be too steep. As designed, the extension of Calvin Circle and its right-of-way will cause several trees to be removed, including a 48" tree.

4. Adjacent properties are also zoned R-20. The property to the northeast is the site of the Mount Hebron Presbyterian Church. The properties to the east and south are improved with single-family detached dwellings fronting the south side of Calvin Circle and the north side of Furrow Avenue. To the west is a stream and driveway providing access to a pumping station.

5. The Petitioner is requesting a variance from Section 108.D.4.b.1(a)(ii) to reduce the 50-foot setback from a public street right-of-way to 44 feet for an existing barn and from Section 128.A.9.b(4) to reduce the 10-foot setback for a an approximately 125-foot long retaining wall to 3 feet to protect the existing 48" tree in front of the existing dwelling on the church property.

6. Jason Van Kirk testified Elm Street Development agreed to keep the existing barn at the request of the Department of Planning and Zoning, who are hoping the barn will be renovated for residential use. He also stated the retaining wall would enable the existing tree to be retained. The wall is the minimum size necessary to protect the tree.

CONCLUSIONS OF LAW

The standards for variances are contained in Section 130.B.2.a of the Regulations. That section provides a variance may be granted only if all of the following determinations are made:

- (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.

(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 necessary to afford relief.

Based upon the foregoing Findings of Fact, and for the reasons stated below, I find the requested variances comply with Section 130.B.2.a(1) through (4), and therefore may be granted.

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.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).

1. In this case, the topography is severely sloping. Additionally, while existing structures may not be considered "unique" features of a property, the old barn is partially situated within the required 50-foot right-of-way setback. As such, the dwelling is a noncomplying structure and therefore constitutes a unique physical condition of the Property. The large 48" tree within the right-of-way is also a unique physical condition. Consequently, I find the topography, the location of the barn and the 48" tree are unique physical conditions or features causing the Petitioner practical difficulties in complying with the setback requirements, in accordance with Section 130.B.2.a(1).

2. The barn will be used for a permitted purpose and it and the retaining wall will not change the nature or intensity of use. The variances, if granted, will therefore not alter the essential character of the neighborhood in which the barn and proposed retaining wall are located nor substantially impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare, in accordance with Section 130.B.2.a(2).

3. The practical difficulties in complying strictly with the setback regulation arise from the location of the noncomplying structure on the lot and the tree and were not created by the Petitioners, in accordance with Section 130.B.2.a(3).

4. The proposed use of the barn as a dwelling is reasonable and the approximately 125-foot long retaining wall is the minimum length required to preserve the tree. Within the intent and purpose of the regulations, then, the variances are the minimum necessary to afford relief, in accordance with Section 130.B.2.a(4).

ORDER

Based upon the foregoing, it is this 7th of July 2008, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Jason Van Kirk, T/A Elm St. Development, Inc. for variances to reduce the 50-foot setback from a public street right-of-way to 44 feet for an existing barn and to reduce the 10-foot setback for a retaining wall to 3 feet to protect the tree in an R-20 (Residential: Single Family) Zoning District are **GRANTED**.

Provided, however, that:

The variances shall apply only to the uses and structures as described in the petition submitted and not to any other activities, uses, structures, or additions on the Property.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**


Michele L. LeFaivre

Date Mailed:

7/8/08

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 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.