

IN THE MATTER OF  
CALEB R. KELLY, III – LEGAL OWNER AND  
PETITIONER FOR VARIANCE ON THE  
PROPERTY LOCATED AT 703-B PADONIA RD

8<sup>TH</sup> ELECTION DISTRICT  
3<sup>RD</sup> COUNCILMANIC DISTRICT

\* BEFORE THE  
\* BOARD OF APPEALS  
\* OF  
\*e BALTIMORE COUNTYe  
\*e CASE NO: 17-155-Ae

\* \* \*e \* \* \* \* \*e \* \* \* \*

**OPINION AND ORDER**

This matter comes before the Board of Appeals for Baltimore County as an appeal of Baltimore County Administrative Law Judge, John Beverungen’s March 13, 2017 denial of a Petition for Variance filed by Caleb R. Kelly, III, owner of the subject property (“Petitioner”). The Petitioner is requesting variance relief from the Baltimore County Zoning Regulations (B.C.Z.R) to permit an existing accessory structure (pole barn) located in the side yard in lieu of the required rear yard. A hearing was held before this Board on July 11, 2017. Michael R. McCann, Esquire appeared on behalf of the Petitioner, Caleb R. Kelly. John Grason Turnbull, III appeared on behalf of the Protestants, John Grason Turnbull, III and Adele L. Brockmeyer. The case was publically deliberated on November 8, 2017.

Caleb R. Kelly and surveyor, Bruce Doak, testified in support of the Petitioner. Adele L. Brockmeyer, the owner of the property adjacent to the Petitioner, testified on behalf of the Protestants.

**FACTS**

The Petitioner’s property is approximately 1.64 acres and is zoned RC-5. Mr. Kelly’s house sits on the far western part of his property and is accessed from Padonia Road by a narrow 900-foot strip used as the house’s driveway. At the end of the 900-foot shared driveway, the driveway splits in two, with one split priding access to the Protestant’s residence and to Mr. Kelly’s

residence, and the other providing access to Mr. Kelly's garage. Petitioner began constructing, without permits, a detached pole barn. After receiving a stop work order from Baltimore County, Petitioner was instructed to seek variance relief. (See Petitioners Ex. 3A-H).

Mr. Kelly's property forms, what the Petitioner's counsel describes as a "9-sided oblong, polygon." Mr. Kelly's house sits on a hill at the rear of the western end of the property. Traveling east from Mr. Kelly's house in the direction of Padonia Road, his property slopes downward and reaches its lowest point in the area where the driveway splits. Mr. Kelly's home is a two-story, wood frame, dwelling with an attached garage. On the west, or left side of the house is a circular driveway that leads from the front of the house around to an attached garage on the back of the house. As testified to by Mr. Kelly, he obtained a variance to construct the garage in order to park his four cars. He explained that he designed the garage so that it is an extension of the house. There are large windows inside the garage. (Petitioner's Ex. 10).

Testimony was provided by Mr. Kelly that the "pole barn" at issue is approximately 67 x 17 square feet and is located in the west side of the house at the end of the right leg of the driveway. Behind the newly constructed pole barn is a shed that was previously located on the present footprint of the pole barn. (See Petitioners Ex. 7A-B). As depicted in Petitioners Ex. 8A-D and as testified to by Mr. Kelly, Mr. Kelly keeps lawn mowers, a snow plow, a John Deere tractor and wagon, a log splitter, chainsaws, a power washer, wheel barrels, deck furniture, bow saws, shovels and materials such as pots, hay, dirt, salt, cement, firewood and grass seed in the pole barn. Mr. Kelly testified that these materials and equipment are necessary to maintain the property, as he is the sole person in the subdivision who maintains the 900-foot driveway and the 36-foot right of way which extends on either side of the driveway and is shared by other property owners in the subdivision. The maintenance includes snow removal in the winter months.

Mr. Kelly believes that keeping his equipment in the pole barn protects it from theft and removes the equipment from being an eyesore to the neighbors.

**A. Bruce Doak**

Expert testimony regarding the “uniqueness” of the Petitioner’s property was provided by Bruce Doak. Mr. Doak testified that the property is unique because of its shape and the orientation of the house on the lot. He states that there is no other lot in the area that has the same or similar shape. He notes that none of the houses in the Caleb Acres subdivision or in the area are oriented in the same direction. Accordingly, Mr. Doak notes that none of the properties in the Caleb Acres would require a variance to place a garage or barn in a comparable location on their properties. Mr. Doak further noted that there is nowhere else to put the pole barn on the Property that would not require a variance. Mr. Doak, who lives on a farm himself attested to the fact that a pole barn was necessary for housing the amount of the material and equipment necessary to maintain a property such as Mr. Kelly’s. Consequently, Mr. Doak testified that the denial of a variance would impose a practical difficulty or unreasonable hardship on Mr. Kelly.

**B. Protestant, Adele L. Brockmeyer**

Ms. Brockmeyer testified that although, she and her family no longer reside at the house adjacent to the Petitioner, they are opposed to the granting of a variance for the Petitioner’s pole barn. Ms. Brockmeyer testified that they have experienced flooding problems in their home in the past, and that she believes that the increased footprint of the newly constructed pole barn will further exacerbate the flooding problem due to water run off from the Petitioner’s property.

**DECISION**

A variance request involves a two-step process, summarized as follows:

(1) It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and

(2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

*Cromwell v. Ward*, 102 Md. App. 691 (1995).

Employing the tenets of collateral estoppel, the majority of the Board defers to finding of the former Zoning Commissioner in Case No. 2008-0505, that the Petitioner's property is unique for purposes of the *Cromwell* analysis. The Majority of the Board also accepts Mr. Doak's testimony that the property is irregularly shaped which constrains, to some extent, the available building envelope.

The part of the *Cromwell* analysis that requires closer scrutiny is, if the variance is denied, would the Petitioner experience practical difficulty or hardship? As noted by the ALJ in the prior proceeding, under Maryland law, variance relief is properly denied when an owner can make "reasonable use of his property." *Montgomery Co. v. Rotwein*, 169 Md. App. 716, 733 (2006). In denying variance relief in *Rotwein* the Court of Special Appeals held the owner had "made more than reasonable use of her property, as it houses not only her residence, but, among other things, a swimming pool and a tennis court." *Id.* at 733.

The facts in this matter are somewhat analogous to the facts in *Rotwien*. As is clearly depicted in the photos, the Petitioner has already constructed a large garage, which now houses four cars. The Petitioner admittedly chooses not to store the tools and equipment used for maintaining his property in this garage space. Consequently, the Petitioner has the space to store and protect his equipment but has chosen to use that space for other purposes. The Board finds that any practical difficulty or hardship suffered by the Petitioner as a result of his request for

variance being denied, is self-imposed. Therefore, the Petitioners request for variance must be denied.

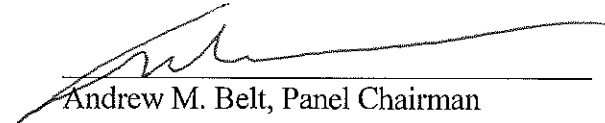
**ORDER**

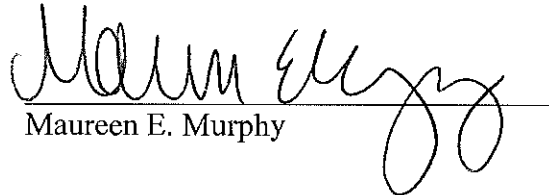
**THEREFORE, IT IS THIS** 5<sup>th</sup> day of February, 2018 by the Board of Appeals of Baltimore County

**ORDERED**, that the Petition for Variance to permit an existing accessory structure (pole barn) located in the side yard in lieu of the required rear yard, be and is hereby **DENIED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
\_\_\_\_\_  
Andrew M. Belt, Panel Chairman

  
\_\_\_\_\_  
Maureen E. Murphy

IN THE MATTER OF  
CALEB R. KELLY, III – LEGAL OWNER AND  
PETITIONER FOR VARIANCE ON THE  
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8<sup>TH</sup> ELECTION DISTRICT  
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\* CASE NO: I7-155-A

\* \* \* \* \*

**CONCURRING IN THE RESULT BUT DISSENT AS TO UNIQUENESS**

As stated by the majority opinion in this matter, the Board is guided by the holding provided by the Court of Special Appeals in *Cromwell v. Ward*, 102 Md. App. 691 (1995). In requiring a finding of "uniqueness," the Court of Special Appeals in *Cromwell* referred to the definition of "uniqueness" provided in *North v. St. Mary's County*, 99 Md. App. 502, 514 (1993):

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 has 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 such characteristics as unusual architectural aspects in bearing or parting walls.

*Cromwell* at 710.

I am not convinced the property would meet the "unique" requirement if there were to be a *de novo* review in this matter as the uniqueness refers to the extent of improvements upon the property previously made by the Petitioner. Nonetheless, I concur that the 2008 ALJ Decision was a final decision on uniqueness and therefore operated under collateral estoppel/res judicata principles.

In the matter of: Caleb R. Kelly, III – Petitioner  
Case No. 17-155-A

I dissent in the majority's finding that the subject property is "unique". However, I concur with the majority's finding regarding a lack of "practical difficulty" or undue hardship, and with the majority's final decision denying the requested variance relief.

February 5, 2018  
Date

  
\_\_\_\_\_  
Kendra Randall Jolivet



## Board of Appeals of Baltimore County

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February 5, 2018

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RE: *In the Matter of: Caleb R. Kelly, III*  
Case No.: 17-155-A

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order, and the Concurring in the Result but Dissent as to Uniqueness opinion, issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington" followed by a date "1/4/18".

Krysundra "Sunny" Cannington  
Administrator

KLC/taz  
Enclosures  
Duplicate Original Cover Letter

c: Caleb R. Kelly, III  
Adele Turnbull  
Office of People's Counsel  
Andrea Van Arsdale, Director/Department of Planning  
Lawrence Stahl, Managing Administrative Law Judge  
Arnold Jablon, Deputy Administrative Officer, and Director/PAI  
Nancy C. West, Assistant County Attorney/Office of Law  
Michael E. Field, County Attorney/Office of Law