

IN THE MATTER OF
WADKINS CONSTRUCTION, INC.
5301 Bush Street
11th Election District; 5th Councilmanic District

RE: Petition for Variance and
Lot Line Adjustment

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case Nos. 17-313-A and
CBA-18-024

* * * * *

OPINION

This matter comes to the Board on appeal by Wadkins Construction, Inc. (the “Petitioner”) of the Opinion and Order issued by an Administrative Law Judge dated July 11, 2017 denying a Petition for Variance with respect to Lot 2 located at 5301 Bush Street (the “Property”). Petitioner also appealed a denial by the Director of Permits, Approvals and Inspections (“PAI”) of Petitioner’s request for a lot line adjustment exemption from the development process under Baltimore County Code (“BCC”) §32-4-106(a)(1)(viii). The cases were consolidated here.

In the proceedings before the Board, Lawrence E. Schmidt, Esquire, represented the Petitioner; the Protestants, Scott Ayre, Steven Zdziera, Jack Amrhein, Karen Harms, John and Katherine Lochary, Angela Cioka, Donna Welch, appeared *pro se*; and Peter Max Zimmerman, Esquire, People’s Counsel for Baltimore County, participated in the hearing.

The Board held hearings on June 20, 2018 and October 4, 2018 and a public deliberation was held on March 14, 2019.

STATEMENT OF FACTS

The subject property is 1.13 acres +/- and is zoned D.R.2 (density residential). It consists of two (2) separate lots originally designated as Lot 8, and part of Lot 7. The lots are shown on the Plat of Forge Acres which plat was recorded in Land Records of Baltimore County in 1948.

In the 1950s, Lot 7 was divided into 3 tracts and totaled 40,018 sq. ft. At some point, 10,018 sq. ft. of Lot 7 became part of Lot 8. (Pet. Exs. 6A-6E). In 2014, a request for a limited exemption from the development process was filed pursuant to BCC, §32-4-106(a)(1)(viii) in which Lot 8 was renamed Lot 1, and Lot 7 was renamed Lot 2. (Pet. Ex. 7). PAI granted the exemption on the condition that an area and setback variance be granted. No appeal was filed.

On September 29, 2016, the Petitioner bought the property and filed a variance request for Lot 2 seeking a lot width of 94.61 ft. in lieu of 100 ft., a total lot area of 18,922 sq. ft. in lieu of 20,000 sq. ft., and if necessary, to permit a side yard setback of 35 ft, along Winkler Street in lieu of the 40 ft. front yard setback requirement. On July 11, 2017, the ALJ denied the variance on the basis that the Property lacked the required element of uniqueness and this appeal was filed.

On or about December 7, 2017, the Petitioner filed another request for limited exemption for a lot line adjustment under BCC, §32-4-106(a)(1)(viii). (Pet. Ex. 9). (PC Ex. 7). On December 22, 2017, PAI provisionally found that the requirements for the lot line adjustment were met but requested that the setback line on Lot 2 be corrected. On January 18, 2018, PAI issued a revised decision reversing the December 22, 2017 decision, and holding that a Special Hearing must be granted to amend a previously approved development plan and proposed lot line division. (Pet. Ex. 9). On February 8, 2018, Petitioner filed a timely appeal of this decision.

EVIDENCE

Petitioner had several witnesses who testified on its behalf:

1. Kenneth Wells – Land Surveyor.

Kenneth Wells was accepted by the Board as an expert in land surveying, in the BCZR and in the development regulations contained in the BCC. Mr. Wells testified about the ownership of the Property beginning with the Plat of Forge Acres in 1948. (Pet. Ex. 1, 6A-6E). He explained that Lots 7 and 8 are described as separate lots of record in each of the deeds. (Pet. Exs. 6A-6E). In 2014, at the request of a prior property owner, he filed a request for limited exemption from the development process. (Pet. Ex. 7). An exemption under BCC, §32-4-106(a)(1)(viii) was provisionally granted upon approval of an undersized lot and setback variance.

In December of 2017, he filed another lot line exemption for the Petitioner to alter the 2014 approved lot line. In this most recent request, the lot line proposed a “zig zag” such that each lot would meet the 100 ft. required width at the front building line. The 2017 exemption also proposed that the 20,000 sq. ft. area requirement would be met with the purchase of an additional 1,200 sq. ft. of land from an adjacent neighbor. This exemption, if granted, would eliminate the need for an area and setback variance.

In furtherance of this case, Mr. Wells testified that the proposed lot line adjustment met each of the required factors for the exemption as set forth in BCC, §32-4-106(a)(1)(viii). Additionally, Mr. Wells also advocated that Lot 2 was unique for variance purposes because no other lot in Forge Acres measured 94 ft. wide or 18,064 sq. ft. in area. He also researched and presented to the Board a summary of variances in area, which had been previously granted.

2. Howard Wadkins.

Howard Wadkins testified that he is the owner of the Petitioner, which owns Lots 1 and 2. He also presented this Board with the Contract of Sale for the purchase of 1,200 sq. ft. of land from the Koenigs.

3. Jeffrey Perlow – Zoning Office.

Jeffrey Perlow has been with the Zoning Office for 30 years. His job duties include reviewing site plans. He testified that the policy of the Zoning Office since prior to 1969 is to measure the width of a lot at the front building line. This was the law prior to the enactment of Bill 100 in 1970s, which, although the front building width measurement language was not carried over into the law at that time, the Zoning Office has continually applied that measurement.

4. Carl Richards – Zoning Office.

Carl Richards is a Zoning Supervisor. Mr. Richards acknowledged that, following customary office policy when reviewing requests for limited exemptions, the December 22, 2017 decision by PAI to provisionally grant the limited exemption was made prior to the DRC meeting on January 18, 2018. Mr. Richards also confirmed that the lot width is measured across the front building line and both Lots meet the 100' width requirement. In his view, both Lot 1 and Lot 2 also meet the minimum lot size of 20,000 sq. ft. due to the purchase of the additional 1,200 sq. ft. as presented by the Petitioner.

People's Counsel also had several witness testify in its case:

1. John Lochary.

John Lochary, 5219 Bush Street, is a certified public accountant. He purchased his home in 2013. Mr. Lochary testified that he is concerned that precedent will be set in this case for

properties to be subdivided in order to increase density. In 2013, the Property was a large lot with a single family home and a garage, similar to his property.

2. Diane Brazil.

Diane Brazil, 5205 Bush Street, has lived in her home for 30 years. Her property consists of 4 lots measuring about 4 acres. Mrs. Brazil attended the January 18, 2018 DRC meeting in which the requested exemption was discussed. When she received the December 22 approval letter, she wrote an email opposing it on December 30, 2017. (PC Exh. 8 and 9). She believes that approval was granted with an incorrect plan.

3. Angela Cioka.

Angela Cioka, 5303 Bush Street, purchased her home in October of 2016. Her home is a 2-story Cape Cod.

4. John Amrhein.

John Amrhein, 1 Heathrow Manor Court, Perry Hall, MD 21236, has been a Fire Captain with Baltimore County for 27 years. Mr. Amrhein presented the Board with Rule 8 papers indicating that he is the President of the Perry Hall Improvement Association. That Association has 200 members. The Association is opposed to having two (2) separate homes on these lots. While admitting on cross-examination that the neighborhood consists of mixed 1 and 2 story buildings, the Association finds the lots here are too small. Thus, 2 homes would be out of character with the neighborhood. Perry Hall is a conservation area, not a growth area.

DECISION

Having consolidated the appeals in this case, Petitioner proposes that this Board either grant the variance relief for Lot 2 or, in the alternative, for a lot line adjustment between Lots 1 and 2 wherein the common property line would be configured in a zigzag such that each lot would

meet the 100 ft. width requirement. In addition, Petitioner has contracted to purchase from a neighboring property located at 5304 Palomino Street (Koenig) an additional 1,200 sq. ft. of land and combine it with Lot 2 to meet the 20,000 sq. ft. minimum area requirement. If the lot line is granted, the variance request is rendered moot.

1. Petition for Variance.

Pursuant to BCZR §307.1, the Board has the power to grant a variance from the BCZR's area regulations "only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship." In addition, "any such variance shall be granted only if in strict harmony with the spirit and intent of said . . . area . . . regulations, and only in such manner as to grant relief without injury to public health, safety and general welfare." BCZR § 307.1.

The Court of Special Appeals has set forth the analytical framework for considering a request for a variance:

[I]t is at least a two-step process. The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is – in and of itself – unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, *i.e.*, a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance *caused by* the property's uniqueness, exists.

Cromwell, 102 Md. App. at 694-95, 651 A.2d at 426.

The Board concludes that the Petitioner has failed to satisfy the requirements established in *Cromwell* to obtain a variance for Lot 2. Specifically, the evidence presented did not support

a finding that Lot 2 was “unique” as that term has been defined in *Cromwell*. Lot 2 is simply an undersized, rectangularly shaped lot. It does not have any typographical features or atypical shape different from other properties in the area. The Plat of Forge Acres confirms that the majority of the properties are either square or rectangular shape. Some properties are the same size and some are larger. Indeed, as originally plotted, Lot 7 (like Lots 4, 5, 6, 10, 11, 12 and 13) measured 200’ by 200’. It was only after the Petitioner’s predecessor filed for the 2014 lot line exemption that Lot 7 was reduced in size to make Lot 8 larger. Such a request to reduce the size of Lot 7 in order to obtain approval for that exemption does not make it unique.

Accordingly, having determined that the Property is not unique, we need not address the remaining factor as to whether the Petitioner would experience a practical difficulty or an unreasonable hardship if the BCZR’s setback regulations were applied strictly to Lot 2.

For all of the foregoing reasons, the Board denies the Petition for Variance requested by the Petitioner in connection with Lot 2.

2. Lot Line Adjustment under BCC, §32-4-106(a)(1)(viii).

In order to satisfy the requirement for a limited exemption under Subsection (a)(1)(viii), the evidence must show:

(a)(1)(viii) - Lot line adjustments in residential zones for lots that are not part of an approved Development Plan under this title or an approved Development Plan under Article 1B of the Baltimore County Zoning Regulations. For purposes of this subsection, "lot line adjustment" means one or more alterations of a divisional property line or lines between two or more lots in common ownership or by agreement of the owners, provided that the alteration does not result in an increase or decrease in the number of lots and there is no increase in total residential density available to the lots considered as a whole;

* * * *

The testimony by Kenneth Wells confirmed that Lots 1 and 2 are not part of an approved Development Plan under either Title 32 or Article 1B of BCZR. The proposal here is to alter

the divisional property line between Lots 1 and 2 which lots are both owned by the Petitioner. Mr. Wells testified that the 2014 lot line adjustment decision (which was not appealed) established that the total number of lots and density units is two (2). With the proposed zigzag lot line adjustment, the total number of lots and density units remains at two (2).

In accordance with the holding in *Beth Tfiloh Congregation of Baltimore City, Inc. v. Glyndon Community Association, Inc.*, 152 Md. App. 97, 831 A.2d 93 (2003), the Petitioner here is entitled to the limited exemption sought under BCC, §32-4-106(a)(1)(viii) having met all of the requirements set forth therein. In fact, the Court of Special Appeals explained “an exemption can [not] be denied if the requirements of BCC section [32-4-106] have been met.” *Id.* at 104.

Not only did the Court in *Beth Tfiloh* clarify that the Petitioner is “statutorily entitled to the exemption”, the Court emphasized that even “a measureable degree of community interest” is not a proper basis for PAI, or this Board on appeal, to deny a requested exemption where all the factors have been met. *Id.* at 104.

We are not convinced by the argument of People’s Counsel that a contract between the Petitioner and the Koenigs, owner of 5304 Palomino Street for 1,200 sq. ft. of land which is pending the outcome of this case and which may be subject to an easement for use by the Koenigs, does not satisfy the 20,000 sq. ft. area requirement. It is more typical than not for contracts for sale of land to be conditioned upon the zoning or other approvals. If the limited exemption were denied, the Petitioner would not need to purchase, and the Koenigs would not need to sell, the 1,200 sq. ft. of land. Further, if the Petitioner elects to provide the Koenigs with an easement over the land sold, that is the prerogative of the owner. The existence of an easement does not invalidate the sale of land. Thus, we do not find that the purchase of land by

the Petitioner is a “transactional charade” because the Petitioner will pay consideration to the Koenigs and the Petitioner will pay property taxes on the land purchased. (PC Post Hearing Memorandum, p. 4).

As to the minimum lot widths, BCZR, §1B02.3.C requires that each lot zoned DR 2 have a minimum 100 feet in width at the front building line. The uncontradicted testimony presented to this Board by Carl Richards and Jeffrey Perlow of the Zoning Office, was that the lot width is measured at the front building line, not the front boundary line as People’s Counsel contends. We find their testimony on this issue credible.

Accordingly, the Petitioner shall be granted a limited exemption under BCC, §32-4-106(a)(1)(viii).

ORDER

THEREFORE, it is this 16th day of May, 2019, by the Board of Appeals of Baltimore County,

ORDERED, that the Petition for Variance with regard to Lot 2: (a) To permit a minimum lot width of 94.61 ft. in lieu of the required 100 ft. (b) to permit a minimum net area of 18,922 sq. ft. in lieu of the required 20,000 sq. ft.; and (c) if necessary, for Lot 1, to permit a side yard setback of 35’ along Winkler Street right-of-way line, in lieu of the 40 ft. front yard setback requirement, be and it is hereby **DENIED**, for the reasons set forth herein; and

IT IS FURTHER ORDERED, that the request for limited exemption under BCC, §32-4-106(a)(1)(viii) for lot line adjustment be and hereby is **GRANTED** for the reasons set forth herein.

In the matter of: Wadkins Construction, Inc.
Case No: 17-313-A and CBA-18-024

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**


Maureen E. Murphy, Panel Chair


Kendra Randall Jolivet


Deborah C. Dopkin



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203,
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

May 16, 2019

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

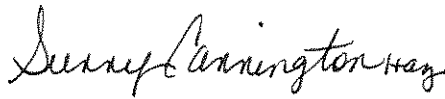
RE: *In the Matter of: Wadkins Construction, Inc.*
Case Nos.: 17-313-A and CBA-18-024

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order 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,


Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Duplicate Original Cover Letter

c: Howard Wadkins/Wadkins Construction, Inc.
Kenneth J. Wells/kjWells Inc.
Lawrence M. Stahl, Managing Administrative Law Judge
C. Pete Gutwald, Director/Department of Planning
W. Carl Richards, Jr., Zoning Supervisor/PAI
Jan Cook, Development Manager/PAI
Michael Mallinoff, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

Scott Ayre
Steven Zdziera
Jack Amrhein
Karen Harms
John and Katherine Lochary
Angela M. Cioka
Donna Welch
Diane Brazil