

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2585

September Term, 2013

RICHARD TURNER, *et ux.*

v.

JAMES LAWRENCE, *et al.*

Kehoe,
Arthur,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: February 5, 2015

The Board of Appeals for Charles County (“the Board”) conditionally granted the application of Richard and Carol Turner (“appellants”) for approval of a special exception use and associated zoning variances for the operation of a slaughterhouse. James Lawrence, *et al.* (“appellees”) filed an appeal to the Circuit Court for Charles County, challenging the Board’s decision. The circuit court reversed the Board’s decision, and remanded the case to the Board to deny the application. Appellants filed a timely appeal to this Court, and appellees filed a cross-appeal. The question before us is whether the Board erred in granting conditional approval for a special exception use for a slaughterhouse on appellants’ property. For the reasons that follow, we shall answer yes, and affirm the decision of the circuit court.

Background

Appellants purchased property known as 13800 Petzold Drive, Waldorf, Maryland (“subject property”) in 1999. They reside at the subject property and, in 2002, began operating what is described as a “custom meat butchering establishment/slaughterhouse” there. Appellants’ business consists largely of the butchering or “dressing” of deer killed by hunters, but appellants also occasionally slaughter and butcher livestock.

The subject property is surrounded on three sides by land that is protected by a perpetual easement for natural resource and agricultural conservation. The subject property is accessed by Petzold Drive, a private, unpaved right-of-way. There are 18 other residential lots improved with single family dwellings that are served by Petzold Drive, ranging in size from one to nine acres. The subject property consists of 10.14 acres. Animal slaughtering

and butchering takes place in a converted barn that is located less than 500 feet from any property boundary.

The subject property is located within the Agricultural Conservation (“AC”) zoning district. Slaughterhouses are a permitted use within the AC zone by special exception, *see* Charles County Code, §297-212(5), Use 1.01.460, subject to approval by the Board after an administrative finding that certain conditions set forth in the Charles County Code have been met.¹ Appellants did not have an approved special exception for a slaughterhouse at the time they started their business in 2002.

Appellants’ neighbors complained to the county zoning department about the speed of vehicles on the right-of-way that they alleged were going to or leaving from appellants’ business. In October 2011, appellants were cited by the county inspector for operating a slaughterhouse in the Agricultural Conservation zone without an approved special exception.

In order to abate the violation, and upon the recommendation of the Charles County Inspection Department and the Charles County Attorney’s office, appellants applied for approval of a special exception for a slaughterhouse, along with a request for variances for three of the requisite conditions:

- (1) a variance to the lot size requirement of 20 acres;
- (2) a variance to the building setback requirements; and

¹ Charles County Code, §§ 297-63 (Table of Permissible Uses).

(3) a variance to the requirement that a slaughterhouse have direct access to a collector or arterial road.

On February 12, 2013 and February 26, 2013, the Board held a hearing on appellants' application for a special exception and variances. Erica Hahn of the Charles County Planning Division ("Planning Division") presented the Planning Division's report ("staff report") along with its findings and recommendations. The Planning Division recommended approval of the special exception with conditions.

The staff report describes the appellants' business as "largely deer processing and occasionally livestock," and indicates that "the Slaughterhouse use designation was the closest permissible use in the Zoning Ordinance that describes [appellants'] facility and the service [they] provide." The structure that is used for the slaughterhouse is a barn on the subject property which is located 100 feet from the property boundary to the east, 400 feet from the property boundary to the north, 460 feet from the property boundary to the west, and 260 feet from the property boundary to the south. Depending on the time of year, appellants average three to five customers a day.

Appellant Richard Turner was called as a witness before the Board, and testified that he agreed with the Planning Division's staff report as far as the description of his business but did not offer additional evidence about the business or the characteristics of the subject property.

Numerous neighbors and other residents of the community testified both in favor of and in opposition to the special exception. The Board kept the record open after the first night of hearing for interested parties to submit letters in support of or in opposition to appellants' application. Most of the neighbors who shared the private right-of-way opined that the nature and condition of the unpaved road was inadequate to support the increased traffic from appellant's business, and/or voiced safety concerns because of the excessive speed of some of the traffic on the road. Those in favor of the special exception emphasized the need for and high quality of the service provided by the appellants.

The Board concluded, without explanation, that:

[appellants] have met their burden of proving . . . that by reason of exceptional narrowness, shallowness or shape of the [appellants'] specific parcel of property, or by reason of exceptional topographical conditions or other extraordinary situations or conditions of the [appellants'] specific parcel of property, the strict application of the regulations of the Zoning Ordinance would result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon the [appellants].

The Board granted the variances requested and approved the special exception use of appellants' property for a slaughterhouse subject to conditions.²

Appellees submitted a petition for judicial review to the Circuit Court for Charles County. On January 24, 2014, the circuit court issued an opinion, holding that a variance to the special exception requirements was not justified because 1) appellants' situation was self-created; and, 2) there was no evidence before the Board that the subject property was "unique

² The conditions are not relevant to the issues before us.

in its narrowness, shape, or topography so as to cause application of the ordinance's explicit requirements to result in practical difficulty or hardship." The instant appeal followed.

Question Presented

As rephrased by us, the question is whether the Board erred in granting appellants' application for a special exception use for a slaughterhouse on the subject property.³

³The question presented by the appellants is: "Did the Circuit Court err in reversing the considered decision of the Board of Appeals which it was legally empowered to make based upon fairly debatable issues raised by the evidence when the Circuit Court based its reversal on a faulty legal premise unsupported by the facts or evidence?"

The appellees' brief presents three additional questions:

1. Whether the granting of a variance was unlawful when no facts were present to indicate that the Subject Property is - in and of itself - unique and unusual because of its shape or topography 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.

2. Whether the Board of Appeals was without legal authority to grant a variance to the minimum use requirement that a slaughterhouse operation have direct access to a collector or arterial road - a requirement unrelated to area, height, density, setback or sideline restrictions, i.e., bulk regulations as opposed to use regulations.

3. Whether the failure of the Board of Appeals to consider the inherent adverse effects of the commercial operation of a slaughterhouse at the proposed location as required by the law in Maryland for special exceptions was arbitrary, capricious and unlawful.

Standard of Review

This Court recently discussed the standard of review of an administrative agency decision in *McClure v. Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission*, ___ Md. App. ___, No. 1031, September Term 2013 (filed December 2, 2014):

When we review the decision of an administrative agency or tribunal, “we [assume] the same posture as the circuit court . . . and limit our review to the agency’s decision.” *Anderson v. Gen. Cas. Ins. Co.*, 402 Md. 236, 244 (2007) (internal citation omitted). The circuit court’s decision acts as a lens for review of the agency’s decision, or in other words, “we look not *at* the circuit court decision but *through* it.” *Emps. Ret. Sys. of Balt. Cnty. v. Brown*, 186 Md. App. 293, 310 (2009), *cert. denied*, 410 Md. 560 (2009) (emphasis in original) (internal citations omitted).

We “review the agency’s decision in the light most favorable to the agency” because it is “prima facie correct” and entitled to a “presumption of validity.” *Anderson v. Dep’t of Pub. Safety & Corr. Servs.*, 330 Md. 187, 213 (1993) (internal citation omitted).

The overarching goal of judicial review of agency decisions is to determine whether the agency’s decision was made “in accordance with the law or whether it is arbitrary, illegal, and capricious.” *Long Green Valley Ass’n v. Prigel Family Creamery*, 206 Md. App. 264, 274 (2012) (internal citation omitted). With regard to the agency’s factual findings, we do not disturb the agency’s decision if those findings are supported by substantial evidence. *See id.* (internal citations omitted). Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569 (1998) (internal citations omitted) (internal quotation marks omitted).

McClure, supra, sl. op. at 8-9.

Discussion

As noted above, the Charles County Code (“Code”) permits slaughterhouses in the AC zoning district as a special exception. A special exception is a “valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible *absent any fact or circumstance negating the presumption.*” *Schultz v. Pritts*, 291 Md. 1, 11 (1981) (emphasis in original.) A special exception (also known as a conditional use⁴) is “a desirable use which is attended with detrimental effects which require that certain conditions be met. . . .” *Cromwell v. Ward*, 102 Md. App. 691, 702 (1995), quoting *Eberhart v. Indiana Waste Systems, Inc.*, 452 N.E.2d 455, 459 (Ind. 1983).

Charles County Code § 297-415 (H)(4) provides that “[t]he Board of Appeals shall grant a special exception when, from a preponderance of the evidence of record, the proposed use . . . [c]omplies with the standards and requirements set forth in Article XIII. Article XIII, § 297-212(5) of the Code sets forth the standards and requirements that must be met before the Board can approve a special exception for a slaughterhouse. The minimum standards include the three requirements from which appellants requested a variance:

Use 1.01.460 Slaughterhouses, where use is located greater than 200 feet from the nearest boundary line of the land on which it is located. This use

⁴ “The terms ‘special exception’ and ‘conditional use’ are essentially interchangeable.” *People’s Counsel for Baltimore County v. Loyola College in Md.*, 406 Md. 54, 72 n. 19 (2008).

is permitted by special exception in the AC, RC and IH Zones, subject to the conditions below:

...

A.(7) The site must have direct access to a collector road or arterial road.⁵

...

B. Minimum site area. A minimum of 20 acres is required for any slaughterhouse operation. . . .

...

D. Stock pens or buildings associated with the slaughterhouse operation must be at least 300 feet from any public right-of-way and must be at least 500 feet from any other property line. (emphasis in original).

The Board is empowered to grant variances to a special exception requirement. “[A] special exception with variances may be granted by a zoning agency when the applicable code contains provisions excluding certain areas of the code from being subject to variance relief, but does not exclude the section covering the relevant special exception from being modified by variances.” *Alviani v. Dixon*, 365 Md. 95, 109 (2001). Here, the applicable Code prohibits a variance that would change the permitted uses of land⁶ (as codified in § 297-63 (Table of Permissible Uses)), but contains no provision prohibiting variances to the minimum requirements for permissible uses that are contained in § 297-212.

⁵ “ROAD, ARTERIAL - a road which carries the major portion of the traffic entering and leaving an area of the County.” Charles County Code § 297-49.

“ROAD, COLLECTOR - a road which provides for principal internal movements at low to moderate operating speeds within residential neighborhoods, business or industrial areas and which is a primary means of circulation between adjacent neighborhoods and which functions to distribute traffic from arterials to local and other collector roads and collects traffic from local roads and channels it into the arterial system.” Charles County Code § 297-49.

⁶ “This provision shall not be construed to permit the Board, under the guise of a variance, to change the permitted use of the land.” Charles County Code, § 297-416(B).

As a preliminary matter we address appellees' argument that by granting a variance to the road access requirement, which cleared the way for approving the special exception, the Board improperly granted a use variance. A use variance "permits a use other than that permitted in the particular district by the ordinance, such as a variance for an office or commercial use in a zone restricted to residential uses." *Anderson v. Bd. of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 38 (1974). As distinguished from a use variance, area variances are variances "from area, height, density, setback, or sideline restrictions, such as a variance from the distance required between buildings." *Id.* at 37. Appellees argue that because the variance to the road access requirement is not a variance to "area, height, density, setback, or sideline restrictions," the variance must be a use variance. We disagree. By Code, a slaughterhouse is a conditionally permitted use in the AC zoning district where the subject property is located.⁷ The Board did not change the permitted use of the land by granting variances to the special exception requirements.

Because the Board cannot grant a special exception unless the use complies with the enumerated standards in § 297-212(5), the Board had to first make a determination that either the standards were met, or, alternatively, that the granting of a variance to those requirements was justified. If there is no justification for a variance to any of the special exception requirements, the special exception must be denied. *See Umerley v. People's Counsel for Baltimore County*, 108 Md. App. 497, 511 (1996) (inability to secure a variance to standards

⁷ Charles County Code, § 297-63, Table of Permissible Uses, Use 1.01.460.

or conditions that must be met in order to receive approval of a special exception requires that the special exception be denied.) Our review of the record indicates a lack of substantial evidence that would justify a variance from the requirement that a slaughterhouse have direct access to an arterial or collector road. We conclude, therefore, that the Board erred in approving appellants' application.

The Charles County Code provides that:

The Board is authorized to grant variances from the strict application of these regulations when, **by reason of exceptional narrowness, shallowness or shape of specific parcels of property or by reason of exceptional topographical conditions or other extraordinary situations or conditions of specific parcels of property**, the strict application of the regulations of this chapter would result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of said property.⁸

When considering the requested variances, the Board was required to engage in 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.**

Cromwell, supra, 102 Md. App. at 694-695 (emphasis supplied).

“Uniqueness” of a property for zoning purposes requires that the subject property have an inherent characteristic **not shared by other properties in the**

⁸ Charles County Code, § 297-416(B) (emphasis supplied).

area, *i.e.* its shape, topography, sub-surface 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.

North v. St. Mary's County, 99 Md. App. 502, 514 (1994) (emphasis supplied).

The Board, in its written opinion, did not explain the factual basis for its finding that the subject property was unique. The only evidence regarding the characteristics of the subject property was contained in the Planning Division's staff report. The staff report analyzed the uniqueness of the property separately for each of the requested variances. As to the request for variance to the setback requirements, the staff report states:

The barn that has been converted to a slaughterhouse is believed to have been built in the 1960s, likely a former tobacco barn, which met building setback regulations when constructed. The barn existed prior to the Turners' ownership of the property and prior to slaughterhouses being a permissible use, which was not permitted until 1992 in the Charles County Zoning Ordinance.

Regarding the variance to the minimum acreage requirement, the staff report describes the uniqueness of the property as follows:

Although the Turners' property is 10.14 acres and the requirement for a slaughterhouse in the AC zone requires 20 acres, their property is unique in that it is contiguous with 582 acres of land protected by perpetual conservation easement. These conservation properties surround the subject property to the north, south and west and are predominantly forested. These properties provide expansive wooded buffers to the subject property.

Finally, as it relates to the requirement that the use be directly located on an arterial or collector road, the staff report contains the following analysis:

Petzold Drive, where the subject property is located, is a unique Private Drive which existed before the establishment of the subject lot and is unusually lengthy compared to other private rights-of-way. The current Zoning Ordinance allows five single family dwelling lots on private drives. However, Petzold Drive currently has 16 lots, some of which were subdivided before the five lot limit was established, and some as a result of interfamily transfers and/or variances issued for additional lots added to the private drive.

It is conceivable that the expansive buffer around the subject property that is afforded by the surrounding conservation property is unique and unusual such that the first prong of the variance test would be satisfied as to the required acreage and building setbacks. We do not reach that issue because we see nothing in the record to establish that there is anything unique or peculiar about the subject property that would justify a variance to the requirement that the property have direct access to an arterial or collector road. Without all three variances, the special exception must be denied.

The subject property is not unique simply because of its location on an unpaved, private right-of-way. The test is whether the property is different or unique from surrounding properties. The record reflects that there are 18 surrounding properties located on the same private drive. Likewise, contrary to the suggestions in the staff report, the length of Petzold Drive, and the fact that it was in existence prior to subdivision of the abutting lots does not make the subject property unique from the surrounding properties.

There was no evidence, much less substantial evidence, to support the Board's finding that the subject property is "unique" within the meaning of applicable Maryland law such that a variance to the requirement for direct access to an arterial or collector road was warranted.

Therefore, the Board erred in granting the variance, and ultimately erred in approving the application for special exception. While appellants provide what is apparently a much-needed, well-run and highly-valued service to the community, the current zoning regulations and applicable law simply do not permit the use of the subject property as a slaughterhouse.

**JUDGMENT OF THE CIRCUIT COURT
FOR CHARLES COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANTS.**