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OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Marc Hansen
Acting County Attorney

MEMORANDUM

TO: Catherine G. Titus, Chairman
Board of Appeals

VIA: Marc Hansen *Marc Hansen*
Acting County Attorney for Montgomery County, Maryland

FROM: *Barbara Jay*
Barbara Jay
Associate County Attorney

DATE: January 25, 2010

SUBJECT: Request for Legal Opinion Regarding
Enforcement of Conditions Attached to a Variance

You have requested legal advice from the Office of the County Attorney regarding the enforcement of the conditions attached to a variance. Your request arose out of variance Case No. A-5714, the Petition of Robin Carruthers. The Board's March 21, 2002 decision to grant a variance in that case contained the following condition:

4. The petitioner shall install and maintain Leyland Cypress trees at 3 feet from the shared side yard property line with Lot 101. The installed Leyland Cypress trees shall be 7 feet in height at the time of planting and be planted 5 feet apart from the rear footprint of the house to the rear property line.

The owner of the property adjoining the property for which the variance was granted in this case has asserted that the subsequent owner of that property moved the trees to a distance less than the required three feet from the shared property line, and that one of the trees has died. She has asked for enforcement of the variance condition.

You indicate that the County's Department of Permitting Services ("DPS") has taken the position that it cannot enforce this variance condition, and thus you are seeking the advice of the County Attorney regarding the enforceability of this and other variance conditions.

Opinion for C. Titus
January 25, 2010

Answer

The grant of a variance allows a petitioner not to comply with otherwise mandatory development and other standards set forth in the Zoning Ordinance. As the Maryland Court of Special Appeals has observed, "[I]n zoning law a variance, if granted . . . permits a use which is prohibited and presumed to be in conflict with the ordinance. *North v. St. Mary's County*, 99 Md. App. 502, 510, 638 A.2d 1175 (1994). If conditions imposed in connection with the grant of a variance are not complied with, the variance either never takes effect or is invalidated, and it follows that any construction undertaken pursuant to that variance would now be in violation of the section of the Zoning Ordinance from which the variance was granted.

Section 2-42B(a)(2) of the Montgomery County Code gives the Department of Permitting Services responsibility for code enforcement, inspection, and licenses, including "administering, interpreting, and enforcing the zoning law and other land use laws and regulations." It is the position of this Office that because the violation of a condition imposed on the grant of a variance causes the resultant construction to violate the section of the Zoning Ordinance from which relief had been granted, DPS can initiate enforcement action for compliance with that section, either through the issuance of a Notice of Violation or through a Civil Citation.

I trust this adequately responds to your request. If you have any questions concerning this matter, or if I can be of any further assistance, please do not hesitate to contact me.

BLJ:blj

cc: Marc Hansen, Acting County Attorney
Ed Lattner, Chief, Division of Human Resources and Appeals
Barbara Jay, Associate County Attorney
Malcolm Spicer, Associate County Attorney
Members, Montgomery County Board of Appeals
Katherine Freeman, Executive Secretary to the Board
Mike Faden, Senior Legislative Attorney