

IN THE MATTER OF
LUTHER-VILLA –
N/s Riderwood Drive, E of Morris Avenue
Stanwood Avenue, LLC – Legal Owner/Petitioner
8TH ELECTION DISTRICT
3RD COUNCILMANIC DISTRICT

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO. CBA-14-009

PETITION FOR FORST BUFFER VARIANCE

* * * * *

OPINION AND REMAND ORDER

This matter came before the Board on appeal by Protestants, Eric Rockel, John Fischer and Lutherville Community Association of the approval by the Department of Environmental Protection and Sustainability (“DEPS”) of a request for Forest Buffer variance and alternatives analysis dated July 2, 2013.

A hearing was held before the Board on November 5, 2013. The Owner/Petitioner, Stanwood Ave., L.L.C. (the “Petitioner”) was represented by Lawrence E. Schmidt, Esquire, and Smith, Gildea and Schmidt, L.L.C. The Protestants, Eric Rockel, John Fischer and Lutherville Community Association (the “Protestants”) were represented by Michael R. McCann, Esquire. Memorandums in lieu of Closing Argument were submitted on behalf of the Petitioner and Protestants. A public deliberation was held on February 26, 2014.

Facts

The subject property is composed of eight separate lots of record located within the established community of Lutherville (the “Property”). The lots are within a large tract of land designated on the plat of Luther-villa, Plat 2 and recorded in the Land Records of Baltimore County at WPC 8, page 3 on July 7, 1927. It was recorded in the Land Records as Talbot Manor on December 17, 1943, at CHK 3, pages 70-71. (Pet. Ex. 3).

The lots are designated as #20 through #27. The entire area of the property is 1.35 acres and is zoned D.R. 1 and D.R. 5.5. The lots are located with frontage adjacent to Railroad Avenue, near its intersection with Morris Avenue. The light rail system runs perpendicular to Railroad Avenue. The Property is unimproved and is mostly wooded. To the rear of the property is a stream and associated area of woodlands. The stream is known as Roland Run which runs north and west of the Property. The geographic area shown within the confines of Luther-villa Plat #2, has been built out and is a well-established residential community.

The 8 lots are among a handful of lots within the subdivision that have not been improved. In this case, 5 single family homes are being proposed. Access to the Property is by way of a driveway.

Of the 1.35 acres, over three-quarters (3/4) of the Property (or 1.04 acres) is encumbered by the calculated forest buffer generated from existing stream, associated floodplain and wetlands. The Petitioner submitted an Alternatives Analysis along with the Request for Forest Buffer variance.

Decision

(1) Res judicata.

We raised *sua sponte* the issue of whether this case is barred under the doctrine of *res judicata*. A plan to develop the Property was previously considered by this Board on May 15, 2006 (Case No.: CBA-05-128). In that case, a predecessor in title to the Petitioner filed for a forest buffer variance to develop the 8 lots of record. Protestants Eric Rockel and Lutherville Community Association opposed that request. DEPS (previously called Department of Environmental Protection and Resource Management or 'DEPRM') approved the variance request. On appeal, we affirmed the decision of DEPRM and granted the variance.

On appeal, the Circuit Court for Baltimore County affirmed in part, and remanded in part, our decision. On remand, we ultimately denied the forest buffer variance on the grounds that the forest buffer had been calculated incorrectly because the floodplain had been incorrectly measured. The Circuit Court then affirmed our denial of the variance.

In order to successfully establish a claim for *res judicata*, each of the following elements must be satisfied: (1) The parties in the present litigation should be the same or in privity with the parties in the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction. *Deleon, et ux. v. Slear, et al.*, 328 Md. 569, 580 (1992)

The Court in *Deleon*, citing its holding in *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487 (1987), explained that the test for determining whether claims are the same for the purposes of *res judicata* is the ‘transaction’ test as set forth in §24 of the Restatement (Second) of Judgments. *Id.* at 589. The transaction test analyzes the facts of each claim to determine whether they are coterminous.

The concept of ‘claim’ is distinguished from the narrow concept of ‘cause of action’ in that a claim is defined as “a group or aggregate of operative facts giving ground or occasion for judicial action...” *Deleon* at 589. Specifically, the holdings in *Bilbrough* and *Deleon* narrow our focus to whether the facts of each case “are related in time, space, origin or motivation.” *Deleon* at 591.

Applying the holding in *Deleon*, and in comparing the previous request for forest buffer variance to the facts here, we find that the instant case does not involve the same set of operative facts as previously presented. We further find that the facts as related to the plan presented here, are not related in time, space, origin or motivation to the previous case. This case involves a

different plan for the development of 5 homes. Previously, the predecessor in title sought to develop 8 homes.

Here, the forest buffer is calculated based on a steep slopes and erodible soils analysis while previously, it was calculated on the floodplain. (Pet. Ex. 6). We previously found that the property size was 1.79 acres. As presented here, the property size is 1.35 acres. We further find that the proposed storm water management facility, proposed driveway use and relocation, proposed lot sizes and estimate of the proposed house dimensions are all different than previously presented to the Board.

In the prior case, the operative facts centered around the location of the floodplain. Based on the facts presented there, we concluded that a variance would not be appropriate on Lots 20 and 21 because the floodplain “would come halfway through the proposed houses on those lots....” We held open the issue of whether a variance on lots 22-27 “should be reviewed to determine whether or not the forest buffer had been correctly calculated by DEPRM when you take into consideration the information developed on the latest FEMA maps.” (Board Remand Opinion, 9/26/2007, p. 9).

For these reasons, we do not find that the instant case is barred by the doctrine of *res judicata*.

2) Practical Difficulty.

The next issue is whether the doctrine of collateral estoppel prevents us from deciding the issue of “practical difficulty.” In order for the Petitioner to obtain a forest buffer variance, the director of DEPS under Baltimore County Code, §33-3-106(a)(1) must find that strict compliance with the requirements of forest buffer regulations would result in either ‘practical difficulty’ or ‘unreasonable hardship’ to the owner. As quoted by this Board in our Opinion on

Remand dated September 26, 2007, the Court of Special Appeals in *Anderson v. Bd. of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 39 (1974) provided the standard for determining practical difficulty:

1. That compliance with the strict letter of the restriction would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome;

2. Whether the grant of the variance applied for would do substantial injustice to applicant as well as other property owners in the district or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners; and

3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

In the prior case, this Board, while ultimately denying the request for forest buffer variance, held that practical difficulty existed and that strict compliance with the letter of the law would unreasonably prevent the owner from using the property for ‘constructing homes.’ We said:

In the Board’s opinion, strict compliance with the letter of the law would unreasonably prevent the owner from using the property for constructing homes, which is a permitted purpose and would render the restriction unnecessarily burdensome. In addition, the Board feels that the grant of the variance applied for would do substantial justice to the applicant; however, a lesser variance with respect to Lots 20 and 21 may be warranted and would give substantial relief to the owner of the property and more consistent with justice to other property owners.

(Remand Opinion, 9/26/2007, p 5).

Under the doctrine of *collateral estoppel*, or issue preclusion, in a second suit between the same parties, even if the cause of action is different, any determination of fact that was

actually litigated and was essential to a valid and final judgment is conclusive. *Welsh v. Gerber Products*, 315 Md. 510, 516, 555 A.2d 486, 489 (1989). *Colandrea v. Wilde Lake*, 361 Md. 371, 387, 761 A.2d 899, 908 (2000); *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189 1194, 25 L.Ed.2d 469, 475 (1970).

Our prior holding was not limited to a specific number of homes but rather generally applied to “using the property for constructing homes.” We hold that our prior finding of practical difficulty in 2007 is conclusive and binding in this case under the doctrine of collateral estoppel.

3) Remand to DEPS.

On the issue of whether the forest buffer variance should have been granted, this Board has determined that this case needs to be remanded to DEPS for a determination of several issues which were raised by the Protestants. Procedurally, we have not found any prohibition in the BCC or the Baltimore County Zoning Regulations which prevents this Board from remanding a case to the agency from which the appeal originated.

In addition, BCZR, §501, this Board has the statutory right to employ technical, expert or other assistance which is needed to render a decision:

§504.1 Right to employ experts, summon witnesses and administer oaths; record of proceedings.

The Board shall have the right to employ such technical, expert and other assistance as in its judgment may be necessary to aid in the proper investigation and determination of any questions pending before it.

* * * *

As such, we will remand the case to DEPS in regard to the following:

A. Petitioner's Plan.

Protestants raise several issues with respect to the Petitioner's Plan under BCC, §33-3-108(c). That section states that the plan "shall contain" 18 specific requirements enumerated in §33-3-108(c). In the Circuit Court Memorandum and Opinion dated April 5, 2007 (Souder, J.), the Court made clear on remand to this Board that the requirements in BCC, §33-3-108(c) are mandatory and the case was remanded to the Board to determine whether the "wetlands were included on the plan submitted." (Memorandum Opinion and Order, 4/5/07, pp. 12-13).

As reiterated by the Protestants, they argue that this Plan fails to contain 4 of the 18 elements:

1) Wetlands. Subsection (c)(6) of §33-3-108 requires that the plan include "field delineated, marked and surveyed...wetlands (include 200 feet into adjacent properties where possible);" The Protestants contend that the plan shows that there are wetlands located to the east/southeast of the site (depicted in green in Protestants' Ex. 1) are 35' from the paving of Riderwood Drive. Protestants claim that the wetland areas are within 16 1/2' of Riderwood Drive. This issue is remanded to DEPS to determine whether the plan complies with Subsection (c)(6) in regard to wetlands delineation. If the plan does not comply with Subsection (c)(6), DEPS should require the Petitioner to resubmit the plan so that it complies. Upon review, DEPS should determine what, if any, impact the resubmitted plan has on its decision to approve the variance.

2) Sewage and Disposal Systems. Subsection (c)(3) of §33-3-108 requires that the plan depict all existing sewage disposal systems. Protestants assert that there is a private sewage disposal system located at 1612 Riderwood Drive which is not depicted on the plan. This issue is remanded to DEPS to determine whether the plan complies with Subsection (c)(3)

in regard to the existing sewage disposal system. If the plan does not comply with Subsection (c)(3), require the Petitioner to resubmit the plan so that it complies. Upon review, DEPS should determine what, if any, impact the resubmitted plan has on its decision to approve the Plan.

3) Utility Lines and Easements. Subsection (c)(15) of §33-3-108 requires the plan to show “existing and proposed utility lines and easements.” Protestants contend that the plan fails to show the proposed extension of water and sewer lines from southeast of the site. Protestants argue that without this information, and the limit of disturbance created by the construction of those extensions, DEPS could not have accurately assessed the impact of the construction upon the water resources and wetlands that are to the east of the termination of the existing lines for the utilities. This issue is remanded to DEPS as to whether the plan complies with Subsection (c)(15) in regard to the utility lines and easement. If the plan does not comply with Subsection (c)(15), require the Petitioner to resubmit the plan so that it complies. Upon review, DEPS should determine what, if any, impact the resubmitted plan has on its decision to approve the forest buffer variance.

4) Subsection (c)(17) of §33-3-108 requires the plan to contain a note: There shall be no clearing, grading, construction or disturbance of vegetation in the forest buffer, except as permitted by the Baltimore County Department of Environment Protection and Sustainability”. This issue is remanded to DEPS as to whether the plan complies with Subsection (c) (17). If the plan does not comply with Subsection (c)(17), require the Petitioner to resubmit the plan so that it complies.

B. Petitioner’s Alternatives Analysis.

1) The Driveway.

In regard to the Alternatives Analysis, Protestants first allege that the Alternatives Analysis fails to mention the proposed driveway or apply the standard set forth in §33-3-112(c) to the driveway. The driveway is intended to be the access road to the proposed homes. In particular, the Protestants assert that the Alternatives Analysis does not address alternative locations or design alternatives for the driveway relocation. By way of example, the Protestants point out that the existing driveway measures 10' wide but the relocated driveway measures 12'. According to the Protestants, the Alternatives Analysis offers no explanation as to why the proposed relocation of the driveway is wider than the existing dimensions.

Protestants further question whether the geometric alignment of the driveway relocation produces the least amount of impacts on the forest buffer. They argue that because the Alternatives Analysis does not address the driveway relocation, it is uncertain whether the Stormwater Management Facility could have been reduced in size and the driveway shifted to the west, thereby reducing the forest buffer disturbance. This issue is remanded to DEPS to determine whether the Alternatives Analysis addresses the driveway in compliance with §33-3-112 (c). If the plan does not comply with §33-3-112 (c), require the Petitioner to resubmit an Alternatives Analysis regarding the driveway. Upon review, DEPS should determine what, if any, impact the resubmitted Alternatives Analysis has on the decision by DEPS.

2) Proposed Water and Sewer Connections.

Protestants next assert that the Alternatives Analysis fails to mention any of the sewer extensions and how the lines will be extended from the manhole (marked MH 52789) and the water valve immediately to the southeast of the site to service the 5 proposed homes. Protestants inform the Board that the Alternatives Analysis should address, pursuant to §33-3-112 (c) not only where the lines will be installed but what impact the proposed lines will have on the forest

buffer. In addition, the Alternatives Analysis should address whether there are other feasible alternatives that exist or that minimize the disturbance which will take place with the proposed location of the utilities.

This issue is remanded to DEPS to determine whether the Alternatives Analysis addresses the impact of the water and sewer connection pursuant to §33-3-112(c). If the Alternatives Analysis does not address the impact of the water and sewer connections pursuant to §33-3-112 (c), DEPS should require the Petitioner to resubmit an Alternatives Analysis regarding the water and sewer connections. Upon review, DEPS should determine what, if any, impact the resubmitted Alternatives Analysis has on the decision by DEPS.

3) Proposed Storm Drains on Lots 3, 4 and 5.

According to the Protestants, the Alternatives Analysis likewise fails to address the impact of the storm drains proposed for Lots 3, 4 and 5. Protestants point out that the expert for the Petitioner admitted that installation of storm drains will impact the forest buffer. This issue is remanded to DEPS to determine whether the Alternatives Analysis addresses the impact of the proposed storm drains on Lots 3, 4 and 5 pursuant to §33-3-112(c). If the Alternatives Analysis does not address the impact of the proposed storm drains on Lots 3, 4 and 5, DEPS should require the Petitioner to resubmit an Alternatives Analysis regarding the proposed storm drains on Lots 3, 4 and 5. Upon review, DEPS should determine what, if any, impact the resubmitted Alternatives Analysis has on the decision by DEPS.

4) Offsite Impacts on the Forest Buffer.

At the hearing, Mr. Lindley from DEPS admitted that the Petitioner would need to submit a separate request for forest buffer variance to address the impacts of 'off-site' improvements including the driveway and water/sewer connections. Protestants contend that because the

driveway and utility connections are part of the development, even if they are located outside of the Property boundaries, the extent of their impact on the forest buffer including an Alternatives Analysis, should have been reviewed by DEPS.

This issue is remanded to DEPS to determine whether the off-site improvements require separate forest buffer variance request. If the off-site improvements require a separate forest buffer variance request, require the Petitioner to submit an Amended Request for Forest Buffer Variance and to resubmit an Alternatives Analysis regarding those off-site improvements. Upon review, DEPS should determine what, if any, impact the Amended Forest Buffer Variance and resubmitted Alternatives Analysis has on the decision by DEPS.

5) Petitioner's Alternatives Analysis for Stormwater Management Facility.

Protestants assert that the Alternatives Analysis that was submitted for the proposed stormwater management facility was incomplete in that it did not address why the proposed stormwater management proposal is superior to, and provides less disturbance than, the individual facilities proposal in the 2005 request. Additionally, Protestants point out that the Alternatives Analysis failed to discuss any other alternative configurations of the stormwater management facility that might reduce the number of dwellings proposed or lessen the impact upon the forest buffer.

This issue is remanded to DEPS to determine whether the Alternatives Analysis submitted for the proposed stormwater management facility is superior to, and provides less disturbance than, the individual facilities proposal in the 2005 request; and to determine whether the Alternatives Analysis discusses any other alternative configurations of the stormwater management facility that might reduce the number of dwellings proposed or lessen the impact upon the forest buffer.

In short, to determine whether the Alternatives Analysis provides that “no other feasible alternative exists” and that “minimal disturbance will take place.” In the event that the Alternatives Analysis does not address these issues, DEPS should require the Petitioner to submit an Alternatives Analysis that does comply. Upon review, DEPS should determine what, if any, impact the resubmitted Alternatives Analysis has on the decision by DEPS.

6) Alleged Designs Issues with Stormwater Management Facility.

Protestants contend that the Alternatives Analysis for the stormwater management facility has several design flaws. This Board requests that the following issues be remanded to DEPS to review, comment on and/or seek clarification from the Petitioner by way of Alternatives Analysis or otherwise in regard to:

A) What affect if any does the Maryland State law requiring a 25 ft. buffer from any regulated wetland have on DEPS approval of the request for variance? Should an approval by this Board, if any, of the variance request be conditioned upon the approval by the State of a reduction of the buffer from the wetland?

B) What, if any, affect do the floodplain limits have on the location of the proposed stormwater management facility?

C) Is the proposed stormwater management pond embankment at least 15 feet from the forest buffer? If not, what affect does that have on DEPS approval of the variance?

D) Was the Department of Public Works (“DPW”) required to review and approve the Petitioner’s plan pursuant to BCC, §32-8-202(b)(1) to determine whether the plan was consistent with the floodplain? If so, DEPS should submit the Plan to DPW for review, Upon review by DPW, what affect does Department of Public Works comments have on DEPS approval of the variance request?

C) Petitioner’s Request for 25’ setback in lieu of required 35’?

Protestants view of the plan is that the Petitioner is not actually requesting a 25' setback from the forest buffer but rather a 0' setback or complete waiver of the 35' setback because all 5 houses are to be built directly in the forest buffer. Protestants argue that DEPS should have required the Petitioner to explain why “no other feasible alternative exists” and that “minimal impacts will occur” for example if smaller homes are proposed. This Board has not found any review by DEPS on this issue. As such, this issue is remanded to DEPS for determination and clarification of this issue. Upon clarification, what if any affect does this issue have on DEPS' approval of the forest buffer variance?

D) Consistency of Proposed Homes with Area.

Protestants highlight that the proposed homes measuring approximately 35' x 40' or 35' by 44' are larger than homes in the neighborhood. In review of the DEPS approval, this Board did not find any review by DEPS of the size of the homes in terms of the impact on the forest buffer. We will remand this issue to DEPS to determine whether the Petitioner demonstrated that there were no other feasible alternatives as to the size of the homes, and whether the proposed size provided the minimal impact on the forest buffer. In the event that DEPS finds that the Petitioner did not demonstrate the same, DEPS should require the Petitioner to provide an Alternatives Analysis that addresses this issue. Upon resubmittal of the Alternatives Analysis, DEPS should determine what affect, if any, this information has on its approval.

ORDER

THEREFORE, IT IS THIS 27th day of March, 2014 by the Board of Appeals for Baltimore County

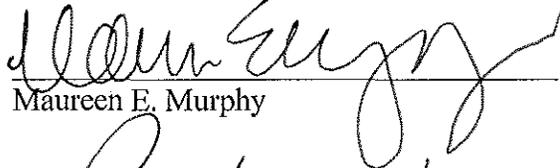
ORDERED, that this case is remanded to DEPS consistent with the provisions set forth herein; and it is further

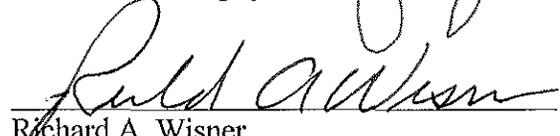
ORDERED, that DEPS is to have all further information to the Board no later than 30 days from the date of this Order; and it is further

ORDERED, that a final Opinion will be issued by this Board after review of the requested information and any further proceedings this Board determines is necessary, with no further action to be taken on this Ruling until such time as the Board's final decision is issued.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**


Andrew M. Belt, Panel Chairman


Maureen E. Murphy


Richard A. Wisner



Board of Appeals of Baltimore County

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March 27, 2014

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RE: *In the Matter of: Luther-villa*
Case No.: CBA-14-009

Dear Counsel:

Enclosed please find a copy of the Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Pursuant to the enclosed, this Order is not final decision of the Board of Appeals for Baltimore County and does not constitute an appealable event at this time. This matter will be held open on the Board's docket until such time as a final opinion can be issued.

Should you have any questions, please do not hesitate to contact us.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington".

Krysundra "Sunny" Cannington
Administrator

/klc

Enclosure

Duplicate Original Cover Letter

c: Luther-villa
Gary Talles/Talles Investments, LLC
Stacey McArthur, R.L.A./D.S. Thaler & Associates, Inc
Eric Rockel
John A. Fischer, III
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