



## 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

August 19, 2015

G. Scott Barhight, Esquire  
Jennifer R. Busse, Esquire  
Whiteford, Taylor & Preston, L.L.P.  
One West Pennsylvania Avenue, Suite 300  
Towson, Maryland 21204

J. Carroll Holzer, Esquire  
508 Fairmount Avenue  
Towson, Maryland 21286

RE: In the Matter of: DMS Development -- Legal Owner  
Case No: CBA-15-004

Dear Counsel:

Enclosed please find a copy of the 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,

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

Krysundra "Sunny" Cannington  
**Administrator**

KLC/tam  
Enclosure  
Duplicate Original Cover Letter

c: DMS Development  
John Canoles/Eco-Science Professionals, Inc.  
Matthew Bishop/Morris & Ritchie Associates  
Frederick Hofferbert, Jr./The American Legion Towson Post #22, Inc.  
Paul Moran/The American Legion Towson Post #22, Inc.  
Vincent J. Gardina, Director/EPS  
Patricia M. Farr, Manager/Environmental Impact Review/EPS  
Nancy West, Assistant County Attorney  
Michael Field, County Attorney/Office of Law

IN THE MATTER OF  
DMS DEVELOPMENT  
(aka 101 York Road)  
101 York Road  
Towson, MD 21204

RE: Forest Buffer Variance  
EPS Tracking No.: 05-14-1867

\* BEFORE THE  
\* BOARD OF APPEALS  
\* OF  
\* BALTIMORE COUNTY  
\* Case No.: CBA-15-004

\* \* \* \* \*

**OPINION**

This case comes before the Baltimore County Board of Appeals on appeal from a letter issued by the Department of Environmental Protection and Sustainability (“EPS”) concerning a requested variance from the Law for the Protection of Water Quality, Streams, Wetlands and Floodplains. Appellee DMS Development proposes to redevelop the subject property currently known as 101 York Road and construct a mixed-use development on that property.

The Board held hearings on this matter on February 19, 2015 and March 30, 2015. J. Carroll Holzer, Esquire, represented Appellant, The American Legion Towson Post #22 (“American Legion”). G. Scott Barhight, Esquire and Jennifer R. Busse, Esquire of Whiteford, Taylor & Preston, LLP represented Appellee DMS Development (“DMS”). Following these hearings, Counsel submitted Memoranda in lieu of closing argument. The Board publicly deliberated the appeal on April 29, 2015, issued an oral opinion at the conclusion of the deliberation and indicated that this written opinion would follow.

**BACKGROUND**

The subject property encompasses multiple parcels that together form a 1.9-acre project site in an area of Towson known as the “Golden Triangle.” This Golden Triangle is formed roughly by York Road, the Towson By-pass, and Burke Avenue. The northern property boundary of the

site parallels part of a stream known as Towson Run. Towson Run is immediately adjacent to the southern portion of the American Legion's property.

Currently, the site contains a significant amount impervious surface, a liquor store and a pizza parlor. The subject property also contains a small, unnamed tributary stream (the "unnamed tributary") that emerges from an existing culvert in the southeast corner of the site. This unnamed tributary flows freely on the site for roughly 27 feet to a piped section totaling approximately 42 feet. Downstream of this piped section, the unnamed tributary again flows freely for approximately 75 feet, and then to another culvert system that conveys the flow under the property to Towson Run. Towson Run and this unnamed tributary require a 75-foot standard stream buffer and a 25-foot buffer from the floodplain. A small portion of the 100-year floodplain from Towson Run also encroaches onto the property.

The existing forest buffer occupies 1.2-acres of the 1.9-acre site. Thus, on September 5, 2014 Appellee DMS filed a Forest Buffer Variance Application, asserting the "unnamed tributary and its associated forest buffer will be completely impacted by the proposed development." (See Application, part of Appellee's Exhibit 1, at 6). DMS also stated "the presence of extensive forest buffers on the site creates a practical difficulty that limits the applicant's ability to create a comprehensive site plan in a manner that meets the County's and applicant's shared goals . . . . " (Id. at 3). DMS requested the variance to permit, *inter alia*, the elimination of the Forest Buffer on the project site, and the piping of approximately 150 feet of the unnamed tributary also located on the subject property. (Application at 3). DMS noted further that as part of the redevelopment, DMS would pipe the unnamed tributary around the proposed development and shift the discharge location to a location in Towson Run further downstream than currently exists. (Id. at 6).

By letter dated October 24, 2014 the Baltimore County Department of Environmental Protection and Sustainability (“EPS”) granted the variance, subject to stated conditions, in accordance with Section 33-3-106 of the Baltimore County Code. According to EPS, “a practical difficulty exists in reasonably developing this site due to the extent and orientation of the resources.” (Appellee’s Ex. 2). EPS stated further that “the potential for impacts to water quality and aquatic resources as a result of this proposal can be minimized by performing mitigative measure both on and offsite.” (Id.). EPS also noted approximately .5-acre of the 100 year floodplain would be filled upon the granting of the variance. Ultimately, EPS granted the request subject to certain conditions, including DMS’s purchase of 1.2 acres of credit at an approved forest buffer mitigation bank and a prohibition against the proposed building from encroaching upon the 100-year floodplain any further than as shown on the plan.<sup>1</sup> (Id.). The American Legion, owner of the property adjacent to the Towson Run and the subject property, appealed the letter decision to this Board.<sup>2</sup> The Board directed the appeal to proceed *de novo*.

#### TESTIMONY AND EVIDENCE

Appellant American Legion called Michael Parr, the organization’s environmental coordinator and authorized to testify on its behalf. Mr. Parr was not offered as an expert witness but testified based on his practical experience with water sampling, and the monitoring and cleaning of area streams including Towson Run. He also has reviewed the environmental documentation relating to the subject variance. ((February 19, 2015 Transcript, “Feb. T.” at 70). He has walked Towson Run at various times and has observed and is familiar with the outfalls and

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<sup>1</sup> “That plan shows the proposed building between 11.5 and 50 feet from this floodplain.” (Appellee’s Exhibit 2).

<sup>2</sup> The American Legion also had appealed the granting of a Forest Conservation Special Variance relating to a particular specimen tree. (CBA 15-003). The American Legion withdrew this appeal at the hearing on February 19, 2015.

piping that runs onto the subject property. (Id. at 66). These observations have led to concerns about the potential for flooding and the quality of the stormwater resulting from the location of the new proposed outfall into Towson Run adjoining the American Legion property (Id. at 73, 93).

According to Mr. Parr, the proposed piping of the unnamed tributary and redirection of the outfall would result in an unreasonably increased surge of untreated water into Towson Run and a significant damage to the American Legion property. (Feb. T. at 75, 92-93). Although not an expert on the Baltimore County Code or with respect to flood plains, Mr. Parr also maintained that the proposed actions are governed not by BCC Article 33, but more properly by the provisions of Article 32, Title 8. (Vol. I at 100-102) regarding flood plains. Mr. Parr also took issue with DEPS' characterization of the stream as "intermittent" and the site as "predominantly impervious". (Id. at 109-110, 114-15). According to Mr. Parr, his calculations based on an analysis of tax records and stormwater remediation fee worksheets indicates the amount of impervious surface is closer to 14% of the site. (Id. at 115-121)

The American Legion's second witness, David Flores, was qualified as an expert in stream ecology and watershed restoration. (Feb. T. at 179). Mr. Flores is familiar with Towson Run and its outfall, has sampled water discharge from the existing site outfall, has produced water quality assessments at various sites, has walked the property at issue and read the applicable documents. (Id. at 156-157, 173-178). Mr. Flores testified he is neither familiar with nor an expert in Article 33 of the BCC or with forest buffer variances in general. (Id. at 173).

According to Mr. Flores, maintaining the unpiped "daylit" sections of the unnamed tributary provides "positive water quality benefit for the downstream portion of the stream, as well as the Towson Run, because the flood plain absorbs the polluted stormwater." (Feb. T. at 187). Conversely, in Mr. Flores's opinion, the proposed piping of the daylit section of the tributary

ultimately will burden downstream portions of Towson Run “because the pipe stream will not have any connectivity to the flood plain for the ground water system.” (Id. at 187-188). The result will be “a tremendous amount of stormwater or stream water, for that matter, during dry weather that is going to be discharging from [the] end of the pipe.” (Id. at 194). Mr. Flores also testified that the more intense discharge of stormwater can lead to more stormwater pollution and “accelerate the rate of stream bank erosion. (Id. at 197).

As to the forest buffer, Mr. Flores testified that the trees in a buffer yield benefits for the related stream in terms of water quality, stormwater reduction, and stream temperature reduction. (Feb. T. at 200-202). Thus, reducing the forest buffer would negatively affect the stream: “[t]he water heats up in the streams, more stormwater enters the streams, and significantly, those tree can help protect the stream banks, and reduce the amount of stream bank erosion.” (Id. at 202). Mr. Flores also opined that any forest buffer remaining on the subject site if the variance is upheld would be very narrow, tall and steep, making it difficult to grow and maintain trees. (Id. at 208-210).

DMS’s first witness was John Canoles, a partner in EcoScience Professionals. Mr. Canoles estimated he has participated in over 4,000 projects as an ecologist and several hundred relating to variance and alternative analyses applications for forest buffers. (March T. at 25). The Board accepted Mr. Canoles as an expert in ecology, specifically federal, county, and state environmental land regulations. (March 30, 2015 Transcript (“March T.”) at 30).

According to Mr. Canoles, who prepared the site plan submitted to EPS and the variance request, the subject site currently contains several buildings and a substantial amount of impervious surface. (March T. at 39). Most of the buildings were torn down for safety reasons and the site was stabilized with stone and rubble. (Id. at 40). Mr. Canoles testified that EPS’s letter

confirmed the site contains no forest as defined by the Forest Conservation Act and no wetlands on the site. (Id. at 69). Mr. Canoles further discussed his observations of the streams and existing piping on the site, noting the relatively makeshift aspects of the stream controls, including boulders, filter cloth, and concrete added to control the flow. (Id. at 51-54). As to other aspects of the subject property, he maintained the majority of the site is impervious, buildings have been removed, and the ground surface stabilized with cobble gravel. (Id. at 56.) According to Mr. Canoles, roughly half the forest buffer currently is impervious. (Id. at 62).

Mr. Canoles took issue with Mr. Flores' opinion, stating that Mr. Flores' opinions relate more to a natural stream system in a natural flood plain setting, but that the subject site does not involve such a natural system or setting. (March T. at 82-83). According to Mr. Canoles, this site involves urban, highly disturbed soil with much impervious surface that does not receive the benefits of a more natural infiltration. (March T. at 83-84). He also disagreed with Mr. Flores's conclusion regarding bank erosion, testifying that the large outfall into Towson Run has been designed to dissipate the energy from the flow and "will not cause bank erosion." (Id. at 85). Mr. Canoles also opined that in general:

the existing conditions on the site are very degraded. The unnamed tributary, as it exists, has been highly impacted by disturbance. The outfall where the 48-inch pipe discharges into Towson Run is not an engineered outfall, it is just a pipe into the stream. . . . any runoff on the site now, it either runs over the impervious surface directly into the unnamed tributary or it runs over the bank, into Towson Run, creating a potentially unstable areas along the bank of Towson Run.

(Id. at 88-89). Mr. Canoles thus concluded that

post construction with the stormwater management that will be included on the site, and with the outfall that will be constructed with the new storm drain system, that ultimately creates a more stable and healthier environment for Towson Run.

(Id. at 89). Mr. Canoles's ultimate opinion was that the granting of the variance was appropriate; given the site conditions, the fact that the site had been heavily developed

already and was located within a highly urbanized area of the county, and the proposed use of the property, he concluded that denying the variance would create a hardship or practical difficulty. (Id. at 79-80).

DMS's second witness was Michael Coughlin, a civil engineer and partner in the firm of Morris & Ritchie Associates where his responsibilities include grading, stormwater management, erosion and sediment control, and storm drain and flood plain analysis. (March T. at 103-104). Mr. Coughlin oversaw the engineering work for the subject property plans and the Board accepted him as an expert in the field of civil engineering, including stormwater management and land development in the county. Id. at 106, 112. According to Mr. Coughlin, the site is 70% impervious, stormwater is not currently managed on the site and erosion is currently occurring. (March T. at 115, 121). Mr. Coughlin testified that many of the existing outfalls around the property (including those associated with the unnamed tributary) are not "suitable" and would not be approved by EPS. (Id. at 122, 125-26). Mr. Coughlin also opined that under the proposed plans, stormwater will be released at a slower rate than exists currently so that discharge from the site will not increase because of development and the erosion potential will be reduced. (Id. at 128, 142. Further, the water quality will be better managed. (Id. at 128).

As to regulation of the flood plain, Mr. Coughlin noted that BCC §32-4-414 indicates that as a general rule, the county does not permit development in a flood plain. However, according to Mr. Coughlin, DMS does not need a flood plain waiver because it will be installing an utility/drainage facility. (March T. at 136-37. See BCC §32-4-414(c)(2).



Appellee DMS also called Glenn Shaffer as a witness on its behalf. Mr. Shaffer is employed by EPS in the Environmental Impact Review Section, a department that enforces the “forest buffer” regulations for the protection of water quality, streams, wetlands and flood plains. (March T. at 148). Mr. Shaffer has been employed by the county in natural resource protection for almost thirty years, has reviewed thousands of buffer plans in his career and is very familiar with the EPS’s administrative practice regarding stream and forest buffers. (March T. at 149-151).

Mr. Shaffer is the lead reviewer for the environmental impact review of the subject property. He has walked the subject site and observed the conditions including the streams and piping. (March T. at 183). He has observed the unnamed tributary and took into account its quality and haphazard piping attempts over the years.<sup>3</sup> He agreed that the existing outfall into Towson Run is not “suitable” but will be replaced with a “suitable” outfall. (*Id.* at 194). He is familiar with the forest buffers on the site. (*Id.* at 192-93.). He also participated in the multitude of meetings and reviews of the application and the property as part of an ongoing back and forth with the developer. (*Id.* at 161-66).<sup>4</sup> Mr. Shaffer was involved in EPS’s decision to grant the subject forest buffer variance, participated in the drafting of the October 24, 2014 letter granting the variance. The letter went up the chain of command for review and necessary changes. (March T. at 152, 158-59,162).

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<sup>3</sup> He testified that in terms of a forest buffer variance, it does not matter whether the stream is intermittent or perennial. (March T. at 190).

<sup>4</sup> According to Mr. Shaffer, the department did not feel initially that DMS had adequately minimized environmental impacts, so the parties engaged in a series of meetings (including EPS head Vincent Gardina) regarding these issues until EPS felt there was adequate mitigation and still a viable project. (March T. at 159). Based on the meetings, reviews and changes resulting therefrom “the consensus was that the impacts had been minimized to the extent practical.” (*Id.* at 161).

According to Mr. Shaffer, EPS considered the two criteria for a forest buffer variance: 1) practical difficulty or unreasonable hardship if the variance is not granted, and 2) the minimization of impact to water quality. (March T. at 161). DMS also conducted an alternatives analysis. (Id. at 165-66). Ultimately, EPS approved the variance, contingent upon the fulfillment of eight conditions to minimize environmental impact, including off-site mitigation of the lost forest buffer through the mitigation bank. (Id. at 163, 166-67).<sup>5</sup>

Asked whether the perceived hardship resulting in the variance was self-imposed by DMS, Mr. Shaffer responded that since the buffer comprises 1.2 of the 1.9 acres of the site, it is a practical difficulty for the developer to stay entirely out of the buffer and honor the setback off the buffer of the building; without the variance, “it is pretty obvious [DMS] wouldn’t be able to build a reasonable development on the site.” (Id. at 172-73). This conclusion apparently was reinforced by the fact that the final proposal was less than what the developer originally submitted, and

based on the constraints of the site, and the way it lays out, it was our department’s position to approve the variance that we felt that adequate minimization occurred with this, and that they could go ahead.

(Id. at 174).

With regard to the flood plain boundary, Mr. Shaffer testified that EPS accepts whatever the Department of Public Works (“DPW”) approves as a flood plain limit and that DPW made such an assessment for Towson Run and the unnamed tributary on the subject property. (March T. at 155-56). Mr. Shaffer utilized the DPW-identified flood plain

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<sup>5</sup> With regard to off-site mitigation, Mr. Shaffer testified that when, as here, much of the buffer area consists of impervious surfaces or old buildings, EPS sometimes does not require one-one offsite mitigation as it did here, and sometimes does not require mitigation at all. (March T. at 167-168).

in analyzing the forest buffer line and testified that the filling of approximately .5 –acres of the 100-year flood plain remains subject to DPW’s approval. (Id. at 156, 188).

### DECISION

Baltimore County Code (“BCC”) sections 33-3-112(b)(2)(ii) and (iii) prohibit disturbance of existing vegetation or soil within a forest buffer. Section 33-3-112(b)(2)(iv) also bars filling or dumping within a forest buffer area. Notwithstanding these prohibitions, BCC §33-3-106(a)(1) authorizes the Director of DEPS to grant a variance “[f]or those projects... where strict compliance with the requirements of this title would result in practical difficulty or unreasonable hardship. . . .”

Courts often consider three factors in determining whether practical difficulties exist:

- 1) Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
- 2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to 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.
- 3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

See Montgomery Cnty. v. Rotwein, 169 Md. App. 716, 729-30 (2006) (citations omitted). Further, the practical difficulties cannot be the result of the applicant’s own actions. Id.

After a series of meetings, property inspection, and multiple reviews of pertinent documents and an alternatives analysis, EPS granted the forest buffer variance, having determined that a “practical difficulty” would result from reasonably developing the subject property according to statutorily required buffer requirements. EPS’s finding is supported by the evidence.

As an initial matter, according to Mr. Canoles, a forest buffer's function is reduced where there exists development or disturbance of the buffer. These conditions exist with regard to the subject property. Taken together, the property's site conditions, the site location in the developed landscape and the proposed use of the property all indicate that on this site the buffer's practical function is negligible. EPS determined "there is no forest onsite." (Appellee's Ex. 8). Truly the site is not a "forest" in any sense of the word.

As to practical difficulty, EPS stated in its October 24, 2014 letter that "a practical difficulty exists in reasonably developing this site due to the extent and orientation of the resources." (Appellee's Ex. 2). In his testimony EPS reviewer Glen Shaffer emphasized that 1.2-acres of the total 1.9-acre site is considered forest buffer. Given the extent of the existing buffer, requiring development out of the buffer and honoring the setback of the building off the buffer renders it "pretty obvious that [DMS] wouldn't be able to build a reasonable development on the site." (March T. at 173.). This conclusion is buttressed by the "constraints of the site, and the way it lays out" and the fact that DMS had already reduced the size and scope of their original proposal. (*Id.* at 174). We give great weight to the conclusions of the reviewing agency charged with administering this statute and evaluating variance applications thereunder. Mr. Canoles similarly testified that in his opinion reasonable site development would be a practical difficulty. Appellants have offered no expert testimony rebutting EPS's conclusions as to this issue. In addition, EPS has conditioned the variance such that the spirit of the statute will be met by the purchase of 1.2 acres of credit at an EPS-approved forest buffer mitigation bank, and by seven other conditions aimed at mitigating or eliminating potential harm to Towson Run and the unnamed tributary and stream banks.

It is obvious that granting the variance would do substantial justice to the applicant. As to neighboring properties, Towson University has submitted multiple letters of support for the project and has discussed various easements from the University to the project developers. (See Appellee's Ex. 16a,b). The neighboring American Legion has argued to the contrary basing its opposition primarily on concerns resulting from the piping of the unnamed tributary, and the potential for erosion of the stream banks and degradation of water quality. While the Board gives credence to the testimony of Appellant's witnesses concerning potential negative impacts from the proposed development and piping, there was significant and more compelling testimony from multiple experts to the contrary, convincing the Board that with the proposed improvements, including new stormwater management, sediment controls, suitable storm drain outfalls, and other improvements such as the green roof, the subject development would not accelerate the quantity of the water flow, further degrade the stream banks or increase pollution to the site or neighboring resources.

The Board also finds that the "practical difficulty" in developing this site was not self-created by Appellee. Rather it is the land itself and current conditions on the site that have led to this difficulty. See Richard Roeser Profl Builder, Inc. v. Anne Arundel Cnty., 368 Md. 294, 314 (2002) ("The types of hardships that are normally considered to be self-created in cases of this type do not arise from purchase, but from those actions of the landowner . . . that create the hardship, rather than the hardship impact, if any, of the zoning ordinance on the property.").

As a final matter, the American Legion contends that the authorization to pipe portions of the unnamed tributary will result in an alteration to the flood plain and thus requires a variance by DPW under BCC §32-8-203. Appellant did not offer any expert on floodplain issues or whether the piping will alter the flood plain. Nor did it offer any testimony from DPW as to this issue or whether the public good outweighs any adverse impacts. Moreover, EPS reviewer Shaffer testified

that DPW has been involved in the review of this project with regard to approval of flood plain boundaries and that any filling of a flood plain is subject to DPW's approval. (March T. at 155, 188).

After thorough review of the above, facts, testimony, and law in this matter, the Board unanimously agreed to GRANT the variance from the forest buffer regulations.

**ORDER**

THEREFORE, IT IS THIS 19<sup>th</sup> day of August, 2015 by  
the Board of Appeals of Baltimore County

**ORDERED** that the letter decision of Vincent J. Gardina, Director of the Department of Environmental Protection and Sustainability dated October 24, 2014 granting the variance from the Law for the Protection of Water Quality, Streams, Wetlands and Floodplains in accordance with Section 33-3-106 of the Baltimore County Code be and is hereby **AFFIRMED**.

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 of Procedure.

**BOARD OF APPEALS OF  
BALTIMORE COUNTY**

  
Maureen E. Murphy, Panel Chair

  
Meryl W. Rosen

Richard A. Wisner was a Board member at the hearings on February 19, and March 30, 2015 and public deliberation on April 29, 2015. He was not reappointed to the Board and his term expired on April 30, 2015.