

IN RE: DEVELOPMENT PLAN HEARING	*	BEFORE THE
AND PETITIONS FOR SPECIAL	*	OFFICE OF
HEARING & VARIANCE	*	ADMINISTRATIVE HEARINGS
2 nd Election District	*	
4 th Council District	*	
(MARRIOTT KIRK PROPERTY -	*	FOR
1st Material Amendment)	*	BALTIMORE COUNTY
8200 Kirk Farm Road	*	
Church Marriott, LLC	*	
Owner/Developer	*	HOH Case No. 02-710 and
		Zoning Case No. 2013-0220-SPHA

* * * * *

**ADMINISTRATIVE LAW JUDGE’S COMBINED ZONING AND
DEVELOPMENT PLAN OPINION & ORDER**

This matter comes before the Office of Administrative Hearings for Baltimore County for a public hearing on a development proposal submitted in accordance with the development review and approval process contained in Article 32, Title 4, of the Baltimore County Code (“B.C.C.”). The hearing also involves requests for special hearing and variance relief under the Baltimore County Zoning Regulations (B.C.Z.R.) and the Comprehensive Manual of Development Policies (CMDP). Church Marriott, LLC, the developers of the subject property (hereinafter “the Developer”), submitted for approval a redlined Development Plan prepared by Richardson Engineering, LLC, known as “Marriott Kirk Property, First Material Amended Development Plan”.

The Developer proposes 64 single-family attached town home dwelling units on 7.27 acres, more or less, of land zoned DR 10.5. The site is currently mostly open field with a single-family dwelling, barn and other out buildings on the site. The property is directly adjacent to Scotts Branch Elementary School.

The site was rezoned to DR 10.5 from DR 5.5 in the 2012 Comprehensive Zoning Map Process (CZMP) (Issue #4-008). Prior to this rezoning, a Final Development Plan (FDP) had been approved for 26 single-family residential dwellings in accordance with the Baltimore County Development and Zoning regulations and the previous zoning of DR 5.5. Developer's Exhibit 12. A plat was also filed among the Baltimore County land records reflecting this configuration. Developer's Exhibit 1.

The property was posted with the Notice of Hearing Officer's Hearing (on April 15, 2013) and Zoning Notice (on April 26, 2013) for 20 working days prior to the hearing, in order to inform all interested citizens of the date and location of the hearing. The undersigned conducted the hearing on Thursday, May 16, 2013, at 10:00 AM, Room 205 of the Jefferson Building, 105 West Chesapeake Avenue, Towson, Maryland.

In addition to the Hearing Officer's Hearing (HOH), the Developer is requesting certain zoning relief and has filed a Special Hearing request pursuant to §500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R."), to Amend the FDP of the Marriott-Kirk Property.

The Developer is also requesting Variance relief as follows:

- (1) From §1B01.2.C.1.c of the B.C.Z.R. and from §504.2 of the B.C.Z.R. and the Comprehensive Manual Development Plan (CMDP), Division II, Section A: Residential Standards Table VII, to permit a side building face to public street right-of-way setback of 15' in lieu of the required 25' setback,
- (2) From §1B01.2.C.1.c of the B.C.Z.R. and from §504.2 of the B.C.Z.R. and the CMDP, Division II, Section A: Residential Standards Table VII, to permit a building face to tract boundary setback of 22' in lieu of the required 30' setback,
- (3) From §1B01.2.C.1.c of the B.C.Z.R. and from §504.2 of the B.C.Z.R. and the CMDP, Division II, Section A: Residential Standards Table VII, to permit a side building face to side building face setback of 13' in lieu of the required 25' setback,

- (4) From §1B01.1.B.1.e.(2) and (5) of the B.C.Z.R., to permit the construction of single family attached dwellings with a 30' setback from the tract boundary in lieu of the required 75' setback,
- (5) From §1B01.1.B.1.e.(2) and (5) of the B.C.Z.R., to permit an Residential Transition Area (RTA) buffer of 0' in lieu of the required 50' buffer,
- (6) From §1B01.1.B.1.e.(5) of the B.C.Z.R., to permit a maximum building height of 45' within the 100' transition area in lieu of the maximum 35',
- (7) From §301.1 of the B.C.Z.R., to permit a one story open porch to have a rear setback of 20' in lieu of the required 22.5',
- (8) From Modification of Standards to permit a side building face to side building face setback of 20' in lieu of the required 25' setback,
- (9) From Modification of Standards to permit the construction of more than 6 units in a row,
- (10) From a Waiver of Public Works Standards to eliminate the requirement to construct a sidewalk on the northwest side of Kirk Farm Road adjacent to the Scotts Branch Elementary School property, and
- (11) From a Waiver of Standards to permit 14 parking spaces to be provided without a landscaped island in lieu of 10 spaces.

Appearing at the requisite Hearing Officer's Hearing in support of the Development Plan on behalf of the Developer and property owner was Ronald Schaftel and David Altfeld, and Donald N. Mitten, P.E. with Richardson Engineering, LLC, the consulting firm that prepared the site plan. Timothy M. Kotroco, Esquire with Whiteford, Taylor & Preston, LLP, appeared and represented the Developer.

Several citizens from the area also attended the hearing, and their names are reflected on the sign-in sheets. The neighbors did not oppose the townhouse project, but strongly objected to the proposed connection of Marriott Lane through the site to Church Lane.

Numerous representatives of the various Baltimore County agencies, who reviewed the Development Plan, also attended the hearing, including the following individuals from the

Department of Permits and Development Management: Darryl Putty (Project Manager), Dennis Kennedy, Development Plans Review, Bruce Gill, Real Estate Compliance, and Jeffrey Perlow (Office of Zoning Review). Also appearing on behalf of the County were David Lykens from the Department of Environmental Protection and Sustainability (DEPS), and Jenifer Nugent from the Department of Planning (DOP).

The role of the reviewing County agencies in the development review and approval process is to perform an independent and thorough review of the Development Plan as it pertains to their specific areas of concern and expertise. The agencies specifically comment on whether the plan complies with all applicable Federal, State, and/or County laws, policies, rules and regulations pertaining to development and related issues. In addition, these agencies carry out this role throughout the entire development plan review and approval process, which includes providing input to the Hearing Officer either in writing or in person at the hearing. It should also be noted that continued review of the plan is undertaken after the Hearing Officer's Hearing during the Phase II review of the project. This continues until a plat is recorded in the Land Records of Baltimore County and permits are issued for construction.

Pursuant to §§32-4-227 and 32-4-228 of the B.C.C., which regulate the conduct of the Hearing Officer's Hearing, I am required first to identify any unresolved comments or issues as of the date of the hearing. At the hearing, each of the Baltimore County agency representatives identified above (with the exception of Ms. Nugent and Mr. Kennedy, whose comments will be addressed below) indicated that the redlined Development Plan (marked as Developer's Exhibit 2) addressed any and all comments submitted by their agency, and they each recommended approval of the plan.

CONNECTION OF MARRIOTT LANE

The majority of development proposals in Baltimore County are uncontroversial, or at least citizens can “learn to live” with the project under consideration. If a common theme exists in those cases where citizen opposition is vocal, it would undoubtedly be traffic. And that was certainly the case in this matter. Nearly a dozen concerned citizens attended this hearing, and most of them stayed throughout the four hours of testimony and discussion. Without exception, each expressed strong objection to the connection of Marriott Lane through this new community.

At present, Marriott Lane, which is accessed off of Liberty Road, terminates at the subject property. Witnesses described the quiet, almost bucolic existence they enjoy, a rarity in this day and age. Photos were submitted which depicted the rural feel of this area. Developer’s Exhibit 6. Everyone expressed fear that if the road is connected through this community to Church Lane, it would become a “race track” with speeding vehicles traveling to and from Liberty Road.

Baltimore County policy discourages dead-end streets, and both Mr. Kennedy and Ms. Nugent indicated their departments supported the roadway connection. I understand the County policies and respect the input and expertise of Mr. Kennedy and Ms. Nugent, but I think in this case the concerns of the existing community members are paramount. It is easy to imagine how their lives would be forever altered by such a connection, and I think the County policies must yield in these circumstances. In addition, the Developer is proposing 64 “units” which pursuant to County policy does not require a second means of access.

CHURCH LANE IMPROVEMENTS

For many years, Baltimore County officials have expressed concern with conditions on Church Lane. In the previous iteration of this case (over six years ago), Stephen Weber of DPW noted that ownership of the roadway was unclear, and that the road surface itself was substandard.

In this case, witness testimony and photographs (Developer's Exhibit 7) make clear that existing conditions are still unacceptable. The only point of debate concerns who bears the responsibility for the needed improvements, including a sidewalk along the north side of Church Lane.

In the March 27, 2007 Order approving the Development Plan for 26 single-family dwellings at this site, former Deputy Zoning Commissioner Murphy (recounting the testimony of Developer's engineer) stated that "sidewalks will be built on Church Lane," and he noted that a greenway project was planned on the opposite side of Church Lane along Scotts Level Branch. *See* Order, p. 7. That was over six years ago, and in the interim Baltimore County completed improvements including curb and sidewalk along the south side of Church Lane. The County now requests the Developer to construct roadway, sidewalk and curb/gutter improvements along the north side of Church Lane, and the Developer contends such an off-site improvement is unwarranted.

On this point, I believe Baltimore County has the better of the argument. The previous developer (in whose shoes the present Developer stands) agreed to construct such improvements, and it is reasonable to assume – especially since it was specifically mentioned in his Order – this was a material factor in Mr. Murphy's approval Order. Baltimore County has since completed improvements on the south side of the roadway, and had it not done so the Developer here would surely be responsible for such improvements along the same side of the street as the proposed development. Since it was relieved of this obligation, it seems equitable to require the Developer to construct similar improvements along the north side of Church Lane.

Baltimore County, like most jurisdictions throughout the country, is entitled to condition development approvals upon a developer's dedication of land or construction of public infrastructure improvements. *See, e.g.* B.C.C. §32-4-302. While these requirements strike many

as a form of extortion, they have been upheld by state and federal courts. There are limits of course, but in this case I believe the requirement that Developer construct curb, gutter and sidewalk improvements along Church Lane bears a reasonable relationship to the anticipated impact upon public services expected to result from the construction of 62 town homes.

OPEN SPACE WAIVER

Mr. Gill testified that Baltimore County agreed to waive the open space requirement in this case, conditioned upon Developer's payment of a fee in lieu of the amount of \$439,680, as reflected on Baltimore County Exhibit 1. This fee was calculated based upon then-applicable fees. But on May 23, 2013 (one week following the hearing in this case), the County Council revised the schedule of Local Open Space Waiver fees pursuant to Resolution No. 43-13. That Resolution provides that the revised fees take effect immediately. As such, the waiver fee in this case will need to be recalculated using the updated fees set forth on page 2 of Resolution 43-13.

One other issue arose concerning the open space fee waiver. Specifically, Mr. Gill testified the previous developer (Marriott-Kirk LLC) paid to Baltimore County \$49,400 pursuant to the open space fee waiver referenced in former Deputy Zoning Commissioner Murphy's March 27, 2007 Order in that case. Mr. Schaftel testified that when he acquired this property from M&T Bank (following the previous Developer's default), the purchase included an assignment of all rights and prior development approvals, including the open space waiver fee referenced above. In these circumstances, I believe the Developer is entitled to a credit in that amount (\$49,400) against the waiver fee to be assessed in the present case. The fee collected by the County is designed as a "reasonably proportionate offset to the County to acquire alternate recreation land." See Resolution 43-13. Since the previous development never came to fruition, there was no need for additional recreational space for the new residents of the community. As such, the previously paid

fee (at least in theory) should still be available for this purpose, and the Developer is entitled to a credit for the prior payment.

DEVELOPER'S CASE

The Developer presented four witnesses in its case. First was Ronald Schaftel, a member of the development entity who has over 35 years experience in commercial and residential development projects. Mr. Schaftel testified that M&T Bank contacted him about this property after the previous developer defaulted. He stated that by purchasing the property the Bank assigned to the present development entity all rights to the project, including all prior approvals and plans, including the open space fee paid previously by the former developer in the amount of \$49,400.

Mr. Schaftel then described his efforts to have the zoning changed and his firm's outreach efforts. He indicated the townhouses would be approximately 2,400 square feet and would sell for between \$220,000 - \$250,000. The witness next indicated that his firm entered into two restrictive covenant agreements with the community association, which were admitted as Developer's Exhibits 3 and 4. Finally, Mr. Schaftel testified that he has always favored cul-de-sac communities (and he recognized that opinion was at odds with the Department of Planning), and that this is the first case he recalls where the County has insisted the Developer make off site improvements as a condition of project approval.

David Altfeld, the other principal in the development entity, was the next witness, and his testimony also focused upon the County's request for off-site improvements to Church Lane. Mr. Altfeld noted that Mr. Lykens had earlier said in response to a citizen question that his agency does not require or request off-site improvements, which is at odds with Mr. Kennedy's request for curb and sidewalk improvements to the north side of Church Lane.

The next witness was Shirley Supik, President of the Liberty Road Community Council, Inc. Ms. Supik stated she has lived in the area for 35 years, and that she supports the Developer's project, which will bring homeowners to the area. With regard to the proposed connection of Marriott Lane through the community, Ms. Supik testified she was strongly opposed to the idea, feared for the safety of children in the area, and saw "no reason" for the connection as requested by DOP and the Department of Public Works (DPW).

The final witness was Donald Mitten, a licensed professional engineer who was accepted as an expert. His CV was marked and admitted as Developer's Exhibit 11, and outlines his background and experience. Mr. Mitten described the project in some detail and opined that the Developer satisfied all County requirements and development regulations. With regard to the Marriott Lane "connection" issue, Mr. Mitten opined that it was preferable for traffic from this community to be directed to Church Lane, rather than traveling through a connected Marriott Lane to Liberty Road, which he described as a dangerous and overcrowded thoroughfare. Mr. Mitten also noted that County regulations only require a second access point for a community when more than 100 units are proposed. *See* Bureau of Development Plans Review Policy Manual, p.22.

The Baltimore County Code clearly provides that the "Hearing Officer shall grant approval of a development plan that complies with these development regulations and applicable policies, rules and regulations." B.C.C. §32-4-229. After due consideration of the testimony and evidence presented by the Developer, the exhibits offered at the hearing, and confirmation from the various County agencies that the development plan satisfies those agencies' requirements, I find that the Developer has satisfied its burden of proof and, therefore, is entitled to approval of the redlined Development Plan.

ZONING REQUESTS

SPECIAL HEARING

In addition to the Development Plan approval, the Developer sought special hearing relief pursuant to §500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”), to Amend the Final Development Plan (FDP) of the Marriott-Kirk Property, which was marked and admitted as Developer’s Exhibit 12. That FDP, as noted earlier, was for 26 single-family dwellings, and the present case seeks to amend (a “material” amendment) that plan to reflect the current proposal for 64 townhouses on the same site. Having approved the Development Plan in this case, it follows logically that the previous FDP must be amended accordingly.

VARIANCES

Furthermore, the Developer sought variances under the B.C.Z.R. and CMDP for certain setbacks and standards. Each of the variance requests was described in detail earlier in this Opinion.

Based upon the testimony and evidence presented, I will grant the requests for variance relief. Under *Cromwell* and its progeny, to obtain variance relief requires a showing that:

- (1) The property is unique; and
- (2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

Trinity Assembly of God v. People’s Counsel, 407 Md. 53, 80 (2008).

Developer has met this test. The property at issue is undoubtedly unique, especially since its dimensions and layout are reflected on a recorded plat, which imposed certain constraints on the Developer.

In addition, the Developer would suffer a practical difficulty if the variances were denied, in that it would need to re-engineer the Development Plan (and possibly construct fewer homes, which according to Mr. Schaftel, would jeopardize the economic viability of the project) to comply with the setbacks. Finally, I find that the variances can be granted in harmony with the spirit and intent of the B.C.Z.R., and in such manner as to grant relief without injury to the public health, safety, and general welfare. This is demonstrated by the lack of County opposition and the support of the community.

Pursuant to the advertisement, posting of the property, and public hearing held thereon, the requirements of which are contained in Article 32, Title 4, of the Baltimore County Code, the Marriott Kirk Property, 1st Material Amendment to the Development Plan shall be granted consistent with the comments contained herein.

THEREFORE, IT IS ORDERED by this Administrative Law Judge/Hearing Officer for Baltimore County, this 30th day of May, 2013, that the three (3) sheet redlined “**MARRIOTT KIRK PROPERTY - 1st Material Amendment**” Development Plan, marked and accepted into evidence as Developer’s Exhibit 2, be and is hereby **APPROVED**.

IT IS FURTHER ORDERED that the Petition for Special Hearing seeking relief pursuant to §500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”), to Amend the Final Development Plan (FDP) of the Marriott-Kirk Property, be and is hereby GRANTED.

IT IS ALSO FURTHER ORDERED that the Petition for Variance seeking relief as follows:

- (1) From §1B01.2.C.1.c of the B.C.Z.R. and from §504.2 of the B.C.Z.R. and the Comprehensive Manual Development Plan (CMDP), Division II, Section A: Residential Standards Table VII, to permit a side building face to public street right-of-way setback of 15' in lieu of the required 25' setback,

- (2) From §1B01.2.C.1.c of the B.C.Z.R. and from §504.2 of the B.C.Z.R. and the CMDP, Division Ii, Section A: Residential Standards Table VII, to permit a building face to tract boundary setback of 22' in lieu of the required 30' setback,
- (3) From §1B01.2.C.1.c of the B.C.Z.R. and from §504.2 of the B.C.Z.R. and the CMDP, Division II, Section A: Residential Standards Table VII, to permit a side building face to side building face setback of 13' in lieu of the required 25' setback,
- (4) From §1B01.1.B.1.e.(2) and (5) of the B.C.Z.R., to permit the construction of single family attached dwellings with a 30' setback from the tract boundary in lieu of the required 75' setback,
- (5) From §1B01.1.B.1.e.(2) and (5) of the B.C.Z.R., to permit an Residential Transition Area (RTA) buffer of 0' in lieu of the required 50' buffer,
- (6) From §1B01.1.B.1.e.(5) of the B.C.Z.R., to permit a maximum building height of 45' within the 100' transition area in lieu of the maximum 35',
- (7) From §301.1 of the B.C.Z.R., to permit a one story open porch to have a rear setback of 20' in lieu of the required 22.5',
- (8) To permit a side building face to side building face setback of 20' in lieu of the required 25' setback,
- (9) To permit the construction of more than 6 units in a row,
- (10) To approve a Waiver of Public Works Standards to eliminate the requirement to construct a sidewalk on the northwest side of Kirk Farm Road adjacent to the Scotts Branch Elementary School property, and
- (11) To approve a Waiver of Standards to permit 14 parking spaces to be provided without a landscaped island in lieu of 10 spaces,

be and are hereby GRANTED.

The Development Plan and zoning approvals herein are expressly subject to and conditioned upon the following:

1. Developer's payment of the applicable fee (calculated under Resolution 43-13) for the waiver of the Local Open Space requirement. The Developer shall be entitled to a credit in the amount of \$49,400, reflecting the Local Open Space waiver fee paid by the prior developer, as shown on Baltimore County Exhibit 4.

2. Developer must construct at its sole cost and expense the roadway, curb, gutter and sidewalk improvements along the north side of Church Lane, as requested by the Department of Public Works. The Developer's obligation in this regard extends only to the construction of the improvements within existing Baltimore County right-of-way, and the Developer is not obliged to acquire and/or dedicate any land along Church Lane for roadway widening and/or construction of the referenced improvements.

Any appeal of this Order shall be taken in accordance with Baltimore County Code, §32-4-281.

Signed
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/dlw