

IN RE: DEVELOPMENT PLAN HEARING & PETITIONS FOR SPECIAL HEARING AND VARIANCE	*	BEFORE THE OFFICE OF
(1121 South Rolling Road)	*	ADMINISTRATIVE HEARINGS
1 st Election District	*	FOR
1 st Council District	*	BALTIMORE COUNTY
(OLD ROLLING ROAD OVERLOOK F.K.A. 1121 S. ROLLING ROAD)	*	
	*	
Whalen Properties	*	HOH Case No. 01-0589 and
<i>Owner/Developer</i>	*	Zoning Case No. 2017-0008-SPHA

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

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County for a public hearing on a development proposal submitted in accordance with Article 32, Title 4, of the Baltimore County Code (“B.C.C.”). Jennifer R. Busse, Esquire with Whiteford, Taylor & Preston, LLP, on behalf of Whalen Properties, *Owner/Developer* of the subject property (hereinafter “the Developer”) submitted for approval a redlined Development Plan (“Plan”) prepared by Morris & Ritchie Associates, Inc., known as “Old Rolling Road Overlook.”

Developer proposes 10 new single-family dwellings, and there are currently two dwellings on the site. Combined, there would be 12 single-family dwellings on a 7.45 acre tract composed of 6.85 acres zoned DR 2 and .5 acres zoned DR 3.5. The site is located near the intersection of Rolling Road and Wilkens Avenue in Catonsville.

The Developer also has filed Petitions for Special Hearing and Variance pursuant to the Baltimore County Zoning Regulations (B.C.Z.R) as follows:

- Special Hearing from § 500.7 to: (1) Grant the recommendation of the Director of Environmental Protection and Sustainability (DEPS) and to grant a Special Variance to permit the removal of specimen trees in accordance with Baltimore County Code (B.C.C.)§ 33-6-116 (G); and (2) Approve a waiver from Baltimore County Standard Design Plat R-J-4 to permit a private street with a 40 ft. right-of-way with 24 ft. wide

paving and no sidewalks in lieu of the required 50 ft. right-of-way with 30 ft. wide paving and sidewalks.

- Variance from § 1B01.2.C.1.b, to permit a minimum distance of 11 ft. from rear building face to rear property line in lieu of the required 30 ft. for Lot No. 12.

The development and zoning cases were considered at a combined hearing as permitted by Baltimore County Code (B.C.C.) § 32-4-230. Details of the proposed development are more fully depicted on the Plan that was marked and accepted into evidence as Developer's Exhibit 7. The property was posted on July 21, 2016 with the Notice of Hearing Officer's Hearing and on July 29, 2016 with the Zoning Notice, in compliance with the regulations. The undersigned conducted hearings on August 18, 2016 and November 7, 2016, in Room 205 of the Jefferson Building, 105 West Chesapeake Avenue, Towson, Maryland.

In attendance at the Hearing Officer's Hearing (HOH) in support of the Plan was Tom Whalen, Stephen W. Whalen, Jr., Mark Fleschner, John Canoles, Wes Guckert, and professional landscape architect Matthew A. Bishop, with Morris & Ritchie Associates, Inc., the consulting firm that prepared the site plan. G. Scott Barhight, Esquire and Jennifer R. Busse, Esquire appeared and represented the Developer. Peter Max Zimmerman participated in the hearing on behalf of the Office of People's Counsel. Several members of the community (whose names are reflected on the sign-in sheets) attended the hearing and expressed concerns regarding traffic and other issues, which will be discussed in greater detail below.

Numerous representatives of the various Baltimore County agencies who reviewed the Plan also attended the hearing, including the following individuals from the Department of Permits, Approvals and Inspections (PAI): Darryl Putty, Project Manager, Aaron Tsui (Zoning Review), Dennis Kennedy (Development Plans Review [DPR]), and Brad Knatz, Real Estate Compliance. Also appearing on behalf of the County were Stephen Ford from the Department of Environmental

Protection and Sustainability (DEPS), and Brett M. Williams from the Department of Planning (DOP).

At the hearing, each of the Baltimore County agency representatives identified above indicated that the Development Plan addressed all comments submitted by their agency, and they each recommended approval of the Plan. Mr. Williams noted DOP approved a Pattern Book for the development (Developer's Exhibit 8), and he also presented a school analysis (Baltimore County Exhibit 1) indicating that while Catonsville Elementary School is overcrowded using state guidelines, spare capacity exists at Arbutus and Hillcrest Elementary Schools. Mr. Kennedy indicated the Developer was granted a waiver and would pay a fee-in-lieu of \$28,557.60 to satisfy the Local Open Space regulations. Baltimore County Exhibit 2. He also indicated a schematic landscape plan for the project had been approved, which was confirmed by Developer.

The Developer presented three witnesses in its case. First was Mark Fleschner, Vice President of Construction for Whalen Properties. Mr. Fleschner explained that Developer proposes creating 10 additional lots on the property, which would ultimately be improved with custom single-family dwellings. Mr. Fleschner was not certain how large the homes would be, and indicated that each lot owner would most likely create "their own unique vision" for their new home. In response to questions on cross-examination, Mr. Fleschner stated he did not believe the new homes would burden traffic conditions in the area. The witness testified that he has walked the site on several occasions, and stated that the retaining wall would be no taller than 14 ft. He also indicated that for the most part existing forest cover would shield the view of the retaining wall by nearby residents.

The next witness in Developer's case was Matthew Bishop, a registered landscape architect. Mr. Bishop testified he prepared the four-sheet redlined Development Plan (Developer's

Exhibit 7) as well as the one-sheet site plan submitted in the zoning case (Developer's Exhibit 6). Mr. Bishop explained in general the layout and proposed features for the site, and described in some detail the retaining wall planned for the northern portion of the site. Mr. Bishop also testified that stormwater management at the site would be in compliance with the most recent regulations, and would include environmental site design (ESD) features on each of the 12 lots.

Mr. Bishop opined that the Developer has satisfied all County agency comments and concerns, and complied with all requirements set forth in the zoning and development regulations. The witness confirmed that a schematic landscape plan had been approved by Baltimore County. Mr. Bishop also testified that the waiver sought concerning the width of road paving and right-of-ways would provide traffic calming and would also result in less impervious surface on the site.

In response to questions on cross-examination, Mr. Bishop advised that Lots 8 through 11 will have a retaining wall, but he believed that due to existing vegetation nearby residents may only have a "filtered view" of the wall. Mr. Bishop testified that he did not believe the development proposal would have an adverse impact on soils, and he believed the Developer tried to configure the project to provide environmental benefits. Mr. Bishop testified that the local open space fee-in-lieu will provide a greater benefit to the community than providing a small 12,000 sq. ft. open space parcel. With respect to the special variance concerning the removal of specimen trees, Mr. Bishop testified that of the 16 trees, only 8 were viable. The remainder were choked with vines or were in other ways not viable. He stated that if the 8 viable trees remained on site it would affect the layout of the project. Finally, Mr. Bishop confirmed that there will be development on areas having steep slopes (i.e., those greater than 25%), but the witness believed those issues would be resolved in phase 2 of the development process.

Developer at this point concluded its case in chief, and several members of the community next testified in opposition to the project, and expressed concerns with the creation of 10 new lots. Community members believed that the steep slopes on the site should not be disturbed, and they feared that the retaining walls would be inadequate. They also were concerned with the removal of specimen trees at the site. In addition, residents believed additional traffic would be generated by the new homes, and one neighbor noted that the intersection of Highfields Drive and South Rolling Road was a “disaster waiting to happen.”

Berchie Manley, a former Councilwoman for this area, testified that she was disappointed with the County’s performance in reviewing this project, and was particularly concerned with the proposed retaining wall and local open space waiver. Ms. Manley also testified that she disagreed with the grant of special variance relief to remove specimen trees from the site. Finally, she questioned why the University of Maryland Baltimore County (UMBC) denied access to its property for a gravity sewer connection, which necessitated grinder pumps being used for this project.

The Developer then presented one witness in a brief rebuttal case: traffic engineer Wes Guckert with the Traffic Group. Mr. Guckert, who was accepted as an expert, testified that both the stopping and intersection site distance standards were satisfied at this site. He also opined that the motor vehicle accidents mentioned by the community did not stem from poor intersection design, but from reckless drivers. Mr. Guckert also opined that the traffic conditions and roadways in the area were safe, and he did not believe that the additional traffic generated by the proposed development would present any problems.

In response to questions on cross-examination, Mr. Guckert confirmed that he visited the site on four occasions. The witness noted that the Developer cannot be responsible for the actions

of careless drivers, but he suggested that the State Highway Administration (SHA) should explore eliminating the high speed off-ramp which now exists off of I-195. In Mr. Guckert's opinion, a safer alternative would be to install a traffic signal at which motorists would make a right turn onto South Rolling Road.

LEGAL ISSUES

A. Traffic

While every new single-family dwelling will generate some amount of traffic, the small number of trips created by the proposed homes cannot justify denial of the plan. As Mr. Zimmerman conceded, the Developer did not create the traffic congestion along this stretch of South Rolling Road and the intersection in question (Highfields Drive and South Rolling Road) is not located on the Developer's property. Mr. Guckert testified these roadways are controlled by the SHA, and it is that agency (not Baltimore County) that is responsible for improving the congested and unsafe traffic conditions at this location.

B. Local Open Space Waiver

Baltimore County granted a waiver, allowing Developer to pay a fee-in-lieu of providing the open space required by County law. Mr. Bishop testified Baltimore County has a policy of not accepting open space parcels smaller than 20,000 sq. ft., and he believed the fee would better serve the community than would a 12,000 sq. ft. open space parcel. While I would be inclined to agree with Mr. Bishop, I do not believe this issue can be resolved by the ALJ at this juncture.

As noted at the hearing, in a recent development case the undersigned disagreed with a LOS waiver granted by the Department of PAI, and imposed a fee in excess of that assessed by County officials. On appeal, the County Board of Appeals (CBA) reversed and held the grant by PAI of the LOS waiver constituted a "final decision" which must be appealed to the CBA within

30 days, and cannot be resolved by the ALJ in the context of a development hearing. Case No. CBA-15-014; see also CBA-15-009. Although Mr. Zimmerman noted the 101 York Road PUD case has been appealed to the circuit court, I will acknowledge and honor the CBA's ruling on this issue unless and until it is reversed by a higher court.

C. Grinder Pumps

It is not clear why UMBC would not permit Developer access to its property to connect to the gravity sewer, but I do not believe that question needs to be answered in this case. Developer has received approval from Baltimore County to utilize grinder pumps (Developer's Exhibit 18), which are in use in many residential communities throughout the County. No evidence was presented which would indicate these grinder pumps would pose a threat to the health, safety or welfare of the community, and the plan cannot be denied on this basis.

D. Steep Slopes

The "steep slopes" issue is not as easily resolved. The Code provision at issue is B.C.C. § 32-4-415 – Slope Protection and Soils, which provides in pertinent part:

- “(a) *Development Plan or plat approval; slope protection required.* The county may not approve a Development Plan or plat unless the county finds that the proposed development:
- (1) Includes protective measures adequate to prevent erosion or sloughing of any steep slope or unstable slope; and
 - (2) Promotes the preservation of the natural topographic features of the steep slope or unstable slope.
- (b) *Same; soil limitation.* The county may not approve a Development Plan or plat on soils that present a severe or moderate limitation to development unless the county finds that adequate measures have been taken to mitigate the effects of the limitation.”

Although Mr. Bishop testified the steep slope concerns would be addressed in Phase II of the process, I do not believe the statutory text or the circuit court's ruling in Five M, LLC (Case No. 03-C-12-4191) supports that interpretation. The Code provides that until the requisite findings

are made by the County the development plan cannot be approved. The purpose of the HOH, of course, is to obtain Development Plan approval, and thus I believe Developer must contend with this requirement at this juncture.

That is also the conclusion reached by the circuit court in Five M, LLC. That court held the steep slope analysis under B.C.C. § 32-4-415 is wholly separate from the steep slope analysis considered by DEPS under Article 33 of the Code which regulates steep slopes in forest buffer areas. In this case the Developer has satisfied the latter requirement, as noted in the approval letter admitted as Developer's Exhibit 2. But the County has not made or confirmed any findings concerning the steep slope analysis outside of the buffer areas, as required by § 32-4-415, and I believe the Plan must be disapproved on this basis.

Developer points out that since December 2014 Baltimore County has required a "slope protection note" to be included on plans when development on steep slopes is proposed. Such a note was included on the Development Plan in this case (Developer's Exhibit 7, sheet 1). Even so, the note only states that measures will be taken to protect steep slopes and natural topographic features. The Code requires more; county staff must find that the project includes measures to protect the slopes. The County has not done so, which prevents the Plan from being approved.

I am somewhat hesitant in reaching this conclusion, because I believe the Developer is not at fault concerning this shortcoming. The fact is that although this provision has been a part of County law for many years it has not to date been enforced, and it is unclear which agency or agencies are responsible for administering and enforcing this provision. Development on or grading of steep slopes is a significant issue which can impact the health, safety and welfare of the community. As such, it is incumbent upon Baltimore County to establish a protocol for evaluating these matters.

ZONING REQUESTS

Special Hearing

Developer originally sought special hearing relief to approve a waiver of Department of Public Works (DPW) standards related to road and right-of-way width and sidewalks. At the hearing Developer withdrew that aspect of the petition concerning sidewalks, which would be provided per the regulations. The waiver requests approval for a 24 ft. wide paved road on a 40 ft. right-of-way, in lieu of 30 ft. width and 50 ft. right-of-way required. As noted, this would reduce the amount of impervious surface and would in no way be detrimental to the community. As such, this request will be granted.

The other special hearing request pertains to the removal of 16 specimen trees at the site. The Director of DEPS granted the variance (Protestants' Exhibit 5), which is then considered a "recommendation" to the ALJ. B.C.C. § 33-6-116(g). Mr. Bishop testified only 8 of the trees were in fact viable, and this testimony was not contradicted. As such, the request essentially involves removing 8 specimen trees. While it is always desirable to retain mature and healthy trees when possible, I do not believe removing 8 trees to create 10 lots on a 7.45 acre parcel is unreasonable or inappropriate. It would mean that approximately one tree would be removed for each acre of land, which in my opinion would not "alter the essential character of the neighborhood," which is all that must be shown under B.C.C. § 33-6-116(d). The County's environmental department (which has expertise in such matters) reviewed and approved the request, and I will do the same.

Variance

In addition, a variance is sought to permit a minimum distance of 11 ft. from rear building face to rear property line in lieu of the required 30 ft. for Lot No. 12. This pertains to an existing

single-family dwelling at the site.

A variance request involves a two-step process, summarized as follows:

- (1) It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
- (2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

Cromwell v. Ward, 102 Md. App. 691 (1995).

Developer has met this test. The dwelling was constructed in its current location many years ago and the site conditions are therefore unique. If the regulations were strictly interpreted, Developer would experience a practical difficulty because it would be required to raze or relocate this existing dwelling. Finally, I find that the variance 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 Baltimore County and/or community opposition.

THEREFORE, IT IS ORDERED by this Administrative Law Judge/Hearing Officer for Baltimore County, this 22nd day of **November, 2016**, that the “**OLD ROLLING ROAD OVERLOOK**” Development Plan, be and is hereby **DENIED**.

IT IS FURTHER ORDERED that the Petition for Special Hearing pursuant to § 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R) to: (1) Accept the recommendation of the Director of Environmental Protection and Sustainability (DEPS) and to grant a Special Variance to permit the removal of sixteen (16) specimen trees in accordance with Baltimore County Code (B.C.C.)§ 33-6-116(g); and (2) Approve a waiver from Baltimore County Standard Design Plat R-J-4 to permit a private street with a 40 ft. right-of-way with 24 ft. wide paving in lieu of the required 50 ft. right-of-way with 30 ft. wide paving, be and is hereby **GRANTED**.

IT IS FURTHER ORDERED that the Petition for Variance pursuant to B.C.Z.R. § 1B01.2.C.1.b, to permit a minimum distance of 11 ft. from rear building face to rear property line in lieu of the required 30 ft. for the existing dwelling situated on Lot No. 12, be and is hereby **GRANTED.**

Any appeal of this Order shall be taken in accordance with Baltimore County Code, §§ 32-3-401 and 32-4-281.

Signed
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/dlw