

IN RE: DEVELOPMENT PLAN HEARING & PETITIONS FOR SPECIAL HEARING AND VARIANCE	*	BEFORE THE OFFICE OF
(16 Saint Thomas Lane)	*	ADMINISTRATIVE HEARINGS
4 th Election District	*	FOR
2 nd Council District	*	BALTIMORE COUNTY
(McDONOGH OVERLOOK)	*	HOH Case No. 04-0760 & Zoning Case 2019-0515-SPHA
Forte Equity St., LLC,	*	
Owners/Developer	*	

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**ADMINISTRATIVE LAW JUDGE’S COMBINED
DEVELOPMENT PLAN AND ZONING OPINION AND 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 (“BCC”). Timothy M. Kotroco, Esquire, on behalf of Forte Equity St., LLC, *Owners/Developer* (hereinafter “the Developer”), submitted for approval a three-sheet redlined Development Plan (“Plan”) prepared by Richardson Engineering, LLC, known as “McDonogh Overlook”.

The Developer is proposing nine single family dwellings on approximately 3.54 acres off of St. Thomas Lane, and the razing of two vacant residences and a derelict pool. The parcel is zoned DR 3.5. The proposed homes will be serviced by public water and sewer on a cul-de-sac road. Two stormwater management facilities at the north and south side of the site are proposed, as well as the widening of St. Thomas Lane in front of the development.

The Developer has also filed a Petition for Special Hearing under § 500.7 of the Baltimore County Zoning Regulations (“BCZR”) and pursuant to Article 32, Title 8, Subtitle 3 of the Baltimore County Code (“BCC”) and Parts 123 and 125 of the Building Code, to approve a waiver to allow the construction of a road and culvert within a 100-year riverine floodplain.

In addition, the Developer filed a Petition for Variance from § 301.1 of the BCZR, to allow an open projection (deck) with a rear yard setback of 20 ft. in lieu of the required 22.5 ft. for Lots 4, 5, 6 and 7, and for such other and further relief as the nature of this cause may require. Finally, the Developer is seeking affirmation of an approval of a Special Variance to remove 17 specimen trees that was granted by David Lykens, the Director of the Department of Environmental Protection and Sustainability.

The Development is subject to the Residential Performance Standards, the Comprehensive Manual of Development Policies (“CMDP”) and the County Landscape Manual pursuant to BCZR §§ 260, 409.8.A.1 and 504.2.

The development and zoning cases were considered at a combined hearing as permitted by BCC § 32-4-230. Details of the proposed development are more fully depicted on the redlined three-sheet Development Plan that was marked and accepted into evidence as Developer’s Exhibit 1A. The property was posted with the Notice of Hearing Officer’s Hearing (“HOH”) and Zoning Notice, both on November 19, 2019 in compliance with the regulations. The undersigned conducted a public hearing on December 20, 2019, in Room 205 of the Jefferson Building, 105 West Chesapeake Avenue, Towson, Maryland.

In attendance at the HOH in support of the Plan was the Developer, Craig Carlson. Also in attendance was Donald N. Mitten, a professional engineer with Richardson Engineering, LLC, the firm that prepared the site plan. His *curriculum vitae* was admitted as Developer’s Exhibit 2 and he was accepted as an expert. Timothy M. Kotroco, Esquire represented the Developer. Two neighbors, Stephen Kariotis and Barbara St. Ours, attended the hearing and expressed concerns about flooding, traffic, and the overcrowding at Woodholme Elementary School. Numerous letters were received from other community members in opposition to the proposed development. The

primary concern raised in these letters was the floodplain issue.

AGENCY WITNESSES

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”): Jerry S. Chen, Project Manager, Michael Viscarra, Jim Hermann and Vishnu Desai (Development Plans Review (“DPR”), Brad Knatz from Real Estate Compliance, and Jason Seidelman, Office of Zoning Review (“OZR”). Also appearing on behalf of the County were Stephen Ford from the Department of Environmental Protection and Sustainability (“DEPS”), and Marta Kulchytska from the Department of Planning (“DOP”).

Each County agency representative indicated the Plan addressed all comments submitted by their agency, and they each recommended approval of the Plan. On behalf of DEPS Steve Ford testified that the stormwater and groundwater management plans had been approved, and that the project had passed the environmental impact review. In addition, he submitted an approved forest conservation variance (County Exhibit 1) which permits the Developer to remove seventeen specimen trees upon payment of an in lieu fee of \$15,654.00. He also submitted a letter from DEPS approving the Developer’s Environmental Alternatives Analysis, subject to seven enumerated conditions. (County Exhibit 2).

Mr. Hermann confirmed that DPR had approved a schematic landscape plan (County Exhibit 3) and an open space waiver (County Exhibit 4). He explained that in lieu of providing the required 9,000 sq. ft. of open space the Developer will pay an in lieu fee in the amount of \$31,950.00. Mr. Seidelman testified that the proposed Development meets all zoning requirements except for the 2.5 foot setback variances requested for the decks on Lots 4, 5, 6, and 7. He stated that his agency does not oppose this requested variance relief.

Ms. Kulchytska acknowledged that Woodholme Elementary and Owings Mills High school are both currently over capacity. However, she explained that there is sufficient extra capacity in neighboring schools to accommodate the projected students from this proposed development. Her testimony is corroborated by the School Impact Analysis (SIA”), which was admitted as Baltimore County Exhibit 5. She also submitted an approved Pattern Book for the project that was admitted as County Exhibit 6. On behalf of the DOP she recommended approval of the Development Plan.

Finally, Mr. Venturina testified that DPR also recommends approval of the project. Upon questioning by Mr. Kotroco he confirmed that a floodplain waiver was not actually needed in this case because the only things being constructed within the floodplain are the culverts and other infrastructure designed to manage flooding and run-off issues, and under BCC 32-4-414(c)(2) this type of construction is permitted in a riverine floodplain. Mr. Venturina did, in any event, submit a letter from Steven A. Walsh, the Director of DPW, stating that DPW did not oppose the requested floodplain waiver in this case should it be deemed necessary. (County Exhibit 7).

DEVELOPER’S CASE

As its sole witness the Developer presented Donald N. Mitten, P.E., with Richardson Engineering, LLC. Mr. Mitten was accepted as an expert and explained in detail the development proposal. He described the layout of the site and also explained and identified which of the proposed lots were included within the variance request.

Mr. Mitten opined that the redlined Development Plan (Developer’s Exhibit 1A) satisfied all requirements set forth in the development and zoning regulations. He testified at length about the floodplain study he had conducted and about the design and capacity of the proposed stormwater and flood control measures depicted on the Plan, which he stated will cost the

Developer approximately \$175,000.00. He explained that the proposed culverts and berms will actually improve the flooding conditions at the development site and that they would not negatively impact adjoining properties. Mr. Mitten further explained that he had prepared an “alternatives analysis” which was approved by DEPS on June 4, 2019, which will permit construction of an access drive and a storm water management facility within the forest buffer easement, subject to several conditions, including onsite forest buffer planting, posting of the outer forest buffer and forest conservation easements, as well as the purchase of offsite forest buffer mitigation credits.

COMMUNITY WITNESSES

As noted above, two of the neighboring property owners attended the Hearing. Their primary concern was the flooding issue, however, they also raised concerns about school overcrowding and traffic. They questioned both the County agency witnesses and Mr. Mitten. With respect to the school issue it was explained that the proposed development is expected to generate only two additional students, and that they will most likely attend the schools in this district and will not have to bus to an adjoining district. As far as traffic goes, the neighbors lamented the anticipated increase in traffic that the new development will create, but they acknowledged that other development in the area – especially the Foundry Row project – have already greatly increased traffic on St. Thomas Lane. Finally, they expressed concern about the effect this development would have on the pre-existing flooding issue. Mr. Kariotis submitted a photo of the site showing substantial flooding. (Protestant’s Exhibit 1). They did listen respectfully to Mr. Mitten’s description of the proposed flood control measures that would be built in connection with the development, as well as the on-site groundwater and stormwater management systems.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The BCC provides that the “Hearing Officer shall grant approval of a development plan that complies with these development regulations and applicable policies, rules and regulations.” BCC § 32-4-229. In *People’s Counsel v. Elm Street Development, Inc.*, 172 Md. App. 690 (2007), the Court of Special Appeals held that if the county agencies recommend approval of a development plan, it is “then up to [protestants] to provide evidence rebutting the Director’s recommendations.” *Id.* at 703. It should also be noted that in Baltimore County “the development process is indeed an ongoing process, and the hearing officer’s affirmation of the plan is just the first step.” *Monkton Preservation Association, et al. v. Gaylord Brooks Realty Corp.*, 107 Md. App. 573, 585 (1996). Indeed, the County agencies will continue to review the developer’s evolving plans and construction activities through every phase of the development process to insure compliance with all County laws and regulations.

In the instant case the testimony of the County agency witnesses and the Developer’s expert was un rebutted. I find that the agency witnesses provided satisfactory answers to any and all questions posed by the community. I further find that Mr. Mitten, the Developer’s engineering expert, provided cogent and convincing testimony concerning the central issue in this case: flood management. I am convinced that the proposed flood control design in this case will actually improve the existing conditions at the site and that it will have no adverse impacts on the adjoining properties on either side of the street. These conclusions are buttressed by the fact that the Director of DPW has reviewed Mr. Mitten’s floodplain study and the proposed Plan and concurs that “there is no perceptible increase in the depth of flow at both the upstream and downstream property lines so no impact is anticipated to both the upstream and downstream neighbors. The Department of Public Works takes no exception to the approval of the waiver

request.” *See*, County Exhibit 7.

After considering the testimony and evidence presented by the Developer, the exhibits offered at the hearing, and confirmation from the various County agencies that the Plan satisfies those agencies’ requirements, I find that the Developer has satisfied its burden of proof and, therefore, is entitled to approval of the Plan.

Pursuant to the advertisement, posting of the property, and the public hearing held thereon, the requirements of which are contained in Article 32, Title 4, of the BCC, the “McDonogh Overlook” shall be approved.

THEREFORE, IT IS ORDERED by this Administrative Law Judge/Hearing Officer for Baltimore County, this **3rd** day of **January, 2020**, that the “**McDONOGH OVERLOOK**” Plan marked and accepted into evidence as Developer’s Exhibit 1A, be and hereby is **APPROVED**.

IT IS FURTHER ORDERED that the Petition for Special Variance to remove 17 specimen trees on the subject property pursuant to BCC § 33-6-116, be and is hereby **AFFIRMED**.

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

SPECIAL HEARING AND VARIANCE RELIEF

In addition to seeking approval of the McDonogh Overlook development plan the Developer also filed for special hearing and variance relief in **Case No. 2019-0515-SPHA**. These requests for relief were also properly advertised and posted.

A. Special Hearing

The special hearing is “to approve a Waiver to allow the construction of a road and culvert within a 100 year riverine floodplain.” Generally, development is strictly prohibited in a riverine floodplain. However, BCC § 32-4-414 (c)(2) makes a specific exception for “[t]he

installation of a pond, culvert, bridge, street, utility or drainage facility that the county finds is not detrimental to the floodplain management programs.” In the instant case a portion of the site running along St. Thomas Lane is, in fact, in a riverine floodplain. Therefore, in accordance with BCC § 32-4-414(d)(3) the Developer was required to do a flood study “in accordance with the requirement of the Department of Public Works Design Manual and sealed by a professional engineer before the issuance of a permit or the recording of a subdivision plat.” The Developer’s engineer, Mr. Mitten, provided extensive testimony about the flood study his firm performed and the flood control measures that will be constructed in connection with this development. Further, as noted above, the DPW has reviewed this study and the Director of DPW has specifically found that the proposed culvert and road construction will not be detrimental to floodplain management programs. *See*, County Exhibit 7.

In this case the Developer’s attorney, Mr. Kotroco, stated that the floodplain waiver request had been made in an abundance of caution, but that he does not believe a waiver is even required because the proposed culvert and road construction in this case fits within the express exception of BCC § 32-4-414 (c)(2). I agree, as explained above. However, in the alternative, I also believe that the evidence supports the grant of a riverine floodplain waiver under BCC § 32-8-303, and the requested waiver will be granted.

B. Variance

The variance relief is “[f]rom section 301.1 of the BCZR to allow an open projection (deck) with a rear yard setback of 20 ft. in lieu of the required 22.5 ft. for lots 4, 5, 6, and 7.”

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).

Mr. Mitten explained numerous aspects of the parcel that make it unique, including the floodplain, which necessitates the use of large portions of the front of the parcel for flood control infrastructure. A site plan was marked and admitted as Petitioner's Exhibit 1. Mr. Mitten also noted that the project is designed to minimize the impact to existing environmental features on the site, which resulted in the site orientation of the lots in question. As such, the property is unique. If the regulations were strictly interpreted, Developer would experience a practical difficulty because it would be unable to construct 10 foot wide decks on the backs of the homes on lots 4, 5, 6, and 7. He further explained that these lots back to the Torah Institute of Baltimore, which is some distance away and up on a hill. Therefore the proposed decks will not impact any adjoining residences. In sum, I find that the Variance can be granted in harmony with the spirit and intent of the BCZR, and in such manner as to grant relief without injury to the public health, safety and general welfare.

IT IS, THEREFORE, FURTHER ORDERED that the Petition for Special Hearing seeking relief from § 500.7 of the Baltimore County Zoning Regulations ("BCZR") pursuant to Article 32, Title 8, Subtitle 3 of the Baltimore County Code ("BCC") and Parts 123 and 125 of the Building Code, to approve a waiver to allow the construction of a road and culvert within a 100-year riverine floodplain, be and hereby is, **GRANTED**.

IT IS FURTHER ORDERED that the Petition for Variance seeking relief pursuant to § 301.1 of the Baltimore County Zoning Regulations ("BCZR"), to allow an open projection (deck) with a rear yard setback of 20 ft. in lieu of the required 22.5 ft. for Lots 4, 5, 6 and 7, be and hereby is, **GRANTED**.

The variance relief granted herein shall be subject to the following:

1. Development of the property must comply with the Regulations for the Protection of Water Quality, Streams, Wetlands and Floodplains (§§ 33-3-101 and 33-3-120 of the BCC).
2. Development of this property must comply with the Forest Conservation Regulations (§§ 33-6-101 through 33-6-122 of the BCC).
3. All approval conditions of the Forest Buffer variance pertaining to the floodplain fill as well as the Forest Conservation variance must be met as prescribed therein.

Signed
PAUL M. MAYHEW
Administrative Law Judge
for Baltimore County

PMM:dlw