

IN THE MATTER OF
MARYVALE PREPARATORY SCHOOL
11300 FALLS ROAD, BROOKLANDVILLE

RE: DEPRM DECISION /GRATING
REVISED FOREST BUFFER

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. CBA-10-010

* * * * *

OPINION

This case comes to the Baltimore County Board of Appeals as a result of an appeal filed by the Falls Road Community Association and Mr. Harold H. Burns, Jr., individually, of a Department of Environmental Protection and Resource Management (DEPRM) letter dated July 1, 2009, granting Maryvale Preparatory School's Petition to modify the Forest Buffer Variance, that was previously granted by DEPRM on September 6, 2006. A public *de novo* hearing was held by the Board on Thursday, September 10, 2009 at 10:00 a.m. o'clock. The Appellants, Falls Road Community Association and Mr. Harold H. Burns, Jr., Individual, were represented by Michael R. McCann, Esquire. Maryvale Preparatory School was represented by Robert Hoffman, Esquire. In lieu of closing arguments, Messrs. McCann and Hoffman agreed to submit simultaneous post-hearing Memorandum. A Public Deliberation was held by the Board on Tuesday, November 17, 2009 at 9:30 a.m. o'clock.

BACKGROUND

Maryvale Preparatory School is a girls college preparatory school situated on a 111 (+/-) acre(s) parcel of land on the west side of Falls Road, north of Greenspring Valley Road, in the 8th Election District, 2nd Councilmanic District of Baltimore County, known as Brooklandville. It has operated on the property for many years. In an effort to modernize its campus and stay competitive with other schools, Maryvale filed a Petition for Forest Buffer Variance on November 14, 2005 to permit construction of a maintenance building, parking lot, a performing

arts building, a septic reserve area, and associated grading, to be located within a portion of a forest buffer area on its campus. On September 6, 2006, DEPRM granted the variance and the variance was not appealed. In 2008, Maryvale generated a revised plan which changed the improvements that were submitted with the Petition for Variance that was granted on September 6, 2006. As part of the revised plan, it was necessary to go back and look at what impact the revisions had on the previously approved forest buffer variance. In 2008, Maryvale contacted Mr. Henry Leskinen, a professional ecologist, who had performed a wetland delineation on the project site in 2005. Following his review and a meeting with Mr. Mike Kulis of DEPRM, Mr. Leskinen submitted "an addendum to a previously approved forest buffer variance" on March 5, 2009, on behalf of Maryvale. That request was granted by DEPRM on July 1, 2009 and is the subject of the appeal before the Board.

ISSUE

Does the Petition for Forest Buffer Variance meet the requirements of Baltimore County Code Article 33, Titled Environmental Protection and Resource Management, particularly paragraph 33-3-106 which concerns variances and states:

(a) Authority to Grant: The Director of the Department may grant a variance:

(1) For those projects... where strict compliance with the requirements of this title would result in practical difficulty or unreasonable hardship;

(b) Application:

(1) The Applicant shall submit a written request for a variance to the Director of the Department; and

(2) The Application shall include specific reasons justifying the variance and any other information necessary to evaluate the proposed variance request.

TESTIMONY AND EVIDENCE

At the start of the hearing, Mr. Hoffman made a Motion to Dismiss, arguing that the Protestants had no standing to appeal this matter. Mr. McCann presented argument that this case should not be presented nor conducted as a *de novo* hearing. The Board made their determination on the bench that this case has enough history and has had enough hearings for the Protestants to have standing to file this appeal. Additionally, the Board determined on the bench that this case was to be *de novo*, as this case for variance was a new case. The hearing proceeded as *de novo* with the Protestants having standing.

Mr. Hoffman called Henry Leskinen, a professional ecologist and principal with Eco-Science Professional Incorporated. Mr. Leskinen was accepted by the Board as an expert ecologist and environmental scientist with particular expertise and background in forest conservation, forest buffers, streams, wetlands and other similar resources. Mr. Leskinen explained the difference between the previously approved 2006 forest buffer variance and the new request:

"[T]he maintenance building and proposed parking that were to occur in the forest buffer... that's been eliminated. That's no longer part of the variance request. Also there was a septic reserve area that had been originally proposed to occur within the Baltimore County forest buffer. That septic area was eliminated and relocated to a location outside of the forest buffer. The (performing arts) building was shifted somewhat... The effect of these changes was to reduce the proposed new forest buffer disturbance from 60,400 square feet to 52,390 square feet. A reduction of little over 8,000 square feet."

Mr. Leskinen then reviewed the Applicant's Exhibit No. 5 that showed the difference between the 2006 forest buffer and the 2009 forest buffer. He confirmed that the Exhibit shows

there is less impact with the 2009 request. He testified that the 2009 forest buffer variance request will have approximately 8,000 square feet less impact than the variance relief Maryvale previously requested in 2006.

Mr. Hoffman cited Baltimore County Code Section 33-3-106(a)(1), which states that the Director of DEPRM may grant a variance "for those projects or activities where strict compliance would result in practical difficulty or unreasonable hardship". When asked what practical difficulty Maryvale would suffer, if the forest buffer variance was not granted, Mr. Leskinen replied:

"Well, it 's a question of space. As we've gone through this whole hearing the point being made here is the forest buffer significantly constrains the Maryvale site. In order for the Maryvale campus to maintain the campus feel and keep the buildings in proximity to each other the room is so limited that it requires that some sort of relief from the strict limits of the forest buffer in order top cite[sic] the buildings in this location in order to allow the school to make its improvements."

He further opined that:

"the [performance arts] building... needs to be located where it is so that its [sic] in proximity to the other buildings on the site. The school has expressed the concerns of safety of their children. They don't want their children to have to wander large distances across campus in order to go to class. It also gives the feel of being a connected school. I mean, part of the element that the...Engineer and the Architect for the project conveyed to me was a school that's spread out and all over the place doesn't really have a feel of a close knit school community. By keeping everything [in] close proximity you get that feel, and again, you address

the safety issue. And given the constraints of the site that we've already discussed there's really no other place for the school buildings to go."

Mr. Hoffman explored the "practical difficulty" standard under the law quoting *McLean v. Soley*, from the Court of Special Appeals and *Anderson vs. Board of Appeals, Town of Chesapeake Beach*. Where the standard of "practical difficulty" applies... the applicant need only show that:

- "1) Whether compliance with the strict letter of the restrictions... 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 the other property owners."

Mr. Leskinen testified that Maryvale satisfies each of these requirements.

Mr. McCann presented no witnesses but concentrated his argument on cross-examination of Mr. Leskinen. Mr. McCann questioned Mr. Leskinen about the content of the variance application. Mr. Leskinen explained that he filed the application in the form based on a conversation he had with Mr. Kulis of DEPRM (Petitioner's Exhibit No. 4) about how to file the application. On cross-examination, Mr. Leskinen confirmed that the primary reason for the variance request was due to the limitation created by the forest buffer. He stated:

"[W]e can not fit a new school building on the property without impacts to the forest buffer."

There is "limited space and we needed an impact in the forest buffer in order to [s]ite the building."

"[T]he buffer constrains the site. And without a[n] allowable impact to the forest buffer we cannot [s]ite the building on the property."

In his Post-Hearing Memorandum, Mr. McCann presented three (3) arguments to deny Petitioner's request.

- A. The evidence introduced by Maryvale woefully fails to meet the applicable standard for granting a forest buffer variance;
- B. The fact that DEPRM granted a variance request in 2006 is legally and factually irrelevant; and
- C. The Board cannot approve the variance because Maryvale's application failed to identify all impacts to the forest buffer.

Mr. McCann introduced a Development Plan (Protestant's Exhibit No. 5) that showed impacts in the forest buffer that were not part of Maryvale's 2009 variance request. The Board held that the Development Plan was not relevant in the case before it. It was introduced for identification only.

That concluded the testimony and evidence.

DECISION

The Board discussed the matter that the Petitioner's had requested a forest buffer variance in 2006 that would impact a similar yet smaller amount of the forest buffer of the property under consideration. In 2006, DEPRM found that the property to be unique and that there was sufficient practical difficulty and granted the variance. In 2008, Petitioner's reviewed their building intentions and found that the forest buffer disturbance could be less than they anticipated. The Board determined that the uniqueness and practical difficulty are the same as

presented in the 2006 variance case. The use of the property is still the same. The only difference is the amount of disturbance to the forest buffer. There has been no change in the uniqueness of the property nor practical difficulty for the Petitioners. The Board reviewed Protestant's argument that the *Baltimore County Code* (BCC) does not permit a variance to a forest buffer and that the BCC doesn't provide authority to modify a previously granted variance. Mr. Hoffman cited *Baltimore County Code* Section 33-3-106(a)(1), which permits the Director of DEPRM to grant such a variance. As to the question of authority, to modify a previously granted variance, Mr. Leskinen's testimony and exhibits introduced, clearly indicate that Petitioner's request, although referencing the 2006 Petition, is a separate Petition, even if labeled as a modification to the 2006 request.

The Board also discussed that this case involves a school located in a residential neighborhood. The school has been operating for a long time and they require additional buildings to house the expanding population of students. The Board determined that this is a legitimate use of the property. The Board also determined that the concern with regard to the safety and well being of the students as they move from building to building was legitimate and the Petitioners are doing what needs to be done to ensure these concerns are addressed.

In addition, the Board also discussed concepts from *McLean v. Soley*. Specifically, that if faced with two versions of relief the lesser amount of relief is better. Therefore, in this matter the fact that the Petitioners have come back to request that the Variance be modified to provide less disturbance to the forest buffer than originally anticipated, it is better to grant the lesser relief than maintain the status quo and keep the previously approved relief.

The Board determined that the subject property is "unique" and there is also sufficient practical difficulty that should the variance not be granted, the Petitioners would not be able to expand to accommodate their student population.

After thorough review of the facts, testimony, and law in the matter, the Board unanimously agreed to GRANT the request for Variance from the forest buffer regulations.

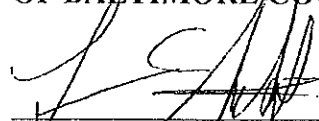
ORDER

THEREFORE, FOR THE REASONS STATED ABOVE, IT IS THIS 7th day of January, 2010 by the Board of Appeals of Baltimore County

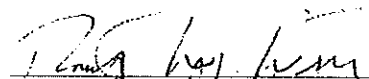
ORDERED that the letter decision of Jonas Jacobson, Director of the Department of Environmental Protection & Resource Management (DEPRM) dated July 1, 2009 granting the revised Forest Buffer Variance request, in accordance with Section 33-3-106(a(4)) be and is hereby **AFFIRMED**.

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.

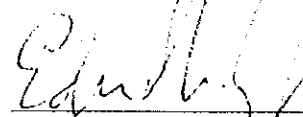
**COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY**



Lawrence M. Stahl, Panel Chairman



Robert W. Witt



Edward W. Crizer, Jr.