

IN THE MATTER OF
LUTHER-VILLA –
N/s Riderwood Drive, E of Morris Avenue
Stanwood Avenue, LLC – Legal Owner/Petitioner
8TH ELECTION DISTRICT
3RD COUNCILMANIC DISTRICT

PETITION FOR FORST BUFFER VARIANCE

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO.: CBA-14-009

* * * * *

FINAL OPINION

This matter came before the Board on appeal by Protestants, Eric Rockel, John Fischer and Lutherville Community Association of the approval by the Department of Environmental Protection and Sustainability (“DEPS”) dated July 2, 2013 of a request for Forest Buffer variance and alternatives analysis under Baltimore County Code (“BCC”), §33-3-101 *et seq.*

A hearing was held before the Board on November 5, 2013. The Owner/Petitioner, Sherwood Ave., L.L.C. (the “Petitioner”) was represented by Lawrence E. Schmidt, Esquire, and Smith, Gildea and Schmidt, L.L.C. The Protestants, Eric Rockel, John Fischer and Lutherville Community Association (the “Protestants”) were represented by Michael R. McCann, Esquire. Memorandums in lieu of Closing Argument were submitted on behalf of the Petitioner and Protestants.

A public deliberation was held on February 26, 2014. As a result of that deliberation, this Board issued an Opinion and Order of Remand dated March 27, 2014 wherein the case was remanded to DEPS pursuant to Baltimore County Zoning Regulations (“BCZR”) §504.1, requesting both clarification and information regarding DEPS’ approval. At that time, this Board decided that it was in need of assistance from DEPS in order to understand issues raised by the Protestants.

On April 23, 2014, DEPS provided this Board with the additional information requested via letter. (Pet. Ex. 13). On September 16, 2014, we held a second hearing during which a representative of DEPS, Brian Lindley, Natural Resource Specialist III, testified in regard to the additional information. Mr. Lindley was cross examined by Counsel for the Protestants and questioned by this Board. Additional evidence, in the form of documents, were accepted into evidence namely: a written request dated April 4, 2014 by DEPS to D.S. Thaler & Associates, the professional engineers for the Petitioner (“Thaler”) requesting information sought by the Board (Pet. Ex. 10), as well as the response by Thaler to DEPS dated April 14, 2014 (Pet. Ex. 11). The Petitioner also submitted a revised Plan in accordance with the Opinion and Remand Order (the “Revised Plan”). (Pet. Ex. 12).

The Parties each submitted Post Remand Memorandums. On November 5, 2014, a deliberation was held on whether the variance should be approved in light of the additional information submitted by DEPS.

Facts

The subject property is composed of eight separate lots of record located within the established community of Lutherville (the “Property”). The lots are within a large tract of land designated on the plat of Luther-villa, Plat 2 and recorded in the Land Records of Baltimore County at WPC 8, page 3 on July 7, 1927. It was recorded in the Land Records as Talbot Manor on December 17, 1943, at CHK 3, pages 70-71. (Pet. Ex. 3).

The lots are designated as #20 through #27. The entire area of the property is 1.35 acres and is zoned D.R. 1 and D.R. 5.5. The lots are located with frontage adjacent to Railroad Avenue, near its intersection with Morris Avenue. The light rail system runs perpendicular to Railroad Avenue. The Property is unimproved and is mostly wooded. To the rear of the property

is a stream and associated area of woodlands. The stream is known as Roland Run which runs north and west of the Property. The geographic area shown within the confines of Luther-villa Plat #2, has been built out and is a well-established residential community.

The 8 lots are among a handful of lots within the subdivision that have not been improved. In this case, 5 single family homes are being proposed. Access to the Property is by way of a driveway.

Of the 1.35 acres, over three-quarters (3/4) of the Property (or 1.04 acres) is encumbered by the calculated forest buffer generated from existing stream, associated floodplain and wetlands. The Petitioner submitted an Alternatives Analysis along with the Request for Forest Buffer variance. The Plan was in evidence as Petitioner's Ex.: 8. The Plan is also referred to herein as the "Original Plan").

Decision

Addressing each of the issues about which we requested information, we specifically find as follows:

A. Wetlands Delineated on Petitioner's Plan.

1) Protestants contended that the Petitioner's Plan failed to contain "field delineated, marked and surveyed streams, springs, seeps, bodies of water and wetlands (include 200 feet into adjacent properties where possible)" as required in BCC, §33-3-108(c)(6). On remand, DEPS explained that the wetlands depicted on the Original Plan matched the field delineated, marked and surveyed wetlands. These delineations were marked on the wetland delineation plan that was already approved by DEPS. Importantly, the purpose behind delineating wetlands on a plan is to determine the extent of the forest buffer. DEPS clarified that the correlation between the

Original Plan here and the field information enabled them to determine the correct Forest Buffer delineation.

Protestants still assert, after Remand, that the wetlands delineation did not change on the revised Plan. DEPS countered that, even if wetlands existed offsite, the Forest Buffer delineation would not change. As a result of the clarification by DEPS, we find that §33-3-108(c)(6) was satisfied. We find that the delineation of the offsite wetlands has no impact on the forest buffer determination here.

2) Sewage and Disposal Systems. Subsection (c)(3) of §33-3-108 requires that the plan depict all existing sewage disposal systems. Protestants assert that there is a private sewage disposal system located at 1612 Riderwood Drive which is not depicted on the plan. In regard to this issue, DEPS requested, and the Petitioner submitted to DEPS for review, a Revised Plan showing all sewage disposal systems on, or within 100 feet, of the proposed development and specifically the system located at 1612 Riderwood Drive, including the septic reserve area. Upon review of the resubmitted Plan, DEPS opined that the presence of the sewage disposal system at 1612 Riderwood Drive did not change DEPS' approval of the variance. DEPS noted that because there are no private wells or sewage disposal systems proposed in the Plan, there were no distance requirements for such systems from the private sewage disposal system at 1612 Riderwood Drive.

The Protestants, in their Post Remand Memorandum agreed that the revised Plan now complies with BCC §33-3-108(c)(3). We agree that the revised Plan complies with §33-3-108(c)(3). We also appreciate DEPS' position that, while §33-3-108(c)(3) requires that the sewer system at 1612 Riderwood Drive to be depicted on the Plan, its existence made no difference in the ultimate approval.

3) Utility Lines and Easements. Subsection (c)(15) of §33-3-108 requires the plan to show “existing and proposed utility lines and easements.” Prior to Remand, the Protestants contended that the Plan failed to show the proposed extension of water and sewer lines from southeast of the site. Protestants argued that, without this information, and the limit of disturbance created by the construction of those extensions, DEPS could not have accurately assessed the impact of the construction upon the water resources and wetlands that are to the east of the termination of the existing lines for the utilities.

The Protestants now agree that the utility lines and easements are located on the Revised Plan and that it complies with BCC, §33-3-108(c)(15). We agree.

4) Subsection (c)(17) of §33-3-108 requires a plan to contain a note: There shall be no clearing, grading, construction or disturbance of vegetation in the forest buffer, except as permitted by the Baltimore County Department of Environment Protection and Sustainability.” Protestants acknowledge the Note is on the Revised Plan. On this issue, we agree with DEPS that the revised Plan complies with §33-3-108(c)(17). We also agree that the existence of the note had no impact on DEPS’ decision to grant the variance.

B. Petitioner’s Alternatives Analysis.

1) The Driveway. In regard to the Alternatives Analysis, Protestants first alleged that the Alternatives Analysis failed to mention the proposed driveway or apply the standard set forth in §33-3-112(c) to the driveway. The driveway is intended to be the access road to the proposed homes. In particular, the Protestants assert that the Alternatives Analysis does not address alternative locations or design alternatives for the driveway relocation. By way of example, the Protestants point out that the existing driveway measures 10’ wide but the relocated driveway

measures 12'. According to the Protestants, the Alternatives Analysis offers no explanation as to why the proposed relocation of the driveway is wider than the existing dimensions.

Protestants further questioned whether the geometric alignment of the driveway relocation produces the least impacts on the forest buffer. They argue that, because the Alternatives Analysis did not address the driveway relocation, it is uncertain whether the stormwater management facility could have been reduced in size and the driveway shifted to the west, thereby reducing the forest buffer disturbance.

On this issue, the April 14, 2014 letter from DS Thaler to DEPS explained that the existing gravel driveway actually varies in width from 8'+/- to 14'+/-. (Pet. Ex. 11). The proposed driveway width of 12' is derived from criteria promulgated by the Department of Public Works. *Id.* As to the size, DEPS added that a 12' driveway is wide enough to allow 2 cars to pass. (Pet. Ex. 13).

As to the issue of relocating the driveway, DEPS clarified that the location of the driveway is consistent with the standards of BCC, §33-3-112(c) in that there is no other physically feasible location on the site. DEPS indicated that if the driveway were moved further south, it would impact the Forest Buffer and interfere with the turn-around at the end of the public road. Likewise, if the driveway were moved further north, the stormwater management facility would have to be relocated further north which would create more forest buffer impacts.

As to the correlation between the size of the stormwater management facility and the location of the driveway, DEPS stated that there was no such correlation. The size of the stormwater management facility is directed by State-mandated specifications. The size cannot be reduced.

In light of these clarifications, we are not persuaded by the Protestants' claim that the Alternative Analysis was not performed or that it did not adequately address design or location. Indeed, while this Board needed the additional expert assistance on these environmental issues, it is clear that these issues were obvious to DEPS. Consequently, DEPS did not find it necessary to have the Petitioner repeat the obvious in an Alternative Analysis.

We agree that the site constraints dictate the location and design of the driveway. Further, state regulations drive the size of the stormwater management facility, not DEPS and not the Petitioner. Thus, we find that no other feasible alternative exists for the driveway and stormwater management facility and that minimal disturbance will take place in accordance with BCC §33-3-112(c).

2) Proposed Water and Sewer Connections. Protestants next asserted that the Alternatives Analysis failed to mention any of the sewer extensions and how the lines will be extended from the manhole (marked MH 52789) and the water valve immediately to the southeast of the site to service the 5 proposed homes. Protestants informed the Board that the Alternatives Analysis should address, pursuant to §33-3-112 (c), not only where the lines will be installed but what impact the proposed lines will have on the forest buffer. In addition, the Alternatives Analysis should have addressed whether there are other feasible alternatives that exist or that minimal disturbance will take place with the proposed location of the utilities.

Having reviewed the revised Plan and location of the water and sewer connections in conjunction with the conceptual grading for the proposed road and building lots, as shown on the Original Plan, on remand DEPS considered again the limits of disturbance associated with those connections. DEPS repeated that those connections are within the limits of disturbance caused by

the grading. As a result, DEPS concluded that, even with the revised Plan showing the water and sewer connections, the Plan was consistent with §33-3-112(c).

In consideration of this additional information, and given both the site constraints and the proposal to locate the water and sewer extensions within grading for the road and buildings, this Board finds that the Revised Plan clearly demonstrates that no other feasible alternative exists and that minimal disturbance associated with these extensions will take place in accordance with §33-3-112(c).

3) Proposed Storm Drains on Lots 3, 4 and 5. According to the Protestants, the Alternatives Analysis likewise failed to address the impact of the storm drains proposed for Lots 3, 4 and 5. Protestants pointed out that the expert for the Petitioner admitted that installation of storm drains will impact the forest buffer.

In response to DEPS' request for further information, DS Thaler wrote in its April 14, 2014 letter that these storm drains were designed to direct runoff from the rear yards and roof tops into the stormwater management facility. (Pet. Ex. 11). The system was designed to allow for maximum collection of surface drainage while reducing the amount of untreated runoff that would otherwise be discharged into the adjacent forest buffer. They added that the position of the drains on the upslope side of the retaining wall allows the wall to remain at a minimum height, while serving as a barrier to the forest buffer during and after construction. DS Thaler pointed out that the alternative is to raise the retaining wall and perform more site grading which would in effect, create more forest buffer impacts.

DEPS again responded that this additional information for DS Thaler lent further support for their original approval. DEPS viewed the proposed storm drains and the proposed stormwater management facility as one system and recognized that minimal disturbance would take place.

DEPS knew that the limits of disturbance for the storm drains were within the forest buffer area. Consequently, DEPS reasoned that its original approval was correct in that the proposed location and design of the storm drain system on lots 3, 4 and 5 were consistent with BCC, §33-3-112(c).

We reviewed the additional information and DEPS' explanation. We acknowledge that the storm drains run through the forest buffer and therefore, an impact will occur. We disagree with the Protestants and find that the alternative analysis was performed and that DEPS considered the minimal disturbance caused by the storm drain locations on those Lots in making its decision. The analysis reveals that the alternative of raising the retaining wall or performing more site grading is not a lesser impact on the forest buffer. In our view, what the Protestant is demanding does not exist because the site does not permit other feasible alternatives. We find that DEPS' justification for its approval based on not only the Original Plan information but the additional clarification leads us to conclude that, the proposed storm drains are in the location which will create minimal disturbance on the forest buffer.

4) Offsite Impacts on the Forest Buffer. At the first hearing before this Board, Mr. Lindley testified that the Petitioner would need to submit a separate request for forest buffer variance to address the impacts of 'off-site' improvements including the driveway and water/sewer connections. Protestants asserted that because the driveway and utility connections are part of the development, even if they are located outside of the Property boundaries, the extent of their impact on the forest buffer including an Alternatives Analysis, should have been reviewed by DEPS.

As requested on remand, DS Thaler added the offsite impacts on the forest buffer to the Revised Plan. Upon review, DEPS explained that the Alternative Analysis, Original Plan as well as the variance application already addressed the offsite relocation of the existing driveway and offsite road within the existing right-of-way. At the time of that review, DEPS knew that information, and determined that a separate variance was not needed. DEPS acknowledged that both the proposed utilities, including water and sewer connections, and mitigation for offsite Forest Buffer impacts, were now on the revised Plan. DEPS recommended, however, that this Board include a condition in any Order that the Final Forest Buffer Protection Plan include mitigation for the proposed offsite Forest Buffer impacts.

The Board finds this explanation helpful. We now understand that an additional forest buffer variance is not required or needed for the offsite impacts. We will include a condition in our Order for mitigation of the proposed offsite Forest Buffer impacts in a Final Forest Buffer Protection Plan.

5) Petitioner's Alternatives Analysis for Stormwater Management Facility. Protestants asserted that the Alternatives Analysis that was submitted for the proposed stormwater management facility was incomplete in that it did not address why the proposed stormwater management proposal is superior to, and provides less disturbance than, the individual facilities proposal in the 2005 request. Additionally, Protestants pointed out that the Alternatives Analysis failed to discuss any other alternative configurations of the stormwater management facility that might reduce the number of dwellings proposed or lessen the impact upon the forest buffer.

On remand, DEPS reminded this Board that the proposed stormwater management facility is a micro-bioretentation stormwater management facility that is designed to meet current State-mandated Environmental Site Design requirements and provide management for a 100 year

storm. DEPS noted that the size of the stormwater management facility was the minimum necessary to meet the State-mandated requirements and as a result, the size cannot be reduced.

As such, there is no alternative design or location which will lessen the impacts on the forest buffer. These impacts are unavoidable. DEPS points out that the number of dwellings was reduced from 8 lots proposed in 2005 to 5 in this Plan. The stormwater management facility proposed in 2005 is not applicable here because these facilities would not meet current regulations.

We agree with DEPS' reasoning regarding the Alternatives Analysis for the stormwater management facility's size, type and location. This Board is not in a position to require less than the State-mandated requirements. It is now clear to us that this issue was obvious to DEPS when DEPS approved the request. It may not have been expressed in terms that were at the time of the hearing, understandable to the Board. We find that the stormwater management facility proposal demonstrates that no other feasible alternative exists and that minimal disturbance will take place.

6) Alleged Designs Issues with Stormwater Management Facility. Protestants contended that the Alternatives Analysis for the stormwater management facility has several design flaws. In response to our request for DEPS to review, comment on and/or seek clarification from the Petitioner by way of Alternatives Analysis, DEPS addressed the following issues:

A) What affect if any does the Maryland State law requiring a 25 ft. buffer from any regulated wetland have on DEPS approval of the request for variance? Should an approval by this Board, if any, of the variance request be conditioned upon the approval by the State of a reduction of the buffer from the wetland?

DEPS explained that the Maryland law has no effect on DEPS' approval here. The State's evaluation of wetland buffer impacts is often granted after DEPS' approval and is subject to different and separate state-mandated criteria. Accordingly, DEPS recommends that this Board condition our approval on the Petitioner obtaining all State and Federal approvals prior to Baltimore County granting a building permit.

We understand now the Protestants' concern but see that DEPS' approval is separate and distinct from any approval by the State. We add that there was no evidence provided by the Protestants to the contrary. As such, we believe it would be appropriate to provide a condition in our Order to resolve this issue.

B) What, if any, affect do the floodplain limits have on the location of the proposed stormwater management facility?

DEPS clarified that the floodplain limits and proposed stormwater management facility are unrelated. DEPS is not required by BCC§33-101 *et seq.* to evaluate the effect of the floodplain limits. Any impact on floodplain limits is reviewed by other Baltimore County agencies as well as the Maryland Department of the Environment. We understand this point and add that there was no evidence provided by the Protestants to the contrary.

C) Is the proposed stormwater management pond embankment at least 15 feet from the forest buffer? If not, what affect does that have on DEPS approval of the variance?

DEPS indicated that the proposed micro-bioretention facility does not have a pond embankment that would necessitate a 15-foot woody-free vegetation zone. DEPS commented that this issue has no merit and no effect on DEPS' approval. We accept DEPS' explanation and add that there was no evidence provided by the Protestants to the contrary.

D) Was the Department of Public Works ("DPW") required to review and approve the Petitioner's plan pursuant to BCC, §32-8-202(b)(1) to determine whether the plan was consistent with the floodplain? If so, DEPS should submit the Plan to DPW for review, upon review by DPW, what affect does Department of Public Works comments have on DEPS approval of the variance request?

DEPS informed this Board that DPW is not required under the BCC to review or approve the Plan to determine whether it is consistent with the floodplain. In any event, DEPS compared the flood study filed by the Petitioner with the current FEMA Flood Insurance Rate Map ("FIRM") and determined that regardless of which floodplain boundary was used, the approved Forest Buffer would not change. Accordingly, DEPS concluded that the minor differences between the Petitioner's flood study and FIRM had no effect on the approval. We agree.

C) Petitioner's Request for 25' setback in lieu of required 35'?

Protestants view of the plan is that the Petitioner was not actually requesting a 25' setback from the forest buffer but rather a 0' setback or complete waiver of the 35' setback because all 5 houses are to be built directly in the forest buffer. Protestants argued that DEPS should have required the Petitioner to explain why "no other feasible alternative exists" and that "minimal impacts will occur" if smaller homes are proposed.

Given that this Board did not find any review by DEPS on this issue, on remand DEPS indicated that it disagreed with this argument. DEPS' practice spanning 20 years in reviewing variances is to have the Petitioner request to reduce the building setback and to separately request a variance from the Forest Buffer. The Original Plan provided the overlap of the building setback and the Forest Buffer variance.

This issue makes more sense to the Board. The overlap between the building setback and the forest buffer variance was designated on the Original Plan. We find DEPS' practice of requiring a request to reduce a building setback and to separately request a variance from the Forest Buffer to be a logical approach to variance requests.

D) Consistency of Proposed Homes with Area.

Protestants highlighted that the proposed homes measuring approximately 35' x 40' or 35' by 44' are larger than homes in the neighborhood. In response, DEPS points out that BCC §33-3-101 *et seq.* does not require that proposed dwellings be similar in size or smaller than existing dwellings in a neighborhood in order to receive Forest Buffer variance approval. In reviewing the Plan, DEPS noted the building envelopes will house the maximum size of the dwellings. Regardless of the size of the dwellings, the Forest Buffer impacts would be about the same. By way of example, if the buildings were smaller, the building setbacks would be larger and these setbacks would impact the Forest Buffer. In any event, the site constraints are inescapable and it is clear that decreasing or increasing the size of the dwellings does not change the impact on the forest buffer.

CONCLUSION

Having been provided the additional information by DEPS as to the issues raised in the Opinion and Order of Remand and for the foregoing reasons, this Board unanimously finds the request for forest buffer variance and alternatives analysis should be approved. We note that we previously found ‘practical difficulty’ as required by BCC, §33-3-106(a)(1) for a forest buffer variance in our Opinion and Order of Remand which Opinion is incorporated herein in its entirety.

ORDER

THEREFORE, IT IS THIS 5th day of February, 2015,

by the Board of Appeals for Baltimore County


ORDERED, that the request for forest buffer variance and alternatives analysis is hereby APPROVED, subject to the following conditions:

1) That the Final Forest Buffer Protection Plan shall include mitigation for the proposed offsite Forest Buffer impact.


2) Petitioner must obtain all State and Federal approvals prior to the issuance of a building permit by Baltimore County.

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*.

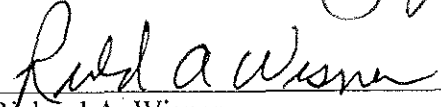
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Andrew M. Belt, Panel Chairman



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Board of Appeals of Baltimore County

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February 5, 2015

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RE: *In the Matter of: Luther-villa*
Case No.: CBA-14-009

Dear Counsel:

Enclosed please find a copy of the final 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: Luther-villa
Gary Talles/Talles Investments, LLC
Stacey McArthur, R.L.A./D.S. Thaler & Associates, Inc
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