



Board of Appeals of Baltimore County

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August 10, 2016

Craig and Karen Kehoe
19520 Burke Road
White Hall, Maryland 21161

G. Macy Nelson, Esquire
Law Office of G. Macy Nelson, LLC
401 Washington Avenue, Suite 803
Towson, Maryland 21204

RE: *In the Matter of: Craig and Karen Kehoe*
(a/k/a Charles J. Reed Property)
Case No.: CBA-16-021

Dear Messrs. Kehoe and Nelson:

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 Ham".

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: Office of People's Counsel
Jan Cook, Development Manager/PAI
Arnold Jablon, Deputy Administrative Officer and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

Lisa Arthur
Dennis Williams
Donald G. Williams
Bertha Mae Williams
Kenneth J. Wells, LS

IN THE MATTER OF	*	BEFORE THE
CRAIG AND KAREN KEHOE	*	BOARD OF APPEALS
(a/k/a Charles J. Reed Property)	*	
19520 Burke Road	*	OF
Minor Subdivision Number 96-035-M	*	BALTIMORE COUNTY
7 th Election District; 3 rd Councilmanic District	*	
RE: Appeal of the Approval of a 1 st Amended	*	Case No. CBA-16-021
Minor Subdivision	*	

* * * * *

OPINION

This matter comes to the Board of Appeals on appeal by Lisa Arthur, who resides at 19500 Burke Road, White Hall, Maryland 21161, and Dennis, Donald Gene, and Bertha Mae Williams, who reside at 19610 Burke Road, White Hall, Maryland 21161 (collectively, the “Protestants”), of the decision by the Baltimore County Department of Permits, Approvals and Inspections dated October 16, 2015 approving the “1st Amended Minor Subdivision of the Charles J. Reed Property” (Minor Subdivision No. 96-035-M). The property at issue is located at 19520 Burke Road, White Hall, Maryland 21161 (the “Property”) and is owned by Craig and Karen Kehoe (collectively, the “Kehoes” or the “Applicants”).

In the proceedings before the Board, the Applicants were not represented by counsel but did have the assistance of Kenneth J. Wells, an experienced land surveyor. The Protestants were represented by G. Macy Nelson, Esquire.

A hearing was held before the Board on February 11, 2016. After the submission of memoranda by the parties, the Board held a public deliberation on April 25, 2016.

STATEMENT OF FACTS

The Property owned by the Kehoes is a working horse farm in northern Baltimore County located on the west side of Burke Road, 2,700 feet southwest of the intersection of Burke Road

and Old York Road. The Property, approximately 73 acres in size, is zoned R.C.2. Per the 1st Amended Minor Subdivision Plan (Applicants Ex. 2), the Property presently consists of three separate parcels. Parcel 1 is 52.85 acres in size and includes the house in which the Kehoes reside, barns, a “tenant house” in the northwest corner of the parcel, and pastures. Parcel 2 is 8.29 acres in size and includes a horse track. Notably, there also is a second “tenant house” that straddles the line between Parcel 1 and Parcel 2. Parcel 3, 12.00 acres in size, is largely wooded and does not include any structures.

The “Site Date” section of the 1st Amended Minor Subdivision Plan confirms that there was a “prior out conveyance” from Parcel 1 of 3.00 acres by Deed dated October 31, 1984 to Donald L. Kincaid and Cynthia M. Piercy, which was recorded among the Land Records of Baltimore County at Liber 6815, folio 618. In addition, the 1st Amended Minor Subdivision Plan identifies a “prior out conveyance” from Parcel 2 of 3.09 acres by Deed dated September 3, 1998 to Lisa M. Arthur and Glenn J. Arthur, which was recorded among the Land Records of Baltimore County at Liber 13757, folio 251.

Under the 1st Amended Minor Subdivision Plan, Applicants seek to transfer 6.90 acres from Parcel 2 to Parcel 1, so that Parcel 1 would be 59.75 acres in size and Parcel 2 would be 1.33 acres in size. In addition, the 1st Amended Minor Subdivision Plan provides “density calculations” in Site Data Note No. 19 that represents that Parcel 1 and Parcel 2 each have one remaining lot – or density unit – remaining and that Parcel 3 has two remaining density units. Pursuant to the 1st Amended Minor Subdivision Plan, Applicants seek to construct a house on “reconfigured Parcel 2.”

On October 16, 2015, the Department of Permits, Approvals & Inspections approved the 1st Amended Minor Subdivision Plan without a hearing. Protestants, who own properties adjoining

the Kehoes' Property, object to the 1st Amended Minor Subdivision Plan and the Kehoes' proposal to construct a new house on reconfigured Parcel 2. Specifically, Protestants assert that the 1st Amended Minor Subdivision Plan cannot be approved because (a) the Applicants lack sufficient density units to allow for the construction of a new house on reconfigured Parcel 2 and (b) there is no vehicular access to the proposed house on reconfigured Parcel 2.

PROCEDURAL HISTORY

This case marks the second round of litigation between the parties regarding the proposed development of the Property. In the first case, the Kehoes initially filed a Petition for Special Hearing "seeking a ruling to determine their right, as a zoning matter, to adjust the lot lines and reconfigure [the] three parcels of property" that make up the Minor Subdivision Plan of the Charles J. Reed Property. *Kehoe v. Arthur*, Sept. Term 2013 No. 1448, at 1 (Md. Ct. Spec. App. Feb. 11, 2015). The Petition was challenged by Lisa Arthur but "ultimately was granted by the Zoning Commissioner of Baltimore County ('Zoning Commissioner')." *Id.* On appeal, this Board affirmed the Zoning Commissioner's decision, but the Board was reversed by the Circuit Court for Baltimore County on appeal." *Id.* The Court of Special Appeals thereafter reversed the Circuit Court and held that the Board did, in fact, have the authority to grant the Kehoes' Petition for Special Hearing. The Court of Special Appeals emphasized, however, the limited nature of its decision to uphold the Board's ruling: "The resulting order means only what it means, *i.e.*, that parcels reconfigured and developed as proposed would not violate County zoning laws or regulations, and leaves yet to the Kehoes the obligation to obtain whatever subdivision approvals, and obtain whatever other permits the proposed uses would require." *Id.* at 14.

In its opinion, the Court of Special Appeals made clear that the determination of whether the Kehoes had sufficient density units remaining to further develop the Property – an issue that Ms. Arthur sharply contested – would need to be resolved at a later time:

[T]he number of available density units bears directly on the number of density units available to allocate to the reconfigured parcels, and our decision that the proposed reconfiguration is consistent with the Property’s zoning should not be read as endorsing the Kehoes’ position that there are three units left. There may be, but there may not, and neither the Zoning Commissioner nor the Board resolved the underlying, and disputed, factual questions.

Ultimately, though, the lingering question of available density units should be resolved in the next phase of the development process, when the Kehoes seek approval for new subdivision plans. Again, this case raised, and resolved, only the declaratory question of whether the proposed use of the reconfigured three parcels was permissible under the Property’s existing zoning. This ruling does not authorize the Kehoes to subdivide or build anything, and we express no views on the number of remaining density units left to allocate to the lots contained in their forthcoming subdivision plans when they submit those plans for approval and satisfy their burdens of proof in that regard.

Id. at 15.

Now that the Kehoes have submitted the 1st Amended Minor Subdivision Plan for approval, it falls to the Board to determine whether the Plan correctly calculates the number of density units available to the Kehoes and, additionally, whether there are sufficient density units to allow for the construction of a new house on reconfigured Parcel 2.

BURDEN OF PROOF

As a threshold matter, the Board must determine which party bears the burden of proof in connection with the calculation of the density units available to the Kehoes. Under Section 603 of the Baltimore County Charter, “all hearings held by the board shall be heard *de novo*, unless otherwise provided by legislative act of the County Council.” Moreover, Rule 7(D) of the Board’s

Rules of Practice and Procedure provides that, “[e]xcept as may otherwise be provided by statute or regulations, the proponent of action to be taken by the board shall have the burden of proof.” Because the Kehoes seek the approval of the 1st Amended Minor Subdivision Plan in this *de novo* proceeding before the Board, the Kehoes bear the burden of demonstrating that the plan complies with the regulations applicable to the calculation of available density units necessary to implement the plan.

DECISION

Based on the evidence presented at the hearing, the Board finds that the Applicants have failed to meet their burden of proof in connection with the density calculations represented in 1st Amended Minor Subdivision Plan. For this reason, the Board concludes that there are insufficient density units remaining under the Baltimore County Zoning Regulations to allow for the construction of a new house on reconfigured Parcel 2.

We look to the succinct summary provided in the Court of Special Appeals’ opinion to set the stage for the Board’s decision in the instant case:

In 1979, the Baltimore County Council passed Bill No. 178-1979, which established subdivision rights for R.C.2-zoned properties of a certain size. The subdivision or density rights attach to each individual lot of record within the R.C.2 zone and allow lots “between two and 100 acres” to be subdivided into two lots. Baltimore County Zoning Regulations (“BCZR”) § 1A01.3.B.1. However, lots in the R.C.2 zone must be at least one acre and can contain no more than one principal dwelling. BCZR §§ 1A01.3.B.2 & 1A01.3.B.4. At the outset, then, each of the three parcels could potentially be subdivided into two lots, for a total of six, and a development right or density unit (we use the terms interchangeably) would attach to each.

Some of the parcels’ density units have already been used or conveyed. The Kehoes’ house on Parcel One utilizes one unit on that parcel, and the remaining Parcel One density unit was utilized by a three-acre conveyance in 1996, so no further development on that parcel is possible. A 1998 three acre conveyance of a dwelling

lot to Ms. Arthur utilized one of the density units for Parcel Two. Except for the dwelling straddling the boundary between Parcel One and Parcel Two, the remaining acreage of Parcel Two is undeveloped; whether or not that line-straddling building consumes a density unit is a matter of dispute.

Kehoe v. Arthur, Sept. Term 2013 No. 1448, at 2-3.

As set forth in the opinion of the Court of Special Appeals, there are no available density units remaining in connection with Parcel 1 on the 1st Amended Minor Subdivision Plan due to the presence of the Kehoes' house on Parcel 1 and the October 31, 1984 out conveyance to Donald L. Kincaid and Cynthia M. Piercy. In addition, one of the density units in connection with Parcel 2 was utilized in connection with the September 3, 1998 out conveyance to Lisa M. Arthur and Glenn J. Arthur. The approval of the 1st Amended Minor Subdivision Plan, providing for a new house on reconfigured Parcel 2 thus hinges on whether the structure described on the plan as a "tenant house" consumes the remaining density unit attached to Parcel 2. If the "tenant house" constitutes a "principal dwelling," then the plan must be denied since all of the available density units associated with Parcel 2 have been used up.

The Board concludes that the Kehoes have failed to carry their burden regarding the dwelling straddling Parcel 1 and Parcel 2 – specifically, the Kehoes have failed to present persuasive evidence that the house is not a "principal dwelling." Instead, the Board finds more persuasive the evidence submitted by Protestants of the Kehoes' Rental Housing License and rental listing, which indicate that the house is, in fact, a principal dwelling that utilizes the remaining density unit associated with Parcel 2.

Because (a) the 1st Amended Minor Subdivision Plan incorrectly states that there is one remaining density unit associated with both Parcel 1 and Parcel 2, and (b) there is no remaining density unit connected with Parcel 2 that would allow for the construction of a new house on

reconfigured Parcel 2, the Board is compelled to deny the plan at this time. The Board declines to make a determination regarding the propriety of the 1st Amended Minor Subdivision Plan based on the alleged lack of access via a public road to reconfigured Parcel 2. Whether the Kehoes and their predecessors in interest in the Property have established a prescriptive easement – as Applicants claim – is an issue that would need to be determined in the first instance by the Circuit Court for Baltimore County.

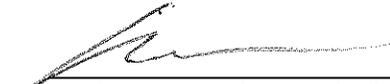
ORDER

THEREFORE, it is this 10th day of August, 2016, by the Board of Appeals of Baltimore County,

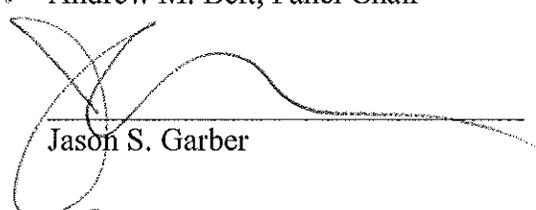
ORDERED, that Applicants' 1st Amended Minor Subdivision Plan be and is hereby **DENIED**.

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.

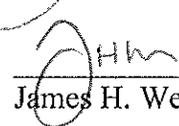
**BOARD OF APPEALS
FOR BALTIMORE COUNTY**



Andrew M. Belt, Panel Chair



Jason S. Garber



James H. West