

IN RE: DEVELOPMENT PLAN HEARING	*	BEFORE THE
& PETITION FOR SPECIAL HEARING		
1915 Turkey Point Road	*	OFFICE OF
S side of Turkey Point Road; 535 feet E of		
the c/l of Bauernschmidt Drive	*	ADMINISTRATIVE HEARINGS
15 th Election District		
6 th Councilmanic District	*	FOR BALTIMORE COUNTY
(Nester’s Landing aka Schweitzer Property)	*	
NKC Properties LLC		HOH Case No. 15-957 and
<i>Applicant/Developer</i>	*	Zoning Case No. 2010-0272-SPH

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

This matter comes before the Office of Administrative Hearings¹ for Baltimore County for a public hearing on a development proposal submitted in accordance with the development review and approval process contained in Article 32, Title 4, of the Baltimore County Code (“B.C.C.”), and a related zoning Petition for Special Hearing. NKC Properties LLC, the developer of the subject property (hereinafter “the Developer”), and Turkey Point Landing, LLC, the legal owner, submitted for approval a redlined Development Plan prepared by Phoenix Engineering, Inc., known as “Nester’s Landing a/k/a Schweitzer Property.”

In the instant matter, the Developer proposes to construct 14 single-family dwellings on 17.021 acres of land, more or less, zoned D.R.3.5. The site is currently improved with a single-family dwelling and exhibits riparian features, extensive forestation and waterfront exposures.

¹ This case was heard on May 13, 2010, by Deputy Zoning Commissioner Thomas Bostwick. The record was left open to allow for the resolution of certain issues with County agencies. In the interim, Mr. Bostwick accepted a position with the Baltimore County Council. The undersigned has reviewed Mr. Bostwick’s copious notes, the plans and materials in the file, and Counsel’s post-hearing memorandum. The resolution of this case does not turn on credibility determinations, and as such, Maryland law authorizes a substitute hearing examiner to conclude the case. Citizens for Rewastico Creek v. Commissioners of Hebron, 67 Md. App. 466, 477-85 (1986).

In addition to the Hearing Officer's Hearing, the Developer is also requesting certain zoning relief and has filed a Special Hearing request pursuant to Section 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to allow the creation of undersized lots for the purpose of conveyance to adjacent lot owners. Details of the proposed development and the requested zoning relief are more fully depicted on the redlined Development Plan that was marked and accepted into evidence as Developer's Exhibits 1A through 1C.

The property was posted with the Notice of Hearing Officer's Hearing on April 14, 2010 for 20 working days prior to the hearing, in order to inform all interested citizens of the date and location of the hearing. In addition, notice of the zoning hearing was timely posted on the property on April 14, 2010 and was timely published in *The Jeffersonian* in accordance with the County Code.

As to the history of the project, a concept plan of the proposed development was prepared and a Concept Plan Conference ("CPC") was held on November 10, 2009 at 10:00 AM in the County Office Building. As the name suggests, the concept plan is a schematic representation of the proposed development and was initially reviewed by representatives of the Developer and the reviewing County Agencies at the CPC. Thereafter, as is also required in the development review process, notice of a Community Input Meeting ("CIM") was posted and scheduled during evening hours at a location near the proposed development. The CIM provides residents of the area an opportunity to review and comment firsthand on the Concept Plan. In this case, the CIM was held on December 14, 2009 at 7:00 PM at the Chesapeake High School located 1801 Turkey Pont Road, where representatives of the Developer and the County attended, as well as a number of interested persons from the community. Subsequently, a Development Plan was prepared based upon the comments received at the CPC and the CIM, and the Development Plan was submitted

for further review at a Development Plan Conference (“DPC”). At the DPC, the Developer’s consultants and County agency representatives further reviewed and scrutinized the plan. The DPC occurred on April 21, 2010 at 9:00 AM in the County Office Building. Thereafter, a Hearing Officer’s Hearing was scheduled and convened on May 13, 2010 in Room 106 of the County Office Building located at 111 West Chesapeake Avenue in Towson.

Appearing at the requisite Hearing Officer’s Hearing and related zoning hearing in support of the Development Plan and request for zoning relief on behalf of the Developer and property owner were brothers Noel A. Schweitzer and Robert D. Schweitzer. Appearing as counsel to the Developer was J. Neil Lanzi, Esquire. Also appearing in support of the requested development plan approval and zoning relief was John R. Heinrichs, P.E. with Phoenix Engineering, Inc., the professional engineering firm that prepared the site plan. In addition, a number of interested citizens attended the hearing.

By way of introduction, Mr. Lanzi proffered the subject property had been owned by the Schweitzer family since 1937 and the surviving family members were trying to determine the best way to develop the property. Counsel indicated that previous legislation had limited the development to three or fewer lots until Bill No. 67-2008 revised Section 4A03.4 of the Baltimore County Zoning Regulations allowing for a subdivision of more than three lots on property zoned DR 3.5 in the Back River Neck area. The subject property consists of 17 acres and, pursuant to the current zoning, it is conceivable the property could be subdivided into more than 50 lots. Counsel proffered that after various meetings with the two affected community associations, Sue Creek Landing Property Owners Association and the Rockaway Beach Improvement Association and due to various environmental restrictions, the current plan of 14 lots has been proposed. Proposed are 11 building lots along Sue Avenue and 3 building lots on Turkey Point Road.

Finally, Counsel proffered that the Developer intends to convey the parcel of land on the south side of Sue Avenue to the adjoining 15 property owners who would like to add the property to their existing back yards. Approximately 10 of the 17 acres available for development will be left in its current condition under the Developer's Plan.

Numerous representatives of the various Baltimore County agencies, who reviewed the Development Plan and zoning Petition, also attended the hearing, including the following individuals from the Department of Permits and Development Management: Darryl Putty (Project Manager), Dennis Kennedy (Development Plans Review), Bruno Rudaitis (Office of Zoning Review), and Ron Goodwin (Bureau of Land Acquisition). Also appearing on behalf of the County were David Lykens from the Department of Environmental Protection and Resource Management ("DEPRM"); and Lloyd Moxley from the Office of Planning. In addition, written comments were received from the Baltimore County Fire Marshal's Office and the Maryland State Highway Administration. These and other agency remarks are contained within the case file.

It should be noted at this juncture that the role of the reviewing County agencies in the development review and approval process is to perform an independent and thorough review of the Development Plan as it pertains to their specific areas of concern and expertise. The agencies specifically comment on whether the plan complies with all applicable Federal, State, and/or County laws, policies, rules and regulations pertaining to development and related issues. In addition, these agencies carry out this role throughout the entire development plan review and approval process, which includes providing input to the Hearing Officer either in writing or in person at the hearing. It should also be noted that continued review of the plan is undertaken after the Hearing Officer's Hearing during the Phase II review of the project. This continues until a plat is recorded in the Land Records of Baltimore County and permits are issued for construction.

Pursuant to Sections 32-4-227 and 32-4-228 of the B.C.C., which regulate the conduct of the Hearing Officer's Hearing, I am required first to identify any unresolved comments or issues as of the date of the hearing. Upon inquiry of the Developer's attorney, Mr. Lanzi, he indicated it was his understanding that all agency comments had been addressed on the redlined Development Plan. Mr. Lanzi also reiterated that a related request for special hearing had been filed pertaining to portions of the proposed development as well as existing conditions. Mr. Lanzi indicated the reasons in support of this request would be expounded upon during a proffer of testimony and evidence, and Mr. Heinrichs' presentation of the plan.

The Zoning Advisory Committee (ZAC) comments are made part of the record of this case and contain the following highlights: Comments were received from the Office of Planning dated April 28, 2010, and that agency has no objection to the creation of 15 undersized parcels in the DR 3.5 zone with the intention they be conveyed individually by the Petitioner to the immediately adjacent landowners, subject to a condition of approval being included in the Final Decision and Order:

Parcels B through P as shown on Petitioner's Exhibit 1A-C shall be subject to the Development Plan and Landscape Plan approved by Baltimore County in Baltimore County Department of Permits, Approvals and Inspections file No. 15-957.

The Planning Office accepts that the parcels are non-buildable and will not be improved with any structure(s) requiring Baltimore County building permit approval.

Particular County agencies were then asked to state whether they had any outstanding issues, and the responses are summarized below:

Planning Office: Lloyd Moxley appeared on behalf of the Office of Planning. Mr. Moxley indicated that his department approved the School Impact Analysis offered as Baltimore County

Exhibit 2. Mr. Moxley indicated the Office of Planning would not approve the Development Plan however, subject to resolution of Section 260 standards of the B.C.Z.R. affecting what was referred to in the hearing as the “triangle piece” of Developer’s property between Sue Avenue and the existing residences along Sue Creek Drive. Mr. Moxley indicated that based on discussions with Avery Harden, Baltimore County Landscape Architect, the landscape plan had not been approved. Mr. Moxley also indicated his office would be requesting a recorded landscape easement to be held by the Sue Avenue parcel holders (existing residents on the south side of Sue Avenue). The Office of Planning was also requesting a 10 foot landscape easement in addition to the 11 foot right-of-way along the entire length of the south side of Sue Avenue. Mr. Moxley also requested a 6 foot high fence along the southern edge of the Baltimore County right-of-way. Mr. Moxley finally requested additional information for the pattern book regarding the facades of the proposed homes in accordance with Section 260 of the B.C.Z.R.

In addition to Mr. Moxley’s testimony, Avery Harden, Landscape Architect, testified and indicated a willingness to reduce the required landscape easement from 10 to 5 feet and also acknowledged a willingness to allow landscaping within the 11 feet Baltimore County right-of-way. Mr. Harden also indicated that he would consider landscaping in lieu of the requested 6 foot high fence (which the neighbors opposed) subject to his approval of a landscape plan.

Subsequent to the hearing, this Administrative Law Judge received written confirmation from Mr. Moxley that a revised pattern book had been submitted and approved by the Office of Planning. Accordingly, by letter dated August 9, 2011, Mr. Moxley on behalf of the Office of Planning recommends approval of the Development Plan.

DEPRM: David Lykens appeared on behalf of DEPRM (now the Department of Environmental Protection and Sustainability), indicating that all sections of Environmental

Review had been approved except for Environmental Impact Review with issues remaining open, including the proposed piers and various buffers. Calculations were also requested with regard to disturbance in the critical area. Driveways proposed for the residents along Sue Avenue were requested to be shown along with driveways that currently exist on the south side of Sue Avenue. Subsequent to the hearing, written confirmation was received from Jeffrey Livingston that all outstanding issues had been satisfied and DEPS recommended approval of the Development Plan.

Recreation and Parks: Bruce Gill appeared on behalf of the Department of Recreation and Parks and indicated that the local open space required for the 14 units is 14,000 square feet or 0.32 acre, more or less; 9,100 square feet active and 4,900 square feet passive. A development plan that proposes 20 or less dwelling units should be considered for a waiver and a fee in lieu of open space. Pursuant to a letter dated April 26, 2010, offered as Baltimore County Exhibit 1, from the Department of Recreation and Parks to the Developer's land use consultant, Mr. Heinrichs, the request for waiver was granted with a fee in lieu of \$73,080 to be paid to Baltimore County prior to recordation of the record plat. That letter was marked and accepted into evidence as Baltimore County Exhibit 1. With no other open issues, Mr. Gill's department recommended approval of the Development Plan.

Development Plans Review (Public Works): Dennis Kennedy appeared on behalf of the Bureau of Development Plans Review. Mr. Kennedy confirmed that the Developer's plan met all of his department's requirements and comments, and that his department recommended approval of the redlined Development Plan, subject to minor red line additions including:

1. 18 feet minimum road width between Nesters Landing and the end of the existing curb on Sue Avenue; and
2. Truncation of the right-of-way line at Old Turkey Point Road and Turkey Point Road; and

3. Label the landscape easement as private; and
4. End the drainage and utility easements at the critical area easement.

Office of Zoning Review: Bruno Rudaitis appeared on behalf of the Office of Zoning Review. Mr. Rudaitis stated that his office had no outstanding issues with the Plan, subject to determination of the special hearing relief. Mr. Rudaitis indicated in the event the special hearing relief was denied, the Zoning Office would request a restriction to be placed on the Development Plan requiring one common metes and bounds description of Parcels B-P and the 15 lots existing on the south side of Sue Avenue. Mr. Rudaitis indicated in the event the special hearing relief as requested is approved, the Zoning Office would request notes on the Plan and/or restrictions in the 15 deeds indicating Parcels B-P are non-buildable, without density and are non-transferable to other neighbors. Further, in the event of a sale of the primary residence, parcels B-P must also be sold. Otherwise, subject to approval of the related special hearing requests, his department recommended approval of the red line Development Plan.

Land Acquisition: Ron Goodwin appeared on behalf of the Bureau of Land Acquisition. Mr. Goodwin indicated that subject to a label on the landscape easement as to ownership of the property and easement area, the Bureau of Land Acquisition recommended approval of the Development Plan.

The Baltimore County Code clearly provides that the “Hearing Officer shall grant approval of a development plan that complies with these development regulations and applicable policies, rules and regulations.” *See*, Section 32-4-229 of the B.C.C. After due consideration of the testimony and evidence presented by the Developer, the exhibits offered at the hearing, and confirmation from the various County agencies that the development plan satisfies those agencies’ requirements, I find that the Developer has satisfied its burden of proof and, therefore, is entitled

to approval of the Redlined Development Plan.

Administrative Law Judge's Hearing on Petition for Special Hearing

The special hearing, as previously indicated, is requested pursuant to Section 500.7 of the B.C.Z.R. to allow the creation of undersized lots for the purpose of conveyance to adjacent lot owners. The basis of relief was presented by proffer by Developer's Counsel as follows:

The subject property is bisected by a Baltimore County road known as Sue Avenue as shown on the site plan filed with this Petition. Approximately 35,494 square feet (.815 acres) of Developer's property is located on the opposite (south) side of Sue Avenue. (The .8156 acres is referred to hereinafter as "Petitioner's Excess Property"). There currently exist 15 improved properties adjacent to Petitioner's Excess Property. After investigating the options with the various Baltimore County agencies and determining Baltimore County does not desire Petitioner's Excess Property for open space or any other use, it is Petitioner's intent to convey Petitioner's Excess Property as 15 separate parcels to the 15 existing improved lot owners. The parcels will remain separate lots by deed, description and tax account. Each of the 15 newly created parcels will be undersized ranging from a low of 164 square feet to a high of 5,812 square feet and will not contain enough square footage to obtain approval for a residential building lot. Further, the newly created parcels combined with the existing 15 improved lots will not provide enough square footage for the combined property to be subdivided, as only one of the 15 improved lots combined with the parcel to be conveyed will meet the 10,000 square foot minimum lot size requirement for property zoned DR 3.5.

For these reasons, Petitioner seeks to create 15 separate undersized parcels from Petitioner's Excess Property for the purpose of conveyance to the adjoining property owners subject to approval of the final Development Plan and record plat.

Various citizens spoke regarding the proposed Development Plan and special hearing petition. The citizens who spoke lived on Sue Creek Drive or on Sue Avenue. The Sue Creek Drive residents owned property directly across from the proposed new homes and were affected by the proposed fencing and landscaping requirements. Some of the residents already had driveways through Petitioner's property into their own back yards and wished to keep the driveways.

A letter dated May 6, 2010, was submitted by the owners of 1914-1942 Sue Creek Drive confirming their support of the development subject to the transfer of the triangle piece as 15 separate parcels to the 15 residents signing the letter.

Petitioner's engineer indicated there were four existing driveways on the triangular portion of land where the 15 lots are proposed, across from the proposed development. Petitioner submitted several photographs (Developer's Exhibits 2 A-F) of the subject property, the one existing house which is to be razed and the area of the proposed pier. Additional photographs were presented (Developer's Exhibits 3 A-Q) of the subject property on both sides of Sue Avenue.

Noel Schweitzer and Robert Schweitzer both testified regarding the family history with the subject property. Noel Schweitzer currently resides in the existing residence located at 1915 Turkey Point Road and Robert Schweitzer currently lives at 1909 Old Turkey Point Road, immediately adjacent to the subject property. Both said they had a vested interest in having a quality development, especially since Robert Schweitzer will continue to live adjacent to the development.

Lastly, it should be noted that the decisions with regard to the Petition for Special Hearing and the Hearing Officer's Hearing considering the proposed development are treated differently for appeal purposes. The decision on the zoning Petition is made by a Deputy Zoning

Commissioner. An appeal from those decisions is a *de novo* appeal to the Board of Appeals of Baltimore County. The decision on the Development Plan is made by a Hearing Officer for Baltimore County. An appeal from that decision is on the record to the Board of Appeals pursuant to Section 32-4-281 of the B.C.C. Both appeals must be filed within 30 days from the date of this Order.

Pursuant to the advertisement, posting of the property, and public hearing held thereon, the requirements of which are contained in Article 32, Title 4, of the Baltimore County Code, the NKC Properties LLC Development Plan shall be approved consistent with the comments contained herein. The requested special hearing relief to allow the creation of undersized lots for the purpose of conveyance to adjacent lot owners is also approved.

THEREFORE, IT IS ORDERED by this Administrative Law Judge/Hearing Officer for Baltimore County, this 2nd day of September, 2011, that the redlined “NESTER’S LANDING AKA SCHWEITZER PROPERTY” Development Plan, marked and accepted into evidence as Developer’s Exhibit 1A-C, be and is hereby **APPROVED**; and

IT IS FURTHER ORDERED that the Petition for Special Hearing relief to allow the creation of fifteen (15) undersized lots for the purpose of conveyance to adjacent lot owners be and is hereby **GRANTED**.

The aforementioned approval and relief granted herein shall be subject to the following as conditions precedent:

1. Parcels B through P as shown on Developer’s Exhibit 1A-C are to be conveyed by Developer to the respective owners of 1914-1942 Sue Creek Drive, and such conveyances shall be expressly subject to a landscape easement granted to Baltimore County – as shown on Developer’s Exhibit 1A-C. The deed of easement to Baltimore County must be in a form acceptable to the Department of Permits, Approvals and Inspections, and must be recorded among the Baltimore County land records prior to the conveyance by Developer of the fifteen parcels (shown on the Development Plan as Parcels B-P) to the adjoining

homeowners. The conveyance of each of the 15 parcels by Developer shall include a property description referencing the final Development Plan only without the necessity of a metes and bounds description for each of the 15 undersized parcels.

2. The approval of a final Landscape Plan by Baltimore County in Baltimore County Department of Permits, Approvals and Inspections file No. 15-957.
3. All landscaping planted in the 11 foot Baltimore County right-of-way shall be installed at the Developer's expense. The landscaping on the south side of Sue Avenue shall be maintained by and at the expense of the fifteen (15) adjoining property owners. The landscaping on the north side of Sue Avenue shall be maintained by the future owners of the adjacent dwellings shown on the Development Plan.
4. Any removal and/or destruction of the landscaping contained in the right-of-way and/or landscape easement shall be subject to a Code violation and enforcement action by the Department of Permits, Approvals and Inspections.
5. Parcels B through P as shown on Developer's Exhibit 1A-C may not be sold or conveyed separately from the adjoining primary residences on the south side of Sue Avenue, and deeds conveying those parcels shall contain such a restriction in conspicuous typeface.
6. Parcels B through P as shown on Developer's Exhibit 1A-C are non-density parcels and may not be subdivided and/or added to other parcels for purposes of subdivision, and such restriction shall be conspicuously noted on the deeds conveying those parcels.
7. Any proposed driveways or accessory structures requested by the lot owners of Parcels B through P shall require a special hearing petition from the requesting lot owner and approval from Baltimore County.

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

Signed _____
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/pz