

IN RE: DEVELOPMENT PLAN HEARING	*	BEFORE THE
AND PETITION FOR VARIANCE		
4 th Election District	*	OFFICE OF
4 th Council District		
(DOLFIELD TOWNHOUSES)	*	ADMINISTRATIVE HEARINGS
9014 and 9018 Dolfield Road		
Dolfield Road, LLC	*	FOR
Owner/Developer		
	*	BALTIMORE COUNTY
	*	HOH Case No. 04-0736 and
		Zoning Case No. 2014-0043-A

* * * * *

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

This matter comes before the Office of Administrative Hearings 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.”). The hearing also involves a request for variance relief under the Baltimore County Zoning Regulations (B.C.Z.R.) and Comprehensive Manual of Development Policies (CMDP). Dolfield Road, LLC, the developer of the subject property (hereinafter “the Developer”), submitted for approval a three-sheet redlined Development Plan prepared by Colbert, Matz, Rosenfelt, Inc., known as “Dolfield Townhouses Development Plan.” Developer’s Exhibit 1A-1C.

The Developer proposes 20 single-family attached townhouse apartment units and 16 multi-family apartments on 3.30 acres of land split-zoned DR 10.5 (2.66+/- acres) and DR 16 (0.77+/- acres). The site is currently developed with two (2) dilapidated single-family detached residences (*See* Developer’s Exhibits 8 and 9) while the remainder of the site is mostly wooded.

The property was posted with the Notice of Hearing Officer's Hearing (on September 22, 2013) and Zoning Notice (on September 27, 2013) for 20 working days prior to the hearing, in order to inform all interested citizens of the date and location of the hearing. The undersigned conducted the hearing on Friday, October 25, 2013, at 10:00 AM, Room 205 of the Jefferson Building, 105 West Chesapeake Avenue, Towson, Maryland.

In addition to the Hearing Officer's Hearing (HOH), the Developer is requesting the following zoning relief:

- (1) From §§1B01.2.C.1.c and 504.2 of the B.C.Z.R. and from of the B.C.Z.R. and the Comprehensive Manual Development Plan (CMDP), Division II, Section A: Residential Standards Table VII, to permit a side building face to side building face setback of 20' in lieu of the required 25' setback,
- (2) From §301.1 of the B.C.Z.R. to permit a one story open porch to extend into a required yard not more than 50% of the minimum required depth of a required yard in lieu of the required maximum of 25%,
- (3) From §§1B02.2 and 504.2 of the B.C.Z.R. and the CMDP, Division II, Section A: Residential Standards Table VII, to permit a building with a height of 58' in lieu of the permitted 50',
- (4) From CMDP, Modification of Standards, Division II, Section A, Residential Standards, Page 29, to permit the more than 6 townhouse units in a row,
- (5) From CMDP, Modification of Standards, Division II, Section A, Residential Standards, Page 28, to permit the construction of townhouses with a width of 16' in lieu of the required 20',
- (6) From CMDP, Modification of Standards, Division II, Section A, Residential Standards, Page 28, to permit 5' rear yard access easement and variable width Storm Water Management Easement to cross through the required 500 square foot private yard area, and
- (7) For such other and further relief as the nature of this cause may require.

Appearing at the requisite Hearing Officer's Hearing in support of the Development Plan on behalf of the Developer and property owner was Jonathan Ehrenfeld, and Richard (Dick) E.

Matz, P.E., with Colbert, Matz & Rosenfelt, Inc., the consulting firm that prepared the site plan. Timothy M. Kotroco, Esquire and John B. Gontrum, Esquire, both with Whiteford, Taylor & Preston, LLP, appeared and represented the Developer.

Representatives from the apartment complexes adjoining this site attended the hearing, and their names are reflected on the sign-in sheets.

Numerous representatives of the various Baltimore County agencies, who reviewed the Development Plan, 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, Brad Knatz, Real Estate Compliance, and Jason Seidelman (Office of Zoning Review). Also appearing on behalf of the County were David Lykens from the Department of Environmental Protection and Sustainability (DEPS), and Jenifer Nugent from the Department of Planning (DOP).

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 §§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. At the hearing, each of the Baltimore County agency representatives identified above (with the exception of Ms. Nugent, whose comments will be addressed below) indicated that the redlined Development Plan (marked as Developer's Exhibit 1A-1C) addressed any and all comments submitted by their agency, and they each recommended approval of the plan.

Ms. Nugent, who submitted a five-page final report (County Exhibit 1), indicated that the DOP did not support the project. Among other reasons, Ms. Nugent believed the proposed 16' width of the townhouses, lack of usable yard areas, and requests for (self-imposed) variance relief required the plan to be denied.

DEVELOPER'S CASE

The Developer presented two witnesses in its case. First, Jonathan Ehrenfeld testified and discussed his background in community and residential development. He explained that the townhouses would in fact be rental apartments, and that this was a new type of project for his company; his firm ordinarily rehabilitates existing projects while this proposal obviously involves new construction.

The final witness was engineer Richard E. Matz, P.E. who was accepted as an expert. Mr. Matz explained the project by referring to the three-sheet Development Plan. The witness opined that the development proposal satisfied all Baltimore County rules and regulations. Mr. Matz also discussed each of the variance requests, and pointed out on the plan the location of each "in the field." He testified the parcel is irregularly shaped and is a remnant from various conveyances through the years, with only 100' of frontage on Dolfield Road. Mr. Matz opined

that B.C.Z.R. §307 was satisfied by Developer. He testified that the property is unique for the above stated reasons (in its comments, the DOP noted that the property was irregularly shaped), and the Developer would experience a practical difficulty if the regulations were strictly interpreted, since it would be unable to construct the proposed improvements.

This is a difficult case, since I must determine whether the benefits of the project (including the elimination of a blighted area) outweigh the DOP's goals -- as expressed in the CMDP. There is no community opposition to speak of, and the DOP was the only reviewing agency to express concern with the Plan. The Community Input Meeting (CIM) was attended by only three (3) citizens, and the only questions raised concerned whether subsidized housing was proposed and when the property would be cleaned up. The site is an eyesore, and a representative from one of the adjacent apartment complexes stated that the site has been vacant for approximately 20 years, and that the boarded up houses are frequented by drug users and criminals. As such, there is no doubt the proposed development would be a vast improvement over existing conditions, a point conceded by the representatives from the two (2) apartment complexes that surround the subject property.

The CMDP provides that townhouses must be at least 20' wide unless approved through the PUD process. Ms. Nugent indicated that the PUD process ensures a higher quality development and other community benefits. The DOP also expressed concern with setting precedent for 16' wide townhouses. I understand and appreciate both of these concerns, but believe that each can be addressed.

As for the quality of the development (materials used, etc.), I concur with Ms. Nugent's comments, and will require the Developer to construct the townhouse apartments with upgraded brick exteriors (on the front, and sides of end units) and high quality materials. In addition, I will

also require the Developer to construct on site (in an H.O.A. open space area) a “tot-lot” for use by residents of the development. This, I believe, will prevent the townhouse apartments (which are nearest to Dolfield Road) from looking like “cookie cutter” housing, and the residents will be provided with additional amenities. In this regard, many of the “upgrades” achieved in the PUD process will also be realized in this conventional development.

I also do not believe there is a danger of setting undesirable precedent. Technically speaking, nothing contained in a Development Plan approval Order is binding on or can be cited as precedent in future zoning/development cases. Another Administrative Law Judge is at liberty to disagree with or disregard the reasoning in this opinion.

But more importantly, the approval of the 16' wide townhouses in this case is premised upon two (2) significant factors: (1) they are in reality apartments; and (2) only twenty (20) townhouse apartments are proposed. While I cannot predict with certainty (given the many variables present in any development case), I do not believe I would approve a large-scale townhouse development (with 100+ units) proposing 16' wide townhouses for sale. The present case is quite unique; the site is small and has been an eyesore for many years, and is surrounded by large apartment complexes. The proposed traditional and townhouse apartments will be compatible with current development in the community.

I am also concerned about denying a development plan based solely on the 20' width requirement set forth in the CMDP. As an initial matter, this strikes me as a purely aesthetic concern; indeed, there was no testimony or reference in the DOP’s final report that 16' wide townhouse apartments would pose safety or health concerns. Maryland case law recognizes that the width of a dwelling is an issue of aesthetics, Swoboda v. Wilder, 173 Md. App. 615, 638 (2007), and that aesthetic goals cannot be the only purpose of a regulation. City of Balto. v.

Mano Swartz, 268 Md. 79, 86-87 (1973).

In addition, although Maryland courts do not appear to have addressed the issue, courts in other states have held that if a county wants to regulate characteristics such as the width of homes, it must regulate the width of all homes. Wright County v. Kennedy, 415 N.W. 2d 728, 731 (Minn. 1987); Howard Township v. Waldo, 425 N.W. 2d 180 (Mich. 1988). Based on my review of the B.C.Z.R. and the CMDP, it appears that only the width of townhomes (and not other dwelling types) is regulated.

The DOP also expressed concern that the site was overcrowded, and to large measure I concur. But Mr. Ehrenfeld testified that for the development to be economically viable, it must be built as proposed with 20 townhouse apartments and 16 “traditional” apartment units. He stated that “it is tight as it is.”

Of course, whether or not a Developer maximizes its profits is not part of the calculus employed to review and decide development cases. But at some point, economic realities do intrude. In this scenario, the property has been blighted for 20+ years, and has not attracted private investment or prior development proposals. The Developer has proposed a project that may not be ideal, but it will offer tangible community benefits, and conditions will be imposed to improve the quality and appearance of the development. In the words of a familiar sentiment: one should not allow the perfect to be the enemy of the good. If this project were denied or subject to draconian conditions that would deter the Developer from undertaking the project, the status quo would continue (perhaps for another twenty [20] years, or more), which is not in the best interest of the community.

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.” B.C.C. §32-4-229. After due consideration of the testimony and evidence presented by the Developer, the exhibits offered at the hearing, and confirmation from County agencies (with the exception of the DOP) 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. After carefully considering the comments and objections from the DOP, I will impose certain conditions designed to ensure that the project complies to the greatest extent possible with the goals of the CMDP.

ZONING REQUESTS

VARIANCES

In addition to the Development Plan approval, the Developer sought variances under the B.C.Z.R. and CMDP for certain setbacks and standards. Each of the variance requests was described in detail earlier in this Opinion.

Based upon the testimony and evidence presented, I will grant the requests for variance relief. Under Maryland law, to obtain variance relief requires a showing that:

- (1) The property is unique; and
- (2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

Trinity Assembly of God v. People’s Counsel, 407 Md. 53, 80 (2008).

The Developer has met this test. The subject property is irregularly shaped, and has barely 100’ of frontage onto Dolfield Road. In addition, the Developer must contend with long-existing site conditions. As such, the property is unique.

In addition, the Developer would suffer a practical difficulty if the regulations were strictly interpreted and the variances were denied, in that it would be unable to construct the proposed improvements. Finally, I find that the variances can be granted in harmony with the

spirit and intent of the B.C.Z.R., and in such manner as to grant relief without injury to the public health, safety, and general welfare.

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 Dolfield Townhouses Development Plan shall be granted consistent with the comments contained herein and the conditions noted below.

THEREFORE, IT IS ORDERED by this Administrative Law Judge/Hearing Officer for Baltimore County, this 15th day of November, 2013, that the three (3) sheet redlined “**DOLFIELD TOWNHOUSES**” Development Plan, marked and accepted into evidence as Developer’s Exhibit 1A-1C, be and is hereby **APPROVED**.

IT IS FURTHER ORDERED that the Petition for Variance seeking relief as follows:

- (1) From §§1B01.2.C.1.c and 504.2 of the B.C.Z.R. and from of the B.C.Z.R. and the Comprehensive Manual Development Plan (CMDP), Division II, Section A: Residential Standards Table VII, to permit a side building face to side building face setback of 20' in lieu of the required 25' setback,
- (2) From §301.1 of the B.C.Z.R. to permit a one story open porch to extend into a required yard not more than 50% of the minimum required depth of a required yard in lieu of the required maximum of 25%,
- (3) From §§1B02.2 and 504.2 of the B.C.Z.R. and the CMDP, Division II, Section A: Residential Standards Table VII, to permit a building with a height of 58' in lieu of the permitted 50',
- (4) From CMDP, Modification of Standards, Division II, Section A, Residential Standards, Page 29, to permit the more than 6 townhouse units in a row,
- (5) From CMDP, Modification of Standards, Division II, Section A, Residential Standards, Page 28, to permit the construction of townhouses with a width of 16' in lieu of the required 20', and

- (6) From CMDP, Modification of Standards, Division II, Section A, Residential Standards, Page 28, to permit 5' rear yard access easement and variable width Storm Water Management Easement to cross through the required 500 square foot private yard area,

be and is hereby GRANTED.

The Development Plan and zoning approvals herein are expressly subject to and conditioned upon the following:

1. Developer shall construct at its own expense a 10' high fence between the subject property and the adjoining apartment complex known as the "Painters Mill Apartments."
2. The Developer shall construct at its own expense a "tot lot" or playground in the northern portion of the site marked as "H.O.A. Area." The amenity shall be of sufficient size to accommodate the residents of the development approved herein, and is subject to the approval of the Baltimore County Landscape Architect and/or DOP.
3. The Developer shall provide at its own expense the necessary right-of-way to connect Campbell Avenue (a paper street) to Blue Ocean Way, the entire length of which shall be a public road constructed to Baltimore County standards. The Developer shall not be responsible for any costs associated with the design and/or construction of Campbell Avenue.
4. The twenty (20) townhouse units shall be for rental only, and shall be designed with brick exteriors on the front of the units (as well as on the sides of the end units). The pattern book shall be amended to reflect these design elements and is subject to the approval of the DOP.

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

Signed
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/dlw