

Elm Street Development * BEFORE THE
Petitioner * PLANNING BOARD OF
PLANNING BOARD CASE NO. 417 * HOWARD COUNTY, MARYLAND

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DECISION AND ORDER

In accordance with pertinent portions of State Senate Bill 236, Section 5-104 of the Land Use Article of the Maryland Annotated Code, the Planning Board of Howard County, Maryland held a public hearing on July 7, 2016, to consider the petition of Elm Street Development, Petitioner, to approve a Preliminary Equivalent Sketch Plan, SP-15-015, for 23 single-family cluster lots and seven non-buildable preservation parcels. The 99.07 acre Crawford and O’Keefe properties subdivision, located on Haviland Mill Road and identified as Parcels 1 and 52 on Tax Map 34 & 39, in the Fifth Election District of Howard County, Maryland, is in the Tier III residential land use category as designated on Howard County’s General Plan, *2030 PlanHoward*, and is zoned RR-DEO (Rural Residential – Density Exchange Option).

The notice of the public hearing, which is required by Section 5-104(d)(1) of the Land Use Article of the Maryland Annotated Code, was published and the subject property was posted in accordance with the Planning Board’s requirements, as evidenced by certificates of publication and posting, all of which were made a part of the record of the case. Pursuant to the Planning Board’s Rules of Procedure, the reports and official documents pertaining to the petition, including the Technical Staff Report of the Department of Planning and Zoning, the Howard County Subdivision and Land Development Regulations, the Howard County Zoning Map and Regulations, the Howard County Design Manuals, the Howard County Landscape and Forest Conservation Manuals, and the Adequate Public Facilities Ordinance were made part of the record in this case.

PLANNING BOARD HEARING

Department of Planning and Zoning’s Technical Staff Report

Julia Boone presented the Technical Staff Report for the Department of Planning and Zoning which recommended approval of Preliminary Equivalent Sketch Plan, SP-15-015, subject to comments from reviewing agencies and any Conditions of Approval by the Planning Board. The Department of Planning and Zoning in its Technical Staff Report found that there are two criteria for the Planning Board to review pursuant to Section 5-104(e) of the Land Use Article of the Maryland Annotated Code for a proposed major subdivision on a Tier III property, only the second of which is applicable:

1. The cost of providing local government services to the residential major subdivision unless a local government’s adequate public facilities law already requires a review of government services; and

2. The potential environmental issues or a natural resources inventory related to the proposed subdivision.

The Department of Planning and Zoning found that criterion 1 above was inapplicable because Howard County had an adequate facilities law which already required a review of government services. It determined that the purpose of the adequate public facilities law “is to provide a predictable planning environment for adequate public road facilities and adequate public school facilities by requiring residential and nonresidential projects to pass certain tests as conditions of subdivision or site development plan approval.” The Department of Planning and Zoning further noted that “the test for adequate public road facilities was conducted and approved by the Department of Public Works and Department of Planning and Zoning with the review of the preliminary equivalent sketch plan. The test for adequate housing allocations and the test for adequate public schools will be conducted upon approval of the Decision and Order of the Planning Board.”

As to criterion 2 above, The Department of Planning and Zoning found:

The Natural Resource Inventory indicates five (5) stream systems and three (3) wetland systems.

- Stream System ‘A’ is an unnamed perennial tributary that flows along the northern property boundary of the Crawford Property west through the O’Keefe Property to the Patuxent River.
- Wetland System ‘B’ is also located along the northern property boundary of the Crawford Property and drains into Stream System ‘A’.
- Wetland System ‘C’ is just west of Wetland System ‘B’ and also drains into Stream System ‘A’.
- Stream System ‘D’ is a headwater tributary to the Patuxent River that parallels the northern property boundary of the O’Keefe Property. Wetland System ‘E’ is the outer edge of a large emergent wetland in the Patuxent River floodplain that touches onto the far western edge of the O’Keefe Property.
- Stream System ‘F’ is a small headwater seep that forms a headwater, intermittent stream as it flows west through the center of the O’Keefe Property. It eventually converges with Stream System ‘G’ and discharges into an extensive wetland within and adjacent to the Patuxent River floodplain.
- Stream System ‘G’ is a headwater tributary that forms on the eastern side of the O’Keefe Property and flows west into Stream System ‘F’.
- Stream System ‘H’ is a headwater tributary located in the far southeastern portion of the O’Keefe Property.

The Natural Resource Inventory also indicates 43 specimen trees and four distinct forest stands that encompass approximately 39.7 acres of the project site.

- Forest Stand #1 occupies approximately 11.5 acres, located entirely within the western and northern portions of the Crawford Property.
- Forest Stand #2 occupies approximately 24.6 acres, located within the northern portion of the O'Keefe adjacent to Forest Stand #1.
- Forest Stand #3 occupies approximately 1.5 acres, located within the 100-year floodplain of the Patuxent River.
- Forest Stand #4 occupies approximately 2.1 acres, located adjacent to Stream Systems 'G' and 'H' in the southeastern portion of the O'Keefe Property.

The Natural Resource Inventory and Floodplain report indicates floodplain along the Patuxent River and Stream System 'A'. The plan also indicates 7.74 acres of steep slopes located within the project site.

The plan does not propose any disturbance to the above referenced streams, wetlands, their buffers, floodplain, or steep slopes. These features are encompassed and protected within the non-buildable preservation parcels. The plan does propose removing 10.2 acres of forest and 16 specimen trees. This has been determined to be necessary in order to accommodate a public road cul-de-sac, utilities, stormwater management devices, houses, driveways and private septic systems.

Based on the Petitioner's presentation of the above information as to a "natural resources inventory related to the proposed subdivision", the Department of Planning and Zoning recommended approval of preliminary equivalent sketch plan (SP) 15-015 because it met the requirements of Section 5-104(e) of the Land Use Article of the Maryland Annotated Code.

PETITIONER'S TESTIMONY

Mr. William Erskine, Esq., represented the petitioner; however, the opposition did not have legal representation. Opening statements were waived.

Mr. Erskine called Mr. Jason Van Kirk, Vice President of Elm Street Development, as his only witness. Mr. Van Kirk testified that its proposed subdivision is subject to a public hearing by the Planning Board, in accordance with the criteria in State Senate Bill 236, according to the criteria provided above. Mr. Van Kirk further testified that he concurred with the Department of Planning Zoning's interpretation that only the "natural resources" criterion was applicable because Howard County had an adequate public facilities law which reviewed the adequacy of

public facilities, so that the “cost of public facilities” criterion was inapplicable. Mr. Van Kirk also concurred with the Department of Planning and Zoning determination that it had met the criterion of Section 5-104(e)(2) of the Land Use Article through its Natural Resources Inventory. Mr. Van Kirk noted that none of the referenced natural resources inventoried, including the streams, wetlands, wetland buffers, floodplains or steep slopes were proposed for disturbance by its proposed development, except for the proposed removal of 10.2 acres of forest and 16 specimen trees, which are needed to be removed to accommodate a public road cul-de-sac, utilities, stormwater management devices, houses, driveways and private septic systems. Mr. Van Kirk noted that the tree removal with respect to the cul-de-sac was due to the road being double-loaded with house on both sides of the proposed street in order to cluster the lots and minimize the proposed impervious surface, thus meeting the intent of Section 5-104(e)(2) of the Land Use Article of the Maryland Annotated Code.

Mr. Van Kirk, in response to a question from Mr. Robert Clapper regarding storm water runoff and nitrates, testified that the design of stormwater management and an erosion and sediment control plan must be reviewed and approved in accordance with state and county regulations and that the Howard County Construction Inspection Division is responsible for inspecting the site during construction. Mr. Van Kirk also said that he is not aware of a soil test for nitrates; that radon tests are conducted by the purchaser of a house; and that wells have to be approved by the Health Department. Mr. Van Kirk explained he could not comment on mitigation practices for failed sediment and erosion control devices because he has never witnessed that scenario.

Mr. Van Kirk, in response to a question from Mrs. Deborah Pacheco regarding radon, testified that the wells have not been tested for radon and that the Health Department and State of Maryland will regulate and approve permits for well construction. Mr. Van Kirk also stated that they will not test neighboring wells for radon.

Mr. Van Kirk, in response to a question from Ms. Kathy Stowe as to whether the removal of 16 trees was reasonable and whether the proposed design would best protect the environment, testified that the cluster option has less of an impact than a non-cluster option and that the proposed plan is the best design.

Mr. Van Kirk, in response to a question from Mr. Neil Talbots as to who was responsible for insuring that stormwater management systems function adequately, testified that the developer is responsible for the construction and maintenance of the facilities until they are released from their development bond, at which time the homeowner or homeowner’s association would be responsible.

Mr. Van Kirk, in response to a question from Mr. Victor Bullen if the developer’s natural resource inventory included rare, threatened or endangered species, testified that the Natural Resource Inventory requires including species of specimen trees and wetland vegetation, but does not include an inventory of animals. Mr. Van Kirk indicated that no rare, threatened, or endangered species have been found on the property and he was unsure what would happen if any were found.

Mr. Van Kirk, in response to a question from Board member Adler, confirmed that qualified professionals conducted the wetland study and that forest will be retained at the rear of lots where grading does not occur. Mr. Van Kirk explained that less impervious surface was in reference to a double-loaded roadway, instead of another site design that would retain the same number of lots, but add impervious areas.

Mr. Van Kirk, in response to a question from Board Member Engelke, testified that cluster subdivisions are typical in western Howard County. Mr. Van Kirk explained that the cluster design allows clustering one-acre lots, instead of dispersed three-acre lots, with the remaining acreage to be preserved in perpetuity.

PROTESTANT'S TESTIMONY

Mr. Ronald Stup intended to testify about the adequacy of the roads but the Board Chair ruled that his testimony was irrelevant and immaterial because Section 5-104(e)(1) of the Land Use Article of the Maryland Annotated Code was inapplicable to this case since Howard County's adequate public facilities law already requires a review of the governmental services to this major residential subdivision.

Ms. Susan Scheidt testified that the subdivision does not meet the purpose or design standards of a cluster subdivision as defined by the Zoning Regulations.

Ms. Theresa Marrow testified that the cluster subdivision does not meet the purpose or design standards of a cluster subdivision. Protestant's Exhibit #1 is a written version of Ms. Marrow's testimony.

Mr. Victor Bullen provided written testimony, Protestant's Exhibit #2. Mr. Bullen testified that the site is designated as a "hub" in the Howard County Green Infrastructure Network Plan and is considered a Maryland Green Print Targeted Ecological Area. Mr. Bullen said development would degrade water quality and the ecological value of the area and he encouraged the County to acquire the property as a protected area for its biological, ecological, recreational, and scenic qualities. Mr. Bullen also stated that the surrounding area has significant cultural resources; including cemeteries and historic farmhouses, attesting to its active African-American agricultural history after the Civil War and through Prohibition. Mr. Bullen, in response to a question on cross-examination, said he would like to see the property as a park, that he was aware a portion would be put into preservation with public access to County and State property as part of the proposed subdivision, and that the site did not contain any significant cultural resources as far as he knew.

Mr. Charles Steggerda testified that the highest portion of the property used to be an airport landing site and the unique character of this site should be taken into consideration before developing.

Mr. Douglas Gary Orr had concerns about the design of septic systems.

Ms. Martha Mann intended to testify that the proposed development does not meet the purpose of Section 16.126 of the Subdivision and Land Development Regulations which concerns protecting agricultural land and rural character but the Board ruled this testimony as irrelevant and immaterial. Ms. Mann further testified that the bioretention facility north of her property will allow periodic stormwater overflow onto her property and that she objects to this.

Mr. David Hartge testified that sensitive and significant wildlife live within the Patuxent watershed and to consider the impact of development on those creatures. Mr. Hartge, on cross-examination, testified that he was aware that 75% of the property would be placed in preservation with the proposed subdivision but that a portion of the property was already preserved because of environmental features and that he would like to see a significant reduction in the number of homes.

Mr. Charles Schmitt testified that the scenic and rural character of the road would be drastically changed by the development.

Ms. Brooke Farquhar testified that she opposed the plan, that it is inconsistent with environmental regulations, and it does not meet the design standards of Section 105.0.G of the Zoning Regulations. Ms. Farquhar testified that the property should be acquired by the County or State, or the Planning Board should defer action until the plan meets the environmental requirements of Section 105.0.G of the County Code.

Mr. Austin Taylor said he is concerned about cluster development decimating the forest and changing the landscape of the property.

Ms. Pamela Marrow testified that the new development will interrupt the natural habitat of wildlife and change the natural resources that exist today. Ms. Marrow, on cross-examination, acknowledged she understood that the subdivision was proposing 23, not 37, lots.

After careful evaluation of all testimony and information presented, the Planning Board made the following Findings of Facts and Conclusions of Law:

FINDINGS OF FACT

1. The proposed Preliminary Equivalent Sketch Plan, SP-15-015, is to create 23 single-family cluster lots and seven non-buildable preservation parcels on 99.07 acres of Tier III land, zoned RR-DEO (Rural Residential – Density Exchange Option).
2. This project is subject to the Howard County Subdivision and Land Development Regulations including the Forest Conservation Regulations, the Landscape Manual, the Zoning Regulations and Maps, the Design Manual and the Adequate Public Facilities Ordinance.

3. The subject property was properly posted and advertised in accordance with legal requirements for this public hearing.
4. The Planning Board has the authority to review the Preliminary Equivalent Sketch Plan in accordance with the pertinent criteria set forth in Senate Bill 236, codified in Section 5-104 of the Land Use Article of the Maryland Annotated Code
5. Howard County's Adequate Public Facilities Ordinance (APFO) requires certain government services to be reviewed. Therefore, Howard County's APFO fulfills the requirements of the first criterion of the Planning Board's review under Section 5-104(e)(1) of the Land Use Article as indicated in the Department of Planning and Zoning's Technical Staff Report. The review by the Planning Board of the cost of providing local governmental services to the residential subdivision criterion is inapplicable in Howard County for a proposed major subdivision of a Tier III designated property such as the subject property due to Howard County's APFO law. The Board agrees with and adopts the analysis of the Department of Planning and Zoning, with which the petitioner concurred, as to the inapplicability of the Planning Board's review of public facility costs based on the plain language of Section 5-104(e)(1) of the Land Use Article of the Maryland Annotated Code. Consequently, the Board did not consider any testimony with regard to the adequacy or cost of public facilities in relation to this subdivision.
6. The only applicable criterion for the Planning Board to consider in its review of this proposed major subdivision in Tier III is "the potential environmental issues or a natural resources inventory related to the proposed residential subdivision". The Petitioner presented a Natural Resource Inventory as to all streams, wetlands, wetland buffers, floodplains, steep slopes and forested area and trees on the property. This inventory shows that the plan does not propose any disturbance to the above referenced streams, wetlands, their buffers, floodplain, or steep slopes. These features are encompassed and protected within the non-buildable preservation parcels. The plan does propose removing 10.2 acres of forest and 16 specimen trees. This has been determined to be necessary in order to accommodate a public road cul-de-sac, utilities, stormwater management devices, houses, driveways and private septic systems. Based on this information, which the Board finds to be convincing and reliable, the Board agrees with and adopts the Department of Planning and Zoning's recommendation for approval.
7. The Board finds that the proposed subdivision will effectively protect, preserve, and minimize disturbance of the environmental resources by placing streams, wetlands, required buffers, floodplains and steep slopes within non-buildable preservation parcels. The development plan does not disturb environmentally sensitive areas, except by removing 16 of the 43 specimen trees and removing 10.2 acres of the 39.7 acre forested areas, which the Board is convinced is necessary for the reasonable development of the subject property.
8. The Board notes that several residents from the surrounding community testified on a number of matters which are not related to the very narrow review criterion given to the


Board for consideration under Section 5-104(e)(2) of the Land Use Article of the Maryland Annotated Code, including the development's effect on view sheds, the effect of the development on radon release, storm water runoff, nitrate pollution, protection of endangered species and scenic roads (Haviland Mill Road), the design of cluster subdivisions under Section 105.0.G.2 of the Howard County Zoning Regulations, and the possible purchase of the subject property for preservation. The Board notes that these concerns are either not currently regulated by County law or are issues which are addressed by State environmental law or laws administered by the Department of Planning and Zoning through the subdivision process. The Planning Board is without authority to address any of these concerns of the community as part of its narrow review under the single applicable criterion of Section 5-104(e)(2) of the Land Use Article of the Maryland Annotated Code..

CONCLUSIONS OF LAW

The proposed Preliminary Equivalent Sketch Plan, SP-15-015, satisfies all of the approval standards for a Tier III major subdivision, according to the pertinent portions of State Senate Bill 236, Section 5-104(e)(2) of the Land Use Article of the Maryland Annotated Code, for the reasons stated in the above findings of Fact and in the Department of Planning and Zoning Technical Staff Report, which the Board finds persuasive and which it adopts as its own in this decision..

For the foregoing reasons, the petition of Elm Street Development, to approve a Preliminary Equivalent Sketch Plan, SP-15-015, to subdivide 23 single-family cluster lots and seven non-buildable preservation parcels on 99.07 acres of Tier III land, zoned RR-DEO, is this 21st day of July, 2016 APPROVED by the Planning Board of Howard County, Maryland.

HOWARD COUNTY PLANNING BOARD



William Santos - Chairperson



Phil Engelke - Vice-Chairperson



Delphine Adler

ABSENT


Jacqueline Easley

ABSENT

Erica Roberts

PB Case No. 417

ATTEST:



Valdis Lazdins
Executive Secretary

REVIEWED FOR LEGAL SUFFICIENCY BY:

HOWARD COUNTY OFFICE OF LAW

Gary W. Kuc, County Solicitor



Paul Johnson, Deputy County Solicitor

LIST OF APPLICANT'S EXHIBITS:

None were introduced

LIST OF PROTESTANT'S EXHIBITS:

Protestant's Exhibit #1 –Written Testimony from Theresa Marrow

Protestant's Exhibit #2 –Written Testimony from Victor Bullen