

IN RE: DEVELOPMENT PLAN HEARING & PETITION FOR SPECIAL HEARING	*	BEFORE THE OFFICE OF
1 st Election District	*	ADMINISTRATIVE HEARINGS
1 st Council District	*	FOR
(6020 Foxhall Manor Drive)	*	
1st Material Amendment Whalen Healy Property fka Foxhall Manor	*	BALTIMORE COUNTY
	*	CASE NOS. 01-0349 AND
Terence and Michele Healy	*	2020-0219-A
<i>Owner/Applicant</i>	*	
Foxhall Manor LLC, c/o Gaylord Brooks Realty Co., Inc.	*	
	*	
Developer		

* * * * *

**ADMINISTRATIVE LAW JUDGE’S (“ALJ”)
COMBINED DEVELOPMENT PLAN AND ZONING OPINION & ORDER**

This matter comes before the Office of Administrative Hearings (“OAH”) for a public hearing on a development proposal submitted in accordance with Article 32, Title 4, of the Baltimore County Code (“BCC”). Terence and Michele Healy, *Owner/Applicant* and Foxhall Manor, LLC, c/o Gaylord Brooks Realty Co., Inc. (herein known as “Developer”) submitted for approval a 2-sheet redlined/greenlined Development Plan ("Plan") prepared by Michael J. Pieranunzi from Century Engineering, known as “1st Material Amendment Whalen Property FKA Foxhall Manor.”

The Developer proposes the following material amendment to the previously approved development plan: Lot A1 will be subdivided into five separate lots: A7 (the existing residence), A8, A9, A10 & A11. The property proposes five single-family detached dwellings on the original Lot A1 in Plat 5. The existing driveway will provide access to the lots via panhandle strips.

The Developer has also filed a Petition for Special Hearing under § 500.7 of the Baltimore County Zoning Regulations (“BCZR”) to determine whether or not the zoning commissioner should approve an amendment under BCZR §1B01.3.A.7.B to the Foxhall Farm partial development plan dated September 20, 1989.

The development and zoning cases were considered at a combined hearing as permitted by BCC § 32-4-230. Details of the proposed development are more fully depicted on the redlined 2-sheet Development Plan that was marked and accepted into evidence as Developer’s Exhibit 15. On February 18, 2021, in compliance with the regulations, the property was posted with the Notice of Hearing Officer’s Hearing (“HOH”) development hearing, and Notice of Zoning hearing. Due to the ongoing COVID-19 restrictions, the undersigned conducted a public virtual WebEx hearing in lieu of an in-person public hearing on March 11, 2021.

The Developer, Stephen Smith, of Foxhall Manor, LLC, c/o Gaylor Brooks Realty Co, Inc., attended the HOH in support of the Plan. Also in attendance was Michael Pieranunzi of Century Engineering, the firm that prepared the site plan. John Canoles, of Eco-Science also attended. Christopher Mudd, Esquire represented the Developer and was assisted by Katie Peach, Esquire, both of Venable LLP. There were no protestants in attendance.

AGENCY WITNESSES

Numerous representatives of the various Baltimore County agencies who reviewed the Plan also attended the virtual hearing, including the following individuals from the Department of Permits, Approvals and Inspections (“PAI”): Jerry Chen, the Project Manager, James Hermann and Michael Viscarra (Development Plans Review (“DPR”), and Department of Recreation and Parks (“R&P”) and Brad Knatz from Real Estate Compliance, and Gary Hucik, Office of Zoning Review (“OZR”) also testified. Also appearing on behalf of the County were Jeff Livingston from

the Department of Environmental Protection and Sustainability (“DEPS”), and Te-Sheng Huang from the Department of Planning (“DOP”).

Other than DEPS (which will be discussed below), each County agency representative indicated the Plan addressed all comments submitted by their agency, and they each recommended approval of the Plan. Specifically, Mr. Hermann identified County Exhibit 1 (Developer’s Exhibit 14) as the Schematic Landscape Plan that was approved on March 9, 2021. He also identified an approved Open Space fee in lieu waiver in the amount of \$14,040.00 as County Exhibit 2. On cross-examination Mr. Hermann acknowledged that his agency had requested that the Developer apply for the waiver as a condition of recommending approval of the plan. He explained that for developments of twenty lots or less it is the long standing agency policy to request a fee in lieu rather than the relatively small area of open space since this better serves the statutory goals. He acknowledged that the Plan does provide for more than the 4,000 sq. ft. of required open space and that the designated open space otherwise satisfies the regulations. He noted, however, that the Open Space Manual gives the agency the discretion to request the fee in lieu.

Gary Hucik testified next on behalf of the Office of Zoning Review and recommended approval of the plan. Te-Sheng Huang of DOP testified next. He identified the approved School Impact Analysis (“SIA”) as County Exhibit 3. He explained that none of the impacted schools is above the 115% state rated capacity. The SIA indicates that these 4 proposed homes are expected to add only one additional student to each school. He also identified Developer’s Exhibit 9 as an approved panhandle strip width waiver signed by the DOP Director on March 3, 2021. He further testified that the Pattern Book (Developer’s Exhibit 6) fully complies with BCZR § 260 performance standards, and with the Comprehensive Manual of Development Policies (“CMDP”). Finally, he testified that the Director of DOP recommends approval of the plan.

Jeff Livingston from DEPS was the final county witness. He explained that Libby Ericson had reviewed the Plan for the Environmental Impact Review section and recommends approval of the Plan, but that she requested that the Developer add a note regarding the approved specimen tree variance. He explained that the Ground Water Management section had no comment because the property is served by public water and sewer. Finally, he testified that Andrew Fish had reviewed the Developer's submissions for the Storm Water Management ("SWM") section. He explained that Mr. Fish had informed him that he had not received concept storm water management plans or calculations from the Developer and so could not recommend approval of the Plan on behalf of SWM until such plans and calculations had been submitted and approved. Other than that, Mr. Livingston stated that the plan addressed all DEPS comments.

DEVELOPER'S CASE

The Developer's primary witness was Michael Pieranunzi, the landscape architect. His *curriculum vitae* was admitted as Developer's Exhibit 2 and he was accepted as an expert in landscape architecture and in the Baltimore County development laws and zoning regulations. He explained the development proposal in detail, including modifications made in response to concerns raised at the Community Input Meeting ("CIM") and the Development Plan Conference ("DPC"). Specifically, Mr. Pieranunzi explained that the subject parcel is zoned DR 1 and DR 2, and is part of the Foxhall Farm Final Development Plan ("FDP"). This FDP was approved in two phases. Ninety three (93) single family detached homes were approved in 1989, and sixty one (61) single family attached homes were approved in 1990, for a total of one hundred fifty four (154) homes. Based on the total acreage the maximum density permitted is 167 units. A manor house, occupied by Mr. and Mrs. Healy, is currently the only structure on the subject parcel and will remain. The Plan proposes four additional single family detached homes on relatively large lots.

All of the homes will be accessed via a single panhandle driveway. Mr. Pieranunzi explained that the panhandle strip width waiver was requested in order to preserve the mature Bradford pear trees that line both sides of the existing driveway. He identified Developer's Exhibit 4 as a series of photos showing existing conditions, including this tree lined drive. One of the photos also shows the open space, which is located in front of the Healy residence. He explained that the panhandle drive design is the most environmentally sound because it will require the minimum amount of impervious surface. He stated that he believes the Developer has satisfied the hardship requirements of BCC § 32-4-409. He explained that the parcel is surrounded by existing homes and that without the panhandle design they would have to construct a full width road with a cul-de-sac turnaround at the end, which would require much more impervious surface. He identified Developer's Exhibit 5 as a simplified version of the plan showing how this 4.9 acre parcel will be subdivided, and how landscape buffers will be planted along each of the adjoining property lines. He explained that the panhandle design was used throughout the existing development and would therefore be compatible. He testified that he believed that the SWM concept plans and calculations had been submitted and stated that he did not know why Mr. Fish had not received them. He agreed to re-submit them. He explained that the plan is to provide a dry well for each of the four new homes. He next identified the Pattern Book as Developer's Exhibit 6. He further noted that per the final plan the Developer has withdrawn the variance request for a panhandle drive exceeding 500 feet in length. He further explained that the Special Hearing relief should be granted because the permissible density on the FDP is 167 units and only 154 were developed, and this proposed amendment adds only 4 units when they could be proposing 9 on this acreage. He noted that the density table on the FDP provides record notice that there are unused density units. He testified that the proposed amendment meets all the factors of BCZR § 502.1. He explained that

no variances are required, that panhandle driveways are compatible with the existing development, that only 50 total new vehicle trips will be generated, and that each proposed home will have its own SWM system. In sum, he testified that in his expert opinion the Plan is within the spirit and intent of the BCZR and will not harm the public health, safety, or welfare.

The Developer, Steve Smith, testified next. He is the President of Gaylord Brooks Realty Co. Based on his many years of experience as a developer, he was also accepted as an expert in land planning and development and in the Baltimore County development law and zoning regulations. He explained that his firm has partnered with the Healys and that they are both intent on building quality homes that will be compatible with the existing development, including the Healys' own home. He too pointed out that they could have proposed as many as nine homes on this 4.9 acre parcel but were only proposing four. He identified Developer's Exhibit 16 as Restrictive Covenants from 1988, when the first phase of the development was approved. Pursuant to these Covenants the parcel in question could not be sub-divided for 25 years, thereby expiring in 2013. He explained that they submitted this exhibit in order to emphasize that the adjoining property owners have been on notice that since 2013 this parcel has had development potential. He also opined that the proposed amendment of the FDP meets all requirements of the BCC and BCZR.

John Canoles was Developer's last witness. His *curriculum vitae* was admitted as Developer's Exhibit 11. He was accepted as an expert in wildlife ecology, including forest and wetland identification and delineation. He is certified by the Department of Natural Resources to provide Forest Conservation Act services and is also an expert in the Baltimore County development law and regulations. He identified, as Developer's Exhibit 12, a Forest Conservation Variance Application that he prepared and submitted. He explained that there are no wetlands in

the vicinity. He testified that he identified eight specimen trees on the parcel and that the plan calls for removal of four of them. Looking specifically at BCC § 33-6-116, he explained that subsection (d)(1) is not applicable and that the variance request satisfies both (d)(2) and (3) because the trees to be removed are non-native, and their removal will not alter the essential character of the existing neighborhood. He also explained that the county did not require a mitigation fee because the trees to be removed are non-native and in poor condition. Finally, he identified Developer's Exhibit 13 as the approved Forest Conservation Variance signed by the Director of DEPS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The BCC provides that the "Hearing Officer *shall* grant approval of a development plan that complies with these development regulations and applicable policies, rules and regulations." BCC § 32-4-229 (emphasis added). In *People's Counsel v. Elm Street Development, Inc.*, 172 Md. App. 690 (2007), the Court of Special Appeals held that if the county agencies recommend approval of a development plan, it is "then up to [protestants] to provide evidence rebutting the Director's recommendations." *Id.* at 703. It should also be noted that in Baltimore County "the development process is indeed an ongoing process, and the hearing officer's affirmation of the plan is just the first step." *Monkton Preservation Association, et al. v. Gaylord Brooks Realty Corp.*, 107 Md. App. 573, 585 (1996). Indeed, the County agencies will continue to review the Developer's evolving plans and construction activities through every phase of the development process to insure compliance with all County laws and regulations.

In the instant case the testimony of the County agency witnesses and the Developer's experts was persuasive and unrebutted. After considering the testimony and evidence presented by the Developer, the exhibits offered at the hearing, and confirmation from the various County

agencies that the Plan satisfies those agencies' requirements, I find that the Developer has satisfied its burden of proof and, therefore, is entitled to approval of the Plan. I do, however, find that the legislative intent of the Open Space regulations will be best served by the payment of the fee in lieu. I further find that the Special Hearing relief should also be granted because it has been proven to be within the spirit and intent of the BCZR and, in my view, will not harm the public health, safety, or welfare. Finally, I will adopt the Director of DEPS' approval of the Forest Conservation Variance.

THEREFORE, IT IS ORDERED by this Administrative Law Judge/Hearing Officer for Baltimore County, this 26th day of **March 2021**, that the "1st Material Amendment Whalen Property FKA Foxhall Manor" development plan, marked and accepted into evidence as Developer's Exhibit 15, be and hereby is **APPROVED**.

IT IS FURTHER ORDERED that the Petition for Special Hearing pursuant to § 500.7 of the Baltimore County Zoning Regulations ("BCZR") to determine whether or not the zoning commissioner should approve an amendment under BCZR § 1B01.3.A.7.B to the Foxhall Farm partial development plan dated September 20, 1989 be and is hereby **GRANTED**.

IT IS FURTHER ORDERED that the Forest Conservation Variance recommended by DPS, permitting removal of four specimen trees upon satisfaction of certain conditions, be and is hereby **GRANTED**.

IT IS FURTHER ORDERED that the request for waiver of the panhandle length, being withdrawn at the hearing, is hereby **MOOT**.

The relief above is granted herein shall be subject to the following:

1. Prior to submitting any additional plans (Final Development Plans, Record Plats, Grading and Stormwater Management plans, or building permit applications) to the County for review and approval, the Developer shall submit and obtain approval of a Concept Stormwater Management Plan.

2. Developer shall pay a Local Open Space waiver fee in the amount of \$14,040.00.
3. The approval of the panhandle strip width waiver shall be affixed to the Plan.

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

Signed _____
PAUL M. MAYHEW
Managing Administrative Law Judge
for Baltimore County

PMM:dlw