

BOARD OF APPEALS CASE NO. 4197	*	BEFORE THE
APPLICANT: Lee National Corp.	*	ZONING HEARING EXAMINER
REQUEST: Interpretation and/or variance to permit new develop- ment in the Critical Area Buffer; end of Foster Knoll Drive, Joppa	*	OF HARFORD COUNTY
HEARING DATE: October 30, 1991	*	Hearing Advertised
	*	Aegis: 9/11/91 & 9/18/91
	*	Record: 9/11/91 & 9/18/91
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ZONING HEARING EXAMINER'S DECISION

The Applicant is Lee National Corporation. The Applicant is requesting an Interpretation of the Department of Planning and Zoning's determination of the Critical Area Buffer or, in the alternative, a variance to allow new development to take place in the Critical Area.

The subject parcel is located in Joppatowne, south of Joppa Farm Road, at the end of Haverhill Road, Brittany Drive, Chimney Oak Drive, and Foster Knoll Drive, in the First Election District. The parcel is identified as Parcel No. 195, in Grid 3-B, on Tax Map 69. The parcel contains 29.552 acres, more or less, all of which is zoned R3. Approximately 19.8 acres of the parcel is located within the Chesapeake Critical Area, and the parcel is classified as an Intensely Developed Area (IDA).

Mr. Edwin J. Garling appeared and testified that he is a land use analysis and project manager for Lee National Corporation. Mr. Garling testified that the subject property is bound by existing residential development to the north, property owned by Old Trails Partnership to the southwest, and the Penn Central Railroad tracks to the southeast. The property is undeveloped and covered by brush and secondary growth, with water, sewer, drainage lines, and roads from adjacent residential development intersecting the site.

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Mr. Garling said the Applicant has owned the subject property since 1982, when it was conveyed to the Applicant from other corporate affiliates of the Applicant who owned the property since the early 1970's. The witness said the subject property was purchased for residential development initially in the early 1960's. Mr. Garling also said that the subject property has not been developed because a sewer moratorium has been in place since 1976. Mr. Garling explained that the subject property was always intended to be developed for residential use and that the original development plan for the site was approved in 1961 and revised plans were approved in 1965 and again in 1972. The latest preliminary plan approved for the site was for 185 lots in November, 1976.

Mr. Garling described the proposed development using a site plan, labeled as Applicant's Exhibit No. 17. He indicated that approximately 108 lots, each 5,000 square feet, with zero lot line houses could be created. He said all lots would be clustered away from slopes, and he indicated all open spaces would be designated as common areas, which could be managed by the homeowners' association. Mr. Garling also said passive open space would be left in its natural state and isolated large trees would be retained wherever possible. Mr. Garling noted that the site plan was conceptual in nature and it may be necessary to make minor modifications to the plan, but he testified no additional critical area buffer would be disturbed if the plan is modified.

Mr. Garling said that the Applicant would suffer practical difficulty and unreasonable hardship if the variance is denied because the four stub roads could not be connected to complete the traffic circulation plan and a large number of the proposed lots could not be developed.

The next witness to testify was Craig Ward, who qualified as an expert witness in the field of civil engineering. Mr. Ward testified that he prepared the site plan for the proposed development, which would be served by public water and sewer, and that the project was designed around topographic conditions contained on the site. Mr. Ward concluded his testimony by saying that the proposed site plan was consistent with generally accepted engineering practices and principles.

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The next witness to testify on behalf of the Applicant was Torrence M. Pierce, who qualified as an expert in the field of engineering and was allowed to render opinions regarding sediment control and storm water management. Mr. Pierce said that he has visited the site, was familiar with the Applicant's request, and located the proposed storm water management facilities as shown on Applicant's Exhibit No. 18. The witness said that the storm water management facilities will manage all storm water run-off created by the project, as well as run-off from existing developments to the north of the site. He said the storm water management facilities will be retention basins which will collect the run-off and then discharge it through an out fall or pipe to an existing swale. Mr. Pierce said that, in his opinion, the proposed storm water management facility meets or exceeds all applicable requirements and will enable the Applicant to meet the required 10% pollutant loading reduction for development of property classified IDA. Mr. Pierce said that he has reviewed the Staff Report of the Department of Planning and Zoning, as well as the letter of October 22, 1991 from Michael Shockley of the Soil Conservation District. Mr. Pierce said that he met with Mr. Shockley and, according to Mr. Shockley, the items listed in his letter were not recommendations but were rather comments concerning the Applicant's request. Mr. Pierce said that assuming the comments were recommended conditions, he felt that Comments 1, 3, 4, 5, 6 and 7 in the letter of October 22, 1991 were appropriate conditions of approval. He explained that Comment 2, which recommended that water quality treatment for the first one-half inch of run-off be provided for the entire development rather than just the newly created impervious surface was ambiguous. Mr. Pierce said that because the proposed storm water management facility would treat all run-off water from the entire development, including that cause by adjoining, existing developments to the north, Comment 2 was adequately addressed.

Mr. Pierce went on to say that Comment 8 was generally acceptable. He agreed that the storm drain out fall from the existing off-site development should be tied into the storm drain system for the subject property and conveyed to the proposed storm water management facility.

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He said he was not sure what Mr. Shockley meant by "consideration should be given to requiring, at a minimum, quantitative treatment of storm water run-off conveyed to the site by the existing off site developments. He noted that all of the run-off that is created from the stubbed off roads entering into the property would be controlled on-site and treated by the storm water management facility as proposed. Therefore, he felt this comment was also addressed.

In addition, Mr. Pierce said that he had reviewed the Staff Report and the five conditions of approval recommended on page 9 of the Staff Report. Mr. Pierce said that Conditions 1, 3 and 5 were simply recitations of existing State law with which the Applicant was required to comply. He said Condition 2 was apparently taken from Mr. Shockley's letter of October 22, 1991, and Mr. Pierce said he already addressed that condition. Mr. Pierce said that Condition 4, which called for the phasing plan for construction to be submitted at the time of preliminary plan review and approval by the Department of Planning and Zoning, which includes staging of site grading and unit construction, was appropriate. In addition, Mr. Pierce said that phased land clearing and no mass grading of the entire site were additional sediment control measures which should be implemented. He stated that the project manager should be made aware of the sediment control requirements to be met on site and that an independent project engineer should monitor compliance with such requirements on an as needed basis.

Mr. Pierce also testified that he designed the proposed storm water management facilities. He said that, in his opinion, the proposed location for these facilities was the best for the site and would maintain all storm water run-off created both on and off site and, accordingly, they should not be disturbed since doing so would reduce their effectiveness.

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Mr. Pierce went on to testify that he also selected the pump station location as shown on Applicant's Exhibit No. 17. He said that, from an engineering standpoint, it is the best location on the site and would enable the Applicant to comply with the required 200 foot setback from residential lots or property lines. He said that if the pumping station were moved as proposed by the Staff Report, it would not function as well, as a gravity feed station, because as a gravity feed station, it needs a lower elevation to function effectively.

Mr. Pierce stated that, based on the sediment control and storm water management controls to be implemented, in his opinion, no sensitive environments, including streams, wetlands or other aquatic environments would be disturbed or adversely affected by erosion or storm water run-off either during or after construction. He also stated that for the above mentioned reasons, adjacent properties would not be adversely affected by storm water run-off or erosion. In fact, he pointed out that the development as proposed would, as Mr. Shockley indicated, address an existing erosion and storm water management problem caused in part by the existing subdivisions to the north.

The final witness to testify on behalf of the Applicant was Robert Jones, who was accepted as an expert in the field of environmental science. Mr. Jones testified that he prepared a pre and post development environmental assessment for the site. He said he was familiar with the proposed development of the subject parcel, the nature of the Applicant's request, and had personally visited the subject property.

Using the Buffer Plan (Applicant's Exhibit No. 19), Mr. Jones indicated the boundaries of tidal waters (in blue), the subject property (in black), the critical area buffer (in red), the expanded buffer, as recommended by the Department of Planning and Zoning (in light green), and the buffer proposed by the Applicant (in dark green).

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Mr. Jones briefly described the proposed development. He noted that the allowable density for the subject property was 5 to 10 dwelling units per acre. However, the Applicant's proposed density was 3.5 dwelling units per acre. He said that, pursuant to the Code, 8 acres of passive open space would be provided, which is 3.7 acres more than the Code requires. He also testified that all mature, valuable trees located on the site would be protected, but that some trees technically classified as forest would be removed. These trees consist of secondary growth that has occurred on the subject property after it was completely cleared in 1976. Mr. Jones described highly erodible soil as those which are prone to erosion and that a "K" value is a scientific value assigned to soil which measures their erodibility. Mr. Jones testified that, with the exception of the critical area buffer, no habitat protection areas are located on the site or proposed for disturbance. An area of the Parkers Pipewort, an endangered plant species, was identified off-site. Recommendations for an appropriate protective zone which is not regulated as a habitat protection area was obtained from the Maryland Forest Park and Wildlife Service. A small portion of this area does fall on the subject property. However, this area is not proposed for disturbance; therefore, no impact to that species will occur.

Mr. Jones stated he believed that the plain language of the Code gives the Department of Planning and Zoning the power to decide whether disturbance of critical areas would impact aquatic environments on a case-by-case basis. Here, as a result of the environmental controls to be implemented as described by Mr. Pierce and Mr. Ward, he said it was clear that no such impact would result if development took place as proposed. In the alternative, Mr. Jones said that the testimony of Mr. Pierce and Mr. Ward clearly shows that the proper environmental controls would ensure that no adverse impact would result to aquatic environments if the area was disturbed, and such a variance was justified and should be granted.

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Mr. Jones went on to say that, in his opinion, the development as proposed, including the variance, would not impair the purpose of the critical area overlay district since it was shown conclusively that no adverse impact would result to aquatic environments if disturbance was allowed as proposed.

Ms. Arden Holdredge, Chief of Current Planning, testified on behalf of the Department of Planning and Zoning at the conclusion of the Applicant's case. She said that even though the County Council classified the property as an intensely developed area (IDA) in 1988, the Critical Area Commission had recommended otherwise. She said that she recognized that the plan presented by the Applicant was conceptual in nature which made evaluating the plan difficult. She said that the Department simply did not feel that the extent of the variance requested had been justified, and recommended that the Hearing Examiner uphold the Department's interpretation and recommendations in the Staff Report.

No protestants appeared in opposition to the request.

CONCLUSION:

There are two issues in this case: (1) Does the Department of Planning and Zoning have the authority to expand the minimum Critical Area Buffer? and, (2) If so, has the Applicant proven sufficient facts to obtain a variance to use a portion of the expanded Critical Area Buffer.

Dealing with the first issue pertaining to expansion of the Critical Area Buffer, Section 267-41.1(G)(2)(a) is controlling and states:

"Critical Area Buffer. An area a minimum one hundred (100) feet in width as measured from the mean high water line of tidal waters, tidal wetlands and tributary streams shall be established and maintained in a natural condition. This buffer area is to be expanded beyond one hundred (100) feet to include contiguous sensitive areas such as steep slopes, hydric soils and highly erodible soils whose developments or disturbance may impact streams, wetlands or other aquatic environments. In the case of contiguous slopes of fifteen percent (15%) or greater, the buffer is to be expanded for (4) feet for every one percent (1%) of slope or to the top of the slope, whichever is greater in extent."

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It is the opinion of the Hearing Examiner that Section 267-41.1(G)(2)(a) of the Code requires the Department to expand the Critical Area Buffer within the limits set forth in that Section. The Department, based on that Section, has indicated (on Attachment No. 7 to the Staff Report), the Critical Area Buffer. It is further the opinion of the Hearing Examiner, based upon the information available to the Department at the time of preparation of the Staff Report and Attachment No. 7, that the Department of Planning and Zoning made the correct interpretation of the expanded Critical Areas Buffer.

Having decided that the Department of Planning and Zoning's interpretation of the Critical Areas Buffer is correct, it must now be determined whether the Applicant has produced sufficient facts to be granted a variance to disturb the expanded Critical Areas Buffer. The Applicant is requesting a variance for 7.69 acres on the total parcel of 29.55 acres. In order to be granted a variance, the Applicant must comply with Section 267-11 of the Harford County Code, pertaining to variances, and Section 267-41.1(H) of the Code pertaining to variances in the Critical Area.

Section 267-41.1(H) of the Code sets forth a 6 part test for variances in the Critical Area. Those areas are:

- (1) That a literal interpretation of the provisions of this section will deprive the applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the critical area.

The Applicant's response to that Section is the literal enforcement of the law would deprive the Applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the Critical Area. The subject property contains soil and slopes which prevent the proposed development, while other similar properties do not. Therefore, unless the requested variance is granted, the right to develop property would be given to the owners of other properties but not to the Applicant.

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- (2) That the granting of a variance will not confer upon the applicant any special privilege that would be denied by this section to other lands or structures within the critical area.

The Applicant, in response to that Section, argues that granting the variance would not confer any special privilege on the Applicant that would not be available to other lands or structures within the Critical Area. Anyone should be allowed to develop their property if they can show that, through the implementation of environmental controls, no adverse impact on aquatic environments would result. Every land owner, assuming he could impose the same environmental controls as the Applicant, can develop his property as the Applicant proposes. Thus, no privilege would be conferred by granting the variance.

- (3) That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or non-conforming, on any neighboring property.

In response to that Section, the Applicant argues it is obvious that the variance request was not based on conditions or circumstances which were the result of actions by the Applicant or from any condition relating to land or building use, and that the variance is required due to specific conditions of the subject parcel.

- (4) That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the critical area, and the granting of the variance will be in harmony with the purpose and intent of this section.

The Applicant argues that, based on the environmental control measures being implemented, there will be no adverse impact on water quality, fish, wildlife or plant habitat within the Critical Area. The variance will be in harmony with the purpose and intent of the law, since no environmental damage whatsoever would result from granting the requested variance.

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- (5) That all identified habitat protection areas on or adjacent to the site have been protected by the proposed development and implementation of either on-site or off-site programs.

The Applicant, in response to that Section, has introduced evidence that all identified habitat protection areas will be protected except, of course, the expanded Critical Area Buffer located on the site to be disturbed, which is the subject of the requested variance.

- (6) That the growth allocation for the county will not be exceeded by the granting of the variance.

The Applicant testified that the growth allocation for the County is not affected by this request.

The Applicant must also comply with the requirements of Section 267-11 of the Zoning Code, which permits variances, provided that the Board finds:

- (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Code would result in practical difficulty or unreasonable hardship.
- (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Code or the public interest.

In response to that Section, the Applicant argues first that the subject property has an irregular shape and contains highly erodible soil and steep slopes. It does not lie adjacent to tidal waters, but is separated from them by an undeveloped parcel which varies in width from 130 to 700 feet. It is the last undeveloped section in Joppatowne and has four stub roads leading into it with an adjacent subdivision causing run-off and sediment control problems. It has also been planned for residential development and was totally cleared in 1976. The County Council intended that it be developed when it was classified an Intensely Developed Area (IDA) in 1988, but due to a sewer moratorium, the parcel has not been developed and is, therefore, clearly unique.

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Second, Mr. Edwin J. Garling, a land use analysis and project manager for the Applicant, testified the property is unique and has special topographic conditions and the literal enforcement of the Code would result in practical difficulty or unreasonable hardship in that it would unreasonably limit the use of the parcel and would prevent the Applicant from completing the traffic circulation pattern by connecting the four stub roads which end on the subject property.

Third, because of the environmental controls agreed to by the Applicant, the variance would not be detrimental to adjacent properties and would not materially impair the public interest or the purpose of the Code.

It is the recommendation of the Hearing Examiner that the requested variance to grant development activities in the Critical Area Buffer, as shown on Applicant's Exhibit No. 19, be granted, subject to the following conditions:

1. Efforts shall be made by the Applicant to retain as much forested area as possible. Retained forested areas shall be in blocks, particularly in sensitive areas adjacent to drainage ways, wetlands, flood plains, steep slopes, and on soils mapped LyD and Av.
2. All storm water run-off from the entire development and run-off from the existing development to the north of the site shall be treated by storm water management facilities located on the site.
3. Infiltration practices shall be used to the maximum extent possible for both qualitative and quantitative management of storm water run-off.
4. Storm water management structures shall be used for sediment control during site development.

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5. The Applicant shall maintain perimeter sediment controls during mass grading, road and utility construction, and building phases.
6. The Applicant shall phase construction activities and related erosion sediment controls.
7. Sediment retention structures shall be designed to utilize 3,600 cubic feet of storage per acre of drainage area.
8. The phasing plan for construction shall be submitted at the time for preliminary plan review and approval by the Department of Planning and Zoning. The phasing plan shall include the staging of site grading and unit construction. Mass grading of the entire site shall not be permitted.
9. Storm water management structures shall be designed to provide discharge to be conveyed in a non-erosive manner to a stable outlet.
10. Storm drain outfalls from the existing off-site development shall be tied into the storm drain system for the subject property and conveyed to the proposed storm water management facilities.
11. Lot grading and on-site drainage shall minimize water flow across lots.
12. The project manager for construction of the proposed development shall be instructed as to applicable sediment control and storm water management requirements by an independent project engineer. The project engineer shall monitor compliance with such requirements on an as needed basis.

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13. The Applicant shall install sediment controls around any soil stock piles.
14. All soil disturbances shall be stabilized within five (5) working days.

Date DECEMBER 3, 1991



L. A. Hinderhofer
Zoning Hearing Examiner