

**APPLICANTS:**  
**Keith & Jaclyn Smith**

**REQUEST: Variance to permit a deck within  
the 100 foot conservation setback in the  
Agricultural District**

**HEARING DATE: April 29, 2009**

**BEFORE THE  
ZONING HEARING EXAMINER  
HARFORD COUNTY  
BOARD OF APPEALS**

**Case No. 5686**

### **ZONING HEARING EXAMINER'S DECISION**

**APPLICANTS:** Keith & Jaclyn Smith

**LOCATION:** 2566 Flora Meadows Drive, Forest Hill  
Tax Map: 33 / Grid: 3D / Parcel: 434 / Lot: 26  
Third (3<sup>rd</sup>) Election District

**ZONING:** AG / Agricultural District

**REQUEST:** Variance, pursuant to Section 267-46.1B(5)(b) of the 1982 Code, to allow a deck to encroach the minimum 100 foot conservation setback (94 foot setback proposed), in the Agricultural District.

#### **TESTIMONY AND EVIDENCE OF RECORD:**

The subject property consists of 1.98 acres, improved by a two-story Colonial dwelling with a detached, two-car garage. The home is part of the Colvard Manor subdivision, a fairly new subdivision outside of Forest Hill, containing relatively large single-family homes.

The Applicants wish to construct a 22 foot by 22 foot deck to the rear of their home. A deck of that size, however, will encroach into the 100 foot conservation setback ~~area~~ by approximately 6 feet. The Applicants, accordingly, request a variance for such an encroachment.

Keith Smith explained that the Applicants want a deck to meet the needs of his growing family. Mr. Smith suggests that his situation is unique for the following reasons: his lot dimensions are not typical or regular; the lot is six-sided; the front portion of his lot is narrow and not suitable for building, whereas the rear portion is more suitable; the Colonial Pipeline also traverses the front half portion of the lot and forced the builder, in Mr. Smith's opinion, to place the house further toward the rear property line than would otherwise be required. The house also sits farther back from Flora Meadows Drive than other homes along Flora Meadows Drive. The septic area for the house was built to the east side of the property rather than in a more traditionally centered area that would conform with the location of the septic area for other homes in the neighborhood. This limits the size of any future additions to the home. The lot topography slopes from the rear of the lot toward the front of the property.

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Because of the topography, shape, septic area and pipeline right-of-way, the builder, Mr. Smith believes, constructed the home on the only suitable portion of the property, which was 116 feet from the rear property line. If approved, the deck would encroach into the required setback 6 feet on its southwest corner and 5 feet on its southeast corner. The proposed area is now maintained as lawn.

Furthermore, Mr. Smith believes that, as the conservation setback requirement has been changed under the newly enacted Development Regulations, a 100 foot setback is now thought to be no longer necessary. Mr. Smith also asserts that the deck needs to be as deep as suggested (22 feet) so that he and his wife will be able to view around the corner of his house in order to see their children at play. Otherwise, the children would be out of view while playing in that area. The side of the house in question is the side which fronts on MD Route 24.

All neighbors, according to Mr. Smith, have indicated their approval of the requested variance. The Colvard Manor Homeowners' Association does not oppose the request. Mr. Smith believes there will be no adverse impact to the neighborhood if the requested variance is granted.

Next for the Harford County Department of Planning and Zoning testified Anthony McClune, Deputy Director. Mr. McClune and the Department are of the opinion that the requested variance, if granted, will not adversely affect adjoining properties. However, the Department cannot find anything unique about the property. All homes on the south side of Flora Drive are situated similarly to that of the Applicants because of the existence of the Colonial Pipeline, which runs through their front yards, and the existence of septic reserve areas, which are also located in the front yards. The location of the septic reserve area is dictated by topography. Because of the "cluster" design of the subdivision, almost all of the lots in Colvard Manor are affected by the conservation setback.

Mr. McClune agreed that the Development Regulations have now been changed to eliminate the 100 foot conservation setback; however, Mr. McClune explained that the new Code imposes other requirements which were not imposed in the 1982 Code. Accordingly, while the specifics of the requirements have changed, the imposition of conservation restrictions has not.

Mr. McClune also explained that Colvard Manor was originally developed with 100 foot conservation setbacks in order to allow for the clustering of lots and reduced lot sizes. The developer, accordingly, received certain considerations in return for maintaining the 100 foot conservation setback area.

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The Staff Report notes:

“All of the lots within this subdivision share similar constraints due to the reduced lot sizes, location of the septic reserve areas and the conservation setback. The limited development area of these lots was a result of the developer’s decision to utilize the CDS standards and should not be used as a basis for a variance. It is the Department’s opinion that a variance would set an unnecessary precedent within this subdivision. Furthermore, the Applicants can construct a 16 foot deep by 22 foot wide deck without the need for a variance.”

Mr. McClune further testified that the 1982 Development Regulations would allow room for a 10 foot deep deck only, whereas the present Development Regulations would allow a 14 foot deck without a variance. Mr. McClune believes that as the Applicants can construct a 14 foot wide deck without a variance, no hardship or difficulty would be experienced if the variance were denied.

Mr. McClune also believes the fact that the lot is not rectangular and is not regular is not a unique factor. The Applicants are not in a situation where only a deck of unusually small dimensions can be built. A deck 14 feet deep can be built.

Upon cross-examination, Mr. McClune stated that of the approximately 16 homes in Flora Meadows, 12 to 13 are affected by the conservation setback requirement. Mr. McClune also stated that there have been no other variances granted in the Colvard Manor subdivision.

No testimony or evidence was given in opposition.

### **APPLICABLE LAW:**

Section 267-11 of the Harford County Code allows the granting of a variance to the requirements of the Code:

*“Variances.*

A. *Except as provided in Section 267-63.H (Chesapeake Bay Critical Area Overlay District, variances), variances from the provisions or requirements of this Part 1 may be granted if the Board finds that:*

(1) *By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Part 1 would result in practical difficulty or unreasonable hardship.*

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(2) *The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.*

B. *In authorizing a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.*

C. *If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval.”*

Section 267-46.1B(5)(a) states:

*“A minimum one hundred (100) foot setback shall be established along existing public roads (measures from the edge of the right-of-way) and along the adjacent property boundaries, and waterways. This setback may be reduced to fifty (50) feet from the edge of the right-of-way and along adjacent property boundary if the area within the fifty (50) feet contains existing forest and that forest is retained and designated as an undisturbed forest buffer area and, if necessary, supplemental landscaping is provided to adequately screen the proposed development from the public road. Lots may be located within the fifty (50) foot setback, provided that no structures are located within this area.”*

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

The Applicants live in a relatively new two-story Colonial home with an attached two-car garage on a less than 2 acre lot in Colvard Manor. This subdivision is located in an agricultural area which has been slowly been converted into large lot residential development. However, this Rural Residential area retains much of its historic, agricultural flavor.

The original developer of Colvard Manor took advantage of the conservation development standards in the 1982 Code, which would allow clustering of homes and a relaxation of certain other development standards. In return, the developer agreed to observe a 100 foot conservation setback along rear lot lines. This conservation setback encumbers many lots in Colvard Manor, particularly those on the south side of Flora Meadows Drive, including the Applicants' property.

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Further restricting the available building area on those lots is the location of the Colonial Pipeline along Colvard Manor and in the front yard of many of the homes. Exacerbating the situation is the topography of properties which require the septic reserve areas to be generally located within the front yard of those lots. All these characteristics, when combined, act to reduce the potential building footprint of homes to be built on the lots, and acted to push that footprint to the rear of the lots. Many of the homes, particularly those south of Flora Meadows Drive, are similarly impacted.

Assuming, for the sake of argument, that the subject property is ‘unique’, for the reasons suggested by the Applicant, Section 267-11, of the Harford County Development Regulations, requires a showing that this uniqueness “results in practical difficulty or unreasonable hardship”. The Applicants would have the Board find that the unreasonable hardship or difficulty that would result if the variance were denied is a deck which would be limited to 16 feet in depth instead of the 22 feet requested by the Applicants. However, there is no suggestion made by the Applicants that a 16 foot deep deck is somehow different from others in the neighborhood or in the County generally, or that a 16 foot deck cannot be built, or that there is some other circumstance which creates a potential problem with having a 16 foot deep deck instead of a deck 22 feet deep. Being required to live with a 16 foot deep deck certainly cannot be found to constitute a hardship or a practical difficulty and, accordingly, the variance standard is not met by the Applicants.

The one argument made by the Applicant in support of a finding of practical difficulty (assuming uniqueness is shown) is that the Applicant would not be able to see his children at play if the children were playing in the side yard, around the corner of the house from the deck. The Applicant states that a 16 foot wide deck does not give him the field of vision which he wants to ensure the children’s safety, whereas a 22 foot wide deck does.

However, in fairness to the Applicant, it must be presumed that the Applicant would do all in his power to insure the safety of his children regardless of the size of the deck or even if there were a deck on his property. A 22 foot deep deck is no substitute for vigilance when it comes to the supervision of one’s children and, no doubt, the Applicant did not mean to suggest otherwise. This argument by the Applicants point out their inability to make a coherent and substantive showing that difficulty or hardship would result if they were not allowed to encroach 6 feet into the conservation district setback.

The position of the Department of Planning and Zoning is also persuasive. The Department is reluctant to recommend approval of a variance request that would have the effect of setting a precedent of enabling a series of additional variances for the same relief. Granting one variance in the situation as suggested by the Applicant would, no doubt, allow other property owners in Colvard Manor to request the same variance. To deny them after having already approved one would be unfair to the subsequent Applicants. Essentially, a series of variances would then result which would tend to impact, if not eviscerate, the purpose and effectiveness of the 100 foot conservation district setback.

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**CONCLUSION:**

Accordingly, it is recommended that the requested variance be denied.

Date: June 3, 2009

ROBERT F. KAHOE, JR.  
Zoning Hearing Examiner

**Any appeal of this decision must be received by 5:00 p.m. on JULY 1, 2009.**