

IN THE MATTER OF : BEFORE THE
THE VILLAS AT : HOWARD COUNTY
CATTAIL CREEK, LLC : BOARD OF APPEALS
Petitioner : HEARING EXAMINER
: BA Case No. 02-31C

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DECISION AND ORDER

On August 19, 2002, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, in accordance with the Hearing Examiner Rules of Procedure, heard the petition of the Villas at Cattail Creek, LLC, Petitioner, for a conditional use for age-restricted adult housing in an RC-DEO (Rural Conservation – Density Exchange Option) Zoning District. filed pursuant to Section 131.N.1 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

David A. Carney, Esquire, represented the Petitioner. Donald R. Reuwer, Jr., and Robert Sheesley testified on behalf of the Petitioner. Dr. Barbara Sellner-Webb, Susan Gray, and Donald Anderson testified in opposition to the petition.

Preliminary Matters

As preliminary matters, Ms. Gray made two motions to dismiss the case. First, she moved to dismiss on the basis that the Hearing Examiner lacks jurisdiction to hear the case because the same issues are currently before the Circuit Court for Howard County. Secondly, she moved to dismiss because the Hearing Examiner’s Rules of Procedure were not properly “published.”

With regard to the first motion, Ms. Gray refers to a pending appeal of Board of Appeals

Case No. 97-54E, which involved a request by this Petitioner to construct a 116-unit elderly housing development on a 58 acre parcel, of which the subject property is a part. The application was filed under the former special exception designation for housing for the elderly, which no longer exists. The issues in that case concern the location of a common dining facility for the development - a requirement that does not exist under the age-restricted adult housing conditional use category.

In this case, the Petitioner is requesting approval of a different use, age-restricted adult housing, on a portion of the original site. The Petitioner is requesting approval of 38 single-family detached dwellings on 38.5 acres, rather than 116 units on 58 acres. The current proposal does not (and need not) include a common dining facility. These facts make it a significantly different proposal, with different issues, such that I may (and must) exercise jurisdiction to hear the case. The motion is therefore denied.

With regard to the second motion, the Howard County Council adopted the Hearing Examiner Rules of Procedure on March 4, 2002, after a public hearing on February 19, 2002, pursuant to Council Resolution No. 9-2002. Adoption by legislative act is more than adequate publication. Ms. Gray alleges that she was unable to obtain a copy of the Rules from the Department of Planning and Zoning. Even assuming her allegation to be true, the inability of one person on one occasion to obtain a copy does not mean that the Rules are not adequately published. Ms. Gray concedes that she was able to obtain a copy of the Rules from the Board of Appeals' office. Consequently, the motion is denied.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, I find the following facts:

1. The subject property is located in the 4th Election District on the west side of Roxbury

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Mills Road (Maryland Route 97), south of Rolling Hills Drive, and about 1,000 feet north of Cattail Creek Drive. It is a 38.5-acre portion of Parcel 229, as identified on Tax Map 21, Block 3 (the "Property").

2. The Property is an irregularly shaped lot that extends approximately 2,400 feet west of Route 97 and is about 960 feet wide. The portion of the Property contiguous to Route 97 is only 190 feet wide and is wooded. The remainder of the Property is primarily open fields with scattered trees. The topography of the site is rolling with the highest point in the northeast corner near Route 97.

Currently, access to the Property is gained via a dirt road at the end of the existing Country Hills Drive cul-de-sac.

3. All adjacent properties are zoned RC-DEO. The site is surrounded to a large extent by the Cattail Creek Country Club, which was approved as a golf course use in BA Case No. 90-02. Portions of the golf course, the clubhouse, tennis courts, and a swimming pool are located to the south of the Property. Directly west of the Property is the 19.5-acre site of a proposed 25-unit elderly housing community approved by the Board of Appeals in Case No. 00-10E. Non-buildable preservation parcels are located to the west and north of the site. The Cattail Ridge subdivision of 32 single-family detached homes on one-acre lots is currently under construction about 400 feet north of the site. Each home in this subdivision is served by an individual septic system.

Directly east of the Property, between the site and Route 97, is Parcel 230, which is improved with a two-story single-family detached dwelling. Across Route 97 to the east are Parcels 29 and 30, each improved with a two-story single-family detached dwelling. The 35-unit subdivision of Peacefields at Cattail Creek is located north of Parcels 29 and 30.

4. The Petitioner proposes to develop on the Property an age-restricted adult housing

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community, to consist of 38 two-story brick single-family detached homes. The community would be accessed via a private, gated drive extending from the cul-de-sac at the end of Country Hills Drive, running roughly east and west, and connecting to the proposed 25-unit elderly community west of the site. The homes would be built along this private drive, with 22 located on the north side and 16 along the south side. Each home will be in excess of 2,500 square feet and will include a two-car garage and a parking pad to accommodate two cars. In addition, 36 pull-in parking spaces will be provided along the private roadway. The private road will have 22 feet of paving within a 50-foot right-of-way. The homes will be set back at least 20 feet from the private road. The units will be constructed no less than 15 feet apart

Residents of the community will be provided membership in the Cattail Creek Country Club, providing them with access to golf, swimming, tennis, and dining facilities. The Petitioner will construct a one-story 2,930 square foot community building near the front entry gate in the northeast portion of the Property. Only members of the community and their guests will use this building. The community will be served by a private sewage disposal system, consisting of a pumping facility to be located in the northwest portion of the site which will pre-treat sewage from the homes and pump it to septic fields located in the southern portion of the Property. A portion of the pumping station will be underground and a portion will be exposed above ground to a height of 4½ feet. Landscaping will screen this portion of the pumping facility.

The Petitioner proposes to install a four-foot wide wood-chip walking path behind each set of units, with a sitting area or "gazebo" at the end of each walking path. A six-foot wide paved golf cart path will lead to the golf course to the south of the Property.

No community loading or trash storage areas are proposed for the site, as each unit will store

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trash within the garage. No trash storage will be maintained outside of structures.

The Petitioner will provide Type "A" landscaping along the northern, southern, and eastern perimeters of the Property. Open space will exceed 60% of the total area of the site.

The closest home in the Cattail Ridge subdivision will be 660 feet from any structure in the proposed development. Each home in the development will be no more than 34 feet high and will be of "universal design" in accordance with the County's regulations for aging in place. The petition contains floor plans for the units and a description of interior features that incorporate universal design principles to be accessible and adaptable for residents with disabilities and/or with limited mobility and/or other age related functional limitations. The individual properties will be subject to condominium covenants restricting occupancy to households having at least one member who is 55 years or older, in accordance with the Zoning Regulations. Ten percent of the units will be offered for sale as moderate-income housing units in accordance with County law.

5. Mr. Reuwer testified that the proposed homes will be comparable in size to some of the smaller homes in the Cattail Ridge subdivision and are consistent with other homes found in the RC zone. Trash removal will be by private contract. The homes will be designed in according to the County's published criteria for "universal design." He also noted that the 30' building restriction line along the northern boundary depicted on the conditional use plan is incorrect, and will be adjusted to 50 feet. The homes and drive depicted on the plan along that portion of the site will be moved southward without any change to the configuration of the rest of the homes. In response to questioning, Mr. Reuwer also testified that the development would be served by wells on the site that will be 150 to 300 feet deep. The wells and multi-use septic system were originally designed for the 116-unit project, and will be more than sufficient to serve the proposed development.

6. Mr. Sheesley testified that the Property has already received groundwater appropriation permits that limit consumption to 26,000 gallons per day. As there is 43,000 gallons per day available at this site, this level of consumption will be sufficient for the proposed development and will not deplete the water resources of the surrounding area. The wells were extensively tested under extreme drought conditions. He testified that because of the depth of the wells for this project they will not be affected by current drought conditions, and will not affect other wells in the area that draw from more shallow groundwater.

He also testified that the development has received a discharge permit for 34,500 gallons per day. In the Piedmont area, water is drawn from local "drainage areas" and not from other areas. In this development, the sewage will be treated to remove contaminants before it is replaced in the septic fields. This treated water is recycled in a closed system. Water consumption and discharge is extensively monitored by State and County agencies.

7. The 2000 General Plan designates the Property as a Rural Conservation Area. The Property is located approximately 3 miles north of the Triadelphia Reservoir. According to the Generalized Zoning Map of Howard County and the "Road Guide to the Patuxent Reservoirs Watershed," both of which were introduced by Ms. Gray, the Triadelphia Reservoir watershed encompasses the majority of the western half of Howard County. Most of this area is zoned RC, including all of the land between the Property and the Triadelphia Reservoir.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

A. General Criteria for Conditional Uses (Section 131.B).

1. Harmony with the General Plan: The Howard County General Plan designates the area in

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which the Property is located as a Rural Conservation Area. The General Plan permits residential development in this area when it is located and designed to minimize the impact on agricultural land, farming operations, and sensitive environmental features, and creates an attractive rural development that respects the existing features of the rural landscape. In addition, the General Plan also recognizes the importance of an adequate housing supply for the elderly and encourages the development of housing for active seniors (see Balanced and Phased Growth Policy No. 4.3, pg. 84).

The proposed age-restricted adult-housing community will be in harmony with these land uses and policies. The density of the development is equivalent to other developments in the area. Because it will be a private community and no additional services will be provided on site, the intensity of the use will be no greater, and likely less, than other rural residential developments. The development is located such that access will be gained through the same roads that provide access to the neighboring Cattail Ridge subdivision. The design and size of the homes will be compatible with others in the area. Sixty percent of the Property will be open space and will be amply landscaped, thus respecting the rural character of the area. The proposed development is not being combined with other permitted uses or conditional uses. The development will provide 38 units of housing for active seniors, 10% of which will be moderately priced. Accordingly, I find that the nature and intensity of the use, the size of the Property in relation to the use, and the location of the Property with respect to streets giving access to the Property are such that the use will be in harmony with the land uses and policies indicated in the General Plan for the district, in accordance with Section 131.B.1.a.

2. Adverse Effect: The Petitioner has met its burden in presenting sufficient evidence establishing that this proposed use will not have adverse effects on vicinal properties above and

beyond those ordinarily associated with age-restricted adult housing in the RC district.

The proposed use consists of 38 single-family detached dwellings and a one-story community building located on a 38.5-acre site. No special services are proposed for the development. No trash loading or storage areas are proposed, as each individual homeowner will store their own trash. The community will be served by a private sewage disposal system that will pre-treat sewage from the homes before depositing it in septic fields located to the south of the Property and away from vicinal residences. No extraordinary noise, dust, fumes, odors, light, vibrations, hazards or other adverse physical conditions will be generated by the use, in accordance with Section 131.B.2.a.

The modest-sized homes will be centrally located on the site and well separated and buffered from vicinal residences. Much of the surrounding property consists of the Cattail Creek golf course and non-buildable preservation parcels. No walls or fences are proposed. Type "A" perimeter landscaping, in combination with the existing woods and the distance of over 600 feet from neighboring homes will adequately screen and buffer the site. Consequently, the location, nature, and height of structures, walls and fences, and the nature and extent of landscaping on the site are such that the use will not hinder or discourage the use or development of the adjacent land and structures more at the subject site than it would generally elsewhere in the zone, in compliance with Section 131.B.2.b of the Zoning Regulations.

The proposed parking for the development will be adequate to accommodate the anticipated use. Each home will have a two-car garage and a parking pad for two additional cars. In addition, 36 other parking spaces will be located at pull-in locations along the private road. These areas will be of adequate size and will be centrally located and screened by landscaping and distance from public roads and residential uses. No loading or refuse areas are proposed. Consequently, the

parking, drives and refuse areas will be adequate and are properly located and suitably screened from the adjacent properties, as required by Section 131.B.2.c.

A 22-foot wide paved private road will give access to the site from the cul-de-sac at the end of Country Hills Drive. This road will provide safe access as required by Section 131.B.2.d.

B. Specific Criteria for Age-Restricted Adult Housing (Section 131.N.1).

1. The proposed development will consist only of single-family detached units in compliance with Section 131.N.1.a.

2. The 38 units in the proposed development exceed the minimum of 20 units required by Section 131.N.1.b.

3. The 38-unit development will be constructed on a 38.5-acre site, and therefore does not exceed the maximum density of one unit per net acre required by Section 131.N.1.c.

4. Each home in the development will be no more than 34 feet high in compliance with the maximum height requirement of Section 131.N.1.d(1). All of the proposed dwelling units will be set back at least 50 feet from adjoining districts in compliance with Section 131.N.1.d(2)(c). In addition, each of the homes will be set back at least 20 feet from the private road in accordance with Section 131.N.1.d(3). The units will be constructed no less than 15 feet apart, as required by Section 131.N.1.d(5)(b).

5. Open space will exceed 60% of the total area of the site, in excess of the 50% open space required by Section 131.N.1.e. The Petitioner proposes to install a four-foot wide wood-chip walking path behind each set of units, with a sitting area at the end of each walking path. A six-foot wide paved golf cart path will lead to the golf course to the south of the Property. These amenities will be available to the residents of the community and will be protective of natural features in

compliance with this section.

6. Residents of the community will be provided membership in the Cattail Creek Country Club, providing them with access to golf, swimming, tennis, and dining facilities. The Petitioner will construct a one-story 2,930 square foot community building near the front entry gate in the northeast portion of the Property. Only members of the community and their guests will use this building. These accessory uses comply with Section 131.N.1.f.

7. The proposed 2,930 square foot on-site community building provides over 77 square feet of floor space per dwelling unit in the development, in excess of the minimum of 20 square feet of floor area required by Section 131.N.1.g(1).

8. No loading area and no common trash storage areas is proposed for the development. Private trash pick-up will be provided to individual units. Therefore, Section 131.N.1.h does not apply.

9. Type "A" perimeter landscaping, in combination with the existing woods and the distance of over 600 feet from neighboring homes will provide a transition and adequate buffering near the periphery of the site. In addition, the units will be designed to be compatible in scale and character to the residential developments in the vicinity, as required by Section 131.N.1.i.

10. The development will not be constructed in phases, so that Section 131.N.1.j does not apply.

11. The individual properties will be subject to condominium covenants restricting occupancy to households having at least one member who is 55 years or older, in compliance with Section 131.N.1.k.

12. All open space, common areas and improvements will be managed and maintained by

the condominium association in compliance with Section 131.N.1.l.

13. The petition contains floor plans for the units and a description of interior features that incorporate universal design principles to be accessible and adaptable for residents with disabilities and/or with limited mobility and/or other age related functional limitations. Each residence will have access to sidewalks and /or parking pads adjacent to the garages of each residence, in accordance with Section 131.N.1.m.

14. At least 10% of the units will be moderate-income housing units in accordance with standards and procedures adopted by the County Council, as required by Section 131.N.1.n.

C. Testimony of the Opposition.

Once a petitioner presents sufficient evidence establishing that its proposed use meets the requirement of the statute, even including that it has attached to it some inherent adverse impact, it is then incumbent upon those opposed to the petition to show that the use and proposed location would cause an adverse effect upon adjoining and surrounding properties unique and different, in kind or degree, than that inherently associated with such a use regardless of its location within the zone. Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995). In this case, the Opposition contends that the development will have an adverse effect on vicinal properties because of its proximity to the Triadelphia Reservoir. They argue that the sewage that will be generated by the additional density permitted by the conditional use¹ will seep into the nearby Cattail Creek and flow to the Reservoir, thereby polluting it. This argument, even if it were supported by probative evidence, is flawed in several respects.

First, it ignores the fact that septic systems and their impact on water supply are regulated by

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the Health Department and the Maryland Department of the Environment. Before this plan can go forward, the septic system must be approved by those agencies. Neither the Board of Appeals nor I have the knowledge or expertise to assess the environmental impact a septic system will have on the water supply of the Triadelphia Reservoir. Nor are we required to make such a specific evaluation. The purpose of the conditional use permitting process is to generally assess the potential adverse affects of a land use on vicinal properties to determine if they would be greater than those ordinarily associated with that use, thus defeating the presumption that the use is compatible. It is not my role to substitute my judgment for those agencies whose function is to evaluate and apply environmental regulations to particular projects. If this proposed septic system fails to meet the requirements of the Health Department or the Department of the Environment, the Petitioner may have to re-design the development and re-apply for a conditional use. Where the County or State has occupied a field of regulation, it is not within my authority to preclude their judgment.²

Second, the Opposition's argument, even if it were to be supported by evidence, fails to demonstrate that the potential adverse effect of the sewage generated by this development upon adjoining and surrounding properties is unique and different, in kind or degree, than that inherently associated with such a use regardless of its location within the zone. Indeed, Ms. Gray contends that, because the Zoning Regulations allow an increased density for such projects, no age-restricted adult housing project should be permitted anywhere in the Triadelphia Reservoir watershed. According to her own evidence, however, the watershed encompasses a large portion the western half of Howard

¹ The premise that the proposed development's density is greater than other RC developments is belied by the fact that the Cattail Ridge development consists of one-acre lots.

² The Opposition argues that I should exercise my judgment over the septic system because a few other septic systems have allegedly failed after being approved by the appropriate regulatory agencies. This would require me to find that the entire regulatory scheme of the County and State is inherently unreliable, a leap of logic I will not take.

County and most of the RC-zoned land. If the Zoning Board had intended that age-restricted adult housing should be prohibited in the watershed area, it would not have permitted it as a conditional use in a zone that is predominantly located in the watershed area.

The Opposition alleges that there are some RC properties outside of the watershed area that are more suitable for age-restricted adult housing. The test for conditional uses, however, is not whether there are *any* other locations in the zone with a *lesser* potential for adverse effect; rather, the test is whether the adverse effect of this proposed use is greater here than it would *generally* be elsewhere in the zone. It is therefore not sufficient to identify one or two more suitable sites if the adverse effect at the proposed site would be the same at the majority of the rest of the properties in the zone. According to Ms. Gray's own testimony and evidence, this project would have the same adverse effect on the Triadelphia Reservoir as it would if it were located anywhere else within the watershed, which encompasses the majority of the RC zone.

Dr. Sellner-Webb argues that potential adverse effect of a shared septic system on the Triadelphia Reservoir increases as it is located closer to the Reservoir.³ This theory, however, begs the question – How close is too close? The Property is located 3 miles from the Reservoir. All of the land in between is zoned RC. Even if I were to find that the adverse effect of the septic system is greater here than it would be if located further away from the Reservoir, I must also find that it is less than if the septic system were located anywhere closer to the Reservoir. Dr. Sellner-Webb's argument would therefore preclude the development of any age-restricted adult housing within a 3-mile radius of the Reservoir – a significant portion of the RC zone. I do not believe that the Zoning Board intended such a result.

Any conditional use carries with it inherent adverse effects of which the legislative body was presumptively aware when it permitted the use. Sharp v. Howard County Bd. Of Appeals, 98 Md. App. 57, 73, 632 A.2d 248 (1993). Despite these adverse effects, the legislature has deemed the use to be desirable and necessary and permits it, provided certain standards are met. Unless there is evidence that the conditional use at the location proposed would cause an adverse effect upon adjoining and surrounding properties unique and different, in kind or degree, than that inherently associated with the use, the conditional use must be granted. Mossburg, *id.*

With respect to age-restricted adult housing, I must presume that the Zoning Board was aware when it approved this use in the RC zone that much of the RC-zoned land in the County is within the Triadelphia watershed. I must therefore presume that it was aware that the increased housing densities allowed by the age-restricted adult housing category would result in a certain level of sewage disposal and therefore a certain degree of adverse impact on the watershed. The Opposition's arguments, even if supported by factual evidence, would only go so far as to show that this presumption is true. They do not show that the effect at this location is in any sense unique or different than it would be elsewhere in the zone. If I were to apply the Oppositions' standards, I would be obliged to deny conditional uses for age-restricted adult housing in a large portion of the RC zone. Such a result would effectively change the intent of the Zoning Regulations. This is beyond the authority that the Zoning Board has granted to me or to the Board of Appeals. If the Opposition wishes to change the Zoning Regulations, it should address its concerns to the Zoning Board.⁴

³ Dr. Sellner-Web presented no evidence to support this assertion.


⁴ Ms. Gray indicated that she had raised this issue with the Zoning Board when the new conditional use category was being legislatively considered. Clearly, the Board's inclusion of age-restricted adult housing in the RC zone

ORDER

Based upon the foregoing, it is this 9th day of October, 2002, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of the Villas at Cattail Creek, LLC, for a conditional use for age-restricted adult housing in an RC-DEO (Rural Conservation – Density Exchange Option) Zoning District is hereby **GRANTED**;

Provided, however, that the conditional use will apply only to the uses and structures as described in the petition and conditional use plan submitted, as amended by the Petitioner, and not to any other activities, uses, structures, or additions on the Property.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**
Thomas P. CarboDate Mailed: 10/9/02

IN THE MATTER OF : BEFORE THE
THE VILLAS AT : HOWARD COUNTY
CATTAIL CREEK, LLC : BOARD OF APPEALS
: BA Case No. 02-31 C

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ORDER

The Howard County Board of Appeals (the "Board") convened on April 8, 2003 to hear the Appeal of the Appellants Joe Carta, Joan Carta, Donald E. Anderson, Jr., Patricia A. Tetro, Sandy Wolfgang, Kaylin Marsden, Camile Rees, and Paul S. Tetro. The Appellants are appealing the Decision and Order of the Hearing Examiner dated October 9, 2002. The Hearing Examiner granted the petition of the Villas at Cattail Creek, LLC, for a conditional use for age-restricted adult housing in an RC-DEO (Rural Conservation - Density Exchange Option) Zoning District.

Board members James Patterson, Albert Hayes, Robert Sharps and Jacqueline Scott were present for the hearing. Chairperson James Patterson presided at the hearing. Board member James Pfefferkorn was absent from the hearing. Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board

Pursuant to Howard County Code §16.304 and §2.209, the Board will hear The Villas at Cattail Creek, LLC's conditional use petition *de novo* as a matter in its original jurisdiction. The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the various technical staff reports, the recommendation of approval of the Department of Planning and Zoning Technical Staff Report dated August 9th, 2002, the


the motion to dismiss the petition raised by Board member Sharps.

Pursuant to §16.304 (c), the person filing an appeal from a decision of a hearing examiner bears the expense of providing notice of and advertising of the hearing. In the instant case, notice of and advertising of the hearing was not done. If any question arises regarding compliance with the public notice requirements, the burden is on the Petitioner of the appeal to prove compliance pursuant to §2.203 (g). Appellants failure to appear at the hearing eliminates the issue of whether or not compliance with the advertising and notice requirements had been met. As such, the Board finds that the Appellants failure to fulfill the requisite public notice requirements warrants dismissal of the petition of appeal.

Based upon the foregoing, it is this 29th day of April, 2003, by the Howard County Board of Appeals, **ORDERED:**

That the Petition of Appeal of the Hearing Examiner Decision dated October 9, 2002 filed by Joe Carta, Joan Carta, Donald Anderson, Jr., Patricia Tetro, Paul S. Tetro, Sandy Wolfgang, Kaylin Marsden, Camile Rees is hereby **DISMISSED**.


ATTEST:


Ann Nicholson, Secretary

HOWARD COUNTY BOARD OF APPEALS


James Patterson, Chairperson

 Dissent 
Albert Hayes, Vice Chairperson


Robert Sharps

