

NEW CASTLE COUNTY PLANNING BOARD

NOTICE OF DECISION

APPLICATION 2009-0217-SV

SUBDIVISION VARIANCE

Date decision filed: June 26, 2009

Date of Hearing: June 2, 2009
Date of Decision: June 16, 2009

Location: North side Bohemia Mill Road, west of Dungarvan Drive

Tax Parcel Nos.: 13-016.10-001 to -043
13-016.20-019 to 024

Applicant: Anderson Homes, LLC

REQUESTED VARIANCE

The applicant requests relief from Section 40.22.340 (A) (6) of the *New Castle County Code* (UDC) which requires installation of dry sewer lines for land development projects located within a County Sewer Service Area where sewer capacity and sewer trunk lines do not yet exist.

BACKGROUND

The applicant recorded a major subdivision plan for The Highlands at Back Creek in February 2009.¹ The plan depicts 100 acres subdivided as a residential open space subdivision, option 1, yielding 42 building lots about 0.8 acre in size and 56 acres (56%) of open space. The dwelling units will be served by public water and individual on-site septic systems. Since the site is located within a county sewer service area installation of dry sewer lines is required pursuant to Section 40.22.340(A)(6) of the New Castle County Code in addition to the individual septic

¹ Record Major Subdivision Plan, The Highlands at Back Creek: Application No. 2006-0161-S, recorded February 11, 2009 (Instrument No. 20090211-0007204).

systems that will serve each parcel. As required by the cited code section, the applicant met with the Department of Special Services to discuss the design of the dry sewer lines. According to the information provided in the variance application, the applicant believes it is highly unlikely that the County will ever extend sewer lines to this area and that the Department of Special Services does not object to the variance request.

June 2, 2009 Public Hearing –

Richard Forsten, attorney representing the applicant, made a presentation emphasizing the distance of the property from existing sewer lines, the potential disturbance of natural resources, and the cost of installing the sewer infrastructure.

Mr. Forsten explained the project is designed with individual septic systems and that each lot is also required to have a backup location for a replacement septic system; additionally the dry sewer lines are to be provided in anticipation of the County extending sewer lines to this area. He explained that a gravity sewer line would lead to the stream, which is the low point on the property, resulting in some disturbance to forest, riparian buffer area, and floodplain. He estimated the cost of installing dry sewer lines at approximately \$300,000 for the community, or \$7,100 per home, a cost that would increase the purchase price of each home. Given that the nearest sewer line is 3.75 miles away and that at least two pump stations would be required, he suggested it is unlikely that sewer service will be extended to this area of the county. Further, he explained that running a sewer line to this parcel also depends on the adjoining parcel being developed since the dry sewer line has been designed to access through that property.

Mr. Forsten emphasized that if the variance is granted, disturbance of natural resources would be reduced and the housing prices would be more affordable. He stated installation of infrastructure that will never be used is a hardship. His communication with the Department of Special Services resulted in that department saying it would have “no objection” to the granting of the variance.

One member of the public spoke in opposition to the variance. Ray Lynch, President of the Chesterfield Civic Association, described his community as a small neighborhood of 29 homes, all served by on-lot septic systems and wells. He said residents are concerned about having an additional 42 septic systems nearby and the possibility of those septic systems failing. He said the community members had some comfort knowing that a dry sewer would be a backup system. In his communication with the Department of Special Services Mr. Lynch said it is his understanding that while sewer service is not promised for this area it is also not ruled out. He expressed concern for future residents who will have to spend much more than \$7,000 per house. By not installing the sewer lines now, Mr. Lynch said we are shifting the cost, at greater expense, to future owners.

EVALUATION

The Comprehensive Plan future land use map (Map II-2) designates the land west of Summit Bridge Road between Middletown and the C&D Canal as low density residential (1 – 3 dwelling units per acre). The Comp Plan also shows this area located within a sewer service area. However, no improvements are funded (Map VII-B.3).

This area is west of the central core sewer area and all but one of the existing developments predates the Unified Development Code (Back Creek II, Section 2); none are served by County sewer. Lea Earra Farms has its own private spray irrigation wastewater system, but all of the other communities have on-lot septic systems: Nautical Cove, Villages at Fairview Farm, Millwood, Dickerson Farm, Chesapeake Meadow, Back Creek, Wheatland, Fox Hunter Crossing, Westside Hunt, Chesterfield, and Bohemia Mill Pond. The use of septic systems requires a minimum lot size of 0.75 acre with public water and 1.0 acre with an on-site well. As a result, all of these communities are low density, particularly when factoring in the private open space, which in some cases is substantial. If sewer trunk lines were installed in this area they would serve far fewer homes than in the higher density central core area, making it a much more expensive system to install and maintain. For these reasons the area west of the central core is not a high priority for expansion of the sewer system.

STANDARDS FOR SUBDIVISION VARIANCES

Section 40.31.452 of the UDC requires that the following standards be applied to this application:

“To approve a variance from subdivision standards, the Planning Board shall find that all of the following standards have been met based upon the testimony and evidence presented:

- A. 1. There is a practical hardship for the development of a site if the development must adhere to the standard;

This standard does not apply.

2. The standard, as applied in this instance, creates conflicts in other sections and makes compliance difficult or unreasonable;

Since the County’s priority for expanding the sewer system is focused on high density growth areas, this standard requiring dry sewer lines is not a reasonable requirement in areas planned for low density development.

3. The site conditions, topography, size, shape, or other natural features make strict adherence difficult or impossible; or,

This standard does not apply.

4. The Department recommends that the subdivision would be better designed if the variance were granted.

This standard does not apply. The design of the subdivision design is not affected by eliminating dry sewer lines.

- B. Granting the variance will not create a safety or health hazard.

Septic feasibility is established for each lot and the lots are large enough to also provide a reserved area for a replacement system as the immediate backup if the initial septic system fails. Since the soils in the area are well-drained and of such high quality for both agricultural purposes and subsequently for septic suitability, it is unlikely that any one system will fail except in an extreme case of neglect.

- C. The variance will not make the subdivision a less desirable place to establish the proposed uses.

The design of the community with individual septic systems is consistent with surrounding neighborhoods. Most, if not all buyers, moving to this community should be well aware of the lack of a later ability to add public sewer and may prefer the septic system. It should be noted that the subdivision is not proposing any more or less density because of the public sewer being available or not.

- D. The variance makes the achievement of the policies of this Chapter easier to attain and permits a better overall plan.

The location of a southern sewer service area has been modified many times over the course of the past decade because of changing need and costs. County policy when Chapter 40 was first adopted anticipated a large sewer service area extending for the most part from the C&D Canal south to Middletown and from the Delaware River to the Maryland State line. During the public review process of several Comprehensive Plan Updates (including 1997, 2002, and 2007), County Council and the administration have modified and generally constricted the public sewer boundary to accommodate only the areas that are now planned for at least moderate dwelling unit densities. As a result, and with much of the area nearby already built-out in extremely low to low residential densities, it would appear to be economically infeasible to later contemplate a need to provide public sewer to this area, based on both distance and the number of homes per linear foot/mile of sewer line to be built and maintained.

- E. The variance is not simply a means of reducing development costs, but is required to address a difficulty or hardship.”

It is difficult to consider the installation of dry sewer lines in this instance to be a hardship, but more of a difficulty. The difficulty arises in how a development should be designed for future sewer without the knowledge of where to place the lines that would be feasible to connect to in the future. In addition, when it is questionable if lines will ever be extended to this area, and where the extensions will come from, also makes it difficult to design a feasible system.

DEPARTMENT OF LAND USE RECOMMENDATION

The Department has reviewed the appropriate UDC standards and the technical evaluation of the Engineering Section. In this case, excellent soils that can accommodate septic systems almost indefinitely appear to exist at this site. The public costs to extend and provide service to areas of very low densities that are not in the projected growth region area appear to negate the need for the dry sewer lines.

The Department of Land Use recommends **APPROVAL** of the variance requested in Application 2009-0217-SV.

DECISION

At a business meeting held June 16, 2009, the Planning Board considered the recommendation presented by the Department of Land Use and voted to **DENY** the variance requested in application 2009-0217-SV by the following action: The Board defeated a motion by Mr. Weinberg, seconded by Ms. MacArtor, to agree with the Department of Land Use recommendation to approve the variance request by a vote of 2-4-2 (YES: MacArtor, Weinberg; NO: Anderson, McDowell, Singer, Wilson; ABSENT: McGlinchey, Udo)

Discussion-

In discussion preceding the vote, the following comments were offered:

Mr. Weinberg announced that although he was not in attendance at the June 2, 2009 public hearing for this application, he had read the transcript of the hearing and was prepared to participate in discussion and voting.

Mr. Wilson was against granting the variance. He said if previous developments were required to install dry sewer lines, why would we change the policy now? He noted this is a Water

Resource Protection Area and also that the cost of future sewer installation will be imposed on taxpayers. He recalled the applicant's estimate of \$300,000 for dry sewer lines and said that is part of the cost of development. Mr. Wilson stated this expense will not come out of the developer's pocket, but instead, will be added to the cost of each house. He felt that if waiving the dry sewer requirement were the right thing to do in this area, why would we grant a variance to just this one developer? He believed granting the variance would put this developer at an unfair economic advantage over other developers who are required to install the sewer lines. Mr. Wilson stated his opinion that this is not a hardship, especially since the developer knew about the dry sewer requirement when he bought the property.

Mr. McDowell agreed with Mr. Wilson's observation that the developer knew about the sewer requirement from the outset. He said that although septic systems may function well in this area, the County long ago made the decision to rely on other types of wastewater treatment. He said because many residents do not maintain their septic systems adequately, failure is still a problem even in areas with fast-draining soils. He acknowledged the Department of Special Services position not to object to this variance, but noted that Special Services does not control funding of the sewer system and that population growth patterns may change by altering the sewer plan for this area back to a priority area. He stated this application does not meet the hardship standard.

Mr. Weinberg asked for clarification of the Department of Land Use' description of the low density developments in the area and whether there are any developments nearby that would facilitate bringing sewer to this area. Ms. Cartolano, staff to the Department, responded by saying that the Department's recommendation included a comprehensive list of the developments in this area and that all are designed as low-density, large-lot communities with individual septic systems. She further explained that there are still many tracts of undeveloped land, but the existing developments absorb a substantial amount of the land area.

Mr. Singer said what could happen in the future should govern the decision on this variance application, rather than existing conditions. He explained that the applicant only addressed the potential for sewer connection in an easterly direction. He stated the potential to connect to sewer in nearby Maryland and to private sewer systems to the north were worth exploring, but recalled at the hearing the applicant's attorney answered a question about proximity to an investor-owned community sewer system to the north by stating that he wasn't aware of any such opportunity. He also noted the applicant's attorney said nothing about the potential for future connection opportunities either to the south or west. Therefore, Mr. Singer stated the applicant really had not made his case.

Mr. Culver, Department of Land Use General Manager, explained that the adjoining area in Cecil County, Maryland is a farmland preservation area with no plans for sewer service. The priority area for sewer expansion in Cecil County, he said, is in the I-95/Route 40 corridor, much farther north than the subject property. Regarding the private sewer system being planned nearby, Mr. Culver described a legal agreement restricting additional connections to it. Back

Creek II, the only community in the area that has dry sewer lines, is not permitted to connect to the private sewer system.

Mr. Singer rebutted Mr. Culver's comments with his observation that the useful life of planned dwellings in the area exceeds forty years, premised on the fact that some lenders are now offering forty year mortgages – a period of time well beyond the County's planning horizon. Considering that timeframe, Mr. Singer stated it cannot be confidently foreseen what could transpire over the useful life of dwellings built today. He viewed the UDC requirement for dry sewer lines as a provision intended to meet what may become a crucial need in the uncertain future. Therefore, he expressed his opinion that the dry sewer requirement be honored for the subject parcel and for all parcels in areas where substantial future development opportunities remain unfulfilled.

Ms. Anderson advocated against approving the variance. She said when sewer service is extended to an area people typically want to connect to it. Other board members suggested that the high cost of connection might deter many homeowners from doing so.

Mr. Weinberg said if sewer service really is not planned for the area west of the central core, then the County should formalize that decision by changing the boundary of the sewer district to reflect that change of priority.

[SIGNED 06/26/2009]

Victor Singer, Chair
Planning Board