

AA 655-05
VAR

Blue Heel, LLC
0332

MSA-S-1829-4716

Robert L. Ehrlich, Jr.
Governor

Michael S. Steele
Lt. Governor



Martin G. Madden
Chairman

Ren Serey
Executive Director

**STATE OF MARYLAND
CRITICAL AREA COMMISSION
CHESAPEAKE AND ATLANTIC COASTAL BAYS**

1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338
www.dnr.state.md.us/criticalarea/

October 18, 2005

Ms. Ramona Plociennik
Anne Arundel County
Dept. of Planning and Code Enforcement
2664 Riva Road, MS 6301
Annapolis, MD 21401

**RE: Blue Heel, LLC Variance
2005-0332-V**

Dear Ms. Plociennik:

Thank you for providing information regarding the Blue Heel, LLC variance. The applicant is requesting a variance to permit a dwelling with less Buffer than required and to clear more than 30% of the existing forested land.

The Commission does not oppose the proposed variance. The entire property is located within the Critical Area and has an RCA land use designation. Due to the amount of non-tidal wetlands, forested areas and given the unique triangular shape of the lot, any home construction on this site would require a Buffer variance.

If the variance request is approved, the Commission recommends that mitigation be provided for the variance in accordance with the provisions of the Anne Arundel County Critical Area Program. Thank you for the opportunity to provide comments on this variance request. If you would like to discuss these comments, please call me at (410) 260-3460.

Sincerely yours,

A handwritten signature in cursive script that reads "Michael A. Paone".

Michael A. Paone
Program Planner

cc: AA-655-05

65505

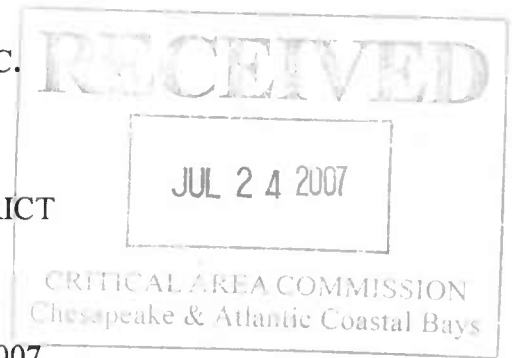
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2007-0148-V

IN RE: BLUE HEEL, LLC.

FIRST ASSESSMENT DISTRICT

DATE HEARD: JULY 12, 2007



ORDERED BY: **STEPHEN M. LeGENDRE**, ADMINISTRATIVE HEARING OFFICER

PLANNER: **ROBERT KONOWAL**

DATE FILED JULY 17, 2007

PLEADINGS

Blue Heel, LLC, the applicant, seeks a variance (2007-0148-V) to allow a dwelling with less setbacks than required on property located along the west side of Beach Drive Boulevard, southeast of Branhum Road, Edgewater.

PUBLIC NOTIFICATION

The hearing notice was posted on the County's web site in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 175 feet of the property was notified by mail, sent to the address furnished with the application. William Aherne, the applicant's managing member, testified that the property was posted for more than 14 days prior to the hearing. I find and conclude that there has been compliance with the notice requirements.

FINDINGS AND CONCLUSIONS

This case concerns the same property the subject of a decision by this office in Case No. 2005-0332-V (November 21, 2005). The Order conditionally approved a variance to disturb nontidal wetlands and a variance of seven feet to the front setback to allow a dwelling (27 by 40 feet). The Order was appealed to the Board of Appeals of Anne Arundel County. By a 3:2 decision, the Board denied the variances. See, Case No. BA 129-05V (September 20, 2006). The

applicant and Mr. Aherne filed a Notice of Appeal of the Board's Order to the Circuit Court for Anne Arundel County. See, Civil Action No. C-2006-117571.AA. However, the appeal was not prosecuted. Instead, the applicant filed the present request on May 1, 2007. More particularly, the applicant seeks to construct a smaller dwelling (25 by 32 feet) 10 feet from the front lot line.¹

Anne Arundel County Code, Article 18, Section 18-4-701 requires principal structures in the underlying R5 Residential district to maintain 25 feet from the front lot line. Accordingly, the proposal requires a variance of 15 feet to the front setback.

Robert Konowal, a planner with the Office of Planning and Zoning, reiterated the testimony from the prior hearing that development of this triangular, corner lot is constrained by non-tidal wetlands and their buffer. As compared to the prior application, the present request deletes the encroachment into the habitat protection area. The request is considered the minimum relief and not likely to alter the character of the neighborhood or to impair the use or development of adjacent property. The witness summarized the agency comments. The Department of Health requested plan approval. By way of conclusion, Mr. Konowal supported the request.

Michael Gillispie, a development consultant to the applicant, summarized the reduction of impacts in the present application as compared to the prior

¹ This office typically does not hear a new application pending an appeal for the same property. The matter has been resolved by the filing of a Notice of Voluntary Dismissal in the Circuit Court case on July 12, 2007.

application.² As indicated, the dwelling has been reduced in size and is closer to the road as a result of being further from the wetlands. The only disturbance to the wetlands buffer is for the installation of the well.

Eric See, an environmental consultant to the applicant, stated that the project has less impact than the impacts authorized by the Maryland Department of the Environment (MDE). Mr. Aherne testified that the two-story dwelling has a one-car integral garage and 1,384 square feet of living space. He compiled an exhibit showing neighboring houses (one and two stories) ranging in size from 1,040 square feet to 2,628 square feet (average 1,729 square feet).

The hearing was well attended by area residents. *Kimberly Comba*, who resides across from the property, asserted that the new application would still result in adverse impacts to the nontidal wetlands. *Deborah Dorsey*, who also resides across from the property, anticipates increased drainage and debris through her property from the development. *Robert Cerulla* expressed concern for the loss of vegetation, increased runoff and increased traffic from this and other development.

The standards for granting variances are unchanged since the time of the prior application. But what has changed is that the present request is limited to the zoning variance to the front setback but does not require any variance to the County's Critical Area program. The standards for the zoning variance are set

² The impervious coverage is reduced by 661 square feet; the clearing is reduced by 1,798 square feet; the disturbed area is reduced by 705 square feet; the wetlands disturbance is reduced from 762 square feet to zero square feet; and the wetlands buffer disturbance is reduced by 1,425 square feet.

forth in Section 18-16-305(a) and (c). Under subsection (a), a variance requires a showing of either (1) unique physical conditions, peculiar to the lot, such that there was no reasonable possibility of developing the lot in strict conformance with the code; or (2) exceptional circumstances such that the variance is necessary to avoid an unnecessary hardship and to enable the applicant to develop the lot. Under Subsection (c), the variance must represent the minimum relief; and its grant may not alter the essential character of the neighborhood, substantially impair the appropriate use or development of adjacent property or cause a detriment to the public welfare.

I find and conclude that the applicant has met its burden of proof. Specifically, the triangular configuration of the lot and the wetlands constitute unique physical conditions, such that there is no reasonable possibility of development in strict conformance with the code. Just as the last time, this case boils down to what constitutes the minimum relief. The size of the dwelling and the wetlands impacts were the primary objections raised by the Board. I am satisfied that the dwelling is as small as is practicable. As indicated, the present plan locates the dwelling closer to the road in order to avoid the nontidal wetlands. I further find that the granting of the variance will not alter the essential character of the neighborhood, substantially impair the appropriate use or development of adjacent property or cause a detriment to the public welfare. The approval is subject to the conditions in the Order.

ORDER

PURSUANT to the application of Blue Heel, LLC, petitioning for a variance to allow a dwelling with less setbacks than required; and

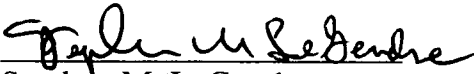
PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 17th day of July, 2007,

ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the applicant is **granted** a variance of 15 feet to the front setback to allow a dwelling (25 by 32 feet) in accordance with the site plan.

The foregoing variance is subject to the following conditions:

1. The limits of disturbance for construction shall be staked prior to the release of the building permit.
2. The applicant shall obtain a grading permit satisfactory to the Permit Application Center.
3. The applicant shall provide mitigation as determined by the Permit Application Center with plantings of native species onsite to the extent practicable.
4. The applicant shall provide stormwater control satisfactory to the Permit Application Center.
5. No further expansion of the dwelling is allowed and accessory structures are not allowed.

6. The conditions of the approval run with the land and shall be included in any contract of sale.


Stephen M. LeGenre
Administrative Hearing Officer

NOTICE TO APPLICANT

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals.

Further Section 18-16-405(a) provides that a variance expires by operation of law unless the applicant obtains a building permit within eighteen months. Thereafter, the variance shall not expire so long as construction proceeds in accordance with the permit.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order, otherwise that will be discarded.

Post-it® Fax Note	7671	Date	10/26	# of pages	14
To	LISA HOERGER	From	DEANNA		
Co./Dept.	CAC	Co.	BOA		
Phone #		Phone #			
Fax #	410-974-5338	Fax #			

* BEFORE THE
 *
 * COUNTY BOARD OF APPEALS
 *
 * OF ANNE ARUNDEL COUNTY
 *
 * CASE NO.: BA 129-05V
 * (2005-0332-V)
 *
 * Hearing Date: June 29, 2006

BLUE HEEL, LLC & WILLIAM AHERNE

Petitioners

MEMORANDUM OF OPINION

Summary of Pleadings

This is an appeal from a decision of the Administrative Hearing Officer. This appeal is taken from the conditional granting of a variance to permit construction of a dwelling with less setbacks and buffer than required, on property located 227' along west side of Beach Dr. Blvd., 0' south of Branhum Rd., Edgewater.

Summary of Evidence

Mr. William Aherne, sole managing member of Blue Heel, LLC, testified that he has resided in Anne Arundel County for 38 years. He is a builder and bought the property under the name of Blue Heel, LLC. Without a variance, the buildable area on the lot comprises only 489 square feet. Tim Martin with Bay Engineering prepared the site plan. The property is zoned R5 Residential; it is located in the Resource Conservation Area (RCA) of the Chesapeake Bay Critical Area (CA). The property is triangular in shape, it has wetlands and a forested area; without a variance it would not be buildable. The proposed footprint of the residence would measure 1,280 square feet with the 2-car garage. The house will have 4 bedrooms, 2.5 bathrooms, and a crawlspace for a total of 1,700 square feet of living space. Variances have been granted in the surrounding community. There would be 1,822 square feet of disturbance in the buffer and 762 square feet of wetland disturbance. The house is a modest size that fits into

the character of the neighborhood. A fee will be paid in lieu of mitigation. He placed as much of the house in the developable area as possible. The property is in a nice area. There has been a lot of development in the area since public sewer was installed 8-10 years ago. He and his father own Lot 89 under the name of Heron Investments. A variance was obtained to build on Lot 89.

Mr. Eric See, an environmental expert, testified that he prepared the CA reports for both lots 89 and 90. The Maryland Department of Environment (MDE) required the properties to go through non-tidal wetlands mitigation. A culvert under Beach Drive Blvd. drains the subdivision through the two properties. Due to site constraints, there is no other practical way to develop the subject lot. A variance would be needed to build any house on the property. In recent years, there have been numerous similar variances issued for houses in the community. Granting the requested variance would not confer a special privilege on the Petitioners. There would be no adverse impact on the CA ecosystems if the County uses the fee paid in lieu of mitigation to reforest other areas and due to the Petitioners' use of stormwater management. The house would be in harmony with the general spirit and intent of the CA regulations because the regulations have specific provisions for grandfathered lots. The lots were designated as RCA because they would not perc. The property would have been designated as LDA if sewer had existed at the time it was zoned.

Mr. Shep Tullier, land use planner and consultant, testified that he has visited the neighborhood and the subject property. He reviewed the CA report and site plan to determine if the property could meet the variance criteria. He believes that the request is justified. There are unique physical conditions consisting of both tidal and non-tidal wetlands. The conditions on the property are inherent in the property; not caused by the acts of the Petitioners. When he visited the site, there was water pooling on properties throughout the neighborhood.

Mr. Donald Bartnick, Protestant, testified that his property is located approximately four houses from the Petitioners' property. He bought the property four to five years ago. The Petitioners bought their property in 2004, with the intent of seeking a variance to develop the property. The Petitioners need a variance because they bought property knowing that a majority of the property was not buildable. There is no hardship when the party needing the variance brought the need upon themselves. The surrounding neighborhood has a drainage problem that will be exacerbated with the additional impervious surface from the development of the Petitioners' lot.

Mr. David Lindenauer, Protestant, testified that he moved to the area four years ago. His house is located at the end of a dirt road nicknamed "Lindy Lane." His house is located on lots 23-25. After he moved in, he bought lot 88 to ensure that no one would build on it. There is always standing water in the entrance area. He also owns one-half of lot 22.

Mr. Rob Konowal, a planner with the Office of Planning and Zoning (OPZ), testified that he prepared the findings and recommendations before the Administrative Hearing Officer (AHO). The subject property meets all of the area requirements. Because of the unique physical conditions, strict interpretation of the Code would result in an unwarranted hardship to the Petitioners. The property is very irregularly shaped and has significant non-tidal wetland coverage. In addition, the sanitary sewer line and drainage ditch are within 10' of the northeast property line. The County would recommend granting the variances.

All testimony was stenographically recorded and the recording is available to be used for the preparation of a written transcript of the proceedings.

Findings and Conclusions

The Petitioners have requested a variance of 7' to the required 25' front setback and a variance to disturb the non-tidal wetland buffer. The proposed house would have a 1,280 square foot footprint and would include a two-car garage. The property is triangular in shape. It is zoned R5 Residential and classified as RCA. To grant the requested variances, the Petitioners' must satisfy an extensive list of requirements set out in the Code. See § 3-1-207. The requirements established for variances within the CA are exceptionally difficult to overcome. In order for this Board to grant a variance, each and every Code requirement must be satisfied; failure to meet even one requirement results in a denial. The requirements for the setback variance and the requirements for the CA buffer variance are slightly different. We address the setback variance requirements first.

In order for this Board to grant the Petitioners a setback variance, they must establish

that because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with this article; or that because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship and to enable the applicant to develop the lot.

Id. § 3-1-207(a)(1) and (2). Testimony offered by the Mr. Aherne, Mr. See, Mr. Tullier and Mr. Konowal of OPZ, established that the subject property is within the wetlands buffer and contains non-tidal wetlands. These conditions are unique physical conditions that would cause the Petitioner to suffer an unnecessary hardship, if the Code is strictly enforced. See *id.* Accordingly, we find that the Petitioner has satisfied the first of several burdens.

The Petitioners must then show that "the variance is the minimum variance necessary to afford relief." *Id.* § 3-1-207(c)(1). According to Mr. See's testimony, the Petitioners moved the house closer to the road in an effort to disturb the least amount of buffer. Although we

appreciate the Petitioners' attempt to limit the disturbance of the CA buffer, we believe that it could be achieved more effectively by reducing the size of the house and the garage. As such, we find that the requested variance is not the minimum necessary.

Next, the Petitioners need to prove that "the granting of the variance will not alter the essential character of the neighborhood or district in which the lot is located." *Id.* § 3-1-207(c)(2)(i). With the various variances throughout the community, we do not believe that an 18' front yard setback compared to the 25' required front yard setback would alter the essential character of the neighborhood.

The Petitioners must also show that "the granting of the variance will not substantially impair the appropriate use or development of adjacent property." *Id.* § 3-1-207(c)(2)(ii). A shorter front yard setback would not, in and of itself, have any affect on adjacent property. However, we are concerned that the additional impervious surface from the house would cause additional flooding and drainage problems throughout the community. Thus, we believe there would be an impairment of the use of adjacent properties.

In addition, the Petitioners need to prove that "the granting of the variance will not reduce forest cover in the limited development and resource conservation areas of the critical area." *Id.* § 3-1-207(c)(2)(iii). The entire property is classified as RCA; building the house anywhere on the property would reduce forest cover in the RCA. However, because the Petitioners propose to pay a fee in lieu of mitigation, the fee could be used to replant in other RCA districts. Therefore, we find that there would not be any reduction of forest cover in the RCA.

The Petitioners must also establish that "the granting of the variance will not be contrary to acceptable clearing and replanting practices required for development in the critical area or a bog protection area." *Id.* § 3-1-207(c)(2)(iv). Paying a fee in lieu of mitigation is an acceptable practice for CA development. However, because of the decimation of the non-tidal wetlands, the

increase in impervious surface, the size of the house and the two-car garage, we do not find that the Petitioners have met the requirements of Section 3-1-207(c)(2)(iv).

The last requirement that the Petitioners must prove in order to be granted a standard variance is to show that "the granting of the variance will not be detrimental to the public welfare." *Id.* § 3-1-207(c)(2)(v). A front yard setback that is 7' shorter than the required 25' would usually not be detrimental to the public welfare. Here, if we were to grant the requested variance it would lead to additional flooding and drainage problems in the community and extensive removal and interference with the RCA qualities of the CA. We believe these results would be detrimental to the public.

Granting a variance in the CA requires the Petitioner to overcome an extremely difficult burden. The Petitioners must establish that their proposal will meet the numerous requirements set out in the Code. This Board can grant a CA variance only when the Petitioners meet each element of their burden.

The Petitioners must first establish "that because of certain unique physical conditions, such as exceptional topographical conditions peculiar to and inherent in the particular lot or irregularity, narrowness, or shallowness of lot size and shape, strict implementation of the County's critical area program or bog protection program would result in an unwarranted hardship." Code, § 3-1-207(b)(1). Here, the subject property has a number of unique conditions, including, tidal and non-tidal wetlands and its irregular size and shape. These various features are "unique physical conditions" as defined by the CA variance requirements of the Code. *Id.* Because the property has so many CA restrictions, strict implementation of the Code would certainly cause the Petitioners to suffer an unwarranted hardship. Variances are necessary to prevent the Petitioners from suffering an unwarranted hardship. However, we do not believe that

the Petitioners have shown that variances of the scale proposed are warranted as we will discuss in greater detail later in the opinion.

The Petitioners next must establish that “[a] literal interpretation of COMAR, 27.01, Criteria for Local Critical Area Program Development or the County’s critical area program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas as permitted in accordance with the provisions of the critical area program within the critical area of the County.” *Id.* § 3-1-207(b)(2)(i). There is only 489 square feet of buildable area on the Petitioners’ property. A variance would be needed to develop the property. Therefore, we find that a literal interpretation of the CA laws would deprive the Petitioners of developing their property.

Next, the Petitioners must show that “[t]he granting of a variance will not confer on an applicant any special privilege that would be denied by COMAR, 27.01, the County’s critical area program to other lands or structures within the County critical area, or the County’s bog protection program to other lands or structures within a bog protection area.” *Id.* §3-1-207(b)(3). Variances have been granted throughout the community. Thus, we do not believe that granting the Petitioners’ variance would give them a special privilege.

The Petitioners also must establish that “[t]he variance request is not based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development before an application for a variance was filed, and does not arise from any condition relating to land or building use on any neighboring property.” *Id.* §3-1-207(b)(4). The unique conditions of the Petitioners’ property are natural conditions, inherent in the property. None of the development issues were created by the Petitioners. It is important to note that simply because the Petitioners bought property knowing that it would be difficult to develop does not, itself, create a self imposed hardship. *See Stansbury v. Jones*, 372 Md. 172; 812 A.2d

312 (2002). Accordingly, we find that the requested variances are needed due to nature, not any acts of the Petitioners.

The next burden that the Petitioners must overcome is to show that "[t]he granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the County's critical area or a bog protection area and will be in harmony with the general spirit and intent of the County's critical area program or bog protection program." *Id.* §3-1-207(b)(5). The subject property is a non-waterfront CA property with non-tidal wetlands. The proposed location of the house would require direct impact to the non-tidal wetlands, which would result in an adverse impact on wildlife and the plant habitat of the area. In recent memory, this Board has not heard of someone actually building in the non-tidal wetlands. There is no doubt that the non-tidal wetlands would be irreparably harmed by the Petitioners proposal. Unlike the Petitioners, we cannot be cavalier in dismissing the importance of non-tidal wetlands; their importance in the environment is evident in that they are protected under federal, state and local laws. In addition, we are not convinced that the proposed stormwater management would provide the necessary controls needed to handle the additional impervious surface. The large amount of impervious coverage so close to and within the wetlands would reduce vegetative cover and alter the hydrology of the area. Therefore, we find that there would be an adverse affect on the various ecosystems in the area.

The subject property is not within the County's bog protection area and thus, Code Section 3-1-207(b)(6) does not apply and need not be addressed.

The Petitioners' next burden is to establish that through "competent and substantial evidence, [they] ha[ve] overcome the presumption contained in the Natural Resources Article, § 8-1808(d)(2), of the State Code." *Id.* § 3-1-207(b)(7). Under the above cited section of the Natural Resources Article it is presumed "that the specific development activity in the critical

area that is subject to the application and for which a variance is required does not conform with the general purpose and intent of this subtitle, regulations adopted under this subtitle, and the requirements of the local jurisdiction's program." Md. Code Ann., Natural Resources §8-1808(d)(2)(i). The majority of the Petitioners' property is not buildable due to the natural characteristics inherent in the property. Like the other property owners in the community, the Petitioners want to build a home and we cannot fault them for that. However, here the Petitioners propose to build a house with a two-car garage, on top of non-tidal wetlands on property designated RCA. Allowing the Petitioners to build a house with a two-car garage is not necessary to avoid denying the Petitioners a reasonable and significant use of their property. Alternative plans exist that would provide for less disturbance to the CA. Therefore, we find that the Petitioners' proposed house would fall outside the intent of the CA programs.

Next, the Petitioners have the burden of proving that "the variance is the minimum variance necessary to afford relief." Code, § 3-1-207(c)(1). The house proposed by the Petitioners is average in size for the community. Testimony offered by Mr. Aherne, Mr. See and Mr. Tullier established that a variance would be required to develop the property regardless of the size of the house. The Petitioners made several modifications throughout the planning process in an effort to build with the least disturbance to the CA as possible. However, we find it difficult to believe that the house as proposed is the minimum necessary to afford the Petitioners relief. A house with a two-car garage is clearly not the minimum necessary. With an environmentally sensitive property such as this, State and County regulations require that the variance be the **absolute** minimum necessary to grant relief. This minimum must protect the CA—not the Petitioners' idea of what size home they would prefer. The CA Program was designed to protect the Chesapeake Bay and its tributaries—not the property owner's ability to make a buck or to build whatever they desire.

In addition, the Petitioners must show that the house must not "alter the essential character of the neighborhood or district in which the lot is located." *Id.* § 3-1-207(c)(2)(i). We do not believe that the style of the house, itself, would alter the "the essential character of the neighborhood." *Id.* § 3-1-207(c)(1), (c)(2)(i). However, because of the environmentally sensitive nature of the property and the surrounding area, we believe that the addition of such a large structure actually in the non-tidal wetlands and the required buffer thereto would alter the essential character. Moreover, the Petitioners' proposal would be a permanent disturbance to the non-tidal wetlands; directly contrary to federal, state and local wetland programs.

The Petitioners must also show that "the granting of the variance will not substantially impair the appropriate use or development of adjacent property." *Id.* § 3-1-207(c)(2)(ii). As we addressed previously, the surrounding area is plagued with flooding and drainage problems. We believe that the proposed stormwater management would fail to alleviate the additional flooding and drainage problems that are bound to arise with the additional impervious surface of the Petitioners' house. In addition, we find persuasive the testimony of Mr. Bartnick and Mr. Lindenauer regarding the conditions of the surrounding community. Their properties already suffer from serious drainage problems that we find will be exacerbated with the construction of the Petitioners' house, as proposed. The house will be in the non-tidal wetlands that are an important natural collection and filtration device for stormwater. Accordingly, we find that there would be a substantial impairment of the appropriate use of neighboring property.

The Petitioners' next hurdle requires them to show that "the granting of the variance will not reduce forest cover in the limited development and resource conservation areas of the critical area." *Id.* § 3-1-207(c)(2)(iii). The property is classified as RCA. The Petitioners' proposal provides for a fee in lieu of mitigation; which means that there will be a reduction of forest cover, but the Petitioners will pay to have forest cover planted elsewhere in the CA. As such, we

find that although there would be a reduction of forest cover on the Petitioners' RCA property; there would be replanting in another RCA location, thus balancing out and satisfying the requirements of the Code.

The Petitioners must also establish that "the granting of the variance will not be contrary to acceptable clearing and replanting practices required for development in the critical area or a bog protection area." *Id.* § 3-1-207(c)(2)(iv). As we addressed previously in this decision, paying a fee in lieu of mitigation is an acceptable practice for CA development. However, development in non-tidal wetlands require the strictest scrutiny. Non-tidal wetlands provide habitat for animal and plant life; erosion and stormwater control; and improve water quality to name a few of their beneficial characteristics. Therefore, we must reiterate that due to the decimation of the non-tidal wetlands, the increase in impervious surface, the size of the house and the size of the two-car garage that the Petitioners proposed, we find that the Petitioners have not met the requirements of Section 3-1-207(c)(2)(iv).

Lastly, the Petitioners must show that "the granting of the variance will not be detrimental to the public welfare." *Id.* § 3-1-207(c)(2)(v). Normally, when variances are necessary to build a house, it would not be detrimental to the public welfare. However, this case is different because the non-tidal wetlands on the property would be permanently impacted and the present hydrology of the site destroyed; the additional impervious surface will create additional drainage problems for the area; the Petitioners' failure to show that their proposal is the minimum necessary under the Code; and the Petitioners' failure to overcome the presumption of nonconformity of the Natural Resources Article of the Maryland State Code. Thus, we find that the granting of the Petitioners' requested variance would be detrimental to the public welfare.

ORDER

For the reasons set forth in the foregoing Memorandum of Opinion, it is this 20th day of SEPT., 2006, by the County Board of Appeals of Anne Arundel County, ORDERED, that the Petitioners' request for:

- (1) a variance of 7' to the required 25' front setback; and
- (2) a variance to disturb within the non-tidal wetlands,

are hereby **DENIED**.

Any appeal from this decision must be in accordance with the provisions of Section 604 of the Charter of Anne Arundel County, Maryland.

If this case is not appealed, exhibits must be claimed within 90 days of the date of this Order; otherwise, they will be discarded.


Any notice to this Board required under the Maryland Rules shall be addressed as follows: Anne Arundel County Board of Appeals, Arundel Center, P.O. Box 2700, Annapolis, Maryland 21404, ATTN: Mary M. Leavell, Clerk.

**COUNTY BOARD OF APPEALS
OF ANNE ARUNDEL COUNTY**

Anthony V. Lamartina, Chairman



Michael Topper, Vice Chairman



Vance N. Remillard, Member

(John W. Boring, Member, and William Moulden, Member, did not participate in this appeal.)

DISSENTING

Unlike our colleagues, we believe that the variances in this case should be granted. We believe that the Petitioners have satisfied each of the necessary Code requirements.

First, we believe that in order to keep with the essential character of the neighborhood under Section 3-1-207(c)(2), the house needs to be a certain size. *See also* § 3-1-207(c)(1). The size of home that the Petitioners proposed was consistent with other homes in the area. What amounts to the minimum necessary is a subjective test. Our colleagues believe that the size of the house and the two-car garage proposed by the Petitioners is not the minimum necessary. However, we disagree. Viewing the variance requirements as a whole, we believe that the two-car garage is necessary to fit in with the essential character of the neighborhood and the Petitioners should not be punished for trying to meet the requirements of the Code.

We believe that the testimony of the Petitioners' engineers and the County's planner should receive more deference; they are trained to determine the best ways to utilize the land, with the least amount of impact to the land. All of the specifications for the property including the location, the size and the stormwater management proposed by the Petitioners were selected and/or approved by expert engineers after they reviewed all necessary information. The use and support of engineers in designing the Petitioners' proposed home and all of its necessary utilities leads us to believe that the plan meets Code requirements.

It is for the above reasons that we respectfully dissent.



Ray J. Jicka, Member

A handwritten signature in black ink, appearing to read "Arnold W. McKechnie", written over a horizontal line.

Arnold W. McKechnie, Member

W/A
AA655-05

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2005-0332-V

IN RE: BLUE HEEL, LLC AND WILL AHERNE

FIRST ASSESSMENT DISTRICT

DATE HEARD: NOVEMBER 8, 2005

ORDERED BY: STEPHEN M. LeGENDRE, ADMINISTRATIVE HEARING OFFICER

PLANNER: ROBERT KONOWAL

DATE FILED: NOVEMBER 21st, 2005

RECEIVED

NOV 28 2005

CRITICAL AREA COMMISSION

PLEADINGS

Blue Heel, LLC and Will Aherne, the applicants, seek a variance (2005-0332-V) to permit a dwelling with less setbacks and buffer than required on property located along the west side of Beach Drive Blvd., south of Branhum Road, Edgewater.

PUBLIC NOTIFICATION

The hearing notice was posted on the County's web site in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 175 feet of the property was notified by mail, sent to the address furnished with the application. Mr. Aherne testified that the property was posted for more than 14 days prior to the hearing. I find and conclude that the requirements of public notice have been satisfied.

FINDINGS AND CONCLUSIONS

This case concerns unimproved property identified on Tax Map 60, Block 4, Parcel 27 as Lot 90, in the subdivision of Selby on the Bay, Edgewater. The property comprises 18,700 square feet and is zoned R-5 residential with a Chesapeake Bay Critical Area designation as Resource Conservation Area (RCA). The request is to construct a two-story single-family dwelling (27 by 40 feet) in nontidal wetlands and 18 feet from the front lot line.

Anne Arundel County Code, Article 27, Section 27-4-701 establishes a 25-foot buffer surrounding nontidal wetlands. Section 27-4-701 requires lots in the R-5 district to maintain a front setback in the amount of 25 feet. Accordingly, the request is for a variance to disturb nontidal wetlands and a variance of seven feet to the front setback.¹

Robert Konowal, a planner with the Office of Planning and Zoning, testified that the property is an irregularly configured corner lot that is encumbered by nontidal wetlands. The zoning setback variance minimizes the habitat disturbance with only a corner of the dwelling in wetlands. There were no adverse comments.² By way of conclusion, Mr. Konowal offered support for the application.

Mr. Aherne offered essentially the same evidence as for the prior case. He supplied photographs of neighboring homes and the specifications and floor plans for the present request. The design calls for a footprint of 1,771 square feet (inclusive of two-car garage) with the living area built over a crawl space. The witness indicated that the property cannot be developed absent variances because the building envelop outside the buffer comprises 499 square feet in the shape of a triangle.³

¹ The adjacent property to the west (Lot 89) received essentially the same relief under Case No. 2004-0542-V, in re: Heron Investments, LLC (April 15, 2005). Mr. Aherne is the principal of Heron Investments, LLC. When Case No. 2004-0542-V was heard, it was clear that the present case would follow.

² The Chesapeake Bay Critical Area Commission requested mitigation.

³ In response to questioning by Donald Bartnick, Mr. Aherne stated that the wetlands survey for Lots 89 and 90 was not performed until after the properties were purchased by the limited liability companies.

Timothy Martin, a licensed surveyor employed by the applicants, testified that stormwater management will be provided, consisting of disconnect credits and rain barrels flowing to a ditch then to the creek. The nontidal wetlands disturbance requires authorization from the Maryland Department of the Environment, which has assessed a mitigation fee. Mr. Martin also indicated that the site plan reflects field located data.

As in the last case, area residents opposed the application. Among other objections, Mr. Bartnick continued to question the accuracy of the drawing. Tammy Switzer questioned the stormwater management for both properties.

The standards for granting variances are unchanged since the last application. See, Section 27-16-305.⁴

As in the last case, I find and conclude that the applicants have met their burden of proof. With respect to the Critical Area variance, the extent of the wetlands constitutes a unique physical condition, such that a strict application of

⁴ Under subsection (a), a zoning variance may be granted only after determining either (1) unique physical conditions, peculiar to the lot, such that there is no reasonable possibility of developing the lot in strict conformance with the code; or (2) exceptional circumstances such that the grant of a variance is necessary to avoid an unnecessary hardship, and to enable the applicant to develop the lot. Under subsection (b), for a property in the Critical Area, a variance to the Critical Area program requirements may be granted only after determining that (1) due to unique physical conditions, peculiar to the lot, a strict implementation of the program would result in an unwarranted hardship to the applicant; (2) a literal interpretation of the program will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area; (3) the granting of the variance will not confer on the applicant any special privilege that would be denied by the program to other lands within the Critical Area; (4) the variance request is not based on circumstances resultant of actions by the applicant and does not arise from conditions relating to land use on neighboring property; and (5) the granting of the variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the Critical Area and will be in harmony with the general spirit and intent of the program. Under subsection (c), any variance must be the minimum necessary to afford relief; and its grant may not alter the essential character of the neighborhood, substantially impair the appropriate use or development of adjacent property, or be detrimental to the public welfare.

the program would be an unwarranted hardship. Under a literal interpretation of the program, the property could not be developed with a residence, which is a right commonly afforded other properties in similar areas of the Critical Area. Conversely, the variance is not a special privilege denied by the program to other lands in the Critical Area. Nor is the request resultant of the actions of the applicants or adjacent land use. Finally, with mitigation and stormwater management, the variance will not adversely impact Critical Area resources and harmonizes with the general spirit and intent of the program.

Considering the zoning variance, the triangular lot configuration and wetlands are unique physical conditions, such that there is no reasonable possibility of development in strict conformance with the code.

Just as the last time, this case boils down to what constitutes the minimum relief. The dwelling is appropriately sized; it is closer to the road so that only a corner impacts the wetlands. I further find that the granting of the variances will not alter the essential character of the neighborhood, substantially impair the appropriate use of development of adjacent property, or cause a detriment to the public welfare. The approval is subject to the conditions in the Order.

ORDER

PURSUANT to the application of Blue Heel, LLC and Will Aherne, petitioning for a variance to permit a dwelling with less setbacks and buffer than required; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 21st day of November, 2005,

ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the applicants are **granted** a variance to disturb nontidal wetlands and a variance of seven feet to the front setback to permit a dwelling in accordance with the site plan.

The foregoing approval is subject to the following conditions:

1. The limits of disturbance for construction shall be staked prior to the release of the building permit.
2. The applicants shall obtain a grading permit satisfactory to the Permit Application Center.
3. The applicants shall provide mitigation at a 3:1 ratio for disturbance in the buffer and 1:1 for disturbance outside the buffer with plantings of native species onsite to the extent practicable.
4. The applicants shall provide stormwater control satisfactory to the Permit Application Center.
5. No further expansion of the dwelling is allowed and no accessory structures are allowed.
6. The conditions of the approval run with the land and shall be included in any contract of sale.



Stephen M. LeGendre
Administrative Hearing Officer

NOTICE TO APPLICANT

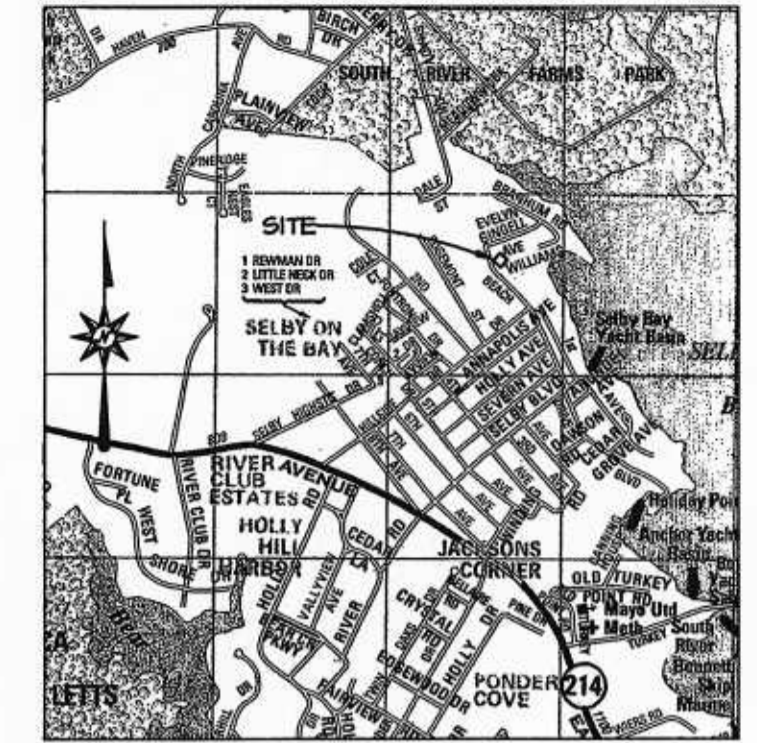
Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals.

Further Section 27-16-405(a) provides that a variance expires by operation of law unless the applicant obtains a building permit within one year. Thereafter, the variance shall not expire so long as construction proceeds in accordance with the permit.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order, otherwise that will be discarded.

VARIANCE REQUEST

Variance requested to relieve Article 28, Zoning, Title 1A Critical Area, Subsection 104 (a)(1A) which states, "there shall be a minimum 25 foot buffer surrounding all nontidal wetlands," and Subsection 105 (h)(2)(i) which states "all buffers for the preservation or enhancement of the environment are maximized." A Variance is also requested to Article 28, Title 2, Subsection 506(a)(1), which states in an R-5 district "a front building line measuring at least 25 feet from and parallel to the front lot line" is required.



Copyright ADC The Map People
Permitted Use Number 20400770

VICINITY MAP 1"=2000'

SITE CALCULATIONS

- Total Site area.....10,454 sq. ft. 0.240 ac.
- Site area In Critical area.....10,454 sq. ft. 0.240 ac.
- Existing Impervious area1,326 sq. ft. 0.030 ac. (ex roadway)
- Proposed Impervious area ...1,260 sq. ft. 0.029 ac. (house)
360 sq. ft. 0.008 ac. (driveway)
68 sq. ft. 0.002 ac. (walks)
1,688 sq. ft. 0.039 ac. Total
- Total Proposed Impervious Coverage...3,014 sq. ft. 0.069 ac.
- Total Impervious Coverage Allowed3,267 sq. ft. 0.075 ac.
- Total Woodland...6,782 sq. ft. 0.156 ac.
- Total Woodland Removed3,852 sq. ft. 0.088 ac.
- Total Woodland Remaining.....2,930 sq. ft. 0.067 ac.
- Proposed Disturbed Area.....4,575 sq. ft. 0.105 ac.
- Wetland Disturbance.....762 sq. ft. 0.018 ac.
- Buffer Disturbance.....1,822 sq. ft. 0.042 ac.

General Notes

- Property Owners:
Blue Heel LLC
c/o Will Aherne
2 Kent Road
Annapolis, MD 21401
- Site Address: Williams Street
Edgewater, MD 21037
- The property is located on Tax Map 60, Grid 4, Parcel 27
- Tax Account Number 1-579-90221094
- Site located entirely in the Resource Conservation Area (RCA) of the Chesapeake Bay Critical Area.
- Area of Site: 10,454 s.f. 0.240 ac.
- No boundary survey performed at this time.
- Property shown in Flood Zone "A8", Elevation 7.0' per FEMA Map 24000B 0048 C dated May 2, 1983.
- This is not a property line survey.
- Building restriction lines shown hereon are minimum.
- This plat was prepared without the benefit of a title report, which may show additional conveyances, easements, covenants, rights-of-ways or more stringent building restriction lines not shown hereon.
- Zoning of Site - R5

Zoning & Setbacks

- The property is zoned R-5.
- Building Setbacks
PRINCIPAL STRUCTURES:
Front Yard 25'
Side Yard 7 1/20'
Rear Yard 20'
Corner 20'

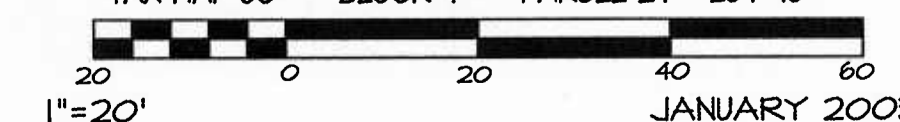
VARIANCE SITE PLAN

of

LOT 90

WILLIAMS STREET
EDGEWATER, MD 21037

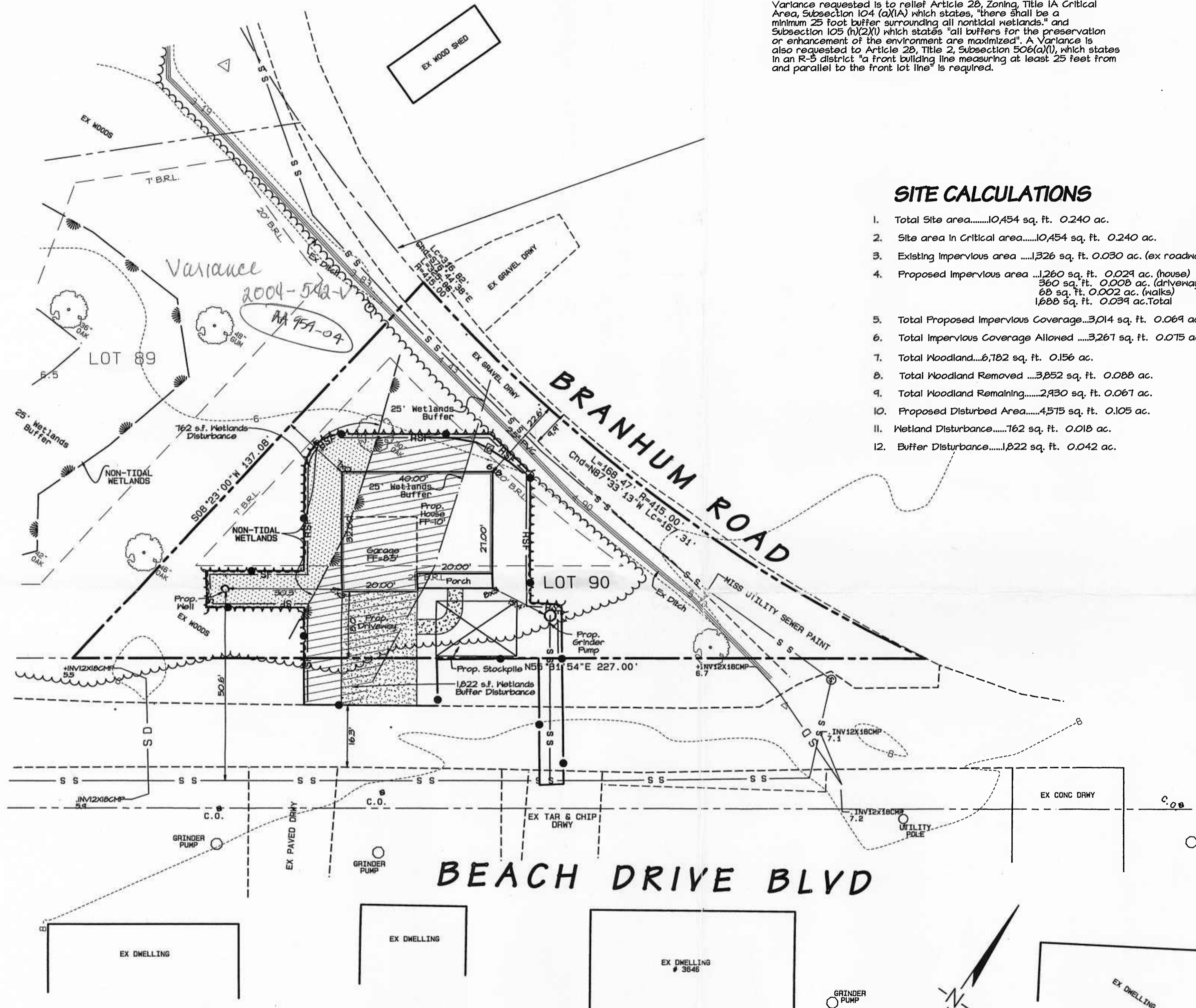
TAX MAP 60 ~ BLOCK 4 ~ PARCEL 27 ~ LOT 90



DRAWN BY: EMG

FIRST DISTRICT ~ A.A. Co. MARYLAND

CADD FILE: F:\Aherne lot 89 & 90 Selby 04-1115\Drawing Files\Var Lot 90rev2.ppt



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CRITICAL AREA COMMISSION

RECEIVED
OCT 04 2005

SITE PLAN
1"=20'