

**Tax Map/Block/Parcel  
No. 74-2-5  
Case 5668**

**OFFICIAL DECISION  
BOARD OF ZONING APPEALS  
CARROLL COUNTY, MARYLAND**

**APPELLANT:** Silverman Companies,LLC.  
c/o Marc Silverman  
1431 Longhill Drive  
Rockville, Maryland 20854

**ATTORNEY:** John Maguire

**PROTESTANT:** James Arnold

**ATTORNEY:** David K. Bowersox

**REQUEST:** An appeal of the Planning & Zoning Commission’s denial of a concept site plan for retirement homes, assisted living facilities.

**LOCATION:** The site is located at 5825 Oklahoma Road, Eldersburg, MD 21784, on property zoned “R-20,000” Residential District & “C” Conservation District in Election District 5.

**BASIS:** Code of Public Local Laws and Ordinances, Chapter 223-79 (C) and 223-186 (B)

**HEARINGS HELD:** September 27 & 28, November 27, December 3 & 4, 2012

**FINDINGS AND CONCLUSION**

On the above noted dates, the Board of Zoning Appeals (the Board) convened to hear the appeal of the Planning & Zoning Commission’s denial of a concept site plan for retirement homes and assisted living facilities. The hearing was conducted during the five days set forth above. At the beginning of the first day of the hearing the Board addressed a preliminary motion by Gail D. Kessler, Deputy County Attorney. The motion was to limit consideration to the denial of the concept plan. After hearing argument from Ms. Kessler and John Maguire on the motion, the Board decided to proceed on this case. Although the Board had advertised two separate cases pertaining to the site in question, the five days of the hearing dealt with the issues concerning the concept plan. It reserved the right to address the conditional use aspect of the matter involving the same property, if and when, an appropriate time came to do so. Based on the testimony and evidence presented, the Board made the following findings and conclusions.

On October 26, 2012, after the second day of the hearing occurred, David K. Bowersox, Esq. entered his appearance in the case on behalf of James Arnold as a Protestant.

## **ISSUE**

The issue in this de novo hearing was whether the concept plan denied by the Planning Commission should be approved, denied or modified.

## **SUMMARY OF EVIDENCE**

### A. Exhibits

The Adams Paradise filed maintained by the Bureau of Development Review was accepted into evidence by the Board.

The Board accepted its file in case 5668 into the record.

The Board accepted into evidence a one sheet document entitled Density Possibilities.

The Board accepted into evidence approximately one hundred e-mail communications and letters to it for this case from September 11, 2012 to November 30, 2012.

The following exhibits were admitted into evidence on behalf of the Appellant:

1. A resume of Martin W. Hackett, president of CLSI.
2. A concept site plan (small version).
3. A multiple page concept site plan (large version).
4. A photo of a view from the street for graphic purposes.
5. Bulk Requirements in zoning law.
6. A drawing of residential for comparison on property.
7. A July 2, 2012 letter from Jason L. Flemming.
8. A deed to Frank W. Adams and Aleta Adams.
9. A resume of Edmund R. Cueman.
10. The 2001 Freedom Community Comprehensive Plan approved on August 14, 2001, including a separate map.
11. A package from the 2001 Freedom Community Comprehensive Plan.
12. A master plan package.
13. Minutes from a December 8, 1970 Planning & Zoning Commission meeting.
14. A two page opinion by Edmund R. Cueman.
15. A map of the priority funding area.
16. A resume of Michael M. Lenhart of Lenhart Traffic Consulting, Inc.
17. A Traffic Impact Analysis prepared by Lenhart Traffic Consulting, Inc.
18. Updated Trip Generation for Site.
19. A resume of Joseph M. Cronyn.
20. Package of impact on nearby property values.
21. A Demographic and socio-economic Outlook sheet.

22. Adams Paradise Density.
23. Adams Paradise – Density Comparisons of other approved retirement projects.
24. A mailing list of citizens.
25. An aerial photograph.

The following exhibits were admitted into evidence on behalf of the Protestants:

1. Code provisions regarding principal permitted uses, conditional uses, and bulk requirements.
2. Article 7 – “R-20,000” Residence District.
3. Ordinance No. 01-6.
4. Ordinance No. 06-07.
5. Carroll County Code R-20,000 Residence District.
6. Thumb Drive of photos.
7. Maximum density allowed under code and total units constructed.
8. Minutes of a portion of July 17, 2012 Planning & Zoning Commission Meeting.
9. A resume of David Straitman.
10. An Evaluation/Impact study of real property.
11. Additional Paired Sales/ Winifred Manor.
12. An email from Mr. and Mrs. McCubbin.
13. A letter from Jan Stephen Carter.
14. A letter from Ralph Robosson.

#### B. Testimony

The following witnesses presented testimony on behalf of the appellant: Martin W. Hackett,

Arla Ely, Edmund R. Cueman, Michael M. Lenhart, Joseph M. Cronyn, and Marc Silverman.

The following witnesses presented testimony on behalf of the Protestants: John Gallegher, Stephen Prior, Curtis Milton, Terry Collins, Jeff Sturgess, Doug Galligher, Mary Louise Carter, David Straitman, George McCubbin, Jan Stephen Carter, Ralph Robosson, Vincent “Bill” Sensel, Don Wooden, Carol Gauthier, and Thomas Brown.

Martin W. Hackett testified that his company prepared appellant’s exhibit 2, 3, and 4. He was qualified as an expert witness in land use, land planning and zoning. He testified that the project had county approval from all of the agencies that reviewed it. He stated that the county had a senior center .6 miles away from the site. He further testified that the site was an appropriate use of the land and was consistent with the comprehensive plan.

Arla Ely lives next to the property in question. Previously the property belonged to her parents. She was pleased with the development of the land for assisted living and independent living.

Edmund R. Cueman was accepted as an expert witness in land use and master planning. He was the former Carroll County Planning Director from 1971 to 1995. Mr. Cueman went

through items in the Comprehensive Plan that would allow the proposed assisted living and independent living site. He stated that the Comprehensive Plan envisioned the need to provide appropriate housing for the aging population. He also noted that the project was consistent with the county master plan. He mentioned that the provisions pertaining to nursing homes in the zoning ordinance dated back to 1970 when he was a director. He stated that the two units per acre set forth by the Planning Commission could not reasonably be applied to such non-single family uses like retirement homes, assisted living facilities, continuing care communities, and nursing homes. These uses were recognized and referenced throughout the Comprehensive Plan as needed uses. In his opinion the R-20,000 Residence District zoning was consistent with the Comprehensive Plan, because the Plan specifically calls for the application of this prescribed zoning with the allowable uses and applicable density standards as set forth in the R-20,000 Residence District of the Code. He believed that the project was consistent with the land and development patterns in the area and the Comprehensive Plan. He explained that it would make no sense to apply single family home density to retirement housing. Indeed, he added that he was "shocked" that the Planning Commission could limit the project to two units per acre. He also explained the further objective of the Comprehensive Plan to cluster this type of higher density use in the public water and sewer service areas which serves the greater objective of conserving land, open space and resources in other areas.

Michael M. Lenhart testified as an expert witness in traffic engineering. He was retained to provide a traffic impact study for the concept plan. His study assumed that the project would have 235 beds and units. The traffic to and from the site would be about twenty percent lower with the proposed 190 beds and units. Mr. Lenhart stated that the proposed site would satisfy the Carroll County Public Facilities requirements, and all of the study intersections will operate at very good levels of service. Furthermore, he noted that the development of this project will have a negligible effect on the levels of service and will not be detrimental to the health, safety, and welfare of the community and adjoining road network.

Joseph M. Cronyn was accepted by the Board as an expert in real estate, appraising, marketing and valuations. He did not see anything in the project that would negatively affect property values. He found that the proposed use was compatible with the neighborhood. He opined that the spacious layout, buffering and attractive appearance of the facility would have a relatively benign effect on the neighborhood. He reached the conclusion that senior living facilities did not negatively affect the value of neighboring properties.

Marc Silverman stated that he was a real estate broker and a real estate developer. He was the real estate developer responsible for the Frocks Sunnybrook Farms senior housing project in the county. He wanted the Oklahoma Road project to be a similar project for seniors. The site is .6 miles away from the senior community center. He saw no adverse effects to having seniors as neighbors. He also noted that seniors were a vital part of the community. It was important to allow seniors to remain in the area in which they lived. The concept plan received all the necessary approvals from county reviewers. He testified that the variance for parking spaces was based on his experience that many of the parking spaces would be underutilized and that not constructing the parking spaces would mean that less of nature would need to be destroyed.

All of the neighbors with the exception of Arla Ely testified against the project. The e-mails, letters and testimony had similar themes. The main theme was that the density of the project was too high. The area was residential and a three story building was out of character for the neighborhood. Other concerns were that Oklahoma Road was not safe and could not be widened. The additional traffic from shift changes, CATS buses, and emergency vehicles was also an issue. People believed that the project was a commercial facility being proposed in a residential area. People believed that the project would ruin the rural character of the area. People claimed that property values would decrease due to the project. The lighting for the parking lots and the building was addressed as a problem. One person claimed that there was too many parking spaces.

Philip R. Hager, Director of Land Use, Planning and Development, and Secretary to the Planning Commission testified on behalf of the Planning Commission. He has been in his current position since February 2012. He stated that not all R-20,000 properties were the same. He believed that the Planning Commission's review of this matter was intense, thorough and extensive. He thought that the distinctive features of the property meant that density had to be reduced. He stated that the Planning Commission tried to do its job with an unyielding applicant. The denial of the concept plan was a part of frustration with the applicant by the Planning Commission. The Planning Commission tried to come up with a reasonable number for density based on the facts. He admitted that the testimony of the public weighed heavily with the Planning Commission. The proposed structure was of a significant size when most of the other structures in the area were single family homes. Ultimately the applicant requested an up or down vote by the Planning Commission on the concept plan. He testified that the proposed project was not consistent with the master plan. Although it was possible that an R-20,000 Residential District could have such a project, he did not know where such a project could be accomplished in the county. Much of his testimony dealt with the area being designated as medium density. However, he admitted that the plan was silent on the appropriate uses for medium density. The Planning Commission clearly believed that the maximum density of 3000 square feet per unit was too much. He also stated that the Planning Commission did not make a finding that two units per acre would be appropriate.

Protestant Exhibit 7 was entered into evidence through Mr. Hager. He stated that the density for assisted living units ranged from five units per acre to fourteen units per acre. The Planning Commission did not have the benefit of considering Protestant Exhibit 7. He also characterized the project as a "monolithic single structure."

Clayton Black, Bureau Chief testified that he had worked for the county for twenty-five years. He wanted to present the Planning Commission with a different density analysis through another part of the County Code. He stated that he provided the calculation of density to the Planning Commission under the Adequate Public Facilities and Concurrency Management requirements in Chapter 71 of the Carroll County Code. The density under the Concurrency Management would have been 129 units. The 90 units would be equivalent to 29 units. The 100 independent living units would be equal to 100 units. The total of 129 units came from the addition of the 29 units with the 100 units. The project met all of the requirements for Concurrency Management. Under the Concurrency Management plan the 190 units requested by the project had a density of 129 single family dwelling units. To put it another way Mr. Black

was clear that the 190 units requested in this calculation had a density of 129 single family dwelling units. He noted that the concept plan was approved by various county reviewers. He stated that in his time with the county that the Planning Commission has not denied a concept plan.

David Straitman testified on behalf of the Protestants. He was accepted as an appraisal expert. His assignment was to evaluate the proposed project and to determine the impact it would have on neighboring properties. He stated that the floor area ratio exceeded most other assisted living facilities in the area. The floor area ratio is generally used for commercial properties, but from a lender standpoint the proposed project would probably be qualified as a commercial property. He agreed with Mr. Cronyn that the site had a semi rural feel to it. He mentioned that the medium density area was a transitional density. The proposed site was near the edge of the R-20,000 Residential District and near the R-40,000 Residential District. He also testified about the paired sales analysis. His opinion was that the proposed site had a negative impact on neighboring properties. He found that the difference in price with the proposed site would be -\$60,000 to neighboring properties. If the project was smaller, then it would have less of an impact on neighboring properties.

### **FINDINGS OF FACT**

The Planning Commission had three meetings about the proposed site. The first public meeting was on March 27, 2012 with the Technical Review Committee. The second meeting was on April 17, 2012, and the third meeting was on July 17, 2012. The minutes of each meeting is included in the record of this case. The concept plan offered at the first meeting had the construction of two buildings and included 100 assisted living/Alzheimer's units and 135 independent living units. The property is zoned in the R-20,000 Residential District for 14.27 acres and Conservation District for 2.03 acres for a total of 16.3 acres. Public water and sewer connections are available at the site. The newly constructed South Carroll Senior Center is .6 acres away from the site. The master plan designates that the area is medium density residential. The revised concept plan took into consideration comments from the April 17, 2012 meeting. The revised concept plan reduced the number of units from 235 to 190. The two building concept was decreased to one three story building. The one building would be set back substantially further from the road. The building was also lowered considerably from the earliest concept plan to reduce visibility from off-site even more. As a number of witnesses testified and it is reflected in the July 17, 2012 minutes of the Planning Commission, a number of county agencies approved the revised site plan: Design and Architectural Review Committee did review the revised concept plan building elevations and had no objections to the appearance at page 3; the floodplain management approval of the concept plan was granted at page 4; the plan meets the requirements for forest conservation concept submittals at page 4; the Bureau of Resource Management has granted concept stormwater management approval at page 4; the facilities and services that will be tested are considered adequate at page 4; and a traffic impact study was reviewed and approved by County staff at page 8. In addition, there were no issues with water and sewer as this project was just added to the priority service area in the latest Water and Sewer Master Plan. The County approved the plan at page 10 of the April 17, 2012 minutes. There was no evidence that a required agency approval was not made for the project.



The Planning Commission considered a number of densities in this matter. These considerations are included in Protestant Exhibit 8. The minutes reflect that the Planning Commission discussed the proposed density and alternative densities. It considered a density of 27 four bedroom houses which would give a density of 108 people. Mr. Black mentioned the 129 equivalent dwelling units under the Concurrency Management ordinance. Another consideration was 162 units based on 27 homes times 54 in-law suites. Mr. Black explained to the Planning Commission that the County Attorney's Office made findings that the density should be no greater than two units per acre. The Planning Commission realized that at the high end the density could be 9.49 and at the low end 2 units per acre. The Planning Commission unanimously agreed that the maximum end for density at the site was inappropriate. Therefore, the Planning Commission unanimously denied the concept plan when requested to make an up or down vote on the revised concept plan.

## **DISCUSSION**


The Board believed that the Planning Commission committed an error by denying the revised concept plan. There was discussion that the plan was consistent with the comprehensive plan and the master plan. The Board recognized that there was a shortage of these types of facilities in the county. As a number of witnesses testified and it is reflected in the July 17, 2012 minutes of the Planning Commission, a number of county agencies approved the revised site plan. In fact, all involved governmental review agencies had given concept plan approval in written comment letters indicating that applicant's concept for 190 retirement units was acceptable to meet the various technical regulatory requirements, e.g., traffic, stormwater management, forestry, landscaping, grading, and sediment control. The Planning Commission recognized that there was a range to consider with regard to density but did not establish a definitive number for the appellant. It was a mistake for the Commission to request the developer to determine the density number, especially when there are existing facilities with a density range approved by the Planning Commission from 4.5 to 14.4. In the history of the Planning Commission, it does not typically deny an applicant's concept plans. The Board considered the principal permitted uses for the R-20,000 Residential District. The Board accepted Mr. Cueman's testimony with regard to density and that such a site was permitted by both the master plan and the comprehensive plan. The Board did not find that property values would decrease if the revised concept plan was followed. The decrease in neighboring property values of \$60,000, as opined by Mr. Straitman, was rejected. The Board found that the proposed use was complimentary to the newly constructed senior center and that the roads and intersections would function at adequate levels of service.

## **CONCLUSION**

The Board voted 4-0 that the Planning Commission erred in denying the concept plan. When the Board started its discussion about an appropriate density, the first number recommended was 144 units. That number was derived from 12.16 acres multiplied by a 10.42 density to equal 144 units. A second way to arrive at a density emerged and took hold. It was the 11.4 units/acre average found in Appellant's Exhibit 23 multiplied by 15.61 acres in Appellant's Exhibit 23. That provided a density of 177.84. The 177.84 was rounded out to 178 total units. The Board approved a total of 178 units in a 4-0 vote. The concept site layout was

approved and additional consideration was to be given at the final site plan review to the parking adjoining the residential subdivision, loading docks, delivery areas, and dumpster locations in a 3-1 vote.

2 January 2013  
Date

  
Gary Dunkleberger, Chairman

Decisions of the Board of Zoning Appeals may be appealed to the Circuit Court for Carroll County within 30 days of the date of the decision pursuant to Article 66B, Section 4.08 of the Annotated Code of Maryland Rules of Procedure.

Pursuant to Section 223-192C of the County Code, this approval will become void unless all applicable requirements of this section are met. Contact the Office of Zoning Administration at 410-386-2980 for specific compliance instructions.

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