

CBI Homes, Inc.	:	BEFORE THE
Appellant	:	HOWARD COUNTY
v.	:	BOARD OF APPEALS
Howard County Department of	:	HEARING EXAMINER
Inspections/Licenses/Permits	:	BA Case No. 775-D
Appellee		

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DECISION AND ORDER

On May 20, 2021, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal of CBI Homes, Inc. (Appellant). Appellant is appealing the Howard County Department of Inspections/Licenses/Permits approval of Residential New Single Family Dwelling Permit B20000911 with attendant School Facilities Surcharge for a single family detached residence at Tax Map 23, Grid 23-9, Lot 1, Parcel 108, also identified as 3683 Folly Quarter Road, Ellicott City, in the RC-DEO (Rural Conservation-Density Exchange Option) zone. Appellee, by its counsel David Moore, Esq., filed a Motion to Dismiss for Lack of Jurisdiction. Appellant, by its counsel Steven Preller, Esq., filed its timely Opposition to the Motion to Dismiss. The Motion to Dismiss was denied April 21, 2021.

Steven Preller, Esq. represented Appellant CBI Homes. Terry Fischer (civil engineer) and Robert Scranton (CBI Homes) testified on behalf of the Appellant. David Moore, Esq., Senior Assistant County Solicitor, represented Appellee Howard County

Department of Inspections/Licenses/Permits (DILP). Donald Mock (Plan Review Chief, DILP) and Julia Sauer (Planning Supervisor with the Division of Land Management, Department of Planning and Zoning (DPZ)) testified on behalf of the Appellee. All witnesses provided sworn testimony.

Appellant presented the following Exhibits:

Exhibit 1: August 2019 deed from CBI Homes

Exhibit 2: 1988 deed

Exhibit 3: Sales Plan for home sites

Exhibit 4: Residential New Single Family Dwelling Permit B20000911

Exhibit 5: Approval of F-18-120, Final Subdivision Plat for Non-Buildable Preservation Parcel "A" "Foxleigh"

Exhibit 6: Sewer and wastewater treatment plan for "Foxleigh"

Exhibit 7: Plans approvals for Non-Buildable Preservation Parcel "A"

Exhibit 8: F-18-120 voided at Appellants request (October 29, 2019)

BACKGROUND

CBI Homes, Inc. applied for a Residential New Single Family Dwelling Permit, B20000911, which was issued May 6, 2020 subject to payment of a \$32,352.25 School Facilities Surcharge in addition to other charges. Appellant noted an administrative appeal to the Howard County Hearing Authority, the Board of Appeals, on June 8, 2020 from the

conditional issuance of this building/use permit. This appeal has been in limbo during the onset of Covid.

STANDARD OF REVIEW

The instant appeal is from the Howard County Department of Licenses/Inspections/Permits' approval of a building permit, subject to the payment of a Schools Facilities Surcharge, to the Howard County Board of Appeals Hearing Examiner. The appeal is authorized by § 3.101(b)(38) of the Howard County Building Code as an appeal from the approval by the Department of Licenses/Inspections/Permits of a building permit to the Board of Appeals, which has the authority to hear and decide appeals in accordance with Title 16, Subtitle 3 of the Howard County Code. Neither the Board of Appeals Hearing Examiner nor the Board of Appeals shall have the authority to waive requirements of this Code. Section 16.303(e)(3) provides that for any case coming before the Hearing Examiner as an appeal of an administrative decision, the burden of proof is as set forth in Section 2.210(a)(4) of the Code. Section 2.210(a)(4)(ii) states that the burden of proof in all appeals which do not involve violation notices is upon the appellant to show that the action taken by the administrative agency was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law.

Findings of Fact

CBI Homes is the developer of "Foxleigh" containing deeded parcels including Lot 1, the subject Property. These deeded parcels, which have been built and

occupied as single family detached dwellings, have never been the subject of a final plan of subdivision. These deeded lots had septic and stormwater issues, and F-18-120, a final plat of subdivision, was approved for Non-Buildable Preservation Parcel "A" to address these issues. F-18-120 was approved December 19, 2018. F-18-120 was voided at the property owners request on October 29, 2019. Appellant applied for, and was issued, Residential New Single Family Dwelling Permit B20000911 on May 6, 2020 for Lot 1. The fees collected for this permit included a School Facility Surcharge of \$32,352.25. A single-family home was constructed pursuant to this permit and the home is currently occupied. Appellant argues that Lot 1 is grandfathered from the current calculation of the Howard County School Facilities Surcharge.

Terry Fischer, a civil engineer, testified as to the development history of the deeded lots that comprise "Foxleigh" and as to Non-Buildable Preservation Parcel "A". In 1988 the Hymans purchased the deeded parcels and Non-Buildable Preservation Parcel "A". Appellant CBI Homes purchased these properties from the Hymans, with whom he had a pre-existing relationship, in August 2019. The septic tank was located uphill from the well on Lot 1 and therefore could not be used, and Lot 1's septic field was moved to the shared facility on the Non-Buildable Preservation Parcel "A".

Mr. Fischer prepared the final plan for Non-Buildable Preservation Parcel "A", FP-18-120, which was approved December 2018. The block on the lower right corner of the final plan states "Foxleigh Non-Buildable Preservation Parcel "A" (Being a

Subdivision of Tax Map 23, Parcel 112). Mr. Fischer testified that FP-18-120 was never recorded and was voided by DPZ in October 2019 at the request of the property owner.

Mr. Fischer also testified that the buildable parcels are deeded parcels and were not created by, or subject to, the subdivision process. There is no recorded subdivision plan for the residential lots. He explained that the development process is (1) creation of a lot by subdivision or deed, (2) site or plot plan approval, and (3) building permit. In the instant appeal Lot 1 was created by deed, site plan approval was obtained, and the residential single family dwelling permit was issued.

Robert Scranton, owner of CBI Homes, testified as to his relationship with the Hymans and the history of the purchase of "Foxleigh" from the Hymans. He stated that the Property is outside the planned service area thus necessitating private well and septic. He also confirmed that the development was a non-senior development and that there was no final subdivision plan for the single family lots including Lot 1.

Donald Mock, Plan Review Chief, DILP, an engineer, testified as to his involvement in the School Facility Surcharge calculation. The standard rate is \$4.75/sq ft unless the proposed development is grandfathered pursuant to Bill-42-2019. He relies on DPZ to determine whether a proposed development is grandfathered. In the instant appeal Mr. Mock was advised by Ms. Annette Merson (DPZ) that Lot 1 was not grandfathered and was subject to the current School Facility Surcharge of \$4.75/sq ft.

Julia Sauer, Planning Supervisor, Division of Land Development, DPZ, testified that although she was not involved in the initial determination of the amount of the

School Facility Surcharge for Lot 1 in early 2020, as a result of the appeal she was requested by Amy Gowan, Director, DPZ to independently review the application. Ms. Sauer found that Lot 1 did not meet any of the grandfather provisions: that Lot 1 was a deeded lot and would never have a final subdivision plan, that Lot 1 was fully developed as a deeded lot, and that there was no final plan for Lot 1. Ms. Sauer stated that although FP-18-120 was approved for Non-Buildable Preservation Parcel "A", Lot 1 is a separate and distinct parcel from Non-Buildable Preservation Parcel "A", and that Lot 1 is not subject to FP-18-120. Ms. Sauer also confirmed that "final plan" is a term of art used only in the Subdivision Regulations and that FP-18-120 was voided at the request of the property owner and was never recorded.

Conclusions of Law

Section 7-101 of the Md. Land Use Art. provides the authority for local legislative bodies to enact development tools or mechanisms such as School Facilities Surcharges.

"To encourage the preservation of natural resources or the provision of affordable housing and to facilitate orderly development and growth, a local jurisdiction that exercises authority granted by this division may enact, and is encouraged to enact, local laws providing for or requiring:

- (1) the planning, staging, or provision of adequate public facilities and affordable housing;

- (2) off-site improvements or the dedication of land for public facilities essential for a development;
- (3) moderately priced dwelling unit programs;
- (4) mixed use developments;
- (5) cluster developments;
- (6) planned unit developments;
- (7) alternative subdivision requirements that :
 - (i) meet minimum performance standards set by the local jurisdiction; and
 - (ii) reduce infrastructure costs;
- (8) floating zones;
- (9) incentive zoning; and
- (10) performance zoning."

Pursuant to the authority granted by Md. Land Use Art., § 7-101, and as compelled by Chapter 744 of the Acts of the General Assembly of 2019, the Howard County Council adopted Bill No. 42-2019, codified at § 20.143 of the Howard County Code, which required "a public school facilities surcharge imposed on residential new construction for which a building permit is issued on or after July 1, 2004" (with enumerated exceptions), "with the revenue from the surcharge to be used to pay for additional or expanded public school facilities such as renovations to existing school

buildings or other systemic changes, debt service on bonds issued for additional or expanded public school facilities, or new school construction.”

The instant appeal is from the Howard County Department of Licenses/Inspections/Permits’ approval of a building permit, subject to the payment of a Schools Facilities Surcharge, to the Howard County Board of Appeals Hearing Examiner. The appeal is authorized by § 3.101(b)(38) of the Howard County Building Code as an appeal from the approval by the Department of Licenses/Inspections/Permits of a building permit. The appeal is from the action of a government official or unit, the Department of Licenses/Inspections/Permits, Md. Land Use Art., § 4-305, by an aggrieved person, Md. Land Use Art., § 4-306, to the body authorized by Md. Land Use Art., § 4- 305, to hear these appeals, the Howard County Board of Appeals Hearing Examiner. The approval of the instant building permit involves the imposition of a Schools Facilities Surcharge as enabled by Md. Land Use Art., § 7-101, and made applicable to building permits by § 20.143 of the Howard County Code. This appeal process is also in accordance with the Express Powers Act, Md. Local Gov’t Art., §§ 10-305 and 10-324. It is established caselaw in Howard County, the State of Maryland, and the United States that public facilities surcharges and extractions are reviewed in accordance with land use law and required procedures.

Howard County Code Section 20.142(d)(1) requires “The school facilities surcharge shall be paid by the applicant at the time a building permit is issued for the residential new construction.” At issue in the instant appeal is an uncodified section of

Bill No. 42-2019 which creates a grandfather clause partially exempting certain development in certain circumstances. Section 2 provides:

(a) Notwithstanding the school facility surcharge rates established in Section 1 of this Act, the school facility surcharge rate shall be \$1.32 per square foot for non-senior residential new construction projects that have, on or before the effective date of this Act:

* * * * *

(2) outside of the Planned Service Area, a technically complete Final Plan;
at record plat of phase one for a phased project; or

* * * * *

In dispute is whether Lot 1 is subject to a "Final Plan". "Final Plan" is a term of art found only in the Subdivision Regulations, Section 16.147. "Final Subdivision plan and final plat." It is uncontested that Lot 1 is a deeded lot. However, Appellant argues that since Non-Buildable Preservation Parcel "A" provides sewage disposal and stormwater management services to Lot 1, and since Non-Buildable Preservation Parcel "A" had an approved final plan F-18-120 from December 2018 through October 2019, this final plan is imputed to Lot 1, vesting in Lot 1 the status of having a technically complete final plan.

Maryland caselaw only recognizes "final plan" or "final plat" in land use cases within the context of subdivision applications and regulations. HCZR also limits any reference to "final plan" to its subdivision regulations. Section 16.147 contains the sole reference to "final plans":

Sec. 16.147. Final subdivision plan and final plat.

- (a) *Purpose.* The final subdivision plan is the culmination of the subdivision process and shall include all information necessary to comply with subsection (c), "required information for final plat"; (d) "construction drawings, documents and specifications"; (e), "developer's agreement"; and (f), "major facilities agreement," of this section. The final plat becomes the official record of the division of land, and no lot within the subdivision may be sold legally until a final plat has been approved and recorded by the Department of Planning and Zoning. The extent of a phased subdivision included in each final subdivision plan shall be consistent with the phasing schedule included in the approved sketch plan.

Section 16.147(c) provides the required information for a final plan. Section 16.147(c)(1)(ii) requires that the certification block in the right lower corner of a final plan include the "Section, area (if any), and lot numbers." The block on the lower right corner of the final plan FP-18-120 states "Foxleigh Non-Buildable Preservation Parcel "A" (Being a Subdivision of Tax Map 23, Parcel 112). The subject Property is Tax Map 23, Grid 23-9, Lot 1, Parcel 108.

It is uncontested that the subject Property, Lot 1, is a deeded parcel and was not created by subdivision. It is also uncontested that FP-18-120, now voided and never recorded, does not encompass Lot 1; it is for Non-Buildable Preservation Parcel "A" only. Appellant cites no statute or caselaw which permits the imputation of a subdivision plat to deeded lots. Residential New Single Family Dwelling Permit B20000911 was issued for

Lot 1, a deeded parcel, with attendant School Facility Surcharges calculated at \$4.75/sq. ft. The grandfather provision of Bill-42-2019 limiting the School Facility Surcharge to \$1.32/sq. ft. providing the property is "outside of the Planned Service Area, a technically complete Final Plan; at record plat of phase one for a phased project" is not applicable to the subject Property as Lot 1 was created by deed and is not subject to subdivision restrictions. Lot 1 is currently developed and occupied as a single-family dwelling. Appellant has failed to meet its burden of proof that the approval of Residential New Single Family Dwelling Permit B20000911, with the \$4.75/sq. ft. School Facility Surcharge, was clearly erroneous, arbitrary and capricious, or contrary to law.

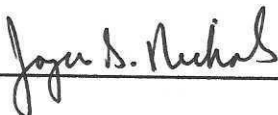
ORDER

Based upon the foregoing, it is this 1st day of June, 2021, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That Appellants Appeal of Residential New Single Family Dwelling Permit B20000911 as regards the calculation of the School Facility Surcharge, at Tax Map 23, Grid 23-9, Lot 1, also identified as 3683 Folly Quarter Road, Ellicott City, be and hereby is **DENIED**.

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER



Joyce B. Nichols

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.