

<b>KARIN NEUFELD, et al.</b>	:	BEFORE THE
Appellants	:	HOWARD COUNTY
v.	:	BOARD OF APPEALS
<b>HOWARD COUNTY DEPARTMENT OF</b>	:	HEARING EXAMINER
<b>PLANNING AND ZONING IN WP-20-016</b>	:	BA Case No. 776-D
Appellee		

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**DECISION AND ORDER**

On February 4, 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 Karin Neufeld, et al. (Appellants). Appellants are appealing the Howard County Department of Planning and Zoning's letter of decision of September 21, 2020 approving WP-20-016 (Alternative Compliance to the Howard County Subdivision and Land Development Regulations) for Clarksville Crossing, Phase 2 (Clarksville NL, LLC), authorizing (1) the removal of 13 specimen trees and (2) Lots 7-12 to share an access easement in lieu of providing public road frontage.

Thomas Meachum, Esq. represented the Appellants. Thomas Coale, Esq. represented the property owner Clarksville NL, LLC (Appellee).

**BACKGROUND**

Clarksville NL, LLC, Inc. filed a request for the Howard County Department of Planning and Zoning to approve WP-20-016, a request for Alternative Compliance

pursuant to Howard County Code Section 16.1216, for a variance to remove 13 State Champion (specimen) trees with respect to Section 16.1205(a)(3) of the Planning, Zoning, and Subdivision Land Development Regulations, and a request for Alternative Compliance for a waiver pursuant to Section 16.104 to allow Lots 7-12 to share an access easement in lieu of providing public road frontage with respect to Section 16.120(c)(3) of the Planning, Zoning, and Subdivision Land Regulations.

The subject property is approximately 20.85 acres in size, in the RR-DEO (Rural Residential: Density Exchange Option) Zoning District, located on the west side of Clarksville Pike, east of Prestwick Drive, Highland, Maryland, as shown on Tax Map 34, Grid 23, Parcel/Lot 301, in the 5th Election District. The public road access is limited to Clarksville Pike (Md. Rt. 108) and the subject property has environmental features including a perennial stream, an unnamed tributary, floodplain, wetlands, steep slopes and 104 specimen trees.

By letter dated September 21, 2020 Clarksville NL, LLC was notified that on September 17, 2020, the Director of the Department of Planning and Zoning, the Director of the Department of Recreation and Parks, and the Administrator of the Office of Community Sustainability met to deliberate the variance request to remove 13 of the 104 specimen trees identified onsite. In determining that the property owner had demonstrated that strict enforcement of Section 16.1205(a)(3) would result in an unwarranted hardship, these Directors/Administrator found as follows:

**1. Describe the special conditions peculiar to the property which would cause the unwarranted hardship.**

The property contains environmental features consisting of streams, wetlands, floodplain, steep slopes and 104 specimen trees. Thirteen of the 104 specimen trees are proposed for removal. The well and septic areas have been predetermined based on percolation testing. In addition, the environmental features which bisect the parcel prohibit the 6 lots from obtaining access via Clarksville Pike and necessitating that all access come through adjacent Lot 19. A site visit confirmed that 9 of the 13 specimen trees to be removed were determined to be in fair to poor condition. The 4 remaining trees are located within the area of the sewage disposal area or within the area of the house location. These conditions cause an unwarranted hardship because they limit the potential building envelopes for construction of homes.

**2. Describe how enforcement of the regulations would deprive the landowner of rights commonly enjoyed by others in similar areas.**

Enforcement of the regulations would deprive the landowner of rights commonly enjoyed by others because the property is severely restricted due to the location of the environmental features and approved well and septic areas. Requiring the preservation of all 104 specimen trees would restrict the property from recording the buildable lots. The proposed subdivision has been designed to maintain a large portion of contiguous forest including the preservation of 91 of the 104 specimen



trees identified on the property. The retained forest will be placed within a record forest conservation easement to provide future protection of this area.

**3. Verify that the granting of a variance will not adversely affect water quality.**

There is no evidence that the granting of a variance will adversely affect water quality. The development is subject to the current Environmental Site Design criteria, which include small filtering processes to address water quality. Stormwater management and soil erosion and sediment control measures will be implemented under the grading permit.

**4. Verify that the granting of a variance will not confer on the applicant a special privilege that would be denied to other applicants.**

Granting of the requested variance will not confer on the applicant a special privilege that would be denied to other applicants because the removal of the thirteen specimen trees is essential for the construction of the houses due to the limited availability where passing percolation tests are available. The design of the proposed subdivision will preserve most of the existing forest onsite within public forest conservation easements. The applicant has demonstrated through several submissions that every effort was made to minimize the impact to the existing specimen trees on site and to reduce the total number considered for removal.

**5. Verify that the variance request is not based on conditions or circumstances which are the result of actions by the applicant.**

The buildable area on the property is limited due to the environmental features, access to the site and the availability of adequate septic areas. These conditions are not a result of actions by the applicant.

**6. Verify that the condition did not arise from a condition relating to land or building use, either permitted or nonconforming on a neighboring property.**

There is no evidence that the condition arose from a condition relating to land or building use on a neighboring property. The unique condition results from the environmental features on the parcel which bisect the site and hamper the ability to develop with strict adherence to the regulations.

The Directors/Administrator's September 17, 2020 Action in approving the variance to Section 16.1205(a)(3) is subject to two conditions:

1. The alternative compliance approval applies only to Specimen Trees #3, #4, #24, #31, #34, #36, #40, #41, #57, #74, #77, #80, and #83 as shown on the alternative compliance plan exhibit. The removal of any other specimen trees on the subject property is not permitted under this approval. Protective measures shall be utilized during construction to protect the specimen trees that are proposed to remain. Include details of the proposed tree protection measures on the Final subdivision plans.
2. The removal of Specimen Trees #3, #4, #24, #31, #34, #36, #40, #41, #57, #74, #77, #80, and #83 will require the planting of 26 native shade trees onsite. The trees shall be a minimum of 3" diameter at breast height and shall be shown on

the landscaping and forest conservation plan sheets as part of the final subdivision plans for Phase 2. The trees will be bonded along with the required perimeter landscaping.

By the same September 21, 2020 letter Clarksville NL, LLC was also notified that on September 15, 2020, pursuant to Section 16.104, the Director of the Department and Zoning considered and approved the request for alternative compliance with respect to Section 16.120(c)(2) of the Subdivision and Land Development Regulations to allow Lots 7-12 of the Clarksville Crossing subdivision to share an access easement in lieu of providing public road frontage.

The Department of Planning and Zoning determined that Clarksville NL, LLC had demonstrated to its satisfaction that strict enforcement of Section 16.120(c)(2) would result in an unreasonable hardship or practical difficulty. This determination was made with consideration of the alternative compliance application and the four (4) items Clarksville NL, LLC was required to address, pursuant to Section 16.104(a)(1):

**1. Strict conformance with the requirements will deprive the applicant of rights commonly enjoyed by others in similar areas.**

The subject property is restricted due to the location of the environmental features which bisect the property thus preventing 6 of the lots from obtaining access through Phase I onto Clarksville Pike. Given these existing physical site constraints, there is limited means of access to the rear portion of the parcel. In order to avoid impact to the existing environmental features, the applicant is proposing to provide



access to these 6 lots via an access easement located on an adjacent lot which fronts onto Prestwick Drive. Adjacent Lot 19 must maintain a minimum lot size which does not allow removal of enough land area to provide fee simple pipestems for the Clarksville Crossing lots. Although this is a technical modification to the regulations, the appearance of the access drive through the easement to these homes will appear as if the pipestems conformed to the regulations and met Prestwick Drive directly. Strict conformance with the requirements will deprive the applicant of development rights commonly enjoyed by others in similar areas whom use use-in-common driveways from ROW to access the development parcels and would have significant impact on the existing environmental features which bisect the site.

**2. Uniqueness of the property or topographical conditions would result in practical difficulty; other than economic, or unreasonable hardship from strict adherence to the regulations.**

The property contains a perennial stream, floodplain, wetlands and steep slopes. Public road access is limited to Clarksville Pike, however, environmental features bisect the parcel and it is not desirable to construct a public road across the unnamed tributary for access to the remaining developable area. Instead the petitioner proposes a private driveway through adjoining Lot 19 for ingress/egress to Prestwick Drive. Adjacent Lot 19 must maintain a minimum lot size which does not allow removal of enough land area to provide fee simple pipestems for the

Clarksville Crossing lots. These conditions limit the developable area of the property and strict adherence to the regulations would create a practical difficulty for the owner to develop the site with single-family homes. The owner intends to fulfill the forest conservation requirements onsite by retaining existing forest and planting trees within public forest conservation easements.

**3. The Variance will not confer to the applicant a special privilege that would be denied to other applicants.**

Approval of this alternative compliance request will not confer to the applicant a special privilege that would be denied to other applicants. When the development of a site is restricted due to unique site conditions, alternative compliance requests have been approved to protect environmental features from impacts such as public roads or vehicular access easements. The use of the shared driveway will allow the lots to obtain vehicular access without traversing or impacting the environmental features bisecting this parcel. Furthermore, if the property had fee simple frontage on Prestwick Drive, the use of a shared driveway would be permitted by right and encouraged by the County because the cost, time and resources of maintaining a public road by the County is not practical for development of six or fewer lots on properties that do not have further subdivision potential.

**4. The modification is not detrimental to the public health; safety or welfare, or injurious to other properties.**



Approval of the alternative compliance request will be beneficial to the public interest since it will allow for the creation of a more uniform lot layout and will allow for the long-term protection of the environmental features and forest within public forest conservation easements. In addition, the shared driveway to be constructed on Lot 19 has been placed between the existing house and septic so that existing trees are preserved to provide a buffer for neighboring Lot 18. This shared driveway will coincide with the existing driveway onto Prestwick Drive to minimize impact to neighbors. Additionally, the use of a narrower shared driveway, instead of a public roadway, will create a smaller area of disturbance. The shared driveway is 24' wide with 16' of pavement. Whereas, a public roadway would require a 50' width and 22' of pavement, a 4' shoulder, 4' to the center of the roadside swale and then 4' to tie the swale back into the existing grade resulting in a disturbed width of 46'.

The Director of the Department of Planning and Zoning's September 15, 2020 Approval of alternative compliance from Section 16.120(c)(2) is subject to the following two conditions:

1. A Plat of Revision for Lot 19 of the Greene Fields subdivision providing the shared access easement to serve Lots 7-12 must be recorded prior to the recordation of the final plat for Clarksville Crossing, Phase 2.
2. A use-in-common maintenance agreement for Lots 7-12 must be recorded with the Plat of Revision of Lot 19 of the Greene Fields subdivision.

On October 16, 2020 Appellants Karin Neufeld et al. timely filed an Administrative Appeal Petition to the Howard County Hearing Authority from the issuance of the Department of Planning and Zoning's September 21, 2020 decision letter advising Clarksville NL, LLC of the approval of alternative compliance from Section 16.1205(a)(3) and Section 16.120(c)(2) of the Howard County Code.

On December 23, 2020, Clarksville NL LLC, through its counsel, filed a Motion to Dismiss for Lack of Standing and Appellants (42), through their counsel, filed their Answer thereto on January 7, 2021.

**MOTION TO DISMISS FOR LACK OF STANDING**

On January 14, 2021 oral argument was held on the Motion to Dismiss and Answer thereto. Mr. Meachum, Esq. represented the 42 Appellants, of which Ms. Suci, Ms. Kline, Ms. Fitzgerald, Mr. Coddington, Mr. Lemme, Mr. Nesmith, Dr. Peters and Dr. Neufeld testified as to their requisite standing. Mr. Coale, Esq. represented the Appellee property owner Clarksville NL, LLC, and Mickey Cornelius and Jack Sheffrin testified in support of the Motion to Dismiss.

Appellee presented the following Exhibits:

Exhibit 1: Use in common driveways in Greene Fields Subdivision

Exhibit 2: Record access across Lot 19, recorded February 2019

The right to appeal an administrative decision is wholly statutory. *Howard County v. JJM, Inc.*, 301 Md. 256, 261, 482 A.2d 908, 910 (1984) (citing *Maryland Bd. V.*

Armacost, 286 Md. 353, 354-55, 407 A.2d 1148, 1150 (1979); Criminal Injuries Comp. Bd. V. Gould, 273 Md. 486, 500, 331 A.2d 55, 64 (19751); Urbana Civic Ass'n v. Urbana Mobile Vill., Inc., 260 Md. 458, 461, 272 A.2d 628, 630 (1971).

Howard County Code Section 16.1215 provides the statutory authorization for an appeal from the administrative decision of the Director of the Department of Planning and Zoning: "Any person *specially aggrieved* by an administrative decision of the Director of Planning and Zoning in relation to this subtitle may, within 30 days of the decision, appeal the decision to the Howard County Board of Appeals according to its Rules of Procedure." (emphasis added) Appellee cites Section 16-105(a) as the controlling statutory authority for the instant appeal, "A person aggrieved by an order of the Department of Planning and Zoning may, within 30 days of the issuance of the order, appeal the decision to the Board of Appeals."

Pursuant to the Howard County Administrative Procedure Act, Section 2.101

- (a) *Agency* means a Board, Commission, Department or other unit of County Government which is authorized by law to make rules or adjudicate contested cases.
- (b) *Contested case* means a proceeding in which the legal rights, duties or privileges of a person are required by law or constitutional right to be determined only after an opportunity for a hearing.



- (c) *Order* means the whole or any part of an Agency's final disposition of a contested case. An order includes licensing, but does not include rule making. An order may be affirmative, negative, injunctive, or declaratory in form.

The instant requests for alternative compliance did not give rise to a contested hearing resulting in the Department of Planning and Zoning issuing a final disposition of a contested case, therefore Section 16.1215 provides the statutory authority for the instant appeal.

### **Special Aggrievement**

Following the standards in *Bryniarski v. Montgomery County*, 247 Md. 137, 230 A.2d 289 (1967), two conditions precedent must be met before a person has standing: (1) he must have been a party to the proceeding before the agency, and (2) he must be aggrieved by the agency decision. A person aggrieved is one whose personal or property rights are adversely affected by the agency decision in a way different from that suffered by the public generally. *Maryland-National Capitol Park & Planning Com'n v. Smith*, 333 Md. 3, 11, 633 A.2d 855, 859 (1993) (internal citation omitted). It is noted that Howard County Code Section 16.1215 dispenses with the first prong of the *Bryniarski* test as there is no requirement that the appellant have been a party to the prior proceeding.

Adjoining, confronting or nearby property owners within "sight and sound" are deemed to be specifically damaged and therefore aggrieved. *Committee for Responsible Development on 25<sup>th</sup> Street, et al. v. Mayor and City Council of Baltimore, et al.*, 137 Md.

App. 60, 767 A.2d 906 (2001). Both “prima facia” aggrievement and special aggrievement simply give rise to rebuttable presumptions.

In qualifying under the Bryniarski test of prima facia aggrievement, if the contesting property owner is not adjoining or confronting, the qualification of “nearby” depends upon a number of factors including: (1) geographic proximity to the subject property; (2) visibility by clear sight to the subject property; and (3) intervening presence of an obstacle notwithstanding visibility to the subject property. The ability to view the subject property must be measured from the objector’s property and not from the objector’s place of employment or the fact that the objector regularly passes by the subject property. In addition, claims that there will be an increase in traffic flow, impact/change in neighborhood character, or depreciation in property value must be demonstrated to be special rather than merely general detrimental effects. Benn Ray v. Mayor & City Council of Baltimore, 203 Md. App.15, 36 A.2d 521 (2012). Distances of 200-1,000 feet between properties have been deemed to be too far away to support “prima facia” aggrievement but may be close enough to be “almost prima facia aggrieved”. Distances greater than 1,000 feet have been found to be too far away to support a claim of special aggrievement. Ray v. Mayor & City Council of Baltimore, 430 Md. 74, 59 A.3d 545 (2013).

Howard County Code Section 16.200(b)(1) defines “*Adjoining* means land which is touching or would be touching in the absence of an intervening utility or road right-of-way, other than a principal arterial highway.” Greene Fields Lot 18 (Palos/Suciu), Lot 16 (Lemme/Son), Lot 13 (Neufeld/Peters), Lot 15 (Nesmith), and

Highland Lake Lot 71 (Fitzgerald) adjoin the portion of the subject property for which alternative compliance has been approved. All these Appellants have standing under the Bryniarski test sufficient to meet prima facie aggrievement and proceed with their appeal. Highland Lake Lot 74 (Coddington) testified that the auto headlights from vehicles exiting the subject property from Lots 7-12 via the approved use in common access would shine into their bedroom windows which, if true, would be a unique harm. Of course, this Appellant has the ability to mitigate any such harm through the use of blinds, curtains, shutters, or landscaping.

The remaining 31 Appellants (including the Highland Lake Community Association which failed to provide minutes of any meeting in which a vote was taken to oppose the requested alternative compliance, the date of such meeting, the number of members in the association, or the number of members present and voting) are not adjoining, do not have a clear line of sight to the subject property, and have intervening buildings and/or woods/vegetation between their property and the subject property. Claims of increased traffic, change in the character of the neighborhood, and depreciation in property value are insufficient to convey standing under either the Bryniarski or Benn Ray tests. These 31 Appellants have failed to meet their burden of proof regarding special aggrievement and do not have standing to proceed with this appeal.

The Motion to Dismiss is granted as to the Guilfords, Ms. Arpasi (it is noted that Greene Fields Lot 10 does not adjoin Phase 2 to any appreciable extent), the



Ritter/Dockstaders, John Taylor, the Moores, the Sovs, the Garippas, the Mahoneys, the Rovito/Castellanos, Ms. Pearre, the Carpentiers, the Oakes's, Ms. Kline, the Kenols, the Cantors, the Yeps, and the Highland Lake Community Association, and is denied as to the Neufeld/Peters, the Nesmiths, the Lemme/Sons, the Palos/Sucius, the Fitzgeralds, and the Coddingtons.

### **APPEAL**

On February 4, 2021, an evidentiary hearing was held on Appellants appeal. Mr. Meachum, Esq. represented Appellants Neufeld/Peters, Nesmiths, Lemme/Sons, Palos/Sucius, Fitzgeralds, and Coddingtons. Paul Sill (civil engineer), Caroline Fitzgerald, Peter Coddington, Cametrick Nesmith, Simona Suciu, Mitchell Lemme, David Peters and Karin Neufeld testified on behalf of Appellants. Mr. Coale, Esq. represented Appellee Clarksville NL, LLC and John Carney (civil engineer) testified on behalf of Appellee.

Appellants presented the following Exhibits:

Exhibits 1-3: Documents from the Planning and Zoning official file WP-20-016

Exhibit 4: One Photo taken by Peter Coddington

Exhibit 5: Five photos taken by Simona Suciu

Exhibit 6: Six photos taken by Mitchell Lemme

### **STANDARD OF REVIEW**

Pursuant to Howard County Code Section 16.1215, appeals to the Board of Appeals of decisions made pursuant to the Director of Planning and Zoning's administrative decision-making authority shall be heard in accordance with the Board of Appeal's Rules of Procedures. Subtitle 2.-Rules of Procedure of the Board of Appeals, Section 2.210 provides that administrative appeals such as the instant appeal are *de novo* and the burden of proof is on 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. Per Howard County Code § 16.302(a) (jurisdiction of Hearing Examiner), when a matter is authorized to be heard and decided by the Board of Appeals, the matter will first be heard and decided by a Hearing Examiner. Hearing Examiner Rule of Procedure 10.2(c) assigns the burden of proof in an appeal from an administrative agency decision of showing by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

In a *de novo* (meaning as new) appeal, the role of the Hearing Examiner is akin to a trial court, and the appeal may be a contested case, in which the evidence is adduced and the Hearing Examiner is the trier of fact awarded deference on appellate review as the Examiner saw the witnesses and the evidence firsthand. Appellants burden of proof is to provide substantial evidence that the alternative compliance approvals were clearly erroneous, arbitrary and capricious, or contrary to law.

**FINDINGS OF FACT**

**I. Approval of Alternative Compliance with respect to Section 16.1205(a)(3) of the Forest Conservation Regulations to remove 13 of the 104 specimen trees onsite.**

**1. Finding 1. Describe the special conditions peculiar to the property which would cause the unwarranted hardship.**

Paul Sill, a civil engineer with 30 years experience, opined that he was “not sure” whether the steep slopes identified by DPZ actually meet the Howard County Regulations for “steep slopes”. He also argued the environmental features did not completely bisect the subject property as he located an area along the Highland Lake Subdivision currently proposed for forest conservation retention and containing specimen trees, and which would require crossing of streams, wetlands and floodplains, that could be used to access Clarksville Pike (Md. Rt. 108) in lieu of the proposed use in common access onto Prestwick Drive. He also opined that having forests was not unique as most property in Howard County has forests. Mr. Sill did not investigate the unnamed tributary and intermittent stream, did not investigate the number and health of the specimen trees which would have to be removed pursuant his proposed access to Clarksville Pike (Md. Rt. 108), did not investigate whether the State Highway Administration would permit additional residential access to Clarksville Pike (Md. Rt. 108), did not investigate the safety of access at a higher speed road Clarksville Pike (Md. Rt. 108) versus Prestwick Drive, did not investigate sight distance of access to Clarksville Pike (Md. Rt. 108) and was not



aware that Clarksville Pike (Md. Rt. 108) access to Phase 1 was constrained due to wetlands and 100-year floodplain along Clarksville Pike (Md. Rt. 108). Mr. Sill simply plotted a road through the subject property without evaluating whether the environmental impacts would be less than the approved alternative compliance to remove 13 trees, 9 of which have been determined to be in fair to poor condition. Mr. Sill did not know how many specimen trees would have to be removed under his proposal and whether they were in healthy condition. This proposed roadway is purely speculative and obviously Mr. Sill did not evaluate the adverse environmental impacts of his proposal.

Mr. Sill limited his testimony to Finding 1 and stated that he had no comment on Findings 2-6 as set forth *supra*. Appellants testified in general as to their enjoyment of the existing trees and vegetation on the undeveloped subject property and to the health benefits of retaining the existing trees and vegetation. They articulated concerns that old growth trees were better than new plantings which would be inferior in size and would take a long time to grow to achieve specimen tree stature. Appellants were not aware that 9 of the 13 proposed specimen trees are in poor to fair quality and your Examiner personally observed 2 trees (#3 and #4) on Lot 19 that were rotted at their base.

Mr. John Carney, Appellees civil engineer, testified that 2 of the specimen trees proposed for removal are located within the septic field of Lot 19 and are required to be removed by the County Health Department and 2 additional trees are located within a house location and would also be required to be removed. Mr. Carney testified as to the substantial environmental features located on the subject property along Clarksville Pike (Md. Rt. 108) and that the widening of the access road, even if permitted by the State

Highway Administration, would greatly infringe on these substantial environmental features. Mr. Carney also testified to the intermittent stream on the subject property and its potential adverse impact on the already undersized culvert on Clarksville Pike (Md. Rt. 108) across from the proposed access to the subject property which currently floods over Clarksville Pike (Md. Rt. 108). The current access to Clarksville Pike (Md. Rt. 108) is limited to 5 homes. Mr. Carney opined that the access proposed by Mr. Sill will have to cross an intermittent stream, will cause the removal of Forest Retention areas and 10%-20% slopes, and will result in the removal of an unknown number of trees.

**2. Findings 2-6 set forth *supra*.**

Appellants presented no testimony or evidence regarding Findings 2-6 and therefore there is no legal basis to reverse Findings 2-6.

**II. Approval of Alternative Compliance with respect to Section 16.120(c)(2) of the Subdivision and Land Development Regulations to permit Lots 7-12 to use a shared access easement in lieu of providing public road frontage.**

**1. Findings 1-3 set forth *supra*.**

Appellants presented little or no testimony regarding Findings 1-3 and therefore there is no legal basis to reverse Findings 1-3.

**2. Finding 4. The modification is not detrimental to the public health, safety or welfare or injurious to other properties.**

Mr. Coddington opined that due to the relationship with the proposed access drive, to be located where a portion of the exiting drive for Lot 19 is already developed and utilized, headlights from vehicles leaving proposed Lots 7-12 at night will shine into his bedroom windows as will red taillights from vehicles accessing Lots 7-12. Mr. Coddington stated that he bought his lot 23 years ago and the proposed additional traffic will be detrimental to his enjoyment of his property.

Mr. Nesmith, Lot 15, argued that although there are currently shared driveways in Greene Fields Subdivision, these are private driveways in lieu of the proposal for 6 homes on a shared driveway which would elevate the driveway to a public road status. The proposed shared drive replaces part of the existing drive on Lot 19 with a 24 foot easement with a 16 foot paved width. The construction standards for a public road are a 50 foot easement with a 22 foot paved width, a 4 foot shoulder, 4 feet to the center of the roadside swale and then 4 feet to tie the swale back into the existing grade, resulting in a disturbed width of 46 feet versus the 16 feet proposed. The proposed shared drive is approximately 1/8 mile from the Nesmith's home.

Ms. Suciu provided 5 photos (Appellants Exhibit 5) depicting her rear and side yards on Lot 18 looking towards the proposed shared driveway. Ms. Suciu sees the lights in the house on Lot 19 and will see lights of vehicles using the shared driveway. Ms. Suciu enjoys the trees on the subject property and wishes them to remain. She is unaware that 9 of the specimen trees proposed for removal are in fair to poor condition. She has not reviewed the proposed Landscape Plan but knows that there is a large septic field



between her lot and a portion of the shared drive resulting in a 44 foot buffer between her lot and the proposed shared driveway. The remainder of the shared drive is to be landscaped to provide a vegetative buffer between the drive and Lot 18. The easement providing for the shared drive across Lot 19 was recorded February, 2019 and Ms. Suciu purchased her home in May, 2019 and therefore Ms. Suciu could have known about the shared access easement prior to her purchase.

Mr. Lemme provided 6 photos (Appellants Exhibit 6) depicting views from his home, Lot 16, towards the proposed shared drive on Lot 19 and towards the rear of his property where the proposed homes are to be developed. Mr. Lemme opined that he will be able to see the lights in the garage to be constructed on Lot 11 from his home. Mr. Lemme clarified that specimen tree #31 proposed for removal is actually on the other side of the proposed drive from Lot 18 and therefore its removal will not affect Ms. Suciu's view of the proposed drive. Mr. Lemme stated that, according to his measurements, the proposed drive will be between 32 and 44 feet from Lot 18. Mr. Lemme did not review the Landscape Plan. Mr. Lemme also enjoys the undeveloped nature of the subject property.

Dr. Peters, Lot 13, opined as to the medical and public health benefits of living near forests and vegetation. He enjoys the existing trees and vegetation on the undeveloped subject property and is opposed to the removal of vegetation and specimen trees. Old growth trees cannot be replaced with new plantings. Dr. Peters home is 1/3 mile from the proposed shared access drive and he has not reviewed the Landscape Plan. He is concerned with the proposed location of the shared drive being both on a downhill grade

and a curve in Prestwick Drive. The speed study prepared by Mr. Carney shows an average vehicle speed of 39-41 mph at the 5 home access drive to Phase 1 along Clarksville Pike (Md. Rt. 108) and an average vehicle speed of 33 mph along Prestwick Drive at the proposed shared access. Dr. Peters provided an anecdotal story about his son having had a vehicle accident in the area of the proposed drive. He feels the traffic from the additional 6 homes will bring additional accidents to Prestwick Drive.

Dr. Neufeld, Lot 13, articulated similar concerns as Dr. Peters and is opposed to the shared driveway and the removal of trees and vegetation.

Mr. Zuchero lives across River Clyde Drive from the Coddingtons and stated that there a vehicle speeding problem along Prestwick Road and the location of the proposed shared drive along a curve would be unsafe.

In addition to the speed study, Mr. Carney performed a sight distance study analysis at the proposed shared drive on Prestwick Drive and determined that both to the right and to the left along Prestwick Road the sight distance was adequate.

### **CONCLUSIONS OF LAW**

The burden of proof borne by Appellants in the instant appeal is providing by substantial evidence that the approvals of alternative compliance by the Department of Planning and Zoning to Section 16.1205(a)(3) and to Section 16.120(c)(2) of the Howard County Code were clearly erroneous, arbitrary and capricious, or contrary to law. The only Findings upon which Appellants provided testimony or evidence are Finding 1 of the

approval of the removal of 13 specimen trees and Finding 4 of the approval of the shared use drive in lieu of public road frontage. Therefore Findings 2-6 of the specimen tree removal approval and Findings 1-3 of the shared access approval are upheld as a matter of law.

A reversal of the Department of Planning and Zonings findings requires a finding that its actions were unsupported by competent, material and substantial evidence, and were therefore arbitrary and capricious. Prince George's County v. Meininger, 264 Md. 148, 285 A.2d 649 (1972). There is a distinction between evidence which compels a certain result and that which merely permits it. If the evidence is of such quality and quantity as to merely permit a finding either way, the decision is not arbitrary or capricious, but is fairly debatable. Jabine v. Priola, 45 Md. App. 218, 412 A.2d 1277 (1980).

Appellants have failed to meet their burden of proving by substantial evidence that Finding 1, in the approval of alternative compliance to remove specimen trees, that the subject property had 'special conditions' such as streams, wetlands, floodplain, steep slopes and 104 specimen trees, was clearly erroneous and unsupported by competent, material, and substantial evidence. Reasonable minds may differ as to the extent of the streams, wetlands, floodplain, and steep slopes but they all clearly exist on the subject property along with 104 specimen trees. Mr. Sill's access road relocation failed to analyze its impact on the streams, wetlands, floodplain, steep slopes and specimen trees but Mr. Sill admitted the existence of streams, wetlands, floodplain, steep slopes (although he quibbled with the definition of steep slopes) and specimen trees. Many Appellants



admitted the existence of the multiple specimen trees, the streams, wetlands and floodplain; indeed Appellants wished to keep these environmental features free from development. The Department of Planning and Zoning's Finding 1 that the subject property has "special conditions" such as streams, wetlands, floodplain, steep slopes and specimen trees is not clearly erroneous, arbitrary and capricious, or contrary to law.

Appellants have also failed to meet their burden of proving by substantial evidence that Finding 4, in the approval of alternative compliance to allow Lots 7-12 to share an access easement instead of providing public road access, the Department of Planning and Zoning's finding that the shared access would not be detrimental to the public health, safety or welfare or injurious to other properties, was clearly erroneous, arbitrary and capricious, or contrary to law.

Appellants provided testimony that the headlights from the additional 5 homes (since it is part of the existing driveway for Lot 19 there will be only 5 additional homes as the home on Lot 19 currently uses the driveway but will not use the driveway in the future) will shine into the bedroom windows of one home. Presumably, the headlights from Lot 19 have historically shown into the bedroom windows of this home which is why Mr. Coddington felt that the new vehicle trips will also shine into the home, but this is pure speculation as there was no testimony in this regard. A few solutions to this situation include blinds and landscaping. Mr. Mickey Cornelius, Appellees traffic engineer, performed a trip generation analysis which found 6 am and 6 pm trips from Lots 7-12.

Concerns were raised regarding the safety of the location of the proposed shared access including grade, road curvature, and vehicular speeding. A sight distance analysis showed that sight distance from the shared access drive both to the right and to the left along Prestwick Drive was legally adequate. A speed study showed the average speed at this location of Prestwick Road is 33 mph which complies with AASHTO (American Association of State Highway and Transportation Officials) safety standards for Prestwick Drive. The use of a shared access, requiring only a paved width of 16 feet, is less invasive than a public roadway with a disturbed width of 46 feet. Appellants have failed in their burden to show by substantial evidence that Finding 4 is clearly erroneous, arbitrary and capricious, or contrary to law.

Appellants have failed to meet their burden of proving by substantial evidence that the approval of WP-20-016 was clearly erroneous, arbitrary and capricious, or contrary to law.

**ORDER**

Based upon the foregoing, it is this 18th day of February, 2021, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Appeal of the Department of Planning and Zoning's approval of WP-20-016 for alternative compliance to remove 13 of the 104 specimen trees on site and for alternative compliance to allow Lots 7-12 to share an access easement in lieu of providing public road access for Clarksville Crossing, Phase 2, on the west side of Clarksville Pike, east of Prestwick Drive, Highland, Tax Map 34, Grid 23, Parcel/Lot 301, be and is hereby **DENIED**; and that the Department of Planning and Zoning approval of WP-20-016 remains in full force and effect, and it is further, **ORDERED:**

That the Motion to Dismiss for Lack of Standing is **GRANTED**, in part, as to Appellants Guilford, Arpasi, Ritter/Dockstader, Taylor, Moore, Sov, Garippa, Mahoney, Rivito/Castellano, Pearre, Carpentier, Oakes, Kline, Kenol, Cantor, Yep, and the Highland Lake Community Association and **DENIED**, in part, as to Appellants Neufeld/Peters, Nesmith, Lemme/Son, Palos/Sucius, Fitzgerald and Coddington.

**HOWARD COUNTY BOARD OF APPEALS**

**HEARING EXAMINER**

A handwritten signature in black ink, appearing to read "Joyce B. Nichols", is written over a solid horizontal line.

**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.