

JAMES AND PATRICIA FAWCETT	:	BEFORE THE
Appellants	:	
	:	HOWARD COUNTY
vs.	:	
	:	BOARD OF APPEALS
DEPARTMENT OF PLANNING	:	
AND ZONING	:	HEARING EXAMINER
HOWARD COUNTY, MARYLAND	:	
Appellee	:	BA Case No. 607-D

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DECISION AND ORDER

On October 9, 2007, 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 departmental appeal of James and Patricia Fawcett (the "Appellants"). The Appellants are appealing from a Department of Planning & Zoning ("DPZ") letter dated June 13, 2007 denying the Appellants' request for waivers from the Howard County Design Manual for the property located at 4941 Bonnie Branch Road, Ellicott City (the "Property"). They are also appealing from a June 29, 2007 DPZ letter denying the Appellants' request for waivers from the Subdivision and Land Development Regulations (the "Subdivision Regulations"). The Appellants claim DPZ's basis for the denied waivers is arbitrary and capricious. They charge DPZ's decisions aggrieve them because the denial deprives them of all subdivision potential for the property and causes them unnecessary delay and expenses.

The Appellants certified that notice of the hearing was advertised and that the subject property was posted as required by the Howard County Code.

I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

David Carney, Esquire, represented the Appellants. Paul T. Johnson, Deputy County Solicitor, represented DPZ. James Fawcett and Joe Rutter testified for the Appellants. Marsha

McLaughlin testified for DPZ. Gephardt Merkel and Helen Barnatny testified in support of the denial.¹

Findings of Fact

The Property, known as 4941 Bonnie Branch Road, is located in the 2nd Election District on the east side of Bonnie Branch Road in Ellicott City. It is identified on Tax Map 31, Grid 9, as Parcel /Lot 321 and is located in an R-20 (Residential: Single) zoning district. The Property is a slightly irregular rectangular parcel consisting of about 2.394 acres. It fronts on Bonnie Branch Road, a County-designated scenic road. The house is currently accessed via a driveway on Bonnie Branch Road and the driveway is located in the Property's northeast corner.

The Property is heavily wooded. Because Bonnie Branch Road runs along Bonnie Branch, a tributary of the Patapsco River, the Property is part of a stream valley characterized by steep slopes and ravines. The Property is therefore an integral part of the stream valley hillside. The slopes along the Property's entire frontage are 25% or more.

In 2006, the Appellants sought to subdivide the Property to create two new lots, including one for their son, and requested waivers to construct a use-in-common driveway on steep slopes. They sought a waiver from Section 16.116(b)(1) of the Howard County Subdivision and Land Development Regulations (the "Subdivision Regulations") to construct grade steep slopes for a use-in-common driveway. They also sought waivers to construct a driveway that did not conform to

¹ I permitted Mr. Merkel and Ms. Barnatny to testify without entering their appearance as parties. As Mr. Johnson explained, although it is long-standing policy not to permit testimony from non-parties in administrative appeals, *Jacob Hickmat v. Howard County*, 148 Md. App. 502, 813 A.2d 306(2002) suggests the Hearing Authority may permit potentially aggrieved parties to testify in appeals concerning DPZ waiver decisions. In that case, the Court of Special Appeals upheld the circuit court's decision to allow nearby property owners with inadequately represented and protectable interests to intervene in DPZ's appeal of a Board of Appeals decision to reverse and deny a DPZ waiver of the Subdivision Regulations to permit disturbance of a stream and buffer area, where the Board had denied the property owners the right to testify pursuant to County policy.

Design Manual standards. DPZ denied the requested waivers, in part because the Appellants had applied for them individually, and not as part of a subdivision application.²

The Fawcetts subsequently hired Mr. Rutter's firm, Land Design Development, to prepare a full subdivision application (F-07-193) and to redesign the grade of the proposed driveway.³ The new plan proposed the addition of one, 1.409-acre lot toward the rear of the Property. Note 4 on the April 1, 2007 Subdivision Plan states the Appellants would abandon and remove the existing driveway and restore the land to its pre-development conditions. The Supplemental Plan (Appellants' Exhibit 1) shows a new use-in-common driveway entrance located toward and running generally parallel with the southern property line. The driveway would climb the hillside, turn in a northerly direction and continue behind the house, and then turn east onto Lot 2.⁴

The use-in-common section of the proposed driveway is shown as 14 feet in width. Retaining walls are shown along a section of the use-in-common driveway where it climbs the hillside. The proposed driveway widens to a 16-foot wide pullover just before it begins to curve behind the existing dwelling. The three private driveways would each be 12 feet in width.

To gain approval for the proposed driveway in steep slopes, the Appellants submitted multiple Design Manual and Subdivision Regulations waiver requests to DPZ.

A. The Requested Subdivision Waivers – (WP-07-115)

1. A waiver from Section 16.116(b) to grade steep slopes for the proposed driveway. Section 16.116(b) defines steep slopes as slopes that average 25% or greater over ten vertical feet. Section 16.116(b)(1) prohibits grading, removal of vegetative cover and trees, new structures, and paving

² The Design Manual applies only when subdivision occurs.

³ Mr. Rutter is the former Howard County Director of Planning and Zoning.

⁴ The plan also shows a driveway and parking pad for a potential third lot.

where the on-site and off-site contiguous area of steep slopes is greater than 20,000 square feet (Appellants' Exhibit 5).

2. A waiver from Section 16.117(b), Forest Conservation, to provide forest conservation on the individual lots subject to a forest conservation easement, and not on a separate Open Space Lot. Section 16.117(b) requires forest conservation easements in residential subdivisions to be located in open space or a non-buildable preservation parcel,

B. Waivers from the Design Manual

1. A waiver from the Howard County Design Manual, Volume III, Section 2.6.F to permit a driveway with a proposed maximum 18% grade, as shown on the Supplemental Plan (Appellants' Exhibit 1). The ultimate driveway would have a 15% grade on the northern end and an 18% grade (the area shown in blue on Appellants' Exhibit 1) on the southern end. The Design Manual's maximum grade for single-family driveways is 15% and the minimum turning radius, 45 feet (Appellants' Exhibit 2).

2. A waiver from the Design Manual, Volume III, Appendix A, Public Road Design Criteria (pavement width) (October 6, 2006). The Appellants requested a waiver to permit a 14-foot wide driveway, with a 16-foot pullover. The Design Manual requires use-in-common driveways to be 16 feet in width (Appellants' Exhibit 3).

3. A waiver from The Design Manual, Volume IV, Detail R6.06, Section A-A, Residential Driveway Section Connection to Open Section Roadway (the tie-in grade). The Supplemental Plan appears to show the proposed grade to the edge of the road as 14%. The Design Manual requires a 6% maximum tie-in grade (Appellants' Exhibit 4).⁵

⁵ Mr. Rutter contended the required tie-in grade is ambiguous, owing to Note 4 on Detail R6.06, which states the "tie-in grade of private driveway shall not exceed 14%" (Appellants' Exhibit 4). However, he conceded

DPZ's Development Engineering Division ("DED"), which reviews Design Manual waiver requests, denied the waiver requests by letter dated June 13, 2007. DPZ's denial letter states it was denying the waiver requests " . . . based on the result of the denial of the WP-07-117, steep slope denial." By letter dated June 29, 2007, DPZ's Division of Land Development ("DLD"), which reviews Subdivision Regulations waiver requests, denied the Appellant's requests to waive Sections 16.116(b)(1) and 16.117(b). The letter asserts it is in the public interest to maintain the integrity of environmentally sensitive features. It states the site has "extremely steep slopes covering one fifth of the site," that the "remainder of the site has steep slopes greater than 15%," and that there are slopes "33%-66% that extend for 28 vertical feet." The letter also asserts the proposed shared driveway does not comply with Design Manual standards for driveways and refers to DED's attached comments dated May 31, 2007, in which DED recommended denial because the proposed use-in-common driveway grade was excessive.

Referring to the requested waiver from Section 16.117(b), the letter states it is in the public interest to have the forest conservation concentrated on a separate Open Space Lot and not provided on individual lots. The letter notes the proposed waivers are contrary to Section 16.125(b) of the Subdivision Regulations, which specifies guidelines for development abutting a scenic road, including a directive to minimize tree removal and grading, and retaining existing topography. It further asserts the scenic road study provided with the plan did not reflect the proposed disturbance to the site.

the County consistently requires 6% as the maximum tie-in grade. Any ambiguity was removed however, when Howard County approved Resolution No. 41 (May 7, 2007), through which the County adopted a comprehensive revision of Volume IV, Design Manual to revise the standards and specifications to the construction of roads and utilities in Howard County. The current R6.06 Detail contains no such note.

Finally, the letter asserts the proposal does not provide safe access to the lots because the grade on the proposed driveway is excessive and may limit the ability of emergency apparatus to reach the dwellings. Attached comments from Howard County Fire and Rescue dated June 7, 2007 states it "does NOT approve this request" because the maximum allowable grade of the driveway shall be 15% with a durable and sustained grade of 8%, per Title 17.

The Appellants timely filed this appeal. In their appeal petition, the Appellants contend DPZ's decisions to deny the requested waivers are arbitrary and capricious because it is inconsistent with past decisions and unfairly restricts the Appellants' use and development of their property. The petition avers the requested Design Manual waivers for the proposed use-in-common driveway and driveway tie-were are for grades that slightly exceed the maximum grade. It also challenges DPZ's decision to deny the Design Manual waivers based on the denial of WP-07-117, a decision the Appellants claim was not made until 16 days after the Design Manual waiver denials.

The petition also contends DPZ's denial of the subdivision waivers (WP-07-115) is arbitrary and capricious because the Department consistently grants waivers to allow disturbance of environmental features when there is no practical alternative for access to a property. The petition also challenges DPZ's and the Soil Conservation District's determination that the impact of the regulations is carefully considered by the county legislature and administrators acting with the best interests of the public with no guarantee of maximum lot yield. The petition avers the Appellants are not seeking the maximum yield and that the County Council could have, but chose not to, rezone the Property to R-ED (Residential: Environmental Development), a net density zoning intended to conserve environmental features.⁶

⁶ Because the Appellants' reasonable use/subdivision potential implicates a takings claim, in Mr. Rutter's words, it is not considered here, as I have no jurisdiction to hear constitutional claims.

The petition contests DPZ's application of the term "steep slopes" to slopes less than 25% and its characterization of 20% of the site as covered by "extremely steep slopes" without defining "extremely." Finally, the petition challenges DPZ's conclusion that the proposed driveway would limit emergency vehicle access, contending it would be less steep and wider than the current driveway and that if DPZ has a true concern for emergency access, it would approve the proposed driveway.

Testimony

1. At the hearing on October 8, 2007, Mr. Fawcett testified the steepest slopes (25% or greater and nearest the road, as marked in red on Appellants' Exhibit 1) were created when Bonnie Branch Road was cut through the hillside.

2. The Appellants introduced into evidence the January 7, 2003, DPZ-approved Site Development Plan ("SDP") for Beechwood Overlook (Appellants' Exhibit 7). Note 19 on that plan states the Planning Director approved Waiver Petition WP-02-75 for Section 16.116(b)(1) on May 21, 2002. The waiver petition approved grading in an area of 25% slopes for a proposed driveway with a 14-foot driveway (Note 12-A).

3. The Appellants also introduced into evidence the revised, January 6, 2006, DPZ- approved SDP for the Tucker Property (Appellants' Exhibit 8). Mr. Rutter referred to Note 23, which notes DPZ's approval of Waiver Petition 91-197 for Section 16.116(b)(1). Mr. Rutter testified the waiver permitted the grading of 25% slopes for a driveway and a series of retaining walls, with a 15% maximum grade and a tie-in grade at 10 percent (as stated on Note 19). Appellants' Exhibit 9 shows three photographs of the Tucker property, which Mr. Rutter testified demonstrates the use of retaining walls to minimize cuts into slopes.

4. It was also Mr. Rutter's testimony that a homeowner's association-owned, forest conservation/Open Space Lot was undesirable for a two-lot subdivision. He also averred DPZ granted waivers to slope grading without requiring fire code compliance and that the Fire Department imposed standards that were not in the County Code.

5. On cross-examination, Mr. Rutter stated the new driveway would have less of an impact on the environment after grading than the existing driveway because the requested waivers (for a narrower, steeper driveway) and retaining walls would cause less disturbance. He also said the Beechwood Overlook plan was similar to the plan in this case because it involved the grading of 25% slopes. Referring to the Tucker Property on cross-examination, he conceded the two dwellings might originally have had a different waiver. DPZ showed him Sec. 17.104(157) of the Howard County Fire Prevention Code, which sets the maximum allowable grade of a fire access road to 15% with a durable and sustained grade of 8% and sets the transition from the road to the driveway at 8% or less.

6. DPZ introduced into evidence its May 24, 2006 letter denying the original, 2006 waiver requests (DPZ Exhibit 1). The letter states DPZ is denying Waiver Petition 06-107 because it is in the public interest to protect the integrity of environmentally sensitive features. The denial letter states the site has "extremely steep slopes covering one-fifth of the site," that the remainder of the site has steep slopes greater than 15%, and that the site has 33%-66% steep slopes extending for 28 vertical feet. Marsha McLaughlin, the Director of Planning and Zoning, testified DPZ denied Waiver Petition 06-107 for substantively the same reasons as the waiver denials under appeal. She also noted the original RBA waiver request cited to several cases not much relevant to Waiver Petition 06-107, including Fincham, Cavanaugh, Bonnie Lass, Beechwood Overlook, and Tucker.

7. Referring to Beechwood Overlook (Appellants' Exhibit 7), she testified the Section 16.11(b) waiver approval concerned grading for an existing road and a deteriorated retaining wall. The waiver decision related to the widening of an existing road, drainage, and involved minimal disturbance, unlike Fawcett. Beechwood also met Design Manual and fire code requirements, as the driveway had an 8 percent grade, unlike Fawcett, which has more disturbance and does not meet Design Manual or the Fire Department's desire for less than 15% grading.

8. Discussing the Tucker Property, Ms. McLaughlin testified the 2005 SDP was not relevant because the Waiver Petition was submitted in 1991. It thus predated scenic road requirements and the County's current recognition of the importance of environmental regulations. She stated steep slopes were not particularly relevant to the waiver, although they may have been in the area of the driveway based on the plan.

9. Discussing DPZ's procedure for acting on waivers, she explained staff prepares a waiver form for her signature, and the form is then translated into letter form, so the letter to the applicant is the substantive decision. Concerning the June 13 denial timing issue raised by the Appellants, she stated the DLD and DED chiefs often discuss a case, especially when DPZ is jointly processing both Design Manual Subdivision Regulations waiver requests. The ultimate recommendation/decision comes from DLD, which in the Fawcett case recommended denial for both the 2006 and 2007 waiver requests.

10. Concerning DPZ's reliance on the Fire Department's comments as a basis for denying Waiver Petition 06-107, she stated the County had no enforcement or regulatory mechanisms to ensure the Fire Department's safe response when an existing driveway is involved, but that DPZ could deny a proposed driveway with unsafe grades. On cross-examination, she maintained the fire code had to be applied at the subdivision stage, not at some later stage, because once DPZ approved

a lot, it was presumed the lot could be developed and not denied based on Fire Department concerns. Although the Fire Department's comments are not mandated considerations in the Subdivision Regulations, it sign offs on plans on safety issues, and the Health Department (for well and septic) and the State Soil Conservation District likewise comment and sign-off on plans. She stated the Fire Department's comments are considered in waiver petitions where relevant, because their concerns could not be considered once a legal lot exists, as DPZ presumes the approval of a legal lot implies the right to develop it.

11. Discussing the Section 16.117(b) forest conservation/open space waiver denial, Ms. McLaughlin testified DPZ wanted the forest in an Open Space Lot, not on private property, because property owners like to encroach on forest conservation area for decks and pools.

12. On cross-examination she stated DPZ has in the past probably granted waivers for 25%+ slopes and that the Fire Department's grade requirement is not generally much of a subdivision problem in the County except in the Ellicott City area. When asked why DPZ did not pull the projects cited by RBA in the in the original Section 116.16(b) waiver petition for review and comparison, she testified DPZ could not undertake a comprehensive search because the database cannot be searched for waivers from specific sections. In her opinion, the issue in Fawcett is the amount of site clearing along a scenic road, which would produce a huge change in forest resources and the scenic view.

13. Mr. Merkel testified that he resided opposite the Fawcetts on the other side of Bonnie Branch Road and that his neighbors had problems relating to sediment control before and after construction. In response to questioning from the Hearing Examiner about what happens when there is a heavy rain, he stated water on the Fawcett Property runs down their driveway and onto his property.

14. Helen Barnatny testified to residing at the property adjoining the Fawcett's south property line. She stated that when it rains, a stream forms on the Fawcett Property and gully and runs onto the Merkel property. It was also her opinion that the driveway' construction would sever the roots of trees that are about four stories high, killing the trees and ultimately increasing runoff.

CONCLUSIONS OF LAW

I. Standard of Review

Section 16.105(a) of the Howard County Code authorizes appeals of DPZ decisions, including the denial of a waiver petition.

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.

Because DPZ denied the Fawcetts' waiver requests, the property owners are aggrieved persons who timely filed this appeal:

Rule 10.2(c) of the Hearing Examiner Rules of Procedure sets out the burden and standard of proof in such appeals.

In any other appeal of an administrative agency decision, the petitioner must show by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

The central issue here is whether DPZ properly denied the requested waivers. To arrive at a resolution of this issue, we must first determine whether DPZ's decision was a mistake of fact or contrary to law. To do so, we turn to the Design Manual and the Subdivision Regulations.

II. The Design Manual Waivers

Volume III, Section 1.2.D.2 of the Design Manual authorizes waivers from its road requirements.

Requests for approval of design deviations for roads to be approved or constructed as part of a development project are to be submitted to the Department of Planning and Zoning. Satisfactory written justification must accompany the submittal. The Department of Planning and Zoning shall make a decision on any design deviation in writing. The Department of Planning and Zoning may approve any waiver requests if it finds the requesting party had demonstrated the desirability of granting the waiver and that the purpose of the Design Manual may be served to an equal or greater extent by the granting of the waiver. Waiver requests that accompany the initial plan submittal will be considered in tandem with the plan review. A fee will be required for waiver requests made with final submissions.

DPZ denied the Design Manual waiver requests based on its denial of the Appellants' Waiver Petition 07-115. The Appellants argue the denial lacks a substantive basis and apparently is contrary to law because DPZ did not deny WP 07-115 until 16 days later. DPZ argues it acted consistently with its procedures for processing related waivers because the DED and DLD chiefs communicate about Design Manual and Subdivision Regulations waiver requests, which the two divisions process simultaneously. I agree with DPZ and so conclude it did not act contrary to law when it based the Design Manual waiver requests denials on the WP-07-115 denials, which I discuss below.

Most significant, however, is whether the Appellants have demonstrated DPZ error or mistake of fact by showing the road design deviations will serve the purpose of the Design Manual to an equal or greater extent. They argue the new driveway would have a lesser ultimate grade than either the original proposed driveway or the redesign of the existing driveway (although no such plan was in evidence at the hearing), that the pullover would serve the purpose of the 16-foot road

width requirement, and that the requested waivers would produce a driveway grade and tie-in only moderately steeper than permitted.

The manifest purpose of the driveway and tie-in grade requirements is to provide for safe, efficient, and coordinated road systems. See Design Manual III, 1.1.C. Based on the Appellant's failure to produce sufficient evidence and testimony that the driveway's design deviations serve the purpose of the Design Manual to an equal or greater extent, I must conclude the Appellants have not met their evidentiary burden of showing by substantial evidence that DPZ acted erroneously or contrary to law in denying the Design Manual waiver requests.

III. The Subdivision Regulations Waivers

The Design Manual requires road design waivers to be considered in tandem with plan review. As DPZ testified, DLD is the ultimate decision-maker in the plan review process, so its simultaneous review and decision on the Appellants' petition to waive Sections 16.16(b)(1) and 16.117(b) ultimately controls in the matters on appeal.

In reviewing a request for a waiver from the Subdivision Regulations, DPZ must apply the criteria set forth in Section 16.104, which requires DPZ to find (1) that (a) that "extraordinary hardships or practical difficulties may result from strict compliance" with the Regulations, or (b) the purposes of the Regulations may be served to a greater extent by an alternative proposal, and (2) that the waiver does not have the "effect of nullifying the intent and purpose" of the Regulations. Section 16.104(a) and (b).

The Appellants produced no evidence of extraordinary hardships or practical difficulties resulting from strict compliance with the Subdivision Regulations. Consequently, the remaining issue here is whether DPZ was mistaken in fact or acted contrary to law because the waivers would serve the Subdivision Regulations to a equal or greater extent. Put simply, would the detriment

caused by a narrower driveway with a steeper grade and located in an area of steep slopes along a scenic road and the placement of forest conservation on private lots subject to easements better serve the Subdivision Regulations?

The manifest purpose of Section 116.16(b)(1)'s prohibition against grading, removing vegetative cover and trees, new structures and paving in slopes that average greater than 25% in a contiguous area equal to or greater than 20,000 square feet is to protect the integrity of such natural features of the land unless development can be accomplished free from the potential hazards of erosion, flooding, and other environmental disturbances. See Section 16.101(a)(7), (8), and (9). In this case, DPZ gave four reasons for denying the requested waivers from Sections 116.16(b)(1): (1) it was in the public interest to maintain integrity of environmentally sensitive features, (2) the proposed shared driveway did not comply with Design Manual driveway standards, (3) the alternative proposal was contrary to the intent of the scenic roads legislation, and (4) the driveway grade is excessive and may limit safe access to the lots by emergency apparatus.

The Appellants counter as follows.

Reason. 1. The driveway would better serve the Regulations because it ultimately would have less impact and cause less disturbance than the original waiver request. Regrading the existing driveway would cause more disturbance. DPZ also misrepresented the disturbance by including areas as steep slopes though they did not meet the regulatory definition. The Appellants also emphasized they are not seeking the maximum yield and that the County Council could have rezoned the Property to R-ED (Residential: Environmental Development), a net density zoning intended to conserve environmental features.⁷

⁷ Because the Appellants' reasonable use/subdivision potential implicates a takings claim, in Mr. Rutter's words, it is not considered here, as I have no jurisdiction to hear constitutional claims.

When I observed the Property, I had to step outside my vehicle and into the right-of-way on the other side of Bonnie Branch Road to view the hillside site. Ms. McLaughlin testified the amount of clearing involved for the driveway belies the Appellants' endeavors to minimize the disturbance of the Property's steep slopes. Although the petition and Mr. Rutter claim DPZ miscalculated the area of steep slopes, apparently to discount the amount of steep slopes and vegetation to be disturbed, Mr. Rutter conceded the frontage is all 25% slopes and Mr. Fawcett testified that the most steep slopes are along Bonnie Branch Road.

Nor am I convinced by the Appellants' R-ED rezoning argument. As I observed at the hearing, it was equally possible the County did not consider the R-ED zone for the area because it was developed out. In any event, as long as there is any disturbance of the Property's steep slopes, it cannot be said that the proposed driveway better serves the purposes of the steep slope grading restriction than *not* disturbing the hillside at all.

Reason 2. Beyond the arguments presented in relation to DPZ's decision to deny the steep slope grading waiver, the Appellants claim DPZ's finding that the proposed shared driveway did not comply with Design Manual driveway standards lacks a factual basis, being grounded in circular reasoning. In their words, DED denied the driveway waiver requests based on DLD's denial of Section 116.16(b)(1), and DLD denied Section 116.16(b)(1) because DED denied the requested driveway design waivers.

This reasoning is specious and totally disregards how DED and DLD, two DPZ divisions, jointly process a subdivision plan involving interrelated Design Manual and Subdivision Regulations, as discussed above.

Reason 3. Although the petition averred the Appellants would show DPZ granted many other waivers along scenic roads, including Bonnie Branch Road, the only evidence related to the

Tucker Property, which predated scenic roads legislation. Nor did the Appellants counter with evidence or testimony that the driveway would fulfill the intent and purpose of Section 16.125(b), which provides guidelines to improve project design to preserve historic resources and structures.

Reason 4. The Appellants argue DPZ should approve the proposed driveway if it has a true concern for emergency vehicle access because it is less steep and wider than the current driveway. As DPZ testified, however, the County has no authority to require a property owner to reconstruct an existing driveway for safe emergency vehicle access. Mr. Rutter testified to DPZ's history of granting waivers for driveways without requiring fire code compliance and the Fire Department's imposition of standards that were not in the County Code. DPZ, however, introduced into evidence that section of the Fire Code on which DPZ ultimately relied on as a basis for denying the requested waiver, per the Fire Department's attached comments. Finally, according to Ms. McLaughlin, DPZ granted the steep slopes waiver for the Tucker property in 1991, so the waiver predated scenic roads legislation and the County's more recent emphasis on environmental protection. For these reasons, I conclude the Appellants have failed to show how the Subdivision Regulations would be served by the waiver requests. Consequently, DPZ reasonably found the Appellants failed to show not only that the Regulations would better served by an alternative proposal but that the waivers would not have the effect of "nullifying the intent and purpose" of the Regulations.

IV. The Forest Conservation/Open Space Lot Waiver

The Appellants argue they have maintained the Property's forest for many years and will continue to do so. They argue a forest conservation easement concentrated on an Open Lot is inefficient, given it would be subject to a two-lot homeowner's association and would require another waiver for irregular lots. DPZ concluded it was in the public interest to require it, given the

Property's location along a scenic road and property owners' historical encroachments into forest conservation easements on their property.

For these reasons, I conclude the Appellants have failed to show Section 117.16(b) would be better served by placing the forest conservation easements on private property. Consequently, DPZ reasonably found the Appellants failed to show not only that the Regulations would better served by an alternative proposal but that the waivers would not have the effect of "nullifying the intent and purpose" of the Regulations.

V. DPZ's Denial of the Waiver Requests are Arbitrary and Capricious

The Appellants alternative and chief argument is that DPZ should grant the waivers because the department has approved similar waivers for driveways with 15%+ grades on graded/disturbed steep slopes. If DPZ had approved waivers for driveways under similar circumstances, then its denial of the Appellants' request might be regarded as arbitrary and capricious.

The only evidence the Appellants furnished to support this claim was two plans, which they said represented past steep slopes waiver request approvals. DPZ distinguished its decision to approve a Section 16.116(b)(1) steep slope waiver request for Beechwood Overlook from the Fawcett Property waivers. Beechwood concerned a waiver for grading in relation to an existing road and a deteriorated retaining wall and involved minimal disturbance. Beechwood also met Design Manual and fire code requirements. The Fawcett Property, on the other hand, has more disturbance and does not meet Design Manual or the Fire Department's desire for less than 15% grading. The second plan, the Tucker Property on Bonnie Branch Road, DPZ discounted as relevant because the Waiver Petition was submitted in 1991, almost 16 years ago, predating scenic roads legislation and the County's current recognition of the importance of environmental regulations.

I cannot conclude from this evidence that these two plans are substantial evidence of a consistent history of approving Section 116.16(b)(1) waivers for driveways on steep slopes. I therefore must conclude DPZ did not act arbitrarily or capriciously in denying the requested waivers for driveways on steep slopes.

The Appellants also argued DPZ's denial of the requested waivers were arbitrary and capricious because the department historically does not consider Fire Department findings or recommendations in waiver petitions. However, in my view, DPZ's denial of the initial, 2006 waiver denies requests evidences DPZ's reliance on emergency apparatus safe access in relation to proposed driveways with excessive grades. I find the Appellants have failed their burden of producing sufficient evidence to support this claim. I therefore must conclude DPZ did not act arbitrarily or capriciously in denying the requested waivers based in part on its finding about the lack of safe access for emergency apparatus.

Conclusion

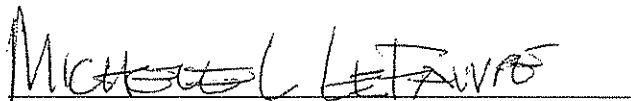
For all of these reasons, I conclude the Appellants have failed to show by substantial evidence that DPZ's denial of the Design Manual and Subdivision Regulations waiver requests was clearly erroneous, arbitrary and capricious, or contrary to law. The administrative appeal is therefore denied.

ORDER

Based upon the foregoing, it is this 15th day of November 2007, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of appeal of James and Patricia Fawcett in BA Case No. 607-D is hereby **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**


Michele L. LeFaiivre

Date Mailed: 11/19/07

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.