

EVA J. NELSON, MICHAEL B. NELSON AND * BEFORE THE
AND MATTHEW J. NELSON, PETITIONERS * PLANNING BOARD OF
PLANNING BOARD CASE NO. 428 * HOWARD COUNTY, MARYLAND

* * * * *

DECISION AND ORDER

The Planning Board of Howard County, Maryland, held a public hearing on July 20 and November 2, 2017 in accordance with Section 107.0.F. of the Howard County Zoning Regulations. It considered the petition of Eva J. Nelson, Michael B. Nelson and Matthew J. Nelson, owner/developer to approve a Preliminary Equivalent Sketch Plan (SP-15-012, Oak Hill Manor) for eight single-family detached residential lots and four open space lots. The project is 8.20 acres, zoned Residential: Environmental Development (R-ED) and is located on the west side of Ilchester Road, in the First Election District of Howard County, Maryland, and is identified as Tax Map 31, Grid 4, Parcel 618.

The Notice of Hearing was published and the property was posted in accordance with the Planning Board’s requirements. The certificates of publication and posting were made a part of the record.

Pursuant to the Planning Board’s Rules of Procedure, the reports and official documents pertaining to the petition; including the Department of Planning and Zoning’s Technical Staff Report, the Howard County Subdivision and Land Development Regulations, the Howard County Zoning Map and Regulations, the Howard County Design Manuals, the Howard County Landscape and Forest Conservation Manuals, and the Adequate Public Facilities Ordinance, were made part of the record.

Mr. William Erskine, Esquire, Offit and Kurman, represented the Petitioners. Mr. Thomas Coale, Esquire. Sang and Oh, represented several adjacent property owners in opposition to the petition. Several individuals, who were unrepresented by legal counsel, appeared in opposition to the petition.

After carefully evaluating all testimony and evidence accepted into the record, the Planning Board made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Planning Board has the authority to review and make a decision regarding the proposed Preliminary Equivalent Sketch Plan in accordance with the pertinent criteria set forth, pursuant to Section 107.0.F.6. of the Howard County Zoning Regulations. Those criteria are as follows:
 - a. The proposed lay-out of lots and open space effectively protects environmental and historic resources.
 - b. Buildings, parking areas, roads, storm water management facilities and other site features are located to take advantage of existing topography and to limit the extent of clearing and grading.
 - c. Setbacks, landscaped buffers, or other methods are proposed to buffer the development from existing neighborhoods or roads, especially from designated scenic roads or historic districts.

2. Brenda Luber presented the Technical Staff Report for the Department of Planning and Zoning, which recommended approval of the Preliminary Equivalent Sketch Plan, SP-15-012, according to the above-stated criteria subject to comments from reviewing agencies and any conditions of approval by the Planning Board.

The proposed development is summarized in the Technical Staff Report as follows:

SP-15-012 proposed eight single-family detached lots, ranging from 10,451 square feet to 15,082 square feet (except for Lot 6 is 38,386 square feet in size), on 8.20 acres, zoned R-ED (Residential: Environmental Development). All lots will be served by a shared driveway, except Lot 1, which will have direct access onto Ilchester Road. Four open space lots ranging from 0.20 acres to 2.49 acres are also proposed.

The site contains 4.04 acres of steep slopes and 6.9 acres of forest. There are no floodplains, streams or wetlands on the subject property. A small portion of a stream buffer is located along the northern edge of the subject property.

Two forest conservation retention easements (FCE) on the subject property will contain 3.51 acres of forest.

The site fronts on Ilchester Road, a scenic road, and therefore, must meet the requirements of Section 16.125 (Protection of Scenic Roads) of the Howard County Subdivision and Land Development Regulations as administered by the Department of Planning and Zoning.

All required setbacks and building restriction lines are being respected. However, a setback reduction was approved by the Hearing examiner for Lots 1 and 2, from 75 feet to 50 feet, pursuant to BA-14-020V.

3. Ms. Stephanie Tuite, Landscape Architect and Civil Engineer with the engineering firm Fisher, Collins and Carter testified first for the Petitioner. Ms. Tuite testified that the subdivision was started in 2013 and a concept plan was presented at a community meeting and before the Historic Preservation Commission (HPC). She described the property and its natural resources (stream buffers, steep slopes). She testified that the existing driveway was shifting slightly to achieve better sight distances. She testified that the initial plan proposed three lots to the north of the historic house; however, advisory comments from the HPC, the former Planning Director, and County staff recommended moving the lots away from the historic structure. This would provide a larger setting for the historic home. The design proposed side loaded instead of front loaded garages, which pushed the proposed homes closer to Ilchester Road. She testified that a variance from the 75' front setback was requested to 50', to minimize disturbing steep slopes. The variance was granted and to her knowledge no appeals were filed. She testified that all lots would share a driveway, except one, which would directly access Ilchester Road. Vegetation along Ilchester Road would have to be removed to provide a driveway and storm water management for this lot. Ms. Tuite added that existing ash trees were in the process of being removed by BG&E. She presented photographs (Petitioner's Exhibit #1) showing ash trees being

removed along Ilchester Road. A photograph (Petitioner's Exhibit #1) shows a utility pole to the south of the existing driveway, in front of Lot 2, and a tree that has been taken down and another that will be felled. She testified that BG&E can remove trees along a scenic road. She further testified that Mrs. Nelson received a request from BG&E to remove four ash trees near powerlines because they pose a risk to electric service. A copy of the request was submitted to the Board (Petitioner's Exhibit #2).

The testimony from the Petitioner's witnesses regarding each of these criteria is set forth below:

a. **The proposed lay-out of lots and open space effectively protects environmental and historic resources.**

Ms. Tuite testified that after meeting with the HPC and county agencies, the plan was redesigned with the understanding that "everything cannot be saved." The modified plan has a larger setting for the historic house than originally proposed, but it required relocating three lots, disturbing steep slopes, and a setback variance, which was supported by the former planning director. Ms. Tuite testified that less than 14,000 square feet of steep slopes would be disturbed and that seven lots would share a common driveway. She added that the configuration of the existing loop driveway would remain and that a Design Manual Waiver was approved, allowing seven lots to share a 16-foot wide driveway, instead of the required 24-foot wide paved public road, with curb and gutter. Ms. Tuite explained how the plan protects the historic house and that moving the lots away from it and retaining existing trees provides a better setting. She added that the historic setting is important when considering historic preservation.

b. **Buildings, parking areas, roads, stormwater management facilities and other site features are located to take advantage of existing topography and to limit the extend of clearing and grading.**

Ms. Tuite testified that the plan takes advantage of the existing driveway by keeping its current location and minimizing any widening, and therefore minimizing clearing and grading as well. However, due to steepness and sight distance issues, a small portion will change to provide safer vehicular access. She added that microbioretention facilities were in the lower portion of the site to capture the most runoff. She then testified that she was not aware of any tree removal along the scenic road prior to July 6, 2017. Further, denying the Alternative Compliance request would not prevent BG&E from removing trees along the scenic road because of the existing powerlines and electrical service concerns.

c. **Setbacks, landscaped buffers, or other methods are proposed to buffer the development from existing neighborhoods or roads, especially from designated scenic roads or historic districts.**

Ms. Tuite testified that in her professional opinion the plan complied with the third criteria and that the site was not within a historic district. She further testified that some trees along the scenic road would have to be removed to provide access. She added that additional vegetation would be planted where the trees were sparse. She testified that stormwater management was engineered so that the front portion of the site would drain to microbioretention facilities and drywells. The runoff from roofs

would be controlled by downspouts, connected to drywells or microbioretention facilities. She testified that the site was designed so that drainage would not be directed to slopes over 25 percent. She testified that the Bonnie Branch area typically floods and requires higher management, for a 10-year storm. She testified that stormwater management was designed so that runoff did not flow into the Bonnie Branch, or through Ellicott City. She testified that the site was treated for a one-year storm and complied with stormwater management regulations. She further testified that the subdivision complies with the bulk R-ED requirements, and the Subdivision Regulations, except for the approved Design Manual waiver. Mr. Erskine concluded his direct examination of Ms. Tuite.

On cross-examination, Ms. Tuite acknowledged that in the original layout of the proposed subdivision, there was no direct access from any of the eight lots to Ilchester Road, that alternative compliance was only necessary for the removal of one specimen tree as opposed to four, there was no setback variance request and that the proposed house locations on the proposed lots were further away from the adjacent property owned by the Marzins. Ms. Tuite indicated that in the revised layout, which was undertaken to provide a larger and better setting for the historic house on the property by increasing the historic house's lot size, the other lots were more spread out, pushing lots 1 and 2 closer to Ilchester Road and resulting in the proposed house location on lot 8 being closer to the Marzin's property than in the original layout and also resulting in Lot 1's access directly onto Ilchester Road. Ms. Tuite added that front-loaded garage house types were changed to side-loaded in the proposed layout to lessen visual impacts on the historic house and create a better historic setting for it.

As to BGE's removal of trees, Ms. Tuite testified that there was no map delineating the location of the ash trees which were removed or which were planned to be removed by BGE. Ms. Tuite acknowledged that Petitioner's alternative compliance petition with DPZ for approval of removal of the four specimen trees was still required despite BGE's removal of the ash trees. Ms. Tuite also agreed that BGE's removal of the ash trees and the Petitioner's proposed removal of the specimen trees would have some impact on Ilchester Road.

Ms. Tuite testified that all the trees proposed to be removed pursuant to the alternative compliance request were on proposed lot 1 and were necessary either for driveway access or house location. She also indicated that the trees to be removed on lot 2 did not require an alternative compliance request because they were not in the required 35-foot buffer area and were being removed only for house location purposes.

Ms. Tuite also testified that the Petitioner heard the concerns expressed by neighbors about the location of the proposed house sites in proximity to their residences, particularly the Marzins, and in response to those concerns they shifted the house location on lot 8 further away from the Marzin's lot, added screening with landscaping between the lot 8's proposed house and the Marzin's lot and graded a swale to provide water flow to the rear of lot 8 rather than towards the Marzin's lot.

Ms. Tuite testified that slopes do affect how storm water management is provided in that as slopes get steeper, water travels faster, so the desire is to have water flow onto areas that are less steep. Ms. Tuite testified that the developer will require sediment control especially in areas of the site that are highly erodible. She indicated that more seeding or sodding would be required to mitigate effects in

those locations. Ms. Tuite testified that some water from the property would flow down Ilchester Road.

Ms. Tuite testified that she was not familiar with the Maryland Department of Natural Resources Ecological Areas Map, and that her firm relies on an environmental consultant for this type of information. She stated that the consultant would not be testifying. She further added that the consultant prepared the Forest Stand Delineation and identified the wetlands on the property.

Ms. Tuite testified that she was familiar with the Howard County Inventory of Scenic Roads and that Ilchester Road was included. In that inventory, Ms. Tuite agreed that the scenic character of Ilchester Road was its outstanding natural feature. Ms. Tuite also agreed that the Subdivision Regulations address how to protect scenic roads above what is required by the R-ED zoning district and that the waiver is addressing those protections. Ms. Tuite agreed that the Subdivision Regulations indicate that when a scenic road exists the subdivision should be developed in such a way to preserve the scenic character. Ms. Tuite agreed that some roads are scenic because of open meadows, but Ilchester Road is scenic because of its forested and natural features, but she added that a considerable portion of Ilchester Road is not forested. Ms. Tuite agreed that when the road was added to the Inventory, it was noted that certain areas had residences and certain areas did not. Ms. Tuite agreed that this proposed subdivision would perhaps change a small portion of this scenic road.

Ms. Tuite agreed that 14,000 square feet, or about 1/3 of an acre, of steep slopes would be disturbed on lots 1 and 2 out of a total area of approximately 4 acres of steep slopes on the subject property. She stated that the affected steep slopes are mainly on Lot 2, with a smaller portion on Lot 1. Grading on Lot 2 would be for the proposed house site and a retaining wall, which is proposed at the rear of both lots 1 and 2. Ms. Tuite agreed that the original plan of the subdivision took better care of the existing topography.

Ms. Tuite agreed that the design before the Planning Board proposed the maximum density permitted under R-ED zoning but also added that original plan did so as well.

Ms. Tuite testified that this subdivision met all required Howard County Storm Water Management protections, and that while the Patapsco River flooded from time to time, there were no special flooding requirements applicable to this subject property's development.

Ms. Tuite testified that the proposed grading at the rear of lots 1 and 2 could affect drainage if not stabilized but since stabilization would be required it would have no impact. Ms. Tuite testified that building a public road to access the subdivision's lot was possible but that it would require much more grading than the current proposed driveway. Ms. Tuite also testified that the parcel currently had two access points on Ilchester Road and that those accesses would remain although one of them would be moved slightly to improve sight distance and lessen the slope of the driveway. Ms. Tuite reiterated that Lot 1 was proposed to have direct driveway access onto Ilchester Road.

Ms. Tuite testified that the retaining walls at the rear of lots 1 and 2 would be three feet high, would span the rear of the lots for approximately 100 feet for each lot to minimize grading. Ms. Tuite indicated that the life expectancy of the retaining walls depended on the materials used but that it

could be from 30 to 100 years depending on the materials and method of construction, the details of which Ms. Tuite was unfamiliar.

Ms. Tuite acknowledged that the proposed size of the lots could be as small as 6,000 square feet but that the current design with larger lots took into consideration the historic house on the site, and that smaller lots would detract from the historic setting for the historic house. Ms. Tuite testified that the subdivision layout's effect on environmental considerations had to be balanced against the historic house and its setting, and it was decided that the minimal grading of steep slopes was considered to be acceptable to protect the setting of the historic house. Ms. Tuite indicated that the proposed size of the subdivision's lots would accommodate regularly-sized homes.

Ms. Tuite indicated she was not an environmental expert but that could affirm that the property's development would comply with Howard County's Storm Water Management requirements, in that the original runoff conditions of the site must remain the same after site clearing and impervious areas are added.

Ms. Tuite explained that, to provide year-round buffering of Ilchester Road from the development, the developer proposed supplemental plantings along Ilchester Road where vegetation is sparse which would consist of evergreen trees, six to eight feet high, with ten to twelve feet spacing. Ms. Tuite added that most of the proposed tree clearing proposed is to accommodate Lot 2.

4. Ms. Eva Nelson, Petitioner, testified that she has resided at this address for 35 years. Ms. Nelson testified that she recognized Petitioner's Exhibit No. 2. Ms. Nelson testified that it is a notice from BG&E, asking permission to remove the ash trees containing ash borers. She testified that she agreed to remove four to eight trees and that their removal started several days before this hearing. She testified that BG&E informed her that due to the size of the ash trees and the density of the forest, after the trees were removed several others may fall. In addition, the understory may be disturbed. She further testified that BG&E was removing trees from other areas along Ilchester Road.
5. The following individuals testified in opposition to the petition:

Ms. Lisa Markovitz testified that she is President of the People's Voice and Vice President of the Howard County Citizens Association. Ms. Markovitz testified that the property is zoned Residential Environmental Development (R-ED), which has development protections. Consequently, it must be shown that environmental features are protected before development can proceed. In her opinion, this development does not protect all nearby sensitive areas, rather it seeks waivers for the impacts to those areas. The maximum density on the parcel is eight lots and the development is preserving the existing house and disturbing steep slopes, but is not eliminating a lot. Three waivers are needed to achieve the maximum density and not all parcels should be allowed that. She testified that a waiver is being requested to allow grading steep slopes and removing specimen/champion trees and vegetation within 35 feet of a scenic road. She testified that since DPZ has deferred action on the waiver, until after a Planning Board decision, the Board has more authority in this case than for typical advisory decisions. She recommended the Board deny the petition by carefully examining the criteria. Ms. Markovitz testified that environmental issues are more important to protect than the historic resources. Ms. Markovitz testified that she was under the impression that lots could be arranged to avoid waivers, but

that lots would have to be closer to the historic house. Ms. Markovitz testified that the petitioner could choose to remove the historic home to avoid the need to ask for waivers from DPZ. Ms. Markovitz testified that the petitioner had the right to remove the historic house, but would then achieve the maximum eight lots. Ms. Markovitz stated that Ms. Tuite testified that the initial plan had less environmental impacts, but achieved maximum density. Ms. Markovitz testified that retaining the historic house does not impact steep slopes. Ms. Markovitz testified that she had read, not in the staff report, that champion trees would be removed. Ms. Markovitz was unable to define the term “champion tree” or identify a champion tree on the property.

6. Ms. Kathleen Rhee testified that she hikes in the Patapsco Park and has observed stormwater runoff, not just during historic flood that affected downtown Ellicott City. She testified that she was concerned about stormwater runoff, in particular as it affects the adjacent Marzin property. She testified that additional runoff would occur to this parcel after additional lots are added. Ms. Rhee testified that she lived approximately one mile from the property, but she was concerned about the runoff on the Marzin Property and Patapsco State Park.
7. Ms. Kelley Robison testified that her parcel was located uphill from the property and that developing Lots 1 and 2 would impact the scenic road.
8. Mr. James Koury testified that he has lived in his home for 34 years and has seen the forested area disappear incrementally as one site is developed after another. This has fundamentally altered the character of the neighborhood.
9. Ms. Julia Kovacs testified that she agreed with the others in opposition to the development. She testified that 8 lots, within an environmentally sensitive area, was too dense and that she is concerned about the additional water velocity impacting an off-site sewer connection and existing problems with discharging sewerage. She was also concerned about preserving the scenic road.
10. Ms. Cathy Hudson testified that stormwater management will be managed for quality at the one inch level; however, since water quantity is not being managed she is concerned. She suggested that the driveway dead end instead looping to avoid impacts to the steep slopes and that the historic barn be preserved. She also recommended reducing the size of the lots and testified that Lots 1 and 2 are a concern. She recommended the Board review the site development plan.
11. Ms. Joanne Heckman testified that she represents the Sierra Club, a branch of the National Sierra Club in Howard County, with approximately 1,000 members. Ms. Heckman presented written testimony, which was supported by the Sierra Club, and testified the developer was proposing eight single-family homes, the maximum density. The developer was requesting a waiver of environmental regulations, which the Sierra Club strongly opposes. Mr. Erskine objected to her testimony because the Board does not consider alternative compliance requests. Ms. Heckman testified that the maximum density would generate maximum profit. Ms. Heckman testified that construction of any kind is deleterious to the environment. This is because trees and other vegetative cover are removed, erosion occurs, and ground cover is replaced with impervious roofs and driveways and semi-pervious lawns. This development also requires re-routing the access road onto Ilchester Road. She further expressed concerns about

erosion, uncontrolled stormwater runoff, a greater risk of flooding, and diminished open space, which could impact the nearby Patapsco Valley State Park. She testified that the R-ED zoning governing development of this parcel also address historic preservation and protecting the scenic properties of Ilchester Road. The developer suggests that because historic features are being preserved, complying with environmental regulations is not required. This is not stated in the regulations. Historic preservation is a requirement, equal to the requirements to safeguard the environment and is not a substitute for environmental protection. The owner decided to build eight single-family homes on an historic property, destroying all but one of the historic buildings. It is an attempt to develop the property, while preserving history and the environment to the minimal extent allowed by law. Private housing developments offer no public benefit and turning an old farm into a new subdivision diminishes public resources irrevocably, with no other benefit to neighbors, the community, or the county. Ms. Heckman concluded with these are the reasons the Sierra Club opposes the subdivision.

The written testimony was entered as Protestant's Exhibit No. 1 over Petitioner's objection based on relevancy. The Board determined that while much of Ms. Heckman's testimony was irrelevant because it did not pertain to the Planning Board's decision-making criteria for the R-ED District, Ms. Heckman's testimony was pre-prepared to present the testimony of the group she represents, so that separating the relevant testimony from the irrelevant testimony was cumbersome, and the Board would be able to separate it during its deliberations.

12. Ms. Grace Kubofcik, President of the Patapsco Heritage Greenway (PHG) testified next in opposition to the petition. Ms. Kubofcik's written testimony, with attachments, was entered into the record as Protestant's Exhibit No. 2. Ms. Kubofcik testified that the Patapsco Heritage Greenway voted to comment on the proposed subdivision because of its proximity to the Patapsco State Park, the Patapsco River, and the Patapsco River watershed. In addition, they had concerns about the existing historic structures and the scenic road. She testified that their testimony was specific to the Board's criteria. She testified that PHG was concerned about the layout of the lots effectively protecting the environmental and historic resources. She testified that a variance was approved, reducing the 75-foot setback along the scenic road to 50 feet. This variance pushed the lots closer to Ilchester Road with one having direct access to the scenic road. The proposal does not provide an adequate setting for the historic home due to small lots. The proposed barn, which adds to the historic setting, is being demolished to accommodate a new lot, thus, impacting the historic house. She further testified that the homes on Lots 1 and 2 will expose themselves on a wooded slope that currently frames the property and buildings at the start of a curved section of Ilchester Road. The scenic road will be interrupted by a new driveway to serve Lot 1. She testified that Ilchester Road is a designated scenic road, with a steep grade, and is heavily wooded, with few existing homes visible from the curve on Ilchester Road. The curve is the setting for the property, as the historic home and barn are elevated - level with a curved driveway, which is visible from the scenic road. The Planning Board has the responsibility to follow its guidelines to preserve environmental and historic features. This proposal should locate homes a greater distance from the historic home and preserve areas that protect steep slopes and the scenic road. She testified that the Planning Board should eliminate Lots 1 and 2 and any other lot that disturbs steep slopes.

13. Mr. Greg Care, testified that his property was located to the southwest of the subject property and identified it on the plan. He testified that he opposed the subdivision because it is not consistent with the R-ED zone, which protects environmentally sensitive areas. He wants the subdivision to comply with regulations. To prepare for the hearing he studied the zoning regulations and MERLIN (Maryland's Environmental Resourced and Land Information Network). The Board determined that MERLIN, Targeted Ecological Areas (marked for identification as Protestant's Exhibits 3 and 4 but not entered into the record as an exhibit) was not relevant to its decision-making under the R-ED District process. Mr. Care testified that the subdivision does not protect environmental and historic resources because waivers are needed to remove specimen tree and disturb steep slopes. He further testified that the historic resources and his historic home are impacted.

Mr. Care testified that to be designated as a Targeted Ecological Area, the parcel must contain trees, wildlife, vegetation, wetlands, and streams, which he has observed on the subject parcel. If the subdivision is developed, these resources will be impacted. He testified that trees will be removed and additional impervious areas added and the subdivision does not effectively protect environmental resources. The historic house is on the registry for historic properties and the historic barn will be removed. He testified that the proposed structures are not compatible with the historic setting because of the number of proposed lots and their proximity to the historic structures. He further added that steep slopes must be disturbed to accommodate lots. He stated that the subdivision does not comply with the criteria because Lots 1 and 2 are close to the scenic road. The opposition submitted Protestant's Exhibit No. 5, an excerpt from the scenic road list. Mr. Care testified that Ilchester Road was a scenic road and described the scenic views. He testified that the homes in the immediate area are more than 50 feet from Ilchester Road. He further testified that parcels located within the R-ED zone should be developed in accordance with the regulations and with no waivers. Mr. Care testified that BG&E removed trees along the scenic road, but the area proposed for Lots 1 and 2 remains wooded. Mr. Care testified that the peace and tranquility would dramatically change and Lots 1 and 2 would be in view of the scenic road.

14. Ms. Adrienne Breidenstine, testified that she supported Mr. Care's testimony and that the Board should consider the R-ED criteria when making their decision. She further testified that the subdivision does not protect the scenic character of Ilchester Road. She testified that wildlife would be impacted because trees would be removed and that the homes should be moved to already cleared areas.
15. Ms. Kim Marzin, testified that she opposed the subdivision because the existing barn was being razed and that lots were proposed close to her property. She testified that Lots 7 and 8 would impact her privacy and their location would impact slopes, which she has stabilized over many years. She testified that she was concerned about water runoff and that she currently deals with run off from this property. Ms. Marzin testified that she has spent time and expense trying to control runoff. Ms. Marzin testified that she opposed the plan and stated that the plan does not provide adequate buffers to its neighbors.
16. Mr. Paul Marzin testified that he was concerned about the location of Lots 7 and 8 and requested that Lot 8 be eliminated, or moved closer to the historic house. He requested that an open space lot be provided next to his property, which would maintain the hillside and pine trees paid for by both property owners. He showed photographs of his home/property in relation to the historic home. He stated that

the removing trees along the property boundary will create runoff. He stated that the subdivision also impacts the scenic beauty and historic nature of the area and that Lot 8 may tower over the scenic road. He presented photographs of the steep slopes along Ilchester Road and said he opposes the plan and asked the Board to vote against the subdivision.

17. On rebuttal Stephanie Tuite testified that the barn was constructed of salvaged material so that it appeared historic but that only its foundation is somewhat historic. She testified that the Forest Conservation Law allows clearing of 4.21 acres of forest and the site is clearing 3.39 acres. The historic structure is protected by the shift in the lot layout and a larger lot is provided for this structure. She testified that retaining walls are provided on Lots 1 and 2 to minimize grading. The existing driveway was relocated slightly to provide a gentler slope and safer access to the site. The private driveway will be narrower than a public road; with less impervious area and grading. She testified that homes nearby on the scenic road are closer to the road and that some parcels are not forested. She testified that BG&E has cleared additional trees along the scenic road and submitted photographs taken on November 1, 2017 (Petitioner's Exhibit No. 3). She testified that trees would be planted along the scenic road that are more compatible with the BG&E powerlines. She testified that the combination of setbacks and buffering, including Mr. Care's setback from his property line, the 150 feet of forest on the open space lot and setback of the houses on proposed lots 1 and 2 would result in the structures being located 250 feet from Mr. Care's house at the closest. Existing trees and additional plantings will buffer the neighboring properties. The proposed homes will be in keeping with the historic structure and have side-load garages. The existing berm near the Marzin Property is 50 feet from the property line and will be replaced with a swale near Lot 8. This swale will direct water to the rear of the property with a newer slight berm and additional landscaping. Additional plantings will be added along the property line.
18. On cross-examination, Ms. Tuite agreed that the Historic Preservation Commission recommended that the barn on the property be retained. Ms. Tuite testified that the alternative compliance request for disturbance within the 35 foot scenic road buffer request is pending with DPZ. Ms. Tuite agreed that the open space buffer between Lots 1 and 2 and Mr. Care's house sloped down and she did think that the Care's house would be buffered from the houses on Lots 1 and 2 despite this slope mainly because of the distance between the Care property and Lots 1 and 2. Ms. Tuite stated that the proposed house on Lot 8 is located approximately 35 feet from the property line and the Marzin house is about 50 feet from the property line. Ms. Tuite agreed that the house on Lot 8 would be located at a higher elevation and 80 feet from the Marzin house. Ms. Tuite said that, in terms of the type of buffer to be provided, within 30 feet of the subdivision a swale will be provided, with a slight berm planted with trees, to buffer the new house. Ms. Tuite testified that 3.39 acres of forest was being cleared in the entire subdivision, which was .8 acres less than permitted by Forest Conservation requirements. Ms. Tuite acknowledged that the area in front of the historic house had a few trees but was not forested and that except for the concerns regarding the historic setting would be a good place to locate a house in terms of the R-ED criteria.
19. The Board is persuaded that the evidence, based both on the testimony of Ms. Tuite as provided in Finding of Fact 3, 17 and 18 above, and the information in the Department of Planning and Zoning's Technical Staff Report, convincingly demonstrates that the proposed layout of lots and open space

effectively protects environmental and historic resources as is required by Section 107.0.F.6.a. of the Howard County Zoning Regulations (HCZR).

In determining which environmental and historic resources are intended in the Howard County Zoning Regulations (HCZR) to be effectively protected by the subdivision's proposed layout of lots and open space, it is necessary to read the R-ED Planning Board decision-making criteria as a whole. Section 107.0.F.3.a. of the HCZR, which indicates what information the Petitioner must present in its application to the Planning Board, requires a petitioner to provide "the existing environmental and historic resources of the site, including streams, wetlands, their buffers, extent and quality of vegetation, especially tree cover, steep slopes; historic structures and their landscape setting; and the scenic qualities of the site." Section 107.0F.3.h. of the HCZR provides a petitioner shall provide "proposed open space, easements, and other forms of permanent protection for sensitive areas, forest conservation areas, or other on-site resources such as historic structures and settings."

In this case, it was undisputed that the Petitioner initially presented a layout which located the historic house on a lot similar in size to all the other proposed lots in the subdivision (ranging from 10,461 square feet to 15,082 square feet), but that based on advisory comments from the Department of Planning and Zoning and the Historic Preservation Commission, the Petitioner submitted a revised layout proposing that the historic house, the Fislage-Cavey House, an on-site historic resource, be located on a proposed 38,386 square foot lot, Lot 6, to provide an appropriate historic setting for the house in accordance with the *Protection of Historic Resources* guidelines established under Section 16.118(b) of the Howard County Subdivision and Land development Regulations and Section 16.118(b)'s criteria. The Department of Planning and Zoning administers these provisions pursuant to the Howard County Subdivision and Land Development Regulations.

It was also undisputed that the increased proposed size of Lot 6 necessitated the spreading out of the other lots in the subdivision such that lots 1 and 2 would be located closer to Ilchester Road, a Howard County Scenic Road, and that Lot 1 would have direct access to Ilchester Road. Ms. Tuite testified that this modified layout, in turn, necessitated several Subdivision Regulation alternative compliance requests to be decided by the Department of Planning and Zoning after the Planning Board's decision in this case, including 4 specimen tree removals instead of one, grading in steep slopes, and the removal of vegetation in the 35-foot Scenic road buffer area from Ilchester Road. Ms. Tuite also testified that the revised layout to protect the historic house with a larger historic setting necessitated the request for a zoning variance from the required 75-foot setback from the public street right-of-way for Lots 1 and 2 to 50 feet, which was granted by the Hearing Examiner.

Ms. Tuite characterized the revised layout as a "trade-off", in that in order to provide an acceptably protective historic setting for the on-site historic house on a larger lot, some minimal relaxation of environmental regulations would be required under the proposed revised layout.

Ms. Tuite testified that, with the proposed layout before the Planning Board, approximately 14,000 square feet, approximately 1/3 of an acre, of the 4.04 acres of steep slopes on the site would be disturbed, if DPZ approves the alternative compliance requests, but that more intensive grading was limited by the construction of the retaining walls at the rear of Lots 1 and 2, the grant of the zoning variance for the 75 foot setback from the Ilchester Road right of way, and the use of the existing driveway for a 16 foot driveway, through a Design Manual waiver, to provide access to 7 of the 8

proposed lots instead of the otherwise required 24 foot -wide paved public road, with curb and gutter. Ms. Tuite testified that a small amount of the grading for this driveway affecting the steep slopes was necessary to address steepness and sight distance issues related to the grade and location of the existing driveway.

In terms of protection of other environmental resources, it was undisputed that 59% of the site will be in open space, that no forest conservation areas or stream buffers will be disturbed, and that the environmental areas on Open Space Lots 9 and 12, including 21 of the 25 specimen trees, will be dedicated to Howard County and protected by Forest Conservation easements.

In making these findings as to the criterion contained in Section 107.0.F.6.a. of the Howard County Zoning Regulations (HCZR), the Board did not consider certain evidence proposed for the Board's consideration by the opposition, including the Maryland Department of Resources' Ecological Areas Map for on-site and off-site environmental resources, and the proposed testimony and/or evidence as to the proposed subdivision's effect on off-site historic and environmental resources. The Board finds that the record indicates that the Ecological Areas Map is not information used by the Department of Planning and Zoning in deciding whether the R-ED Sketch Plan has met the criteria in the Howard County Subdivision and Land Development Regulations, which is necessary for the plan to come to the Planning Board for its consideration under the R-ED Sketch Plan criteria, so that it would be beyond the Planning Board's authority to consider that information at this stage of the approval process.

In addition, the Board finds that the intent of the R-ED Sketch Plan criteria which the Board is charged with applying, pertains only to the proposed subdivision layout's effective protection of on-site environmental and historic resources, not off-site environmental and historic resources. The Board finds and concludes that the opposition's proposed evidence in this regard is immaterial and irrelevant under Section 107.0.F.6.a of the Zoning Regulations.

The Board also notes that the opposition contended that the Planning Board should deny the proposed subdivision based on the fact that the proposed layout before the Board was dependent on several alternative compliance waivers pending before the Department of Planning and Zoning. The opposition, however, did not produce any evidence to show that any of the alternative compliance waiver standards and criteria are applicable to the Planning Board's review of the proposed subdivision under the R-ED Zoning Regulations, and the Board finds that it could not find any authority that these standards or criteria are applicable to the Planning Board's decision-making responsibilities in this matter. The Board also notes that this proposal, like any other R-ED subdivision, is not scheduled for a hearing and decision before the Planning Board until the Petitioner has met all the subdivision and land development regulations administered by the Department of Planning and Zoning, including all environmental regulations such as Forest Conservation, Storm Water Management, and sediment control and erosion, pending any alternative compliance matters. The Board must reject the argument that it can deny an R-ED subdivision under the R-ED criteria based on the fact that the layout would require later alternative compliance requests; the Board only has authority to apply the R-ED criteria given to it for application in the Zoning Regulations. The Board notes that the Department of Planning and Zoning applies all the technical environmental regulations through the subdivision approval process, and the evidence indicates that the Petitioner's proposal has met all these requirements before it was presented to the Planning Board under the R-ED Sketch Plan criteria. Therefore, the Board could not and did not

consider any of the opposition testimony as to concerns about run-off, storm water management, forest conservation, and other environmental regulations related to DPZ's authority.

For the same reason cited above that it is constrained to apply only the R-ED criteria, the Board cannot base its decision on a policy decision that the proposed 8 lot subdivision's layout is too dense for the area or because a less dense subdivision would perhaps more effectively protect on-site environmental resources; the only issue for the Board to decide is whether the proposed layout, even though it is proposed at the maximum density under the Zoning Regulations, effectively protects environmental and historic resources.

The Board also finds that it is required to make the decision as to whether the proposed layout protects on-site historic resources, based on just the protection of the historic house, not the barn which also is or was located on site. The Board accepts the testimony of Ms. Tuite in this regard that the barn in question was not of significant historic value because it had been rebuilt with salvaged materials despite the fact that she acknowledged that the Historic Preservation Commission had recommended the saving of the barn. Some of those in opposition to the proposed subdivision contended that the historic house did not require a larger setting or that the Petitioner could have proposed razing the house, while others contended that the barn should also have been saved. The Board notes that there was not convincing testimony presented that the barn was of significant historic value requiring its protection, and if the Petitioner had proposed saving the barn it would have been required to provide an additional protective historic setting for the barn which could have further impacted the protection of the on-site environmental resources through additional lot layout spread-out.

20. The Board is persuaded that the evidence, based both on the testimony of Ms. Tuite as provided in Findings of Fact 3, 17 and 18 above, and the information in the Department of Planning and Zoning's Technical Staff Report, convincingly demonstrates that the buildings, parking areas, roads, storm water management facilities and other site features are located to take advantage of existing topography and to limit the extent of clearing and grading.

The Board is persuaded that the proposed subdivision substantially takes advantage of the existing topography in locating the various site features. While the Board notes, as discussed in Finding of Fact 19 that the houses on the proposed lots could have been located to be completely out of the steep slopes, this layout would have constrained the historic setting for the historic house and adversely affected it as a historic resource. The subdivision layout's disturbance of the steep slopes, 14,000 square feet out of 4.04 acres of steep slopes, and out of 8.2 acres of the entire subject property, is limited. The clearing and grading caused by this layout is also mainly limited to providing a driveway access for Lot 1 onto Ilchester Road, improving the existing main driveway's steepness and sight distance conditions, and constructing a retaining wall at the rear of Lots 1 and 2 which will limit the need for further grading. The Board also is persuaded that the Petitioner has shown it is attempting to limit grading by constructing a driveway instead of a public road in the area of the existing driveway for the main to access to 7 of the 8 lots, and because it is locating storm water management facilities in the lower portion of the lot to maximize runoff capture.

The Board agrees with DPZ that the 2.63 acres of site disturbance is necessary to accommodate reasonably sized lots, and that the minimal clearing in the 35-foot scenic road buffer where tree removal is proposed for Lot 1 and the clearing which has already occurred as required by BGE for utility safety

unrelated to the proposed development, will be mitigated and supplemented by plantings that will both be more compatible with the utility lines and provide greater screening of the houses on Lots 1 and 2 from Ilchester Road.

The opposition provided testimony to the effect that any clearing or grading which involves the need for approval of an alternative compliance request renders the proposed subdivision as non-compliant with this criterion. The Board has already noted that it is DPZ that will make the decision on the alternative compliance requests as it relates to the appropriateness of clearing and grading in steep slopes or the scenic road buffer and the removal of specimen trees. As to the R-ED criterion, the Board is convinced that Petitioner has shown that the subdivision substantially locates site features to take advantage of existing topography and reasonably limits clearing and grading based on what is stated above.

21. The Board is persuaded that the evidence, based both on the testimony of Ms. Tuite as provided in Findings of Fact 3, 17 and 18 above, and the information in the Department of Planning and Zoning's Technical Staff Report, convincingly demonstrates that setbacks, landscaped buffers, or other methods are proposed to buffer the development from existing neighborhoods or roads, especially from designated scenic roads or historic districts.

As to the proposed buffer between the existing scenic road, Ilchester Road, and the proposed development, the Board notes that the Petitioner proposes to remove three specimen trees and disturb the 35-foot buffer with the clearing of vegetation in order to provide direct access to proposed Lot 1 from Ilchester Road, pending the granting of an alternative compliance request from DPZ. As to the Board's R-ED criterion, the Board notes that this buffer disturbance is caused by the layout modification noted above to provide a greater historic setting for the historic house on proposed Lot 6, and that the trees removed for the driveway access and house location, along with the continuous tree removal within the scenic road buffer due to BGE utility line maintenance, will be mitigated by Petitioner's additional plantings in the scenic buffer with "utility line- friendly" year-round vegetation which will replace the lost vegetative buffering. The Board also notes that the Hearing Examiner approved a variance from the 75-foot setback from the Ilchester Road right-of-way to 50 feet in order to minimize steep slope disturbance and to accommodate the more appropriate side-loaded garages. The Board believes the scenic buffer will be maintained and even improved with this development except for the area for Lot 1's access and that this buffer from the scenic road will be restored except for the driveway area itself and the house location, and therefore is acceptable within the intent of this criterion. There is no historic district involved in this case, so there is no need to analyze buffering from historic districts.

As to the proposed buffer between the existing neighborhoods and the proposed development, the Board is convinced that intervening open space lots with vegetation and trees, both existing and proposed additional plantings, setbacks and distances between existing houses and proposed houses, 250 feet at the closest between the Care's house and the proposed houses on Lots 1 and 2, will provide sufficient buffering as required by this criterion for all the subdivision's neighbors except for the Marzin's property adjacent to proposed Lot 8. As to the proposed buffer between the proposed development and the Marzin's property, the Board is convinced that the buffering proposed by the Petitioner, which includes a 35-foot buffer with a swale, a slight berm and the proposed tree planting

will be sufficient pursuant to this criterion if combined with the additional tree buffering as required in the Board's conditions of approval as provided below.

CONCLUSIONS OF LAW

1. Petitioner, as one seeking the Planning Board's approval of its Preliminary Equivalent Sketch Plan for a residential subdivision consisting of 8 single-family detached lots and 4 open space lots in the R-ED Zoning District, pursuant to Section 107.0.F. of the HCZR, has the burden of demonstrating that the criteria of Subsections a. through c. of that section has been met, in order for the Board to approve the above-mentioned Plan.
2. There is sufficient evidence in the record as identified in the Board's Findings of Fact above, for the Board to conclude that the Petitioner has met its burden of demonstrating that it has satisfied the above-cited criteria for approval.
3. For the reasons stated in the above Findings of Fact, the Board concludes that Petitioner has conclusively established through the evidence in the record that the following criteria for approval have been met by its proposal:
 - a. The proposed layout of lots and open space effectively protects environmental and historic resources.
 - b. Buildings, parking areas, roads, storm water management facilities and other site features are located to take advantage of existing topography and to limit the extent of clearing and grading.
 - c. Setbacks, landscaped buffers, or other methods are proposed to buffer the development from existing neighborhoods, especially from designated scenic roads or historic districts. Petitioner's satisfaction of this criterion is subject to the Board's condition of approval provided below.

For the foregoing reasons, the petition of Eva J. Nelson, Michael B. Nelson and Matthew J. Nelson, to approve a Preliminary Equivalent Sketch Plan, SP-15-012, to subdivide eight single-family lots, 4 open space lots on 8.20 acres of land, zoned R-ED, is the ____ day of _____, 2108 APPROVED by the Planning Board of Howard County, Maryland, subject to the following conditions:

1. That the Petitioner provide additional landscaping consisting of a mix of evergreen trees and shrubs that grow to 8 feet in height to provide year-round buffering and screening for Ilchester Road from the houses on Lots 1 and 2, and for the Marzin property to the east from the house on Lot 8, to be administered by the Department of Planning and Zoning on Petitioner's subsequent site development plan; and
2. That the proposed landscaping plan on the site development plan as required by Condition 1 be approved by the Planning Board as meeting its intent in imposing Condition 1.

HOWARD COUNTY PLANNING BOARD

Phillips Engelke - Chairperson

Erica Roberts – Vice -Chairperson

Delphine Adler

Ed Coleman

Kevin McAliley

PB Case No. 428

ATTEST:

Valdis Lazdins
Executive Secretary

REVIEWED FOR LEGAL SUFFICIENCY BY:
HOWARD COUNTY OFFICE OF LAW
Gary W. Kuc, County Solicitor

Paul T. Johnson
Deputy County Solicitor

LIST OF APPLICANT'S EXHIBITS:

- Applicant's Exhibit No. 1 – Photographs of Tree Cutting along Ilchester Road
- Applicant's Exhibit No. 2 – BG&E Authorization Form for removal of 4 ash trees
- Applicant's Exhibit No. 3, Photographs of Ilchester Road

LIST OF PROTESTANT'S EXHIBITS:

- Protestant's Exhibit No. 1 – Howard County Group Ex Com Meeting Minutes, 9/26/17
- Protestant's Exhibit No. 2. – Patapsco Heritage Greenway Letter, 11/2/17
- Protestant's Exhibit No. 3 – MERLIN Screen Shot – For Information Only
- Protestant's Exhibit No. 4 – MERLIN Map – For Information Only
- Protestant's Exhibit No. 5. – Scenic Road Excerpt for Ilchester Road