

**MINUTES OF THE ST. MARY'S COUNTY BOARD OF APPEALS MEETING  
ROOM 14 \* GOVERNMENTAL CENTER \* LEONARDTOWN, MARYLAND  
Thursday, June 10, 2004**

Present: Marie Underwood, Chairperson  
George Allan Hayden, Vice Chair  
Greg Callaway, Member  
Ronald C. Delahay, Sr., Member  
Bryan Barthelme, 1st Alternate  
Joseph Densford, Acting Counsel for the Board of Appeals

Yvonne Chaillet, Planner III, Department of Land Use & Growth Management  
Janice Blackistone, LUGM Fiscal Specialist (backup for Recording Secretary)

Also Present: John F. Taylor, Sr., Chairman, of Planning Commission

John B. Norris, III, County Attorney for the Planning Commission

Commission

Phil Shire, Planner IV

A sign-in sheet is on file in the Department of Land Use & Growth Management. All participants in all cases were sworn in. The Chair called the meeting to order at 6:30 p.m.

**PUBLIC HEARING**

**ZAAP #98-1128 – THE WOODS @ MYRTLE POINT, SECTION 1,**

**PHASE 1**

Requesting an Appeal of the Planning Commission's decision of February 9, 2004, pursuant to Chapter 23 of Zoning Ordinance #Z-02-01, granting final approval of the subdivision plat for The Woods @ Myrtle Point, Section 1, Phase 1. The property contains 286.3 acres, is zoned Residential, Low-Density (RL), Resource Conservation Area (RCA) Overlay, and is located on the west side of Patuxent Boulevard, approximately 1,600 feet north of its intersection with Maryland Route 4; Tax Map 34, Block 6, Parcels 485, 585, 586 and 587.

Owner: Myrtle Point Partnership, LLP

Present: Attorney G. Macy Nelson, representing Citizens, the Potomac River Association

Attorney Christopher Longmore, of Dugan, McKissick & Wood, LLC, representing P.F Summers Myrtle Point, LLC

Legal Ad published in The Enterprise on 5/26/04 and 6/2/04

Property posted by 5/26/04 by Appellant

#A-1 Environmental Features Map – The Woods @ Myrtle Point – 9/19/98

#A-2 Letter from Michael Slattery, Director of Maryland Department of Natural Resources, to Matthew Smith, of American Land Concepts, dated May 11, 1999

#A-3 Letter from Matthew Smith, of American Land Concepts, to Mike Slattery, Director of Maryland Department of Natural Resources, dated April 15, 1998

#A-4 Forest Stand Delineation – April 8, 1998

#A-5 Forest Stand Delineation Map – The Woods @ Myrtle Point – 5/1/98

#A-6 Forest Stand Delineation Map – The Woods @ Myrtle Point – 9/19/98

#A-7 Merlin Online – Layer Control – 11/1/01

#A-8 Jeffrey A. Wolinski - Resume

#A-9 Planning Commission Minutes – February 9, 2004

#A-10 Letter from Lori A. Byrne of Maryland Department of Natural Resources, to Richard Klein, of Community & Environmental Defense Services, dated 7/30/03

#A-11 Certified Receipts of notification to contiguous property owners

#D-1 The Woods @ Myrtle Point c/o P.F. Summers Myrtle Point, LLC, dated 2000

#D-2 The Woods @ Myrtle Point, Phasing Plan, dated 2000

#PC#1 Merlin Online – Layer Control – Section 1 – 11/1/01

Ms. Chaillet read a legal description of the property and stated that Section I, Phase I is not in the Critical Area portion of the property and that no development was proposed in the Critical Area portion of the property at this time. Mr. Shire provided a summary of his staff report to the Planning Commission, dated February 9, 2004, and noted that the Planning Commission granted final approval to the subdivision plat for Phase I, Section I at this time

Mr. Shire said the Planning Commission granted preliminary approval for Section I, Phase 1, consisting of 55 lots, on September 27, 1999. Final approval of Section I, Phase I was granted by the Planning Commission on February 9, 2004. The sole findings made by the Planning Commission at this time were issues of drainage and the adequacy of stormwater management.

Mr. Shire said Attachment 3, which included the applicant's letter dated January 26, 2004 and attachments from the Soil Conservation District and American Land Concepts, Attachment 4, which included a letter from Community and Environmental Defense Services dated September 2, 2003 and attached letters from the Department of Natural Resources (DNR), and Attachment 5, consisting of a map of Wetlands of Special State Concern (WSSC), contain information and testimony regarding the impact of the development on the WSSC. Generally, the concern was raised that this project will have an adverse impact on the slopes and adjacent wetland which is a critical habitat for two (2) state-listed endangered plants should routine development control measures be used. Attachment 3 contains testimony that proposed development control measures exceed what is routinely applied and are sufficient to protect the sensitive wetland habitat areas. The technical review led staff to the conclusion that this site can be developed properly if a "higher than normal degree" of construction, inspection and design practices is ensured.

G. Macy Nelson, representing the Appellant (Citizens, Potomac River Association), provided an opening statement asking for reversal of the Planning Commission's February 9, 2004 decision granting final approval of Section I, Phase I, of The Woods at Myrtle Point. Mr. Nelson claims that the Planning Commission erred in granting final approval because the applicant (Myrtle Point Partnership, LLP) failed to submit the required environmental features map. Had the applicant submitted the map, the endangered species and critical habitat area would have been identified correctly and the final subdivision plat would not have been approved. Failure to submit the environmental features map is a critical omission that requires a vacation of the approval and a remand for the submission and analysis of this document. Mr. Nelson's argument relied heavily on Section 44.1 of Zoning Ordinance #90-11 regarding forest stand delineations and the requirement for an environmental features map.

In addition, Mr. Nelson argued that he will demonstrate that his clients are aggrieved by the Planning Commission's decision because they live downstream from the proposed development, and sediments from storms flow downstream past their properties.

Christopher Longmore, representing the Appellee (Myrtle Point Partnership, LLP) presented an opening statement asking the Board to limit the scope of tonight's testimony to what was noticed in the Notice of Appeal, which is the issue of the endangered species. Moreover, Mr. Longmore asked the Board to honor the burden of proof that the Appellant carries before the Board. The Appellant must demonstrate that the action taken by the Planning Commission granting final approval to Phase I, Section I of the Woods at Myrtle Point was clearly erroneous, illegal, unconstitutional, or arbitrary and capricious.

In addition, Mr. Longmore argued that Section 44.4 of Zoning Ordinance #90-11 does not apply in its entirety to tonight's topic of discussion; that is, land that is outside the Critical Area. All of the endangered species that have been potentially identified are in the Critical Area portion of the property. None of the property that has been approved for development is in the Critical Area. Therefore, these rules do not apply. The area at issue is not governed by Section 44.4 of Zoning Ordinance #90-11, but by the Critical Area Ordinance. Appellee did not have to go through a Critical Area analysis because they are not developing in the Critical Area portion of the property. The Board of Appeals should then support the Planning Commission's decision which found that the potential for the existence of endangered species was not at issue.

John Taylor, Chairman of the Planning Commission, stated under oath that all areas of adequate public facility, except stormwater management, were approved in 2002 when preliminary plan approval was reissued. The Planning Commission then considered traffic, schools, and recreation areas, and other health, safety, and welfare concerns on February 9, 2004 when the project went forward for final approval. All considerations were made under Zoning Ordinance #90-11 because this project was grandfathered under the current Zoning Ordinance. All public facilities existing as proposed by the applicant were deemed adequate.

In addition, Mr. Taylor stated that the project met all regulations and went beyond the minimum requirements to address environmental concerns in Mill Run. Erosive soils were addressed, sewage disposal was enhanced, and design concerns expressed by the Planning Commission in 2002 were addressed. Regarding threatened or endangered species and wetlands habitat protection, the Planning Commission accepted George Junkin's conclusion that nothing in this development will impact the two endangered species. Mr. Junkin is President of American Land Concepts and testified at the February 9, 2004 Planning Commission meeting.

Mr. Shire was called to testify as a witness by Mr. Nelson regarding the approved Forest Stand Delineation (FSD) for this project and the environmental features map. According to Mr. Nelson, an environmental features map was never submitted to the Planning Commission. Mr. Shire responded that the state has approved the depiction of environmental features on the FSD rather than on a separate map. Applicants have the choice of submitting an environmental features map in addition to the FSD or including the environmental features on the FSD. The FSD that he reviewed prior to submission of the preliminary subdivision plat of Section I, Phase I of the Woods at Myrtle Point to the Planning Commission contained the environmental features.

John Norris, County Attorney and representing the Planning Commission, argued for dismissing the case, asserting that Mr. Shire approved

the FSD in 1998 and if anyone thought his decision was in error, that person should have filed an appeal within 30 days of the decision. In addition, the Planning Commission had the information regarding the two endangered species at the time of their decision on February 9, 2004, contrary to Mr. Nelson's claim that the Planning Commission had insufficient evidence for granting final approval. Therefore, Mr. Norris argued, there was no violation of the law and the Planning Commission's decision should be upheld.

Chair Marie Underwood stated that the Board would not entertain hypothetical questions and answers from the Appellant and would concentrate on the basis of the Appeal, which was that the Planning Commission did not have specific information before them as required by law when they made their decision to grant final approval and that the applicant had failed to disclose the presence of critical habitat areas.

Mr. Nelson called Richard Klein, President of Community & Environmental Defense Services, and Jeffrey Wolinski, a Biologist and consultant, as expert witnesses on the presence of endangered species on the subject property. Mr. Klein and Mr. Wolinski claimed that they walked through the tidal marsh and during this walk discovered four clusters of *Gratiola Viscidula* and *Utricularia Inflata* (Short's Hedge-hyssop and Swollen Bladderwort respectively), the two endangered species in question. One of the clusters was found at the northern edge of Mill Creek and the other three clusters were found downstream. Upon further questioning, Mr. Wolinski stated that he disagrees with Mr. Junkin's testimony in February that the two endangered species are more likely to occur above Mill Pond rather than below it because the water conditions are more stable above the pond.

Mr. Longmore then requested a motion to dismiss on two grounds: 1) If the endangered species are in the Critical Area, then they are not covered under Zoning Ordinance #90-11 and the appeal should be denied; and 2) The burden of proof is very high on the Appellants to prove that the Planning Commission did not have any evidence that any reasonable person could rely upon to reach their decision.

Mr. Nelson responded that he will file a five-page memorandum outlining the Appellants views in an effort to state their determination of legal argument.

Joseph Densford, Acting Counsel for the Board of Appeals, then asked Mr. Norris if the Planning Commission would be making the same motion [as Mr. Longmore]. Mr. Norris responded that the Planning Commission would join in on the motion, but that they would also ask for dismissal of the time period for filing of the appeal.

Mr. Hayden moved to deny the appeal because the appellant did not prove that all required information was not provided to the Planning Commission, and did not prove that the Applicant failed to disclose the presence of endangered species. On the contrary, the Board heard testimony that all of the information was furnished to the Department of Land Use and Growth Management and was available to the Planning Commission before it made its decision. The motion was seconded by Mr. Callaway and approved by a vote of 5-0.

**ACTIONS TAKEN BY PLANNING DIRECTOR ON VARIANCE APPLICATIONS RECEIVED FOR ADMINISTRATIVE REVIEW:**

VAAP #04-0144 – Connell – 10,556 square feet  
VAAP #04-0001 – Byrd – 15,681 square feet  
VAAP #04-0158 – Hayden - .95 acres  
VAAP #03-2788 – Gardner – 18,247 square feet

**MINUTES AND ORDERS APPROVED**

The minutes of May 13, 2004 were approved as recorded.

**BOARD OF APPEALS ANNUAL REPORT**

Mr. Delahay moved to approve the Board of Appeals 2003 Annual Report. The motion was seconded by Mr. Barthelme and passed by a vote 5-0.

**ADJOURNMENT**

The meeting was adjourned at 9:41 p.m.

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Janice C. Blackistone  
Fiscal Specialist

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Approved in open  
session: July 8, 2004

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Marie E. Underwood  
Chairperson