



THE PRINCE GEORGE'S COUNTY GOVERNMENT

Office of the Clerk of the Council
301-952-3600

May 16, 2023

**RE: DSP-21001 Suffrage Point
Werrlein WSSC, LLC, Applicant**

NOTICE OF DECISION OF THE DISTRICT COUNCIL

Pursuant to the provisions of Section 27-134 of the Zoning Ordinance of Prince George's County, Maryland requiring notice of decision of the District Council, you will find enclosed herewith a copy of the Council Order setting forth the action taken by the District Council in this case on May 11, 2023

CERTIFICATE OF SERVICE

This is to certify that on May 16, 2023, this notice and attached Council Order was mailed, postage prepaid, to all persons of record.

A handwritten signature in cursive script that reads "Donna J. Brown".

Donna J. Brown
Clerk of the Council

Case No.: DSP-21001
Suffrage Point
(formerly known as Magruder
Pointe)

Applicant: Werrlein WSSC, LLC

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL

ORDER OF REMAND

On May 8, 2023, using oral argument procedures, this matter was considered by the District Council on its motion to review the decision of the Planning Board to approve Detailed Site Plan (DSP)-21001. Upon full consideration of the record, including oral and written testimony from the City of Hyattsville, Julie Wolf, Greg Smith, Save Our Sustainable Hyattsville, Inc., and others, the Board's approval of DSP-21001, a request to construct 41-single-family townhouse dwelling units on floodplain area of the subject property, located in the southeast quadrant of the intersection of Hamilton Street and 40th Avenue, more specifically, between 40th Place and Magruder Park, in Planning Area 68, within the incorporated City of Hyattsville, Council District 2, is hereby REMANDED for further testimony or reconsideration as set forth herein.¹

A. Introduction.

The subject property consists of two parcels. The upper parcel is approximately 3.6 acres in size, and the lower parcel is approximately 4.66 acres in size. In October 2022, after certain court orders, the District Council approved density for the subject property as follows: 1) density for one-family detached not to exceed 6.7 dwelling units per net acre of net lot or tract area and 2) density for townhouses not to exceed 12.3 dwelling units per net acre of net lot or tract area. At issue here, among other things, is the site plan application to construct 41-townhouse dwelling

¹ The Board's decision is embodied in Resolution 2023-15 (hereinafter PGCPB No. 2023-15).

units, on the lower parcel of the property, which is in the 100-year floodplain. PGCPB No. 2023-15, pp. 1-7.

The District Council finds that the Board’s decision to approve the site plan application was based on three (3) legal errors. First, the Board relied on an invalid waiver from the Department of Permitting, Inspections and Enforcement (DPIE) to construct 41-townhouse dwelling units in the 100-year floodplain because DPIE evaluated and approved the waiver based on law repealed by the County in County Bill (CB)-38-2016. Second, because the waiver to construct in the 100-year flood plain was void from the beginning, the Board’s approval of the site plan to construct 41-townhouse dwelling units in the 100-year flood plain was illegal. Third, even if DPIE’s waiver was valid (which it was not), the Board’s decision to approve the site plan to construct 41-townhouse dwelling units in the 100-year floodplain lacks substantial evidence to demonstrate a density calculation excluding alleys, streets, or other public roadways or land otherwise conveyed out of the tract.

B. DPIE’s Waiver To Develop On 100-Year Flood Plain Was Invalid.

On September 27, 2018, DPIE granted the Applicant’s request for a waiver to construct townhouses in the 100-year floodplain based on the following project specific factors:

- a) This is a redevelopment project.² Existing conditions of this site reflect the presence of buildings and parking lots in floodplain. This waiver will allow for the elimination of parking lots out of the 100-year floodplain.
- b) The proposed project will not have any buildings, parking lots, nor roads in the approved 100-year floodplain areas.
- c) The County is requiring 100-year controls, which will result in reduced 100-year flows leaving the site.
- d) The applicant has demonstrated no increase in 100-year flood elevations.

² DPIE approved the waiver in **September 2018** as a redevelopment project. But the District Council did not rezone the property from O-S (Open Space) to R-55 (One-Family Detached Residential) **until June 2019**—almost a year later. Under the County Code, this was not a redevelopment project when DPIE approved the waiver. *See* PGCC § 32-171(a)(55) Redevelopment (Any construction, alteration or improvement performed on sites where existing land use is commercial, industrial, institutional, or multifamily residential and existing site impervious area within the limit of disturbance exceeds 40 percent).

- e)The applicant has demonstrated that access to all proposed structures will be free and clear of 100-year flooding.
- f)The applicant has provided compensatory storage.
- g)The applicant has located all structures \geq 25' from the 100-year floodplain.

Additional Backup at 20-26 of 403. But DPIE relied on outdated information provided by the Applicant and outdated project specific factors in PGCC § 32-206 from 2011. Id. at 21-22. Those project specific factors were repealed, in whole or in part, by the County in CB-38-2016. Among other things, CB-38 amended PGCC 32-206 in 2016, as follows:

(a)In order to undertake any development in the County floodplain other than as permitted in Section 32-205(b) of the County Code, the applicant must obtain a waiver from the Director or the Director's designee.

(b)The request for waiver shall include:(1)The information required for a permit for development as set forth in this Division;(2)A statement explaining the need for the development, any public benefit to be derived, and the actions that will be taken to reduce the threat of any potential flooding, flood damage, or adverse environmental impacts;(3)Plans and studies as required by the Department.(4)

The Name, address, and telephone number of the applicant and property owner; a legal description of the property; a parcel map; a description of the existing use; description of the proposed use; a site map showing the location of flood hazard areas, designated floodway boundaries, flood zones, base flood elevations, flood protection setbacks; and a description of the waiver sought; and(5)If the application is for a waiver to allow the lowest floor (A Zones) or bottom of the lowest horizontal structural member (V Zones and Coastal A Zones) of a building or structure below the applicable minimum elevation required by these regulations, the application shall include a statement signed by the owner that, if granted, the conditions of the waiver shall be recorded on the deed of the property.

(c)Required plans and studies. The Department may require plans and studies to be submitted. All studies shall be subject to approval by the Department. All studies and calculations furnished to satisfy this provision shall become the property of the County and may be used by the County for reviewing other development or for other purposes. **The request for a waiver shall include all necessary documentation, including analysis of hydrology and hydraulic requirements, as defined in the Prince George's County Stormwater Management Design Manual (latest edition) for technical analysis by the Department.**

(d)The Director shall grant a waiver only upon determining that:(1)There is good and sufficient cause that is based solely on the physical characteristics of the property and cannot be based on the character of the improvement, the personal characteristics of the owner/inhabitant, or local provision that regulate standards other than health and public safety;(2)The granting of the waiver will not result in additional threats to public safety, or other adverse impacts on other public or private property either upstream, downstream or adjacent to the subject property;(3)The granting of the waiver will not result in fraud or victimization of the public;(4)The waiver is the minimum necessary, considering the flood hazard, to afford relief to the owner, and public funds shall not be expended to mitigate the results of the waiver;(5)The development will not violate other Federal, State or local laws or regulations;(6)The waiver does not violate the purpose and intent of this Division;(7)The failure to grant the waiver would result in exceptional hardship due to the physical characteristics of the property.(8)A building, structure or other development is protected by methods to minimize flood damages; and (9)A waiver is the minimum necessary to afford relief, considering the flood hazard.

(e)Waivers will not be granted for any filling, or the construction or placement of any structures or obstructions ultimately located in the FEMA-designated Floodways. Within the floodplain, waivers shall not be granted for any new structures, the lowest floors of which are below flood protection elevations.

(f)If granted, a waiver shall involve only the least modification necessary to provide relief. If it should become necessary to grant a waiver, the applicant shall be required to comply with all applicable requirements of the National Flood Insurance Program regulations (60.3d) including the requirements for elevation, flood proofing and anchoring. The applicant must also comply with any other requirements considered necessary by the Department. Notwithstanding any of the provisions above, all structures shall be designed and constructed so as to have the capability of resisting the 1-percent annual chance (100-year) flood. Flood proofing is not an option in residential construction. All residential structures must be elevated.

(g)A record of all waiver actions, including justifications for their issuance, shall be maintained by the Department, shall be included in a bi-annual report submitted to the Federal Insurance Administrator, and shall be available upon request by FEMA or its authorized agent during periodic assessments of the County participation in the National Flood Insurance Program.

(h)As a condition of the waiver, the owner of the property being developed shall be required to execute covenants to provide notice of the waiver, the potential for higher insurance premium rates, commensurate with the increased risk (with rates up to \$25 per \$100 of insurance coverage), the flood hazard, and any responsibilities of the owner to maintain flood proofing or stream modification facilities or systems, which covenants shall be recorded among the Land Records of the County. Where there will be enclosed areas below the 1-percent annual

chance (100-year) flood elevation, the owner shall provide a statement to be recorded in the Land Records of the County which reads, “No conversion of this area to habitable space is to occur unless the lowest floor is elevated at or above the flood protection elevation. At this site the flood protection elevation is _____ in _____ (datum).”

(i) All construction within the floodplain must indicate whether any portion of the site lies within the danger reach of any existing or planned upstream dams. For information on danger reach, please refer to Prince George’s County Soil Conservation District Soil Erosion and Sediment Control Pond Safety Reference Manual (PGSCD Reference Manual).

(j) Considerations for Waiver. The Director shall consider and make findings of fact on all evaluations, all relevant factors, requirements specified in other sections of these regulations, and the following factors:

- (1) The danger that materials may be swept onto other lands to the injury of others;
- (2) The danger to life and property due to flooding or erosion damage;
- (3) The susceptibility of the proposed development and its contents (if applicable) to flood damage and the effect of such damage on the individual owner;
- (4) The importance of the services to the community provided by the proposed development;
- (5) The availability of alternative locations for the proposed use which are not subject to, or are subject to less flooding or erosion damage;
- (6) The necessity to the facility of a waterfront location, where applicable, or if the facility is a functionally dependent use;
- (7) The compatibility of the proposed use with existing and anticipated development;
- (8) The relationship of the proposed use to the comprehensive plan and hazard mitigation plan for that area;
- (9) The safety of access to the property in times of flood for passenger vehicles and emergency vehicles;
- (10) The expected heights, velocity, duration, rate of rise, and sediment transport of the floodwaters and the effects of wave action, if applicable, expected at the site;
- (11) The costs of providing government services during and after flood conditions, including maintenance and repair of public utilities and facilities such as sewer, gas, electrical, and water systems, and streets and bridges; **and**
- (12) The comments provided by the Department and/or the MDE. (Emphasis added).

C. Applicant Failed To Provide Evidence That Impact To The Floodplain Has Been Approved By The Authority Having Jurisdiction.

Under PGCC § 27-548.26, at the time of Detailed Site Plan, the Applicant shall “[p]rovide evidence that impact to the floodplain has been approved by the authority having jurisdiction.”

PGCPB No. 2023-15, p. 9. Because DPIE’s approval of the waiver to construct 41-townhouse dwelling units in the 100-year flood plain was void from the beginning, the Board erred, as a matter of law, when it concluded that the site plan satisfied the requirements in PGCC § 27-548.26.

Assuming, *arguendo*, that DPIE’s waiver was valid, DPIE found that the site contains a defined Northwest Branch, which is recognized as a County **and FEMA designated special flood hazard area**. Additional Backup at 20 of 403. Yet, DPIE granted the Applicant’s request for a waiver to construct on the 100-year floodplain when “[w]aivers **will not be granted** for any filling, or the construction or placement of any structures or obstructions ultimately **located in the FEMA-designated floodways.**” PGCC § 32-206(e). Furthermore, DPIE found that the Applicant is responsible for obtaining any other approvals, license or permits in accordance with Federal, State or local requirements before commencement of the proposed project. Additional Backup at 22 of 403. Under PGCC § 32-206(d)(5), the Director of DPIE shall grant a waiver only upon determining that “[t]he **development will not violate other Federal, State or local laws or regulations.**” Here, the record contains **no** evidence of any other approvals, license or permits in accordance with Federal and State law. Yet again, the Director granted the Applicant’s request for a waiver to construct in the 100-year floodplain—without ever making the determination that “[t]he development will not violate other Federal, State or local laws or regulations.” PGCC § 32-206(d)(5).

D. The Applicant Has Failed To Provide A Density Calculation That Complies With Requirements of the Zoning Ordinance.

Density is defined as the number of dwelling units per acre of net lot area. PGCC § 27-107.07(a)(66). Net lot area is the total contiguous area included within the lot lines of a lot excluding alleys, streets and other public ways and land lying within a 100-year floodplain. PGCC § 27-107.07(a)(161). Net tract area is the gross tract area minus all land which lies within a 100-

year floodplain and has been dedicated, donated, or otherwise conveyed out of the tract. PGCC § 27-107.07(a)(163). Here, it is undisputed that DPIE's waiver to allow the Applicant to construct within the 100-year flood plain was invalid. Moreover, the record reveals that two-parcels of the subject property are to be conveyed out of the tract to the City of Hyattsville. PGCPB No. 2023-15, p. 3. As a result, the Applicant may not utilize acreage in the 100-year floodplain and the two parcels to be conveyed out of the tract to the City of Hyattsville to calculate density. Furthermore, the record lacks substantial evidence to demonstrate a density calculation excluding alleys, streets, or other public roadways.

E. Conclusion.

Having concluded that DPIE's waiver to allow the Applicant to construct on the 100-year floodplain was invalid, and that the Board erred in approving the site plan to construct 41-townhouse dwelling units within the 100-year floodplain, the decision of the Board is hereby remanded.

Planning Board shall reopen the record to take further testimony or evidence as follows:

1. Allow the Applicant to withdraw the site plan since DPIE is not allowed to grant a waiver for any filling or the construction or placement of any structures or obstructions ultimately located in the FEMA-designated floodways. PGCC § 32-206(e).
2. In the alternative, allow the Applicant to submit a revised site plan, which shall include a new application request to DPIE for a waiver to construct in the 100-year floodplain that complies with the requirements in PGCC § 32-206, as amended by CB-38-2016.
3. Any revised site plan submitted by the Applicant shall contain a new decision from DPIE on the Applicant's new application request for a waiver to construct in the 100-year floodplain. DPIE's new decision on the Applicant's waiver request shall make all required findings and considerations in PGCC § 32-206(d) and (j), as amended by CB-38-2016. DPIE's findings and considerations shall include, but are not limited to, whether a waiver can be granted for any filling or the construction or placement of any structures or obstructions ultimately located in the FEMA-designated floodways. PGCC § 32-206(e).

4. Any revised site plan submitted by the Applicant shall include evidence of all Federal and State permits required to commence with any development of the proposed project.
5. Any revised site plan submitted by the Applicant shall include a density calculation worksheet documenting and explaining the net lot acreage or net tract acreage of the lower parcel that is subject to be developed after excluding any land in the 100-year floodplain, and after excluding any alleys, streets, or other public roadways or land that has been dedicated, donated, conveyed or proposed to be dedicated, donated or conveyed out of the tract.

ORDERED this 11th day of May, 2023, by the following vote:

In Favor: Council Members Blegay, Dernoga, Fisher, Hawkins, Ivey, Olson, Oriadha, Watson.

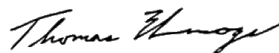
Opposed:

Abstained:

Absent: Council Members Burroughs, Franklin, and Harrison.


Vote: 8-0.

COUNTY COUNCIL OF PRINCE GEORGE'S
COUNTY, MARYLAND, SITTING AS THE
DISTRICT COUNCIL FOR THAT PART OF
THE MARYLAND-WASHINGTON
REGIONAL DISTRICT IN PRINCE GEORGE'S
COUNTY, MARYLAND

By: 

Thomas E. Dernoga, Chair

ATTEST:



Donna J. Brown
Clerk of the Council