



FAIRFAX COUNTY

DEPARTMENT OF PLANNING AND ZONING

Zoning Evaluation Division
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Fairfax, Virginia 22035-5509

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V I R G I N I A

November 12, 2003

Mr. C. David McCarthy
President, Virginia Division
DR Horton
11216 Waples Mill Road, Suite 105
Fairfax, Virginia 22030

Mr. Michael W. Jones
Vice President, Land
DR Horton
11216 Waples Mill Road, Suite 105
Fairfax, Virginia 22030

Re: Interpretation for Five Oaks Subdivision
Tax Map 48-1 ((1)) 55A; RZ 2001-PR-054

Dear Mr. McCarthy and Mr. Jones:

This is in response to your letter of September 9, 2003, and subsequent meeting with Mr. Jones. Specifically at issue is whether DR Horton has complied with the limitations on the construction of decks and operable French doors as set forth in Proffer 12(c) and 12(e) of the Proffers dated September 13, 2002, which were accepted by the Board of Supervisors in conjunction with the approval of RZ 2001-PR-054. This determination is based on the documentation submitted with your September 9, 2003, letter, a review of the Homeowners' Association (HOA) documents for the Five Oaks subdivision which have been recorded in the land records, as well as a review of the Planning Commission's public hearing record on the zoning application.

Proffer 12(c) states:

"No second floor decks shall be permitted on the rear of Lots 1-6. No decks higher than 2 feet above grade shall be permitted on the rear of Lots 7 through 9. Decks on Lots 10 and 11 shall be limited to finished grade level at the rear of the home. All prospective purchasers shall be notified of this restriction in writing, prior to purchase, and such restriction shall be placed in each of the lot's deeds among the land records of Fairfax County and in the HOA documents in a form approved by the County Attorney."

Mr. C. David McCarthy
Mr. Michael W. Jones
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Proffer 12(e) states:

"The rear facades of all homes shall not have any second story operable French doors which would otherwise be used for deck access."

With regard to Lots 1-6, the grading plan you provided shows a basement floor, a first floor and a second floor, with the first floor being anywhere from one to six feet above grade. While the homes on these lots have not yet been constructed, you have submitted documentation which shows that the limitation on construction of decks is disclosed: 1) in a contract addendum to be signed by contract purchasers; 2) in the Homeowners' Association (HOA) Documents; and 3) in the proposed deeds of conveyance to be executed at the time of settlement. You state that each of the homes on Lots 1-6 will have first floor operable French doors at the rear which may lead to low decks or patios, but that there will be no operable French doors at the second story.

The proffer states that no deck higher than two feet above grade shall be permitted on Lots 7-9; for Lots 10 and 11, decks are limited to finished grade at the rear of the home. The grading plan for Lots 7-11 shows a basement floor, a first floor and a second floor. The finished grades at the rear of these lots range from six feet below the first floor level for Lot 7 to eight feet below the first floor level for Lot 9. The finished grades behind Lots 10 and 11 range from nine feet below the first floor level for Lot 10 to about 10 feet below the first floor level on Lot 11. Lots 10 and 11 will have full walk out basements which may lead to at grade patios or decks. The homes on these lots are currently under construction, and, while there are no operable French doors at the second story of these homes, there is an operable door at the first floor level. While you have indicated that DR Horton will not be offering deck options on these units and that the limitation on construction of decks for these lots have been properly disclosed in the contract, HOA documents and in the proposed deeds, there is concern that the placement of an operable door at the first floor level, while not technically in violation of the proffer, could lead a prospective homeowner to believe that stairs leading down to a deck constructed at grade or two feet above grade would be permissible.

In Article 20 of the Zoning Ordinance, Deck is defined as:

"Any patio, balcony, terrace, gallery, veranda, piazza, porch, portico or similar projection from an outer wall of a building, other than a carport as defined herein. A deck shall include any associated stairs." (emphasis added).

Based on the foregoing, it is my determination that for Lots 1-6, decks, as defined in the Zoning Ordinance to include any associated stairs, shall not be permitted on the second floor (bedroom level) rear facades. There shall be no operable French or other type of operable doors permitted at this level. Further, no decks or stairs leading to decks shall be located higher than six feet above finished grade at the rear of the dwelling.

Mr. C. David McCarthy
Mr. Michael W. Jones
November 10, 2003
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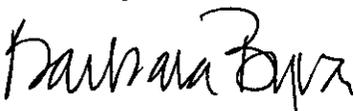
For Lots 7-9, decks, as defined in the Fairfax County Zoning Ordinance to include any associated stairs, shall be no higher than two feet above finished grade at the rear of the dwelling. No decks or stairs to decks, shall be permitted from the main living level at the rear of the dwelling. There shall be no operable French or other type of operable door permitted at the second (bedroom) level.

For Lots 10 and 11, decks, as defined in the Fairfax County Zoning Ordinance to include any associated stairs, shall be limited to finished grade level at the rear of the dwelling. No decks or stairs leading to decks which may be constructed at grade, shall be permitted from the main living level at the rear of the dwelling. There shall be no operable French or other type of operable doors permitted at the second (bedroom) level.

It is my understanding that you have declined our suggestion to incorporate this clarification of the proffer language into the deeds of the proposed dwellings. Although it is disappointing that you have declined our suggested language, the deeds as currently written do satisfy the proffer. However, please be advised that a copy of this interpretation will be placed in the rezoning file and in the street file for the subdivision which is kept in the Zoning Permit Review Branch, of the Department of Planning and Zoning. Any building permit request received will be reviewed based on this interpretation.

This determination has been made in my capacity as duly authorized agent of the Zoning Administrator. If you have any questions, please contact Ms. Leslie Johnson at 703-324-1290.

Sincerely,



Barbara A. Byron, Director
Zoning Evaluation Division, DPZ

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Attachments: A/S

cc: Gerald E. Connolly, Supervisor, Providence District
Linda Q. Smyth, Planning Commissioner, Providence District
William E. Shoup, Zoning Administrator
Michelle Brickner, Director, Office of Site Development Services, DPWES
Audrey Clark, Building Plan Review Division, OSDS, DPWES
Bonds and Agreements Branch, Office of Site Development Services DPWES
File: RZ 2001-PR-054

September 9, 2003

Barbara Byron
Zoning Administrator
Fairfax County
12055 Government Center Parkway
Fairfax, VA 22035

Re: Five Oaks Subdivision
RZ-2001-PR-054

RECEIVED
Department of Planning & Zoning
SEP 10 2003
Zoning Evaluation Division

Dear Ms Byron:

Pursuant to your conversation today with Mike Jones, you advised us that Supervisor Connolly's office has requested a proffer interpretation regarding the above referenced community. Specifically, Fairfax County is questioning D.R. Horton, Inc.'s compliance with Proffers 12 (c) and 12(e) which state:

- 12(c) *No second floor decks shall be permitted on the rear of Lots 1 through 6. No decks higher than 2 feet above grade shall be permitted on the rear of Lots 7 through 9. Decks on Lots 10 and 11 shall be limited to finished grade level at the rear of the home. All prospective purchasers shall be notified of this restriction in writing, prior to purchase, and such restriction shall be placed in each lot's deeds among the land records of Fairfax County and in the HOA documents in a form as approved by the County attorney.*
- 12(e) *The rear facades of all homes shall not have any second story operable French doors which would otherwise be used for deck access.*

You have asked us to explain our understanding of these proffers.

Attached for your information and assistance are the following:

- 1) Copy of the rear elevations for the two house types approved by Fairfax County for Five Oaks
- 2) Copy of the Fairfax County approved House Grading Plan
- 3) Copy of an executed Proffer Addendum, signed by one of our Purchasers, disclosing the Proffer limitations
- 4) Copy of the relevant section of the HOA documents, as approved by the Fairfax County Attorney
- 5) Copy of typical Fairfax County approved building permit showing the houses to be TWO STORIES.
- 6) Copies of various e-mails from Jay Montgomery to and from Pat Walsh, our Land Development Manager responsible for this site.

Please start with a review of the rear elevations. Pay special attention to see how the floors are designated "First Floor" and "Second Floor" at the left of each drawing. Note the first floor French doors on both house types and note that, for safety reasons, a 36" guardrail is shown in

front of each. Please further note that these doors provide rear access to the homes in a fire emergency as is often desired by County Fire Marshalls.

Next, please review the grades on Lots 1 through 6. You will see a basement floor, first floor and second floor elevation on all of the grading plans. Note that on 1 through 6, the first floor on each house is anywhere from 1 to 6 feet above the outside grade. There is no apparent dispute that these lots do not (and will not) have second floor decks (as prohibited in Proffer 12 (c)) nor do they have second floor operable French doors (as prohibited in Proffer 12 (e)). All six houses will have operable First Floor French doors that may lead to low-decks or patios.

The question raised seems to deal solely with Lots 7 through 11. Proffer 12(c) says that "no decks higher than 2 feet above grade shall be permitted on the rear of Lots 7 through 9". A review of the House Grading Plan shows the grades behind these houses to range from 6 feet below first floor level on Lot 7 to about 8 feet on Lot 9. Proffer 12(c) clearly permits decks here, provided they are no higher than 2 feet above grade. Note that all three of these homes have basements that are partially buried at the rear. Each of these homes has operable First Story French Doors, none of these homes have "Second Story operable French Doors" as precluded by Proffer 12(e). We have not offered, built or sold deck options of any kind on these lots.

Proffer 12(c) says that "Decks on Lots 10 and 11 shall be limited to finished grade level at the rear of the home". A review of the Approved House Grading Plan shows the grades behind these houses to range from 9 feet below first floor level on Lot 10 to about 10 feet on Lot 11. Both of these homes are full walk-outs that may lead to future patios. While each of these homes has an operable First Story French Door, neither has a "Second Story operable French door" as precluded by Proffer 12(e). We are not offering nor will we sell decks on these lots.

Mr. Montgomery, who lives behind Lot 11 and our Stormwater Management Pond is, by all accounts, the driving force for this inquiry. The full flavor of his motivation is found in his August 24th e-mail to Supervisor Connolly where he states "The neighbors of Vienna Oaks question D.R. Horton's commitment to the proffers imposed (emphasis added) on their Five Oaks development". He goes on to say, "There can be no question as to the intent of the proffers written with the help of Ms Smyth and other members of the Board." In both the August 24th e-mail to Supervisor Connolly and in his August 2nd e-mail to Pat Walsh, he goes on to show his misunderstanding about this proffer. In both places, he refers to the large openings (where the French doors were ultimately installed) as being "on the 2nd level". As seen by the approved plans, they are, of course, on the first story (first level).

While Linda Smyth and Supervisor Connolly may have been a part of the group that "imposed" these proffers on D.R. Horton, Inc., neither Dave McCarthy (who signed these proffers) nor Mike Jones (who is responsible for all Virginia Division land issues) were at these meetings. Our attorney, Keith Martin, presented us with proffers that include many onerous and costly obligations to which we agreed as a condition of the re-zoning. Mr. Martin reported that the only way to get our plans approved was to agree to these terms.

We discussed all of the proffers at length. We realized that the reason for no second floor decks on the houses backing to Route 123 would minimize the impact of our houses on the highway -

and we readily agreed. We discussed the whole deck issue and decided that we could live within these constraints. We discussed the question of Second Story French Door proffer and since none of our planned house-types have Second Story French Doors, we agreed to make the proffer.

D.R. Horton, Inc. is the largest homebuilder in the country. We have met every obligation and commitment associated with this community and it is our express intention to continue doing so. Our commitment is evidenced by our compliance with all of the twenty-one proffers including:

1. Develop the site in compliance with the approved GDP/FDP.
2. Met the terms of the Final Development Plan Amendment.
3. Designed homes that meet the Energy Efficiency requirements.
4. Met the Tree Preservation requirements (which included ROOT PRUNING the entire perimeter of the site). We (and the County Arborist) extended multiple offers to Mr. Montgomery to walk the Vienna Oaks Subdivision property line, as required by Supervisor Connolly's office. Mr. Montgomery declined, stating scheduling conflicts, but he was later able to meet with our arborist and have him take-out vines in his trees that were hanging over our property.
5. Install Landscaping in accordance with proffer.
6. Purchased and are ready to install the recreational facilities outlined in proffer.
7. Made roadway dedications to VDOT and are in the process of spending almost \$100,000 to re-signalize the Sutton Road/123 intersection.
8. Meet the requirements of proffer (#8) including landscaping the stormwater management pond to "minimize the visual impact of the adjacent homes in the Vienna Oaks subdivision" (read Mr. Montgomery's home).
9. Granted the Conservation Easement.
10. Created an HOA.
11. Paid almost \$35,000 to the Fairfax County Housing Trust Fund.
13. Designed the homes along Route 123 to satisfy noise requirements.
14. Build the decorative wall.
15. Designed all driveways to be at least 18' in length, Lots 1 through 6 have minimum 20' rear yards and Lots 7 through 11 are all a minimum of 30' from the Vienna Oaks Subdivision lots.
16. No popsicle signs have been placed..
17. Tied-in the stormwater system to the line at Courthouse Road. Although the Vienna Oaks Subdivision Plan anticipated our site's development and sized its stormwater system appropriately, we incurred about \$250,000 in excess costs because the Vienna Oaks homeowners refused our access to its stormwater system. They could do this because the recorded easements were deficient and left a "spite strip" between our properties.
18. Install lighting.
19. Delivered copies of the subdivision plans to Supervisor Connolly and his Planning Commissioner before each submission.
20. Re-stoned the Madison High parking lot (#20).

You have been charged by a County Supervisor to determine if we meet the *letter* and the *intent* of these proffers. We submit that we have met both the letter and intent of every proffer at Five Oaks including ALL of Proffer #12.

With regard to 12(c), while we have met all of the deck notice requirements, we are not building nor selling any decks in this community. Our compliance with the letter and the intent of the deck language cannot be in dispute. With regard to 12(e), it may have been the intent of those who "imposed" (Mr. Montgomery's words- not ours) these proffers to mean NO FIRST STORY FRENCH DOORS and, if so, they should have said NO FIRST STORY FRENCH DOORS. They instead said (and we proffered) "NO SECOND STORY FRENCH DOORS". The letter of this proffer is clear - and we meet it. Had they said "NO FIRST STORY FRENCH DOORS", we would have loudly objected at the time. But they did not say "first", they said "second".

Virginia state law states "A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions . . ." that include, among other things, that "the rezoning itself must give rise for the need for the conditions" and "the conditions shall have a reasonable relation to the rezoning".

After a review of all 21 proffers, we could argue that the deck and door issue as well as several other proffers are not reasonable and have no relation to the rezoning. We could argue that these proffers were not voluntary, but, rather, *imposed* upon us by Supervisor Connolly and members of Vienna Oaks Subdivision. But we are only asked to address Proffer #12 and our compliance.

The intent is clear and unmistakable. While Mr. Montgomery may *feel* his intent was that there be no FIRST STORY French Doors, he was not making the proffer. We can assure you that it was D.R. Horton, Inc.'s intent in this proffer was that there will be no SECOND STORY French doors. There is a difference between *First* Story and *Second* Story and we, and the other experts that have been associated with these plans, know the difference. As a voluntary proffering (in writing), made in accordance with state law, how can anyone establish that our intent was anything other than what is expressly stated? For you to rule otherwise will do us a great injustice and will cause material damage to our company and to our home buyers.

We have approved proffers, an approved re-zoning, an approved subdivision plan, an approved house lot grading plan, a recorded plat and approved building permits. Our homes are being built in accordance with all of the above. We are in total compliance with the proffers and respectfully ask that you affirm this compliance.

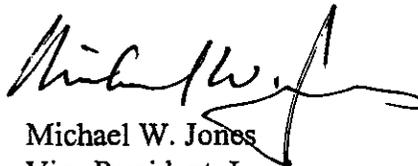
Please contact us directly and immediately if anything is unclear or if you require further explanation. Our office phone is (703) 385-8001 and our fax is (703) 385-8002.

We look forward to receiving a copy of your interpretation letter affirming the above.

Regards,



C. David McCarthy
President
Virginia Division



Michael W. Jones
Vice President, Land
Virginia Division

cc: Jon F. Mains, Esq.

attachments (12)