APPLICATION ACCEPTED: January 5, 2016
BOARD OF ZONING APPEALS: August 3, 2016 @ 9:00 a.m.

County of Fairfax, Virginia

July 27, 2016

STAFF REPORT

VARIANCE VC 2016-LE-005

LEE DISTRICT

APPLICANT/OWNER:	Heath Hohensee
SUBDIVISION:	Clermont
STREET ADDRESS:	4410 Elmwood Drive, Alexandria, 22310
TAX MAP REFERENCE:	82-1 ((4)) 37
LOT SIZE:	1.06 acres
ZONING DISTRICT:	R-3
ZONING ORDINANCE PROVISIONS:	18-401
VARIANCE PROPOSAL:	To permit construction of a residential dwelling within 200 feet of an insterstate highway.

STAFF RECOMMENDATION:

Staff recommends denial of VC 2016-LE-005 for construction of a residential dwelling within 200 feet of an interstate highway. However, if it is the intent of the BZA to approve the Variance application, the BZA should condition its approval by requiring conformance with the proposed development conditions contained in Appendix 1.

It should be noted that it is not the intent of staff to recommend that the Board, in adopting any conditions, relieve the applicant/owner from compliance with the provisions of any applicable ordinances, regulations, or adopted standards.

Erin M. Haley

Department of Planning and Zoning
Zoning Evaluation Division
12055 Government Center Parkway, Suite 801
Fairfax, Virginia 22035-5509
Phone 703-324-1290 FAX 703-324-3924
www.fairfaxcounty.gov/dpz/

It should be further noted that the content of this report reflects the analysis and recommendations of staff; it does not reflect the position of the Board of Zoning Appeals.

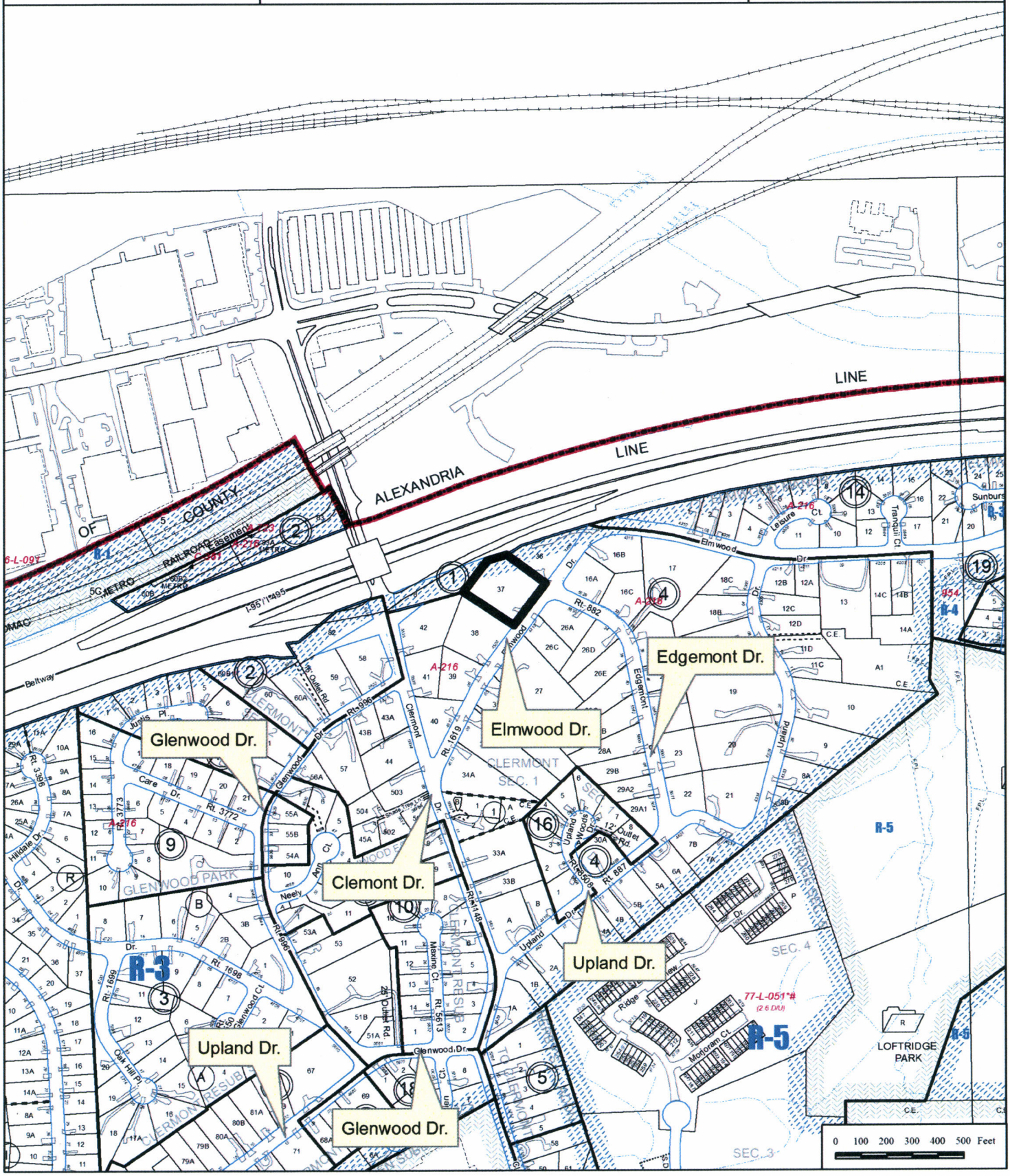
A copy of the BZA's Resolution setting forth this decision will be mailed within five days after the decision becomes final.

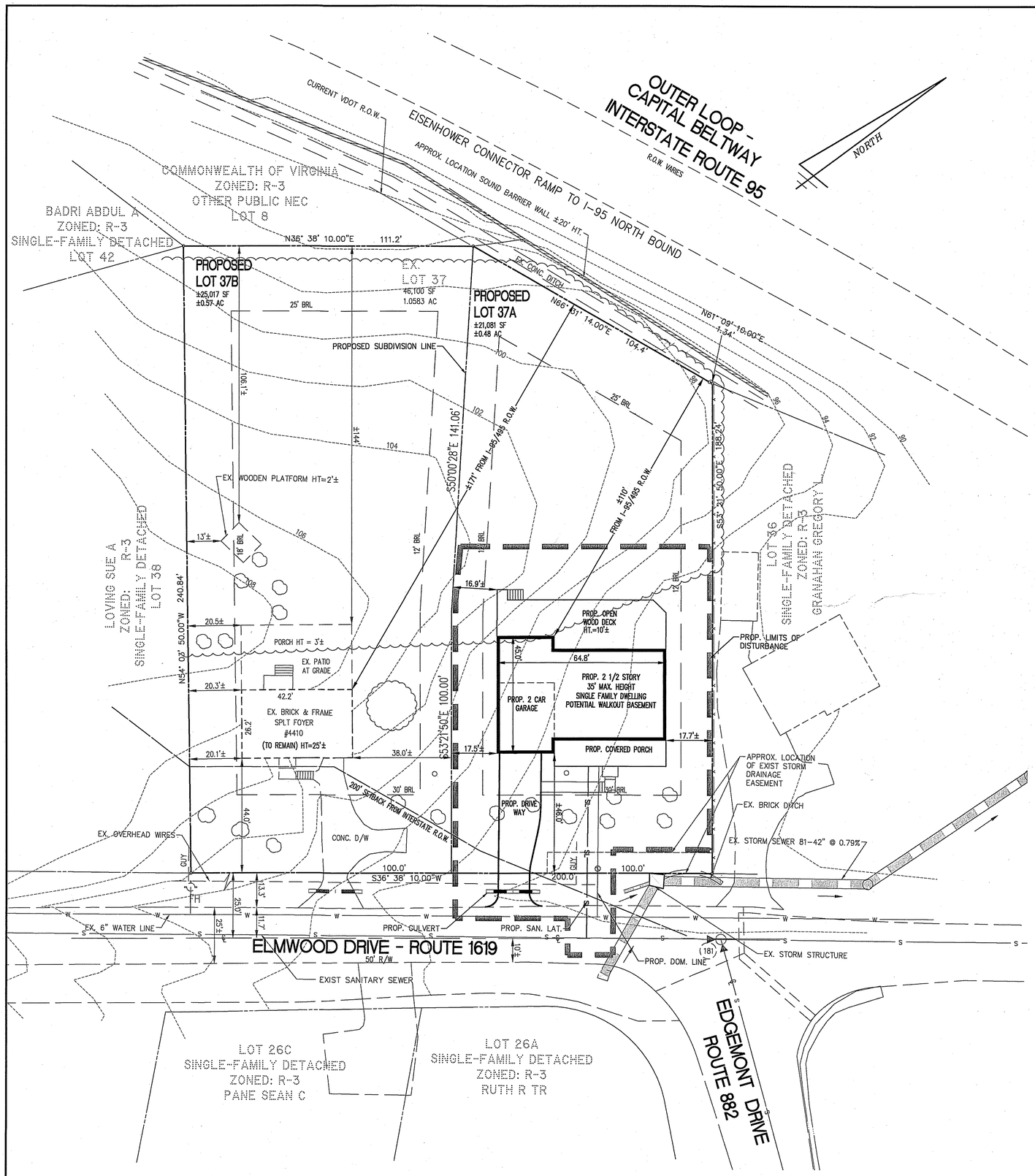
The approval of this application does not interfere with, abrogate or annul any easements, covenants, or other agreements between parties, as they may apply to the property subject to the application.

For additional information, call Zoning Evaluation Division, Department of Planning and Zoning at 703-324-1280, 12055 Government Center Parkway, Suite 801, Fairfax, Virginia 22035. **Board of Zoning Appeals' meetings are held in the Board Room, Ground Level, Government Center Building, 12000 Government Center Parkway, Fairfax, Virginia 22035-5505**

Americans with Disabilities Act (ADA): Reasonable accommodation is available upon 48 hours advance notice. For additional information on ADA call (703) 324-1334 or TTY 711 (Virginia Relay Center).

Variance Application
VC 2016-LE-005
HEATH HOHENSEE



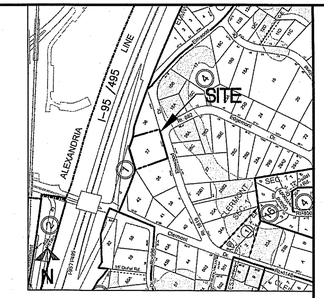


NOTES

1. THE PROPERTY SHOWN HEREON IS DESIGNATED BY FAIRFAX COUNTY, VIRGINIA, AS TAX ASSESSMENT MAP NUMBER 082-1-04-0037 AND IS ZONED R-3.
2. THE PROPERTY, BEING COMPRISED OF LOT 37 SECTION 1, CLERMONT, AS RECORDED IN DEED BOOK 444 AT PAGE 60, IS NOW IN THE NAME OF HOHENSEE HEATH ERICH, AS RECORDED IN DEED BOOK 23216 AT PAGE 1042, ALL OF THE FOREGOING AMONG THE LAND RECORDS OF FAIRFAX COUNTY, VIRGINIA.
3. TOTAL AREA OF THE PROPERTY IS APPROXIMATELY 46,100 SQUARE FEET OR 1.0583 ACRES.
4. BOUNDARY AND TOPOGRAPHY GENERATED BY RECORD INFORMATION AND IS NOT THE RESULT OF A FIELD SURVEY BY THIS FIRM.
5. THE APPLICANT HEREBY REQUESTS A VARIANCE OF ZONING ORDINANCE 2-414-1A & 2 TO ALLOW EXISTING AND FUTURE SINGLE DETACHED DWELLINGS TO REMAIN OR BE CONSTRUCTED WITHIN THE 200' SETBACK FROM THE INTERSTATE HIGHWAY WHERE THE ENFORCEMENT OF THIS REGULATION WOULD NEGATE THE USE OF THE LOT IN ACCORDANCE WITH THE PROVISIONS OF R-3 ZONING DISTRICT.
6. THIS PROPERTY IS SERVED BY PUBLIC WATER AND PUBLIC SEWER.
7. THERE ARE NO EXISTING PUBLIC EASEMENTS HAVING A WIDTH OF 25' OR MORE ON THIS PROPERTY.
8. THERE ARE NO VISIBLE SIGNS OF GRAVES ON THIS PROPERTY.
9. THERE ARE NO FLOOD PLAINS OR RESOURCE PROTECTION AREAS ON THIS PROPERTY.

ZONING TABULATION R-3 (CONVENTIONAL)

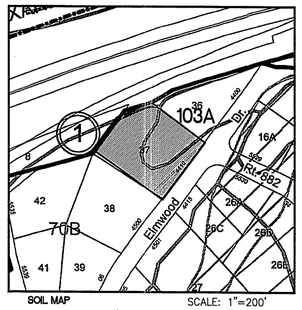
1. MINIMUM LOT AREA = 10,500 SF
2. MINIMUM LOT WIDTH:
   INTERIOR = 80'
   CORNER LOT = 105'
3. MINIMUM YARD REQUIREMENTS
   PRINCIPAL USES: FRONT 30'
   SIDE 12'
   REAR 25' *
   * THE PROPERTY IS ADJACENT TO RIGHT-OF-WAY OF AN INTERSTATE HIGHWAY THAT REQUIRED 200' SETBACK. VARIANCE REQUESTED.
4. MAXIMUM BUILDING HEIGHT 35' PRINCIPAL USES,
5. OPEN SPACE: N/A
6. MAXIMUM DENSITY: THREE DWELLINGS PER ACRE



VICINITY MAP SCALE: 1"=500'

LEGEND

PROPOSED	DESCRIPTION	EXISTING
EP	EDGE OF PAVEMENT	EP.
MH	MANHOLE	MH
WV	WATER VALVE	WV
WM	WATER METER	WM
GM	GAS METER	GM
TCB	TRAFFIC CONTROL BOX	TCB
LP	LIGHT POLE	LP
LP/S	LIGHT POLE WITH SIGNALS	LP/S
	CURB & GUTTER CG-2	
CG-6R CG-6	TRANSITION FROM CG-6 TO CG-6R	CG-6 CG-6R
	SANITARY SEWER	S
SL	SANITARY LATERAL	SL
C.O.	CLEAN OUT	C.O.
	STORM SEWER	
	WATER MAIN	W
	FIRE HYDRANT	
	PLUG	
	OVERHEAD WIRES	
	UTILITY POLE	
UE	UNDERGROUND ELECTRIC	UE
T	TELEPHONE	T
G	GAS MAIN	G
E	ELECTRICAL	E
	TRANSFORMER	
	HANDICAP RAMP (CG-12)	
	GUARDRAIL	
	FENCE	
	TRAFFIC FLOW	
	LIGHT	
	DOOR	
	TREES	
	LIMITS OF CLEARING AND GRADING	
	TEST PIT	
DW	DRIVEWAY	
R.O.W.	RIGHT OF WAY	



SOIL MAP SCALE: 1"=200'

SOIL ID NUMBERS	SOIL SERIES NAME	FOUNDATION SUPPORT	SOIL DRAINAGE	EROSION POTENTIAL	PROBLEM CLASS
70	KINGSTOWNE	GOOD	GOOD	LOW	IVB
	SASSAFRAS COMPLEX				
103	WHEATON-CODORUS COMPLEX	POOR	POOR	LOW	IVA

SHEET INDEX

1 VARIANCE PLAT
2 EXISTING VEGETATION MAP

RECEIVED
Department of Planning & Zoning
MAR 11 2016
Zoning Evaluation Division

WALTER L. PHILLIPS INCORPORATED
ESTABLISHED 1945
Engineers • Surveyors • Planners
Landscape Architects • Arborists
207 PARK AVENUE
FALLS CHURCH, VIRGINIA 22046
(703) 532-6163 Fax (703) 533-1301
www.WLPINC.com

DRAWN: SO | CHECKED: JG
SCALE: 1"=20' | DATE: 2/18/16, 3/8/16

COMMONWEALTH OF VIRGINIA
JOHN L. GROSSMUCH
Lic. No. 002270
3/8/16
LANDSCAPE ARCHITECT

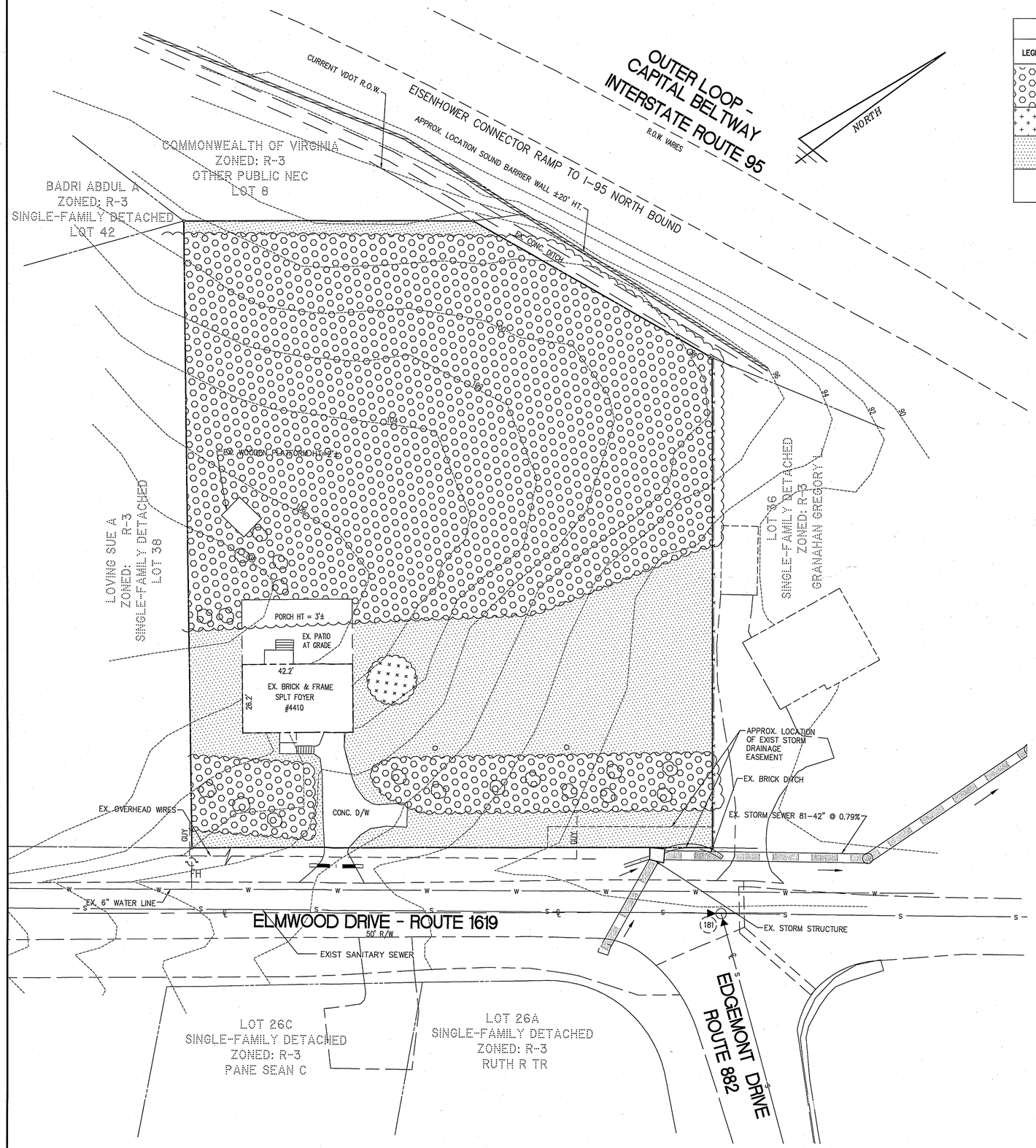
REVISION APPROVED BY				
NO.	DESCRIPTION	DATE	REV. BY	APPROVED

VARIANCE PLAT

4410 ELMWOOD DRIVE

LEE DISTRICT

FAIRFAX COUNTY, VIRGINIA



EXISTING VEGETATION MAP INFORMATION

LEGEND	COVER TYPE	PRIMARY SPECIES	SUCCESSIONAL STAGE	CONDITION	ACREAGE	COMMENTS	%
	UPLAND FOREST	OAK, BEECH	SUB-CLIMAX	FAIR TO GOOD	30,741 SF 0.70 AC		67%
	LANDSCAPED TREE CANOPY			GOOD	200 SF 0.01 AC		1%
	MAINTAINED GRASS			GOOD	12,683 SF 0.29 AC		27%
	DEVELOPED	BUILDING, DRIVEWAY. PATIO, SIDEWALK		N/A	2,476 SF 0.06 AC		5%
				TOTAL:	46,100 SF OR 1.06 AC		

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COMMONWEALTH OF VIRGINIA
JOHN L. GROSSKOPH
Lic. No. 000270
3/8/16
LANDSCAPE ARCHITECT

REVISION APPROVED BY			
NO.	DESCRIPTION	DATE	REV. BY	APPROVED	DATE

EXISTING VEGETATION MAP

4410 ELMWOOD DRIVE

LEE DISTRICT

FAIRFAX COUNTY, VIRGINIA

SHEET: 2 OF 2

File No. FD-12 Tax Map No. 82-1 Job No. 15-097 Cadd Dwg. File: Q:\sdskproj\15097\dwg\planning\exhibit\15097X-0001.dwg Xref: DIR\0000

VARIANCE REQUEST

The applicant is seeking a variance to permit construction of a residential dwelling within 200 feet of an interstate highway.

A copy of the special permit plat titled, “Variance Plat, 4410 Elmwood Drive,” by John L. Gavarkavich, Landscape Architect, of Walter L. Phillips, Inc., dated February 18, 2016, as revised through March 8, 2016, is included in the front of the staff report.

Copies of the proposed development conditions, the statement of justification with select file photographs, and the affidavit are contained in Appendices 1 through 3, respectively.

CHARACTER OF THE SITE AND SURROUNDING AREA

Figure 1: House Location
For illustrative purposes only

The application property is located on Elmwood Drive near its intersection with Edgemont Drive. It is developed with a split level single-family detached dwelling with a full basement and approximately 1,164 square feet of above grade living area. The house is positioned in the southeastern corner of the 1.06 acre property. A “T”-shaped concrete driveway provides access from Elmwood Drive to an attached one car garage. An open rear porch is located at the rear of the house and a wooden platform 2 feet in height is located in the rear yard. The property is largely covered with mature trees. The northeastern portion of the rear yard backs up to the sound wall that abuts

Interstate Route 95/495 (Capital Beltway). All of the property, with the exception of the southeastern corner, is located with the 200 foot setback required by the Zoning Ordinance from the right-of-way for interstate highways.

The subject property and surrounding properties to the north, south, and east are zoned R-3 and developed with single-family detached houses. The property to the west is I-95/I-495.

BACKGROUND

Fairfax County Tax Records and building permit records indicate that the existing house was constructed in 1978 and purchased by the property owner in 2013.

In 1996, the Eisenhower Avenue connector ramp was constructed to the west of the subject property. As part of this widening project, the Virginia Department of Transportation (VDOT) acquired 1,773 square feet of the property taking the size of the property from 1.101 acres to 1.06 acres. At the time of the acquisition, the previous property owner (Mr. Edward N. Johnson) asked the Zoning Administrator whether the acquisition of this land would affect the property's R-3 zoning or keep him from subdividing the property into two lots in the future and constructing a house on the second lot. The Zoning Administrator made the determination (Appendix 4) the land acquisition would not affect the R-3 zoning but could not determine if subdividing and development of a second lot could be accomplished without a plat showing the proposed subdivision. In 2015, the applicant requested the Zoning Administrator determine if the property could be subdivided at a 90 degree angle creating two lots each 100 feet in width and approximately one-half acre in size. The applicant noted in his written request that the majority of the property is located less than 200 feet from the abutting interstate highway and requested information about a process to obtain permission to develop the potential new lot. The Zoning Adminstrator issued a written determination (Appendix 4) in response that noted the R-3 District requires a minimum total area of 10,500 square feet in size and 80 feet in width, and a maximum density of three dwelling units per acre. Lot 37 contains sufficient land area to be subdivided into two lots while meeting the lot area, width, and density requirements of the R-3 District. Additionally, Section 1 of the Clermont Subdivision currently contains 70 lots on 69.9 acres, which equates to a density of 1.02 dwelling units per acre. The addition of one lot to the existing subdivision would increase the density to 1.03 du/ac, which is less than the 3 du/ac allowed under the R-3 District regulations, and therefore the subdivision of the subject property would be feasible as proposed.

However, Section 2-414 of the Zoning Ordinance requires that a minimum distance of 200 feet be maintained between a principal residential building and the right-of-way of an interstate highway. Paragraph 4 of Section 2-414 states:

> *The provisions of Par. 1 and 2 above shall not apply in those instances where a lot has been recorded prior to the effective date of this Ordinance where the*

> *enforcement of this regulation would negate the use of the lot in accordance with the provisions of the zoning district in which located.*

The effective date of the Zoning Ordinance is August 14, 1978 and Section 1 of the Clermont Subdivision, including Lot 37, was recorded before that date. However, the proposed re-subdivision of the lot would not be exempt from Sect. 2-414 as it will occur after the effective date of the Zoning Ordinance. Either a variance must be approved by the BZA to reduce the 200 foot setback or it could be modified with the approval of a proffered rezoning by the Board of Supervisors. Both the 1996 and 2015 Zoning Administrator Determinations are included in Appendix 4.

Records indicate that no other variance applications to permit construction of a new residential dwelling within 200 feet of an interstate highway have been heard by the Board of Zoning Appeals (BZA) in the surrounding area.

DESCRIPTION OF THE PROPOSED VARIANCE REQUEST

The applicant requests approval of a variance to permit construction of a new residential dwelling within 200 feet of an interstate highway. The proposed house would be two and a half stories, 35 feet in height, with an attached two car garage, covered front porch, and open wood deck 10 feet in height located at the rear of the house. The proposed dwelling would be located entirely within the 200 foot setback area with the closest point of the house located 110 feet from the right-of-way for I-95/I-495. The applicant currently owns the property and resides in the house at the southeastern corner of the property that is also entirely within the 200 foot setback with the northern corner of the house located 171 feet from I-95/I-495, but the existing house was constructed by-right as the property was recorded prior to the effective date of the Zoning Ordinance and is therefore exempt from the 200 foot setback requirement. The applicant proposes to subdivide the property, which he can potentially do by right, into Lot 37B (the location of the existing house) and Lot 37A (the proposed house) and then to sell Lot 37A to a developer who would then build the proposed house. As only the southeastern corner of the existing lot is outside of the 200 foot setback, almost the entirety of the proposed lot is inside the setback area and no portion of the lot would be feasibly buildable by-right.

ANALYSIS

Comprehensive Plan Provisions

Plan Area: Area IV, Rose Hill Planning District
Planning Sector: Burgundy Community Planning Sector (RH3)
Plan Map: Residential, 2-3 du/ac

Zoning District Standards

Bulk Standards (R-3)			
Standard	**Required**	**Provided**	**Proposed**
Lot Size	10,500 sf.	1.06 acres	Lot 37A: 21,081 s.f. Lot 37B: 25,017 s.f.
Lot Width	Interior: 80 feet	200 ft.	100 ft.
Building Height	35 feet	25 ft.	Lot 37A: 35 ft. Lot 37B: 25 ft.
Front Yard	30 feet	44 ft.	Lot 37A: 46 ft. Lot 37B: 44 ft.
Side Yard	12 feet	Northern: 138 ft. Southern: 20.1 ft.	Lot 37A: Northern: 17.7 ft. Southern: 16.9 ft. Lot 37B: Northern: 38 ft. Southern: 20.1 ft.
Rear Yard	25 feet	144 ft.	Lot 37A: 110 ft. Lot 37B: 144 ft.

Environmental Analysis (Appendix 5)

<u>Transportation Noise Mitigation</u>

The subject property will be affected by transportation generated noise coming mostly from I-95/I-495. Zoning Ordinance Sect. 18-403, Par. 5 states, “If the proposal includes the request for a variance of the yard regulations for yards abutting certain principal arterial highways and railroad tracks pursuant to Sect. 2-414, a study showing the projected noise impacts, proposed mitigation measures and the effectiveness of such measures shall be submitted.” The applicant has provided a noise study performed by Hush Acoustics, LLC, dated May 17, 2016 for the subject property. The noise study is included as Appendix 6. Noise measurements were taken between Tuesday, May 10, 2016 and Tuesday, May 17, 2016. Two noise measurement locations were provided for this study.

- Noise meter M1 was placed 22.3 feet above the ground to replicate an upper story. This location represented the loudest location outside the proposed new house.
- Noise meter M2 was placed at approximately 12.6 feet above the ground in the approximate location where a deck would be situated.

The loudest measurement for M1 was 68.6 decibels and the loudest measurement for M2 was 67.8 decibels. When developing recommendations for appropriate building material specifications to mitigate the measured noise levels, the consultant added one decibel to each of the highest measurements to account for any future increase in noise

level at this location – 69.6 decibels for M1 and 68.8 decibels for M2.

The Comprehensive Plan states that, “New development should not expose people in their homes, or other noise sensitive environments, to noise in excess of DNL 45 dBA, or DNL 65 dBA in the outdoor recreation areas of homes.”

The noise study recommends the following building material specifications in order to achieve a Noise Level Reduction (NLR) for the proposed home which meets the Comprehensive Plan guidance that noise in interior areas of new residences should not exceed 45 decibels:

- Windows on the rear and sides facades rated with a Sound Transmission Class (STC) 31 or greater and doors rated at STC 29 or higher; or
- Windows rated at STC 28 or higher and doors STC 27 or higher with
    - Brick walls or
    - Non-brick walls with resilient channels between the gypsum board and studs.

If approved, a development condition has been included to require that the future developer use these materials in construction of the house.

The highest sound level measurement taken in the outdoor area which simulated the location of the deck (one decibel added for future impacts) was 68.8 decibels. The noise study did not provide a recommendation to mitigate exterior noise. The applicant has also not proposed any mitigation for outdoor noise impacts from locating a home less than 200 feet from I-95/I-495. In the Fairfax County Comprehensive Plan, 2013 Edition, Policy Plan, Environment, as amended through July 1, 2014, on pages 11 and 12, the Plan states:

> **Objective 4: Minimize human exposure to unhealthful levels of transportation generated noise.**
>
> Policy a: Regulate new development to ensure that people are protected from unhealthful levels of transportation noise.

The Plan also notes:

> *Transportation generated noise impacts the lives of many who live in the county. Some county residents are subjected to unhealthful levels of noise from highway traffic, aircraft operations and railroads, including WMATA's Metrorail…Federal agencies with noise mitigation planning responsibilities have worked with the health community to establish maximum acceptable levels of exposure…While federal guidelines for acceptable noise levels consider all land uses to be compatible with noise levels below 65 decibels, they are not proscriptive as they relate to local land use decisions. Further, it is known that adverse noise impacts can occur at levels below DNL 65 dBA…*

The applicant has not shown that the property can be developed in a way that would protect future residents from the unhealthful levels of transportation noise in outdoor areas surrounding the house. Because of this finding, staff does not believe this application meets the recommendations of the Comprehensive Plan for noise levels in outdoor recreation areas.

If approved, a development condition has been proposed to require the applicant to record the development conditions in the land records to make future property owners aware of the noise levels at the property and that the house must be constructed as proposed on the variance plat and with the above required sound-mitigating materials.

Stormwater Management Best Management Practices and Adequate Outfall

There is no Resource Protection Area or regulated floodplain within this property. The subject property falls within the Cameron Run watershed. Development of a proposed home will generate runoff from new impervious surfaces. However, no information has been provided with this application to address how water quality, water quantity, and adequate outfall requirements will be achieved for the resulting stormwater runoff generated from a new home. Any future developer must meet all stormwater requirements at the time of site plan or infill lot grading plan review and a development condition has been proposed to address this issue.

Urban Forestry Analysis (Appendix 7)

Staff noted that the applicant did not provide adequate information on how tree resources and existing vegetation will be impacted by construction of the proposed house, covered front porch, and open wood deck. A development condition has been proposed to require that any future developer must take reasonable steps to maximize the preservation of existing vegetation by minimizing soil disturbance to only that necessary to access the site, to provide tree protection fencing in the form of 14 guage welded wire fencing to protect trees that may be impacted by construction activities, and to require that trees be removed by hand with no heavy equipment.

Variance Requirements (Appendix 8)

Code of Virginia Sec. 15.2-2309, as amended

In addition to meeting the definition of variance, an application must satisfy a specific set of criteria in order for the Board to grant a variance. According to the recently amended Virginia state code in Sec. 15.2-2309, a variance meeting the definition shall be granted if the following elements are met:

The evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or

improvements thereon at the time of the effective date of the ordinance (Sect. 15.2-2309.2)

The subject property is a residentially-zoned lot that is generally square in shape with lot lines that are proportionately sized. The property is already developed with a single family dwelling and is being used by the applicant as his residence. The property is similar in size to many of the other properties in this section of the subdivision. In staff's opinion, the request to subdivide the property in order for a new house to be built within the required 200 foot setback would, therefore, not alleviate a hardship or unreasonably restrict the utilization of the property since the applicant is aready able to use his property for a residence. Despite the size of the property, staff sees no hardship or issue with utilization through the application of the Ordinance as it is intended to prevent new home construction close to interstate highways. Therefore, staff does not believe the application satisfies this standard.

The property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance (Sect. 15.2-2309.2(i))

Staff believes that Lot 37 was acquired in good faith based on the information contained in the applicants' statement of justification. The hardship, if one exists, for which the variance is being requested is created by the applicant through the subdivision of the property. As Lot 37 was recorded before the establishment of the Zoning Ordinance, the property, in its current form, is exempt from the 200 foot setback restriction. The applicant can use and improve the property by-right. Once Lot 37 is subdivided and the new deed recorded in the land records, the applicant will have created a new lot (37A) that is now subject to the 200 foot setback requirement. While staff notes that the noise impact which the 200 foot setback requirement is, in part, attempting to mitigate is not created by the applicant and he acquired the property long after I-95/I-495 was constructed, that, in itself, does not constitute a hardship, and even if it did, it would appear to be self-inflicted. Overall, staff does not believe the application satisfies this standard.

The granting of the variance will not be of substantial detriment to the adjacent property and nearby properties in the proximity of that geographical area (Sect. 15.2-2309.2(ii))

Lot 37 is a large lot over an acre in size. The applicant could tear down the existing house and build a much larger home and accessory structures by-right on the property. Adjacent and nearby properties are of a similar size with large yards and mature trees that provide a substantial amount of screening. Staff does not believe that the construction of a new house on the subdivided property would be of substantial detriment to the adjacent or nearby properties. However, to the extent that the new home would subject additional people to potentially unhealthy levels of noise, staff believes it could be considered a detriment to the goals and objectives of the Comprehensive Plan.

The condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general reduction to be adopted as an amendment to the ordinance (Sect. 15.2-2309.2(iii))

The residential lots in the vicinity of the subject property are similar in terms of area and contain single family detached dwellings. There are several that are large enough to subdivide and create new lots that are also within the 200 foot setback area. The subject lot is not unique or unusual. The condition of being near an interstate highway is common and recurs throughout the County. No other applications to permit construction of new residential dwellings within the 200 foot setack have been heard by the BZA on properties in this area. In addition, there are numerous oversized lots along interstate highways around the County. If it desired, the Board of Supervisors could amend the Ordinance to reduce or remove the 200 foot setback requirement. Therefore, in staff's opinion this standard is not met.

The granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property (Sect. 15.2-2309.2(iv))

Staff finds that the variance request to allow the construction of a new house within the 200 foot setback from an interstate highway right-of-way would not result in a use that is otherwise permitted or cause a change in the zoning classification of the property. The property is a residentally zoned lot and the request is to construct a new house.

The relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of § 15.2-2286 at the time of the filing of the variance application (Sect. 15.2-2309.2(v))

While relief from the 200 foot requirement can also be granted by the Board of Supervisors through a proffered rezoning, outside of such an application, the Zoning Administrator has determined that the Ordinance permits a variance application to modify this standard.

CONCLUSION / RECOMMENDATION

Staff recommends denial of VC 2016-LE-005 to permit the construction of a new house within the 200 foot setback from an interstate right-of-way. Staff believes that the applicant has adequate utilization of his property as it exists and the application of the Ordinance as it is intended presents no hardship, in this instance. Though the applicant could otherwise subdivide the property by-right, staff finds that this is analogous to a parcel of land that is below the required minimum area, width, or density. Unless one can satisfy all of the required standards to establish a new,

buildable lot, one has no right to it; thus, the need to ask for relief via a variance. However, in this case, the standards for a variance are not met, in staff's opinion. Furthermore, staff believes that the applicant is creating a hardship that does not currently exist by subdividing an exempt lot and creating a new lot that would not be exempt from the 200 foot setback requirement. However, if it is the intent of the BZA to approve the variance application, the BZA should condition its approval by requiring conformance with the proposed development conditions contained in Appendix 1.

It should be further noted that the content of this report reflects the analysis and recommendations of staff; it does not reflect the position of the Board of Zoning Appeals.

The approval of this application does not interfere with, abrogate or annul any easements, covenants, or other agreements between parties, as they may apply to the property subject to the application.

APPENDICES

1. Proposed Special Permit Development Conditions
2. Applicant's Statement of Justification and Select File Photographs
3. Applicant's Affidavit
4. Zoning Administrator Determinations
5. Environmental Analysis
6. Noise Study
7. Urban Forestry memo
8. Code of Virginia Sec. 15.2-2309, as amended

PROPOSED DEVELOPMENT CONDITIONS

VC 2016-LE-005

July 27, 2016

If it is the intent of the Board of Zoning Appeals to approve VC 2016-LE-005 located at Tax Map 82-1 ((4)) 37 to permit construction of a residential dwelling within 200 feet of an interstate highway pursuant to Section 18-401 of the Fairfax County Zoning Ordinance, staff recommends that the Board condition the approval by requiring conformance with the following development conditions.

1. This variance is approved for the construction of a residential dwelling within 200 feet of an interstate highway as shown on the plat titled, "Variance Plat, 4410 Elmwood Drive," by John L. Gavarkavich, Landscape Architect, of Walter L. Phillips, Inc., dated February 18, 2016, as revised through March 8, 2016, as submitted with this application and is not transferable to other land.

2. To provide notice to future property owners that this property is subject to requirements for noise mitigation, these conditions shall be recorded by the applicant among the land records of Fairfax County for Lot 37A prior to the issuance of a building permit. A certified copy of the recorded conditions shall be provided to the Zoning Permit Review Branch, Department of Planning and Zoning.

3. At the time of site plan review, stormwater management quantity and quality controls shall be provided and reviewed as required by the Public Facilities Manual and County Code.

4. In order to achieve a Noise Level Reduction (NLR) for the proposed home which would reduce exterior noise in the interior areas of the home below 45 decibels (DNL 45 dBA) the following or comparable building materials shall be used in construction of the home:

   - Windows on the rear and sides facades rated with a Sound Transmission Class (STC) 31 or greater and doors rated at STC 29 or higher; or
   - Windows rated at STC 28 or higher and doors STC 27 or higher with
     - Brick walls or
     - Non-brick walls with resilient channels between the gypsum board and studs.

5. During construction of the house, reasonable steps to maximize the preservation of existing vegetation must be taken incuding at a minimum:
   a. Minimizing soil disturbance to only that necessary to access the site,
   b. Providing tree protection fencing in the form of 14 guage welded wire fencing to protect trees that may be impacted by construction activities,
   c. Trees being removed must be removed by hand with no heavy equipment.

This approval, contingent upon the above-noted conditions, shall not relieve the applicants from compliance with the provisions of any applicable ordinances, regulations or adopted standards including requirements for building permits.

RECEIVED
Department of Planning & Zoning
FEB 23 2016
Zoning Evaluation Division

APPENDIX 2

STATEMENT OF JUSTIFICATION

Revised February 22, 2016

The Applicant is the owner of a lot containing 1.0583 acres which is zoned R-3. Applicant desires to subdivide the lot into 2 buildable lots in accordance with the plat attached hereto. The proposed lots would meet lot size requirements and bulk regulations in the zoning district, except for the requirement contained in Section 2-414 of the Fairfax County Zoning Ordinance, which requires that a minimum distance of 200 feet be maintained between the principal residential building and the right of way of an interstate highway. The existing house, at its closest point, is located 171 feet from the right of way of interstate 95 (Capital Beltway). The proposed new dwelling, would, at its closest point, be 112 feet from the right of way of the Capital Beltway. This requires a variance from the provisions of Section 2-414 of the Zoning Ordinance that requires a minimum distance of 200 feet between a principal residential dwelling and the right of way of an interstate highway to permit a dwelling to be within 112 feet of the right of way.

The original subdivision was recorded on January 3, 1945, which predates both the current zoning ordinance and the existence of the Capital Beltway. To require strict adherence to this provision would render the newly created undeveloped lot unbuildable, despite meeting all other requirements of the zoning ordinance. The requirement of Section 2-414 unreasonably restricts the utilization of the property. Granting the variance would alleviate a hardship due the physical condition of the property.

The property was acquired in good faith and the hardship was not created by the applicant;

The granting of the variance will not be of substantial detriment to adjacent and nearby properties;

The condition or situation of the subject property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopred as an amendment to the ordinance.

The granting of the variance does not result in a use that is not otherwise permitted or change the zoning classification of the property; and

The relief sought by the variance is not available through a special exception, special permit or the process for amending the zoning ordinance at the time of the filing of the variance application.

If the variance and subdivision is approved, the Applicant will try and sell the newly created lot to someone who wants to build on it. Applicant requests that in lieu of providing a noise study and proposed mitigation, the variance, if approved, include a condition that prior to issuance of a building permit for the new lot, the applicant for the building permit shall provide evidence that a noise study will be performed and mitigation measures to bring the noise levels at the house to within that permitted by the Fairfax County Noise Ordinance.

RECEIVED
Department of Planning & Zoning
JAN 05 2016
Zoning Evaluation Division

885

RECEIVED
Department of Planning & Zoning
JAN 05 2015
Zoning Board of Appeals

9/2

RECEIVED
rtment of Planning & Zoning
JAN 05 2016
Evaluation Division

907

BEAVER
MAY 14 & 27, 2016
Photo by Jim Thomas, Photo Technician, Bureau of Reclamation
Hoover Dam Exploration Project

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Department of Planning & Zoning
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Zoning Evaluation Division

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Department of Planning & Zoning
JAN 08 2016
Zoning Evaluation Division

914

SPECIAL EXCEPTION AFFIDAVIT

DATE: Feb. 23, 2016
(enter date affidavit is notarized)

133303

I, William M. Baskin, Jr., do hereby state that I am an
(enter name of applicant or authorized agent)

(check one) [ ] applicant
[✓] applicant's authorized agent listed in Par. 1(a) below

in Application No.(s): VC 2016-LE-005
(enter County-assigned application number(s), e.g. SE 88-V-001)

and that, to the best of my knowledge and belief, the following information is true:

==========

1(a). The following constitutes a listing of the names and addresses of all **APPLICANTS, TITLE OWNERS, CONTRACT PURCHASERS,** and **LESSEES** of the land described in the application,* and, if any of the foregoing is a **TRUSTEE,**** each **BENEFICIARY** of such trust, and all **ATTORNEYS** and **REAL ESTATE BROKERS,** and all **AGENTS** who have acted on behalf of any of the foregoing with respect to the application:

(**NOTE:** All relationships to the application listed above in **BOLD** print are to be disclosed. Multiple relationships may be listed together, e.g., **Attorney/Agent, Contract Purchaser/Lessee, Applicant/Title Owner**, etc. For a multiparcel application, list the Tax Map Number(s) of the parcel(s) for each owner(s) in the Relationship column.)

NAME (enter first name, middle initial, and last name)	**ADDRESS** (enter number, street, city, state, and zip code)	**RELATIONSHIP(S)** (enter applicable relationships listed in **BOLD** above)
Heath Hohensee	4410 Elmwood Drive Alexandria, Virginia 22310	Applicant/OwnerAgent of Tax Map 082-1-04-0037
Baskin, Jackson & Lasso, PC	301 Park Avenue Falls Church, Virginia 22046	Attorney/Agent for the Applicant
Agent: William M. Baskin, Jr.		Attorney/Agent for the Applicant
Walter L. Phillips, Inc.	207 Park Avenue #104 Falls Church, Virginia 22046	Engineers/Agent for the Applicant
Agent: John L. Gavarkavich Monica R. Westgate Karen L.S. White		Engineers/Agent for the Applicant

(check if applicable) [ ] There are more relationships to be listed and Par. 1(a) is continued on a "Special Exception Attachment to Par. 1(a)" form.

* In the case of a condominium, the title owner, contract purchaser, or lessee of 10% or more of the units in the condominium.

** List as follows: Name of trustee, Trustee for (name of trust, if applicable), for the benefit of: (state name of each beneficiary).

BW

SPECIAL EXCEPTION AFFIDAVIT

DATE: Feb. 23, 2016
(enter date affidavit is notarized)

for Application No. (s): 13303
(enter County-assigned application number(s))

==========

1(b). The following constitutes a listing*** of the **SHAREHOLDERS** of all corporations disclosed in this affidavit who own 10% or more of any class of stock issued by said corporation, and where such corporation has 10 or less shareholders, a listing of all of the shareholders:

(**NOTE**: Include **SOLE PROPRIETORSHIPS**, **LIMITED LIABILITY COMPANIES,** and **REAL ESTATE INVESTMENT TRUSTS** herein.)

CORPORATION INFORMATION

NAME & ADDRESS OF CORPORATION: (enter complete name and number, street, city, state, and zip code)

Baskin Jackson & Lasso, PC
301 Park Avenue
Falls Church, Virginia 22046

DESCRIPTION OF CORPORATION: (check one statement)

[✓] There are 10 or less shareholders, and all of the shareholders are listed below.
[ ] There are more than 10 shareholders, and all of the shareholders owning 10% or more of any class of stock issued by said corporation are listed below.
[ ] There are more than 10 shareholders, but no shareholder owns 10% or more of any class of stock issued by said corporation, and no shareholders are listed below.

NAMES OF SHAREHOLDERS: (enter first name, middle initial and last name)

William M. Baskin, Jr.
John G. Jackson

(check if applicable) [✓] There is more corporation information and Par. 1(b) is continued on a "Special Exception Affidavit Attachment 1(b)" form.

*** All listings which include partnerships, corporations, or trusts, to include the names of beneficiaries, must be broken down successively until: (a) only individual persons are listed or (b) the listing for a corporation having more than 10 shareholders has no shareholder owning 10% or more of any class of stock. ***In the case of an APPLICANT, TITLE OWNER, CONTRACT PURCHASER, or LESSEE* of the land that is a partnership, corporation, or trust, such successive breakdown must include a listing and further breakdown of all of its partners, of its shareholders as required above, and of beneficiaries of any trusts. Such successive breakdown must also include breakdowns of any partnership, corporation, or trust owning 10% or more of the APPLICANT, TITLE OWNER, CONTRACT PURCHASER, or LESSEE* of the land. Limited liability companies and real estate investment trusts and their equivalents are treated as corporations, with members being deemed the equivalent of shareholders; managing members shall also be listed.*** Use footnote numbers to designate partnerships or corporations, which have further listings on an attachment page, and reference the same footnote numbers on the attachment page.

Special Exception Attachment to Par. 1(b)

DATE: Feb. 23, 2016
(enter date affidavit is notarized)

for Application No. (s): 133303
(enter County-assigned application number (s))

==========

NAME & ADDRESS OF CORPORATION: (enter complete name, number, street, city, state, and zip code)

Walter L. Phillips, Inc.
207 Park Avenue, #104
Falls Church, Virginia 22046

DESCRIPTION OF CORPORATION: (check one statement)

[✓] There are 10 or less shareholders, and all of the shareholders are listed below.
[ ] There are more than 10 shareholders, and all of the shareholders owning 10% or more of any class of stock issued by said corporation are listed below.
[ ] There are more than 10 shareholders, but no shareholder owns 10% or more of any class of stock issued by said corporation, and no shareholders are listed below.

NAMES OF THE SHAREHOLDERS: (enter first name, middle initial, and last name)

Jeffrey J. Stuchel
Brian B. Baillargeon
Aaron M. Vinson
Karen L.S. White

==========

NAME & ADDRESS OF CORPORATION: (enter complete name, number, street, city, state, and zip code)

DESCRIPTION OF CORPORATION: (check one statement)

[ ] There are 10 or less shareholders, and all of the shareholders are listed below.
[ ] There are more than 10 shareholders, and all of the shareholders owning 10% or more of any class of stock issued by said corporation are listed below.
[ ] There are more than 10 shareholders, but no shareholder owns 10% or more of any class of stock issued by said corporation, and no shareholders are listed below.

NAMES OF THE SHAREHOLDERS: (enter first name, middle initial, and last name)

==========

(check if applicable) [ ] There is more corporation information and Par. 1(b) is continued further on a "Special Exception Attachment to Par. 1(b)" form.

SPECIAL EXCEPTION AFFIDAVIT

DATE: Feb. 23, 2014
(enter date affidavit is notarized)

for Application No. (s): 133303
(enter County-assigned application number(s))

==========

1(c). The following constitutes a listing*** of all of the **PARTNERS,** both **GENERAL** and **LIMITED**, in any partnership disclosed in this affidavit:

PARTNERSHIP INFORMATION

PARTNERSHIP NAME & ADDRESS: (enter complete name, and number, street, city, state, and zip code)

None

(check if applicable) [ ] The above-listed partnership has no limited partners.

NAMES AND TITLE OF THE PARTNERS (enter first name, middle initial, last name, and title, e.g. **General Partner, Limited Partner, or General and Limited Partner**)

(check if applicable) [ ] There is more partnership information and Par. 1(c) is continued on a "Special Exception Affidavit Attachment to Par. 1(c)" form.

*** All listings which include partnerships, corporations, or trusts, to include the names of beneficiaries, must be broken down successively until: (a) only individual persons are listed or (b) the listing for a corporation having more than 10 shareholders has no shareholder owning 10% or more of any class of stock. ***In the case of an APPLICANT, TITLE OWNER, CONTRACT PURCHASER, or LESSEE* of the land that is a partnership, corporation, or trust, such successive breakdown must include a listing and further breakdown of all of its partners, of its shareholders as required above, and of beneficiaries of any trusts. Such successive breakdown must also include breakdowns of any partnership, corporation, or trust owning 10% or more of the APPLICANT, TITLE OWNER, CONTRACT PURCHASER, or LESSEE* of the land. Limited liability companies and real estate investment trusts and their equivalents are treated as corporations, with members being deemed the equivalent of shareholders; managing members shall also be listed.*** Use footnote numbers to designate partnerships or corporations, which have further listings on an attachment page, and reference the same footnote numbers on the attachment page.

SPECIAL EXCEPTION AFFIDAVIT

DATE: Feb. 23, 2016
(enter date affidavit is notarized)

for Application No. (s): _____
(enter County-assigned application number(s))

133302

==========

1(d). One of the following boxes **must** be checked:

[ ] In addition to the names listed in Paragraphs 1(a), 1(b), and 1(c) above, the following is a listing of any and all other individuals who own in the aggregate (directly and as a shareholder, partner, and beneficiary of a trust) 10% or more of the **APPLICANT, TITLE OWNER, CONTRACT PURCHASER,** or **LESSEE*** of the land:

[✓] Other than the names listed in Paragraphs 1(a), 1(b), and 1(c) above, no individual owns in the aggregate (directly and as a shareholder, partner, and beneficiary of a trust) 10% or more of the **APPLICANT, TITLE OWNER, CONTRACT PURCHASER,** or **LESSEE*** of the land.

2. That no member of the Fairfax County Board of Supervisors, Planning Commission, or any member of his or her immediate household owns or has any financial interest in the subject land either individually, by ownership of stock in a corporation owning such land, or through an interest in a partnership owning such land.

EXCEPT AS FOLLOWS: (**NOTE**: If answer is none, enter "**NONE**" on the line below.)

None

(check if applicable) [ ] There are more interests to be listed and Par. 2 is continued on a "Special Exception Attachment to Par. 2" form.

Application No.(s): _____
(county-assigned application number(s), to be entered by County Staff)

SPECIAL EXCEPTION AFFIDAVIT

DATE: Feb. 23, 2016
(enter date affidavit is notarized)

133305

3. That within the twelve-month period prior to the public hearing of this application, no member of the Fairfax County Board of Supervisors, Planning Commission, or any member of his or her immediate household, either directly or by way of partnership in which any of them is a partner, employee, agent, or attorney, or through a partner of any of them, or through a corporation in which any of them is an officer, director, employee, agent, or attorney or holds 10% or more of the outstanding bonds or shares of stock of a particular class, has, or has had any business or financial relationship, other than any ordinary depositor or customer relationship with or by a retail establishment, public utility, or bank, including any gift or donation having a value of more than $100, singularly or in the aggregate, with any of those listed in Par. 1 above.
EXCEPT AS FOLLOWS: (**NOTE**: If answer is none, enter "**NONE**" on line below.)

None

NOTE: Business or financial relationships of the type described in this paragraph that arise after the filing of this application and before each public hearing must be disclosed prior to the public hearings. See Par. 4 below.)

(check if applicable) [ ] There are more disclosures to be listed and Par. 3 is continued on a "Special Exception Attachment to Par. 3" form.

4. **That the information contained in this affidavit is complete, that all partnerships, corporations, and trusts owning 10% or more of the APPLICANT, TITLE OWNER, CONTRACT PURCHASER, or LESSEE* of the land have been listed and broken down, and that prior to each and every public hearing on this matter, I will reexamine this affidavit and provide any changed or supplemental information, including business or financial relationships of the type described in Paragraph 3 above, that arise on or after the date of this application.**

WITNESS the following signature: William M. Baskin Jr.

(check one) [ ] Applicant [✓] Applicant's Authorized Agent

William M. Baskin, Jr.
(type or print first name, middle initial, last name, and & title of signee)

Subscribed and sworn to before me this 23rd day of February 2016, in the State/Comm. of Virginia, County/City of Falls Church.

Brigitte Chabo Burke
Notary Public

My commission expires: 11-30-2017

BRIGITTE CHABO BURKE
NOTARY PUBLIC
REG. #124709
MY COMMISSION EXPIRES 11/30/2017
COMMONWEALTH OF VIRGINIA

8

Melinda SD file

APPENDIX 4

FAIRFAX COUNTY
VIRGINIA

FAIRFAX COUNTY
RECEIVED
JAN 16 1996
DIVISION OF
ZONING ADMINISTRATION

OFFICE OF COMPREHENSIVE PLANNING
Zoning Administration Division
Ordinance Administration Branch
12055 Government Center Parkway, Suite 800
Fairfax, Virginia 22035-5506

(703) 324-1314 Fax (703) 324-3924

January 16, 1996

Mr. Edward N. Johnson
6160 McLendon Court
Alexandria, Virginia 22310

RE. 4410 Elmwood Drive
Clermont Sec. 1
Tax Map Ref: 82-1 ((4)) 37
Zoning District: R-3

Dear Mr. Johnson:

This is in response to your letter of January 3, 1996 to Jane W. Gwinn concerning a proposed acquisition of a portion of the above-referenced property by the Virginia Department of Transportation (VDOT). According to our records the above-referenced property is zoned R-3, Residential District, Three Dwelling Units/Acre, and consists of 47,960 square feet and is currently developed with a single family detached dwelling.

The R-3 District requires conventional subdivision lots to have 10,500 square feet of lot area, a minimum lot width of 80 feet and have minimum required yards of 30 feet in the front, 12 feet on each side and 25 feet in the rear. Based upon the plat you provided it does not appear that the acquisition of 1,773 square feet by VDOT of the above-reference property will affect the current zoning status of the property.

With regard to future subdivision of the property, please be advised that subdivision of the above-referenced property into 2 buildable lots could be accomplished in accordance with the current R-3 District requirements in terms of lot area and lot width, however without a plat showing your proposed subdivision we cannot fully evaluate your request.

Should you have questions concerning the subdivision process, I would suggest you

contact Mr. Bruce Nassimbeni, Site Review Branch Chief for the Lee / Providence Districts at 703-324-1720. If you have further questions regarding Zoning Ordinance provisions please contact me at 703-324-1314.

Sincerely,

Robert J. Bosco

Robert J. Bosco
Assistant to the Zoning Administrator

RJB/sph

cc: Dana Kauffman, Supervisor
Lee District
Jane W. Gwinn, Zoning Administrator
Melinda M. Artman, Deputy Zoning Administrator
for Zoning Permit Review Branch
Bruce Nassimbeni, Chief, Site Review Branch, DEM

N:\ZAD\BOSCO\WPDOCS\JOHNSON.WPD

Street + Reading

County of Fairfax, Virginia

To protect and enrich the quality of life for the people, neighborhoods and diverse communities of Fairfax County

FAIRFAX COUNTY
RECEIVED
JUL 15 2015
DIVISION OF
ZONING ADMINISTRATION

July 14, 2015

Mr. Heath Hohensee
4410 Elmwood Drive
Alexandria, Virginia 22310

RE: Proposed Subdivision of a Lot Abutting a Principal Arterial Highway
4410 Elmwood Drive
Tax Map Ref.: 82-1 ((4)) 37
Zoning District: R-3

Dear Mr. Hohensee:

This is in response to your email dated May 26, 2015 concerning the subdivision of a lot that is located within the minimum required 200 foot setback for principal residential buildings to a right-of-way of an interstate highway, pursuant to Par. 4 of Section 2-414 of the Fairfax County Zoning Ordinance.

The subject property is zoned R-3 Residential District, Three Dwelling Units/Acre, is 1.0583 acres in size and has a lot width of approximately 200 feet. The southwest portion of the lot is developed with a 1,164 square foot, single family detached dwelling that has access on Elmwood Drive, a local street to the south, and abuts the Eisenhower Avenue connector ramp to northbound Interstate I-95, which is a limited access, principle arterial highway, on the north. The lot is part of Clermont, Section 1, a 70 lot subdivision that was recorded among the Fairfax County Land Records in Deed Book 444, Page 60 on January 3, 1945.

The current R-3 District has a minimum lot area requirement of 10,500 square feet, a minimum lot width requirement of 80 feet, and a maximum density of 3 dwelling units per acre (du/ac). Under Sect. 2-401 of the Zoning Ordinance, only a lot that exceeds the minimum provisions of the Zoning Ordinance can be subdivided to create more lots, and only then where the resultant lots meet the maximum density, minimum lot size and minimum lot width provisions of the zoning district in which they are located. Additionally, the density of the overall subdivision, minus the area to be dedicated for streets, cannot exceed the density of the zoning district in which the lot is located.

Lot 37 contains sufficient lot area to be subdivided into two lots while meeting the lot area, lot width, and density requirements of the R-3 District. Furthermore, Section 1 of the Clermont Subdivision currently contains 70 lots on 68.9 acres, which equates to a density of 1.02 dwelling units/acre (du/ac). The addition of one lot to the existing subdivision would increase the overall density to 1.03 du/ac, which is considerably less than the 3 du/ac allowed under the R-3 District

Department of Planning and Zoning
Zoning Administration Division
Ordinance Administration Branch
12055 Government Center Parkway, Suite 807
Fairfax, Virginia 22035-5505
Phone 703-324-1314 FAX
www.fairfaxcounty.gov/dpz/

regulations. As such, the subdivision of the referenced lot into two lots would comply with the minimum lot size, the minimum lot width, and the maximum density requirements of the R-3 District.

Section 2-414 of the Fairfax County Zoning Ordinance requires that a minimum distance of 200 feet be maintained between a principal residential building and the right-of-way of an interstate highway. Paragraph 4 of Sect. 2-414, however, states:

> "The provisions of Par. 1 and 2 above shall not apply in those instances where a lot has been recorded prior to the effective date of this Ordinance where the enforcement of this regulation would negate the use of the lot in accordance with the provisions of the zoning district in which located."

The process for determining whether the subject lot is subject to the 200 foot setback from interstate highways consists of a two parts. The first part is whether the lot was recorded prior to the adoption of the current Zoning Ordinance on August 14, 1978. The second part is whether the application of the 200 foot setback would negate use of the subject lot, in accordance with the R-3 District regulations. Section 1 of the Clermont Subdivision was recorded before the effective date of the current Zoning Ordinance. In addition, the 200 foot setback covers most of the lot with the exception of a small area located to the southwest. As such, the application of the 200 foot setback on Lot 37 would preclude the development of this lot and Par. 4 would be applicable. Therefore, the existing dwelling may remain and may be expanded.

However, the proposed re-subdivision of Lot 37 is not exempt from Sect. 2-414, as it will occur subsequent to the effective date of the Zoning Ordinance. Therefore, to effect the desired subdivision, a variance must be approved by the Board of Zoning Appeals (BZA) to reduce or eliminate the 200 foot setback. The 200 foot setback could also be modified by the approval of a proffered rezoning by the Board of Supervisors. The variance process requires the submission of an application, plat and fees; notification of adjacent property owners; and a public hearing before the BZA. Variances are subject to strict standards which must be met to the satisfaction of the BZA before the BZA can approve such applications. Such standards include:

- That the strict application of the Zoning Ordinance would produce an undue hardship; and

- That the strict application of the Ordinance would effectively prohibit or unreasonably restrict the utilization of the property or the granting of the variance will alleviate a clearly demonstrable hardship as distinguished from a special privilege or convenience sought by the applicant.

Enclosed is a copy of Sect. 18-400 of the Zoning Ordinance regarding the variance process and the BZA's required findings. Information pertaining to the variance process is also available by contacting the Zoning Evaluation Division (ZED) at 703-324-1290.

Subsequent to obtaining a variance, you will need a Licensed Land Surveyor or Professional Civil Engineer to prepare a subdivision plat for approval by the Department of Public Works and

Environmental Services (DPWES). Additional information on the subdivision process may be obtained by calling the Land Development Services Division of the DPWES at (703) 324-1575.

This determination has been made in my capacity as the duly authorized agent of the Zoning Administrator, and is based upon the facts presented in your request email and information provided by phone and the applicable Fairfax County Zoning Ordinance provisions in effect as of the date of this letter. If the facts as presented change or if the applicable provisions of the Zoning Ordinance change subsequent to the issuance of this determination, the determination may be subject to modification.

I trust that this adequately responds to your request. If you have any additional questions, please feel free to contact me at (703) 324-1314.

Sincerely,

Brian S. Parsons

Brian S. Parsons, AICP
Assistant to the Zoning Administrator

Attachments: A/S

cc: Jeffrey C. McKay, Supervisor, Lee District w/ attachment
Leslie B. Johnson, Zoning Administrator w/ attachment
Diane Johnson-Quinn, Deputy Zoning Administrator for Zoning Permit Review Branch w/ attachment

N:\bparso\Subdivision Density\4410 Elmwood Dr. Clermont, Sect. 1, Lot 37.doc

County of Fairfax, Virginia

MEMORANDUM

DATE: May 31, 2016

TO: Barbara Berlin, Director
Zoning Evaluation Division, DPZ

FROM: Denise M. James, Chief
Environment and Development Review Branch, DPZ

SUBJECT: **ENVIRONMENTAL ASSESSMENT** **VC 2016-LE-005**
Hohensee

This memorandum, prepared by Mary Ann Welton, includes citations from the Comprehensive Plan that provide guidance for the evaluation of the subject Variance Plat, dated March 8, 2016 and the acoustical analysis, by Hush Acoustics, LLC, dated May 17, 2016. The extent to which this application is in harmony with the Comprehensive Plan is noted. Possible solutions to remedy identified issues are suggested. Other solutions may be acceptable, provided that they achieve the desired degree of mitigation and are in harmony with Plan policies.

DESCRIPTION

The applicant requests a variance from Section 2-414 of the Zoning Ordinance which requires that at least 200 feet be maintained between a principal dwelling unit and the interstate highway in order to allow the creation of 2 lots from the existing lot which is 1.0583 acre located at 4410 Elmwood Drive. The proposed lot will meet other lot size requirements, but the proposed new dwelling would be located 112 feet at the closest point from the right-of-way of Interstate 95. The subject property is currently zoned R-3 (residential, 3 dwelling units per acre) and it is developed with one single-family home constructed in 1978.

ENVIRONMENTAL ANALYSIS

This section characterizes the environmental concerns raised by an evaluation of this site and the proposed land use. Particular emphasis is given to opportunities provided by this application to conserve the County's remaining natural amenities.

Department of Planning and Zoning
Planning Division
12055 Government Center Parkway, Suite730
Fairfax, Virginia 22035-5509
Phone 703-324-1380
Fax 703-653-9447
www.fairfaxcounty.gov/dpz/

DEPARTMENT OF PLANNING & ZONING

Transportation Noise Mitigation
The subject property will be affected by transportation generated noise. The applicant has provided a noise study performed by Hush Acoustics, LLC, dated May 17, 2016 for the subject property. Noise measurements were taken between Tuesday, May 10, 2016 and Tuesday, May 17, 2016. Two noise measurement locations were provided for this study.

- Noise meter M1 was placed 22.3 feet above the ground to replicate an upper story. This location represented the loudest location outside the proposed new house.
- Noise meter M2 was placed at approximately 12.6 feet above the ground in the approximate location where a deck would be situated.

The loudest measurement for M1 was 68.6 decibels and the loudest measurement for M2 was 67.8 decibels. When developing his recommendations for appropriate building material specifications to mitigate the measured noise levels, the consultant added one decibel to each of the highest measurements to account for any future increase in noise level at this location – 69.6 decibels for M1 and 68.8 decibels for M2. Note: The loudest measurement excluded days with extraneous paving noise.

The consultant recommends the following building material specifications in order to achieve a Noise Level Reduction (NLR) for the proposed home which meets the Comprehensive Plan guidance that noise in interior areas of new residences should not exceed 45 decibels:

- Windows on the rear and sides facades rated with a Sound Transmission Class (STC) 31 or greater and doors rated at STC 29 or higher; or
- Windows rated at STC 28 or higher and doors STC 27 or higher with
    - Brick walls or
    - Non-brick walls with resilient channels between the gypsum board and studs.

The highest sound level measurement taken in the outdoor area which mimicked the location of the deck (+ one decibel added for future impacts) was 68.8 decibels. The consultant did not provide a recommendation to mitigate exterior noise.

The Comprehensive Plan states that "New development should not expose people in their homes, or other noise sensitive environments, to noise in excess of DNL 45 dBA, or to noise in excess of DNL 65 dBA in the outdoor recreation areas of homes." Therefore, staff recommends that the applicant provide a condition for this application which commits to using building materials, as recommended by the consultant, that are capable of mitigating transportation generated noise to meet the Comprehensive Plan guidance for the proposed new home. Staff notes that the acoustical consultant provided an additional recommendation for building material specifications to reduce interior noise by 3 decibels lower than the Comprehensive Plan guidance.

The sound level measurements that were recorded for the analysis for this application were slightly higher than 65 decibels, but the measurement fell within a reasonable range of the Policy Plan guidance of 65 decibels. Because of this finding, staff recommends that the applicant provide a development condition which commits to providing full disclosure regarding the noise levels at this location in the event that the property is transferred to another owner or in the event that the new home is transferred to a future resident.

Stormwater Management Best Management Practices and Adequate Outfall
The subject property falls within the Cameron Run watershed. Development of a proposed home will generate runoff from new impervious surfaces. However, no information has been provided with this application to address how water quality and water quantity requirements will be achieved for the resulting stormwater runoff generated from a new home. The applicant is encouraged to provide information about how water quality, water quantity and adequate outfall requirements will be addressed for this application.

Stormwater management/best management practice measures, outfall adequacy and the stormwater management ordinance requirements are subject to the review and approval by the Department of Public Works and Environmental Services (DPWES).

Green Building
In support of the County's green building policy, the applicant is encouraged to provide a commitment to the attainment of Earthcraft House or the 2012 National Green Building Standard (formerly known as NAHB National Green Building Certification) using the Energy Star Qualified Homes path for energy performance.

DMJ: MAW

COMPREHENSIVE PLAN CITATIONS:

The Comprehensive Plan is the basis for the evaluation of this application. The assessment of the proposal for harmony with the environmental recommendations of the Comprehensive Plan is guided by the following citations:

In the Fairfax County Comprehensive Plan, 2013 Edition, Policy Plan, Environment, as amended through July 1, 2014, on pages 7-9, the Plan states:

"Objective 2: **Prevent and reduce pollution of surface and groundwater resources. Protect and restore the ecological integrity of streams in Fairfax County.**

Policy a. Maintain a best management practices (BMP) program for Fairfax County and ensure that new development and redevelopment complies with the County's best management practice (BMP) requirements. . . .

Policy k. For new development and redevelopment, apply better site design and low impact development (LID) techniques such as those described below, and pursue commitments to reduce stormwater runoff volumes and peak flows, to increase groundwater recharge, and to increase preservation of undisturbed areas. In order to minimize the impacts that new development and redevelopment projects may have on the county's streams, some or all of the

following practices should be considered where not in conflict with land use compatibility objectives:

- Minimize the amount of impervious surface created.
- Site buildings to minimize impervious cover associated with driveways and parking areas. . . . "

In the Fairfax County Comprehensive Plan, 2013 Edition, Policy Plan, Environment, as amended through July 1, 2014, on page 10, the Plan states:

"**Objective 3:** **Protect the Potomac Estuary and the Chesapeake Bay from the avoidable impacts of land use activities in Fairfax County.**

Policy a. Ensure that new development and redevelopment complies with the County's Chesapeake Bay Preservation Ordinance...."

In the Fairfax County Comprehensive Plan, 2013 Edition, Policy Plan, Environment, as amended through July 1, 2014, on pages 11 and 12, the Plan states:

"Transportation generated noise impacts the lives of many who live in the county. Some county residents are subjected to unhealthful levels of noise from highway traffic, aircraft operations and railroads.... Federal agencies with noise mitigation planning responsibilities have worked with the health community to establish maximum acceptable levels of exposure (Guidelines for Considering Noise in Land Use Planning and Control). These guidelines expressed in terms of sound pressure levels are; DNL 65 dBA for outdoor activity areas, DNL 50 dBA for office environments, and DNL 45 dBA for residences, schools, theaters and other noise sensitive uses. While the federal guidelines consider all land uses to be compatible with noise levels below DNL 65 dBA, they are not proscriptive as they relate to local land use decisions. Further, it is known that adverse noise impacts can occur at levels below DNL 65 dBA and that there may be variability among communities in responses to such noise.

Objective 4: **Minimize human exposure to unhealthful levels of transportation generated noise.**

Policy a: Regulate new development to ensure that people are protected from unhealthful levels of transportation noise.

Federal agencies with noise mitigation planning responsibilities have worked with the health community to establish maximum acceptable levels of exposure (Guidelines for Considering Noise in Land Use Planning and Control). These guidelines expressed in terms of sound pressure levels are; DNL 65 dBA for outdoor activity areas, DNL 50 dBA for office environments, and DNL 45 dBA for residences, schools, theaters and other noise sensitive uses. While the federal guidelines consider all land uses to be compatible with noise levels below DNL 65 dBA, they are not proscriptive as they relate to local land use decisions. Further, it is known that adverse noise impacts can occur at levels below

DNL 65 dBA and that there may be variability among communities in responses to such noise."

In the Fairfax County Comprehensive Plan, 2013 Edition, Policy Plan, Environment, as amended through July 1, 2014, on pages 19 -20 the Plan states:

"Objective 13: **Design and construct buildings and associated landscapes to use energy water resources efficiently and to minimize short- and long-term negative impacts on the environment and building occupants.**

Policy a. In consideration of other Policy Plan objectives, encourage the application of energy conservation, water conservation and other green building practices in the design and construction of new development and redevelopment projects. These practices may include, but are not limited to:

- Environmentally-sensitive siting and construction of development;
- Application of low impact development practices, including minimization of impervious cover (See Policy k under Objective 2 of this section of the *Policy Plan*);
- Optimization of energy performance of structures/energy-efficient design;
- Use of renewable energy resources;
- Use of energy efficient appliances, heating/cooling systems, lighting and/or other products;
- Application of best practices for water conservation, such as water efficient landscaping and innovative wastewater technologies, that can serve to reduce the use of potable water and/or reduce stormwater runoff volumes;
- Reuse of existing building materials for redevelopment projects;
- Recycling/salvage of non-hazardous construction, demolition, and land clearing debris;
- Use of recycled and rapidly renewable building materials;

- Use of building materials and products that originate from nearby sources;

- Reduction of potential indoor air quality problems through measures such as increased ventilation, indoor air testing and use of low-emitting adhesives, sealants, paints/coatings, carpeting and other building materials;

- Reuse, preservation and conservation of existing buildings, including historic structures;

- Retrofitting of other green building practices within existing structures to be preserved, conserved and reused;

- Energy and water usage data collection and performance monitoring;

  Solid waste and recycling management practices; and

- Natural lighting for occupants.

Encourage commitments to implementation of green building practices through certification under established green building rating systems for individual buildings (e.g., the U.S. Green Building Council's Leadership in Energy and Environmental Design for New Construction [LEED-NC®] or the U.S. Green Building Council's Leadership in Energy and Environmental Design for Core and Shell [LEED-CS®] program or other equivalent programs with third party certification). An equivalent program is one that is independent, third-party verified, and has regional or national recognition or one that otherwise includes multiple green building concepts and overall levels of green building performance that are at least similar in scope to the applicable LEED rating system. Encourage commitments to the attainment of the ENERGY STAR® rating where available. . . . Encourage the inclusion of professionals with green building accreditation on development teams. Encourage commitments to the provision of information to owners of buildings with green building/energy efficiency measures that identifies both the benefits of these measures and their associated maintenance needs. . . .

Policy c. Ensure that zoning proposals for residential development … will incorporate green building practices sufficient to attain certification under an established residential green building rating system that incorporates multiple green building concepts and that includes an ENERGY STAR Qualified Homes designation or a comparable level of energy performance. Where such zoning proposals seek

development at or above the mid-point of the Plan density range, ensure that county expectations regarding the incorporation of green building practices are exceeded in two or more of the following measurable categories: energy efficiency; water conservation; reusable and recycled building materials; pedestrian orientation and alternative transportation strategies; healthier indoor air quality; open space and habitat conservation and restoration; and greenhouse gas emission reduction As intensity or density increases, the expectations for achievement in the area of green building practices would commensurately increase…."

HUSH ACOUSTICS LLC

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T [703] 534.2790

May 17, 2016
Heath Hohensee
Re: 4410 Elmwood Drive
Traffic Noise Analysis

Mr. Hohensee:

This report summarizes the traffic noise analysis for the 4410 Elmwood Drive project in Fairfax County, VA.

1. Introduction

Hush Acoustics LLC was contracted to measure sound levels on the site and compare them to the Fairfax County design goals. This analysis was based on the Concept Plan drawing dated October 29, 2015, prepared by Walter L. Phillips Incorporated. This drawing shows the existing house at 4410 Elmwood Drive and a proposed 2-1/2 story house to the east of the existing house. The site is located along the south side of the Capital Beltway (I-95) and along the north-northwest side of Elmwood Drive. A bird's eye view photo and vicinity map is included as Figure 1.

The Fairfax County Policy Plan states "New development should not expose people in their homes, or other noise sensitive environments to noise in excess of 45 dBA Ldn, or to noise in excess of 65 dBA Ldn in the outdoor recreation areas of homes," and "New residential development should not occur in areas with projected t noise exposures exceeding 75 dBA Ldn." The 45 dB limit is normally evaluated in noise-sensitive rooms of the proposed residences, the 65 dB limit is normally evaluated in rear yards and specifically designated outdoor recreation areas, and the 75 dB limit is normally evaluated at the proposed house facades. On this site, the outdoor recreation areas include the rear yard and deck.

2. Site survey

2.1 Sound level measurement procedure

Larson Davis model 831 sound level meters were installed in the locations indicated M1 and M2 in Figure 2 from approximately 11 am on Tuesday May 10, 2016, through approximately 10 am on Tuesday May 17, 2016. The sound level meters were programmed to report average, maximum, and minimum A-weighted sound levels during each one-minute interval. For an explanation of A-weighted sound levels see the appendix. The meters were chained to trees and the microphones were attached to poles. The microphones were 22.3 feet above the ground at M1 (representing the loudest location at the exterior of the proposed house) and 12.6 feet above the ground at M2 (representing a fairly elevated deck of the proposed house).

2.2 Site observations

The site currently has a single-family residence at the southern corner, a lawn at the south-southeast corner, and a forest at the north side. The main noise source on the site is traffic on the Capital Beltway (I-95). There was also some noise from construction on Elmwood Drive and rain. Elmwood Drive was repaved on the evening of May 11 and during the day on May 12.

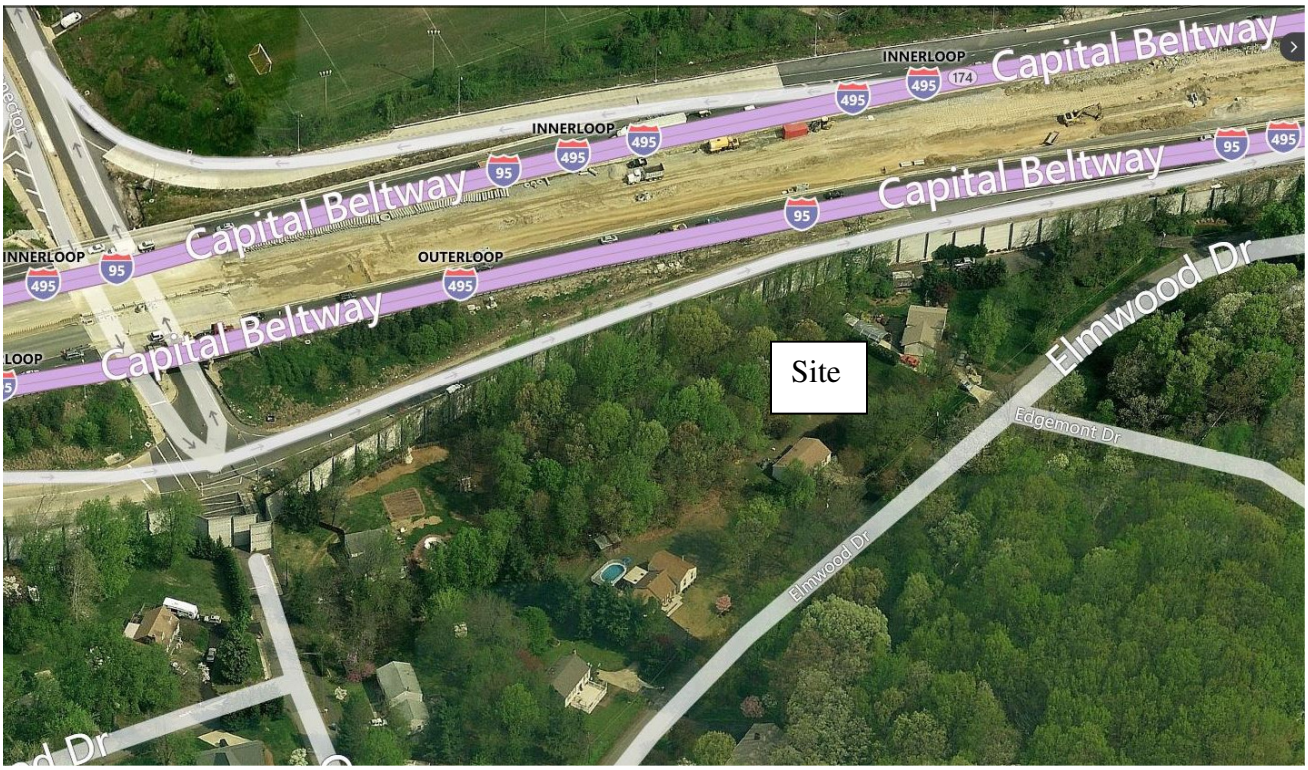

Figure 1. Bird's Eye View and Vicinity Map

2.3 Measured sound levels

Average sound levels during five-minute intervals were calculated based on the measured one-minute average sound levels. Figure 3 presents the resulting five-minute average sound levels. Hourly average sound levels were calculated based on the five-minute average sound levels. Figure 4 presents the hourly average sound levels. The Day-Night Average Sound Levels (DNL) were calculated for each full calendar day. Table 1 presents the DNL and loudest-hour average sound level for each calendar day.

Table 1. Measured DNL and Loudest-Hour Average Sound Levels, dB

Day, Date	DNL		Loudest-Hour Average Sound Level	
	M1	M2	M1	M2
Tuesday, May 10, 2016			66	64.5
Wednesday, May 11, 2016	69.7	68.9	67.1	66.2
Thursday, May 12, 2016	69.3	68.8	68.2	68.3
Friday, May 13, 2016	68.6	67.8	66.6	66.7
Saturday, May 14, 2016	68.6	67.5	65.6	65.2
Sunday, May 15, 2016	67.9	66.7	66.3	65.2
Monday, May 16, 2016	68.2	67.3	66.9	65.2
Tuesday, May 17, 2016			64.3	65.9

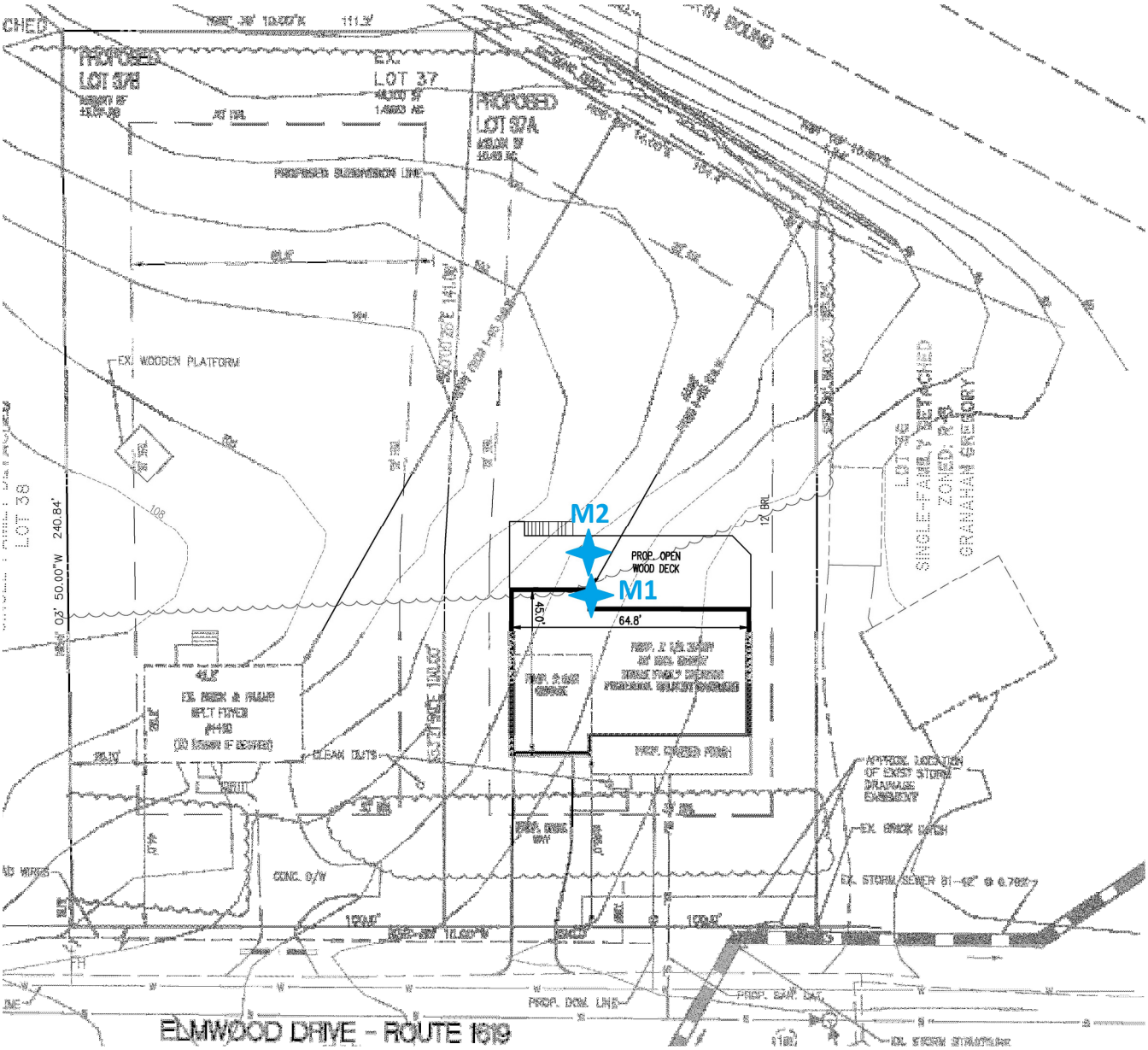

Figure 2. Sound Level Meter Locations

2.4 Weather

Rain can increase noise levels slightly both at the source (i.e., the tire/pavement) as well as at the microphone. Weather conditions were documented during the survey. Hourly weather information was obtained from the website Weather Underground. It rained at the following times:

- 11-1130 am on Tuesday May 10
- 2-3 am and 12-4 pm on Wednesday May 11

- 11 am to 1 pm on Friday May 13
- 3-4 pm and 730 pm on Saturday May 14
- 8 am until the end of the survey on Tuesday May 17

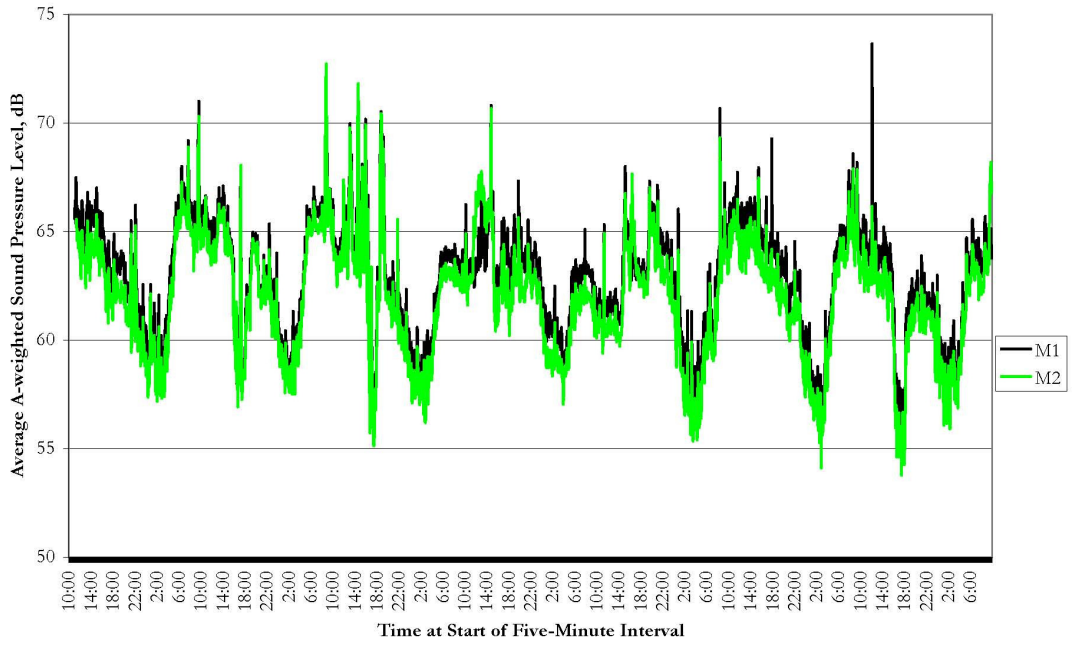

Figure 3. Five-Minute Average Sound Levels

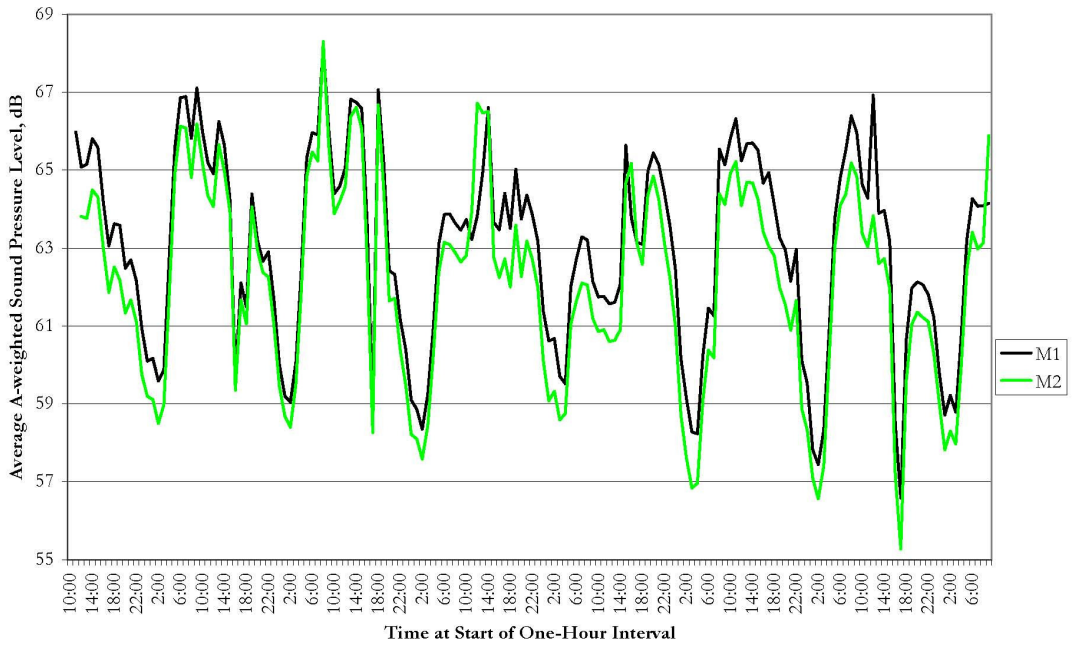

Figure 4. Hourly Average Sound Levels

3. Outdoor noise

Often, the Federal Highway Administration's (FHWA) Traffic Noise Model (TNM) is used to develop a three-dimensional model of the site and predict future noise levels in various locations. This is useful when the site is large and sound level meters cannot be placed at each proposed house, and when the traffic is on a road that is planned to be widened. However, for this site, the added complexity of a TNM analysis was not necessary in our opinion. For a road such as I-95 it is likely that noise levels will not change much in the future, since it is so close to capacity currently. This can be seen in Figures 3 and 4 where sound levels dropped around 5 pm on weekdays due to traffic slowing. If traffic volumes increase beyond approximately Level Of Service (LOS) C or D, speeds will drop and overall noise levels will also drop. To be conservative, we assumed noise levels could increase 1 dB in the future; this would correspond to a 26% increase in traffic volumes without any decrease in traffic speeds.

It can be seen from Figure 1 that the DNL was as high as 69.7 dB at location M1 and 68.7 dB at location M2. However, this was for Wednesday and Thursday which had noise from re-paving Elmwood Drive. Considering only days that had no paving noise (i.e., Friday, Saturday, Sunday, and Monday), the DNL were as high as 68.6 dB at location M1 and 67.8 dB at location M2. With 1 dB added to account for possible future increases, the total is 69.6 dB at location M1 (representing the loudest location at the exterior of the proposed house) and 68.8 dB at location M2 (representing a fairly elevated deck of the proposed house).

The value of 69.6 dB at the house is less than the limit of 75 dB and is acceptable per Fairfax County policy. However, the value of 68.8 dB at the deck exceeds the county limit of 65 dB.

4. Indoor highway noise levels

Typically, indoor noise levels are predicted based on the outdoor noise level and the proposed design of the building. However, architectural drawings are not available at this time. In lieu of performing a detailed analysis, we performed an analysis using prototypical drawings from another recent project we completed.

As noted above, the future DNL at the proposed house will be as high as approximately 69.6 dB. To reduce the DNL to 45 dB indoors, the building envelope must reduce noise levels by at least 24.6 dB. The reduction is called the Noise Level Reduction (NLR). Our calculations for that other project show that in order to provide this NLR one of the following approaches should be used for the rear and side facades:

- Windows rated at Sound Transmission Class (STC) 31 or higher, and doors rated at STC 29 or higher
- Windows rated at STC 28 or higher, doors rated at STC 27 or higher, and either:
    - brick exterior walls or
    - non-brick exterior walls having resilient channels between the gypsum board at studs

If you wanted to aim for 3 dB lower than the maximum allowable noise level, to provide a DNL of 42 dB or lower indoors, you would have to achieve an NLR of 27.6 dB or higher and use the following upgrades:

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- Windows rated at STC 33 or higher, doors rated at STC 32 or higher, and either:
  - brick exterior walls or
  - non-brick exterior walls having resilient channels between the gypsum board at studs

The following appendices provide additional information about acoustical terminology and criteria, and the precision of this analysis.

If you have any questions, please contact me at 703/534-2790 or via e-mail at Gary@HushAcoustics.com.

Sincerely,

Gary Ehrlich, P.E.
Principal

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T [703] 534.2790

Appendix A – Noise Metrics

There are many different ways to express sound levels, but all ways must have some means of incorporating the three most important aspects of the sound: loudness (level), pitch (frequency), and duration (time pattern). The chosen way to express the sound level is known as the noise metric.

Level. The sound level is almost always expressed in decibels, abbreviated dB. The decibel is a unitless quantity; it is technically based a ratio between the sound pressure and a standard reference pressure. Sound level meters can show the sound level varying with a moving needle or changing electronic display. How quickly this display changes, and therefore how quickly the meter responds to changes in sound level, is called the time weighting network or simply the meter "response." The four most commonly used responses are peak, impulsive, fast, and slow; peak response is the fastest response while slow is the slowest. The peak response is only normally used to evaluate the potential for hearing damage and damage to structures, and is never used to express the annoyance of noise. The impulsive response is only typically used to evaluate loud periodic noises such as pile driving and gun fire. The fast and slow responses are the most commonly used. Fast response is used when the sound level changes relatively rapidly over time as would be the case at a night club or a construction site. Slow response is used when the sound level is relatively steady as would be the case for environmental noise such as near highways, railroads, and airports.

Following are how high A-weighted sound levels are for some familiar sounds (taken from U.S. Environmental Protection Agency documents):

Noises:

Chain saw operator	103-115 dBA
Heavy truck at 50 feet	85-95 dBA
Motorcycle driver	80-115 dBA
Power lawn mower operator	80-95 dBA
Subway rider	80-90 dBA
Train passenger	72-90 dBA
City bus at 50 feet	70-85 dBA
Waste food disposer	67-93 dBA
Automobile at 50 feet	64-88 dBA
Vacuum cleaner	60-85 dBA
Washing machine	47-73 dBA
Refrigerator	45-68 dBA

Average conversational speech at 1 meter:

Inside suburban house	55 dBA
Outdoors in suburban area	55 dBA
Inside urban house	57 dBA
Outdoors in urban area	65 dBA
On a train	66 dBA
On an aircraft	68 dBA

Frequency. The frequency of sound is always expressed in Hertz, abbreviated Hz. The audible frequency range (20 Hz to approximately 15,000 or 20,000 Hz) is typically divided into bands covering one octave,

or one-third of an octave. Each doubling of frequency is defined as one octave. A sound level can then be stated either as a single-value covering the entire audible frequency range, or for a given octave or one-third octave band. When sound levels are stated for the entire audible frequency range, the sound could be filtered to roughly simulate the hearing sensitivity of the average person. There are two commonly-used filter types: A- and C-weighting. An A-weighted sound level is by far the most-commonly used, and was designed to approximately represent the hearing sensitivity of a person exposed to sounds of moderate loudness. A C-weighted sound level is occasionally used to assess noise from blasting and other loud short-duration sounds and was developed to approximately represent the hearing sensitivity of a person exposed to loud sounds. For environmental noise studies, or for most other purposes as well, it is assumed that the sound level is A-weighted if there is no specific designation otherwise.

Time Pattern. The variation of a sound level over time is perhaps the most complex of the three parameters, and there are a myriad of ways to express this variation. The various ways can be divided into single-event sound levels and long-term sound levels. Examples of "single events" are a train passby, an aircraft overflight, or a gun firing. Single-event sound levels can be based on the maximum sound level reached during the event (abbreviated L_{max}), the total sound energy produced during the event (known as the sound exposure level, or SEL), or the number of times the sound level exceeds a threshold value (known as the number of events above, or NA). Long-term sound levels must be based on sound levels over a given time interval. Common time intervals are one hour and 24 hours. During this time interval the stated quantity could be the average sound level (known as the equivalent-continuous sound level, or L_{eq}), the amount of time the sound level exceeds a threshold value (known as time above, or TA), or the sound level exceeded any set percentage of the time (known as the statistical sound level; e.g., the sound level exceeded ten percent of the time is written L_{10}, while the sound level exceeded 90 percent of the time is written the L_{90}). One-hour average sound levels, or occasionally one-hour statistical sound levels, are used by the Federal Highway Administration and state departments of transportation to express highway noise levels. The sound level exceeded 90 percent of the time, L_{90}, is often considered the background sound level, since it is not significantly affected by loud periodic noise events. 24-hour average sound levels, and occasionally 24-hour statistical sound levels, are typically used to express all forms of transportation noise including highway, aircraft, and railroad noise. The 24-hour average noise level can include some adjustments to account for peoples' increased sensitivity to noise in the evening and at night. The two most common ways to account for this sensitivity is with the Day-Night Average Sound Level (DNL) and the Community Noise Equivalent Level (CNEL). The DNL is just a 24-hour average sound level for a calendar day with 10 dB added to all noise which occurs between 12 a.m. and 7 a.m. and between 10 p.m. and midnight. The CNEL is identical to the DNL but with 5 dB added to all noise which occurs between 7 p.m. and 10 p.m.

Appendix B – Noise Criteria

Noise is unwanted since it causes: (1) hearing damage, (2) annoyance, (3) speech interference, and (4) sleep disturbance. There are various types of noise criteria that revolve around different unwanted causes. The Occupational Safety and Health Act (OSHA) established maximum allowable sound levels in the workplace in an effort to prevent hearing damage. The OSHA limits often become significant in industrial and military settings, as well as for construction workers. In most work and home environments the sound levels are well below the OSHA limits. Most noise criteria relate to the other

three unwanted effects of noise. There are noise criteria at the federal, state, and local levels, and there are also non-regulatory criteria developed by many private and governmental organizations.

Federal Noise Criteria. There are many government agencies that have established noise criteria. The U.S. Environmental Protection Agency (EPA) developed many of the criteria used by other federal agencies. The U.S. Department of Housing and Urban Development (HUD) established an outdoor noise standard for residential land use. This HUD program lays out three levels for noise. A DNL below 65 dB is "acceptable." A DNL over 65 dB but not exceeding 75 dB is "normally unacceptable." A DNL above 75 dB is "unacceptable." The HUD indoor noise goal is that the DNL not exceed 45 dB inside proposed residences. These limits are typically only evaluated by HUD when the project receives funding from the Federal Housing Administration (FHA). The Federal Aviation Administration (FAA) has established an outdoor threshold with a DNL of 65 dB, above which residential development is not compatible. The FAA indoor threshold is also a DNL of 45 dB. These limits are typically only evaluated when environmental noise studies (such as environmental assessments or environmental impact statements) are performed in support of a major project, or when existing residences, schools, or churches are sound insulated in FAA-sponsored programs. The Department of the Navy uses similar criteria which are typically only evaluated when environmental noise studies (such as Air Installation Compatible Use Zone, or AICUZ, studies) are completed in support of a major realignment of assets. The Federal Highway Administration (FHWA) established noise abatement criteria (NAC) for various land uses; the NAC for residential use is an hourly average sound level of 67 dB outdoors and 52 dB indoors. When the sound level approaches or exceeds the NAC a noise impact occurs. The state departments of transportation may define the word "approach" although it is typically considered to be when the sound level reaches within one dB of the NAC.

State Noise Criteria. Many states have established different noise criteria for four purposes: (1) to control noise produced by citizens, (2) to evaluate the compatibility of a proposed land use with respect to environmental noise, (3) to determine if construction of a state-funded noise barrier is warranted along a highway, and (4) to verify that new construction provides adequate acoustical separation between dwelling units of multi-family housing. The first purpose is incorporated into a noise ordinance and is enforceable against the person generating the noise. The Code of Maryland includes such as noise ordinance, while in the state of Virginia the noise ordinances are developed at the local level. Noise ordinances typically limit the maximum A-weighted noise level, and many also limit the maximum noise level in each octave band. The second purpose is incorporated into the environmental noise policy and is enforceable by the state and local (if adopted at the local level) planning and zoning departments. The Code of Maryland also includes such an environmental noise policy, while in most other states such as Virginia it is solely up to the municipalities to develop such a policy. The state of California has a building code requirement that if the outdoor DNL or CNEL exceeds 60 dB, an acoustical analysis shall be performed demonstrating that the indoor DNL or CNEL not exceed 45 dB. Environmental noise policies are almost always expressed in terms of the DNL, with the exception of the state of California which also uses CNEL. The third purpose is incorporated in the noise barrier policy and is used by the state department of transportation. Maryland and Virginia, as well as other states, have such a noise barrier policy. The noise barrier policies are almost always expressed in terms of the hourly average sound level referencing the noise abatement criteria used by the FHWA, although some are expressed in terms of the sound level exceeded during 10 percent of the hour (the L_{10}). The fourth purpose is

incorporated into the state and local building code in the form of a minimum acceptable Sound Transmission Class (STC) or Impact Insulation Class (IIC) rating.

Local Noise Criteria. Many municipalities have established both a noise ordinance and an environmental noise policy. The environmental noise policy is sometimes summarized in a policy plan, comprehensive plan, or similar document, while in other jurisdictions it is not documented at all (outside of in-house planning department memos). The environmental noise policy is sometimes enforceable by ordinance in the case of an overlay zone. Overlay zones are often adopted around airports or military air bases, as is the case for High Point, North Carolina. In some municipalities the state department of transportation noise barrier policy is used to assist determining if a developer applying for a re-zoning must build a highway noise barrier.

Private Noise Criteria. In many cases, there are no applicable regulatory criteria. For example, there rarely is any regulatory limit on noise levels due to plumbing systems, noise levels in classrooms, or noise levels transmitted from one office to another. In these cases it is useful to consider non-binding criteria developed by private and governmental organizations. The American Society of Heating Refrigerating and Air-conditioning Engineers (ASHRAE) provides recommendations regarding noise from mechanical systems. The ASHRAE recommendations are typically expressed in terms of the Room Criterion (RC) rating, and formerly were expressed in terms of the Noise Criterion (NC) rating. The American National Standards Institute (ANSI) developed a standard regarding noise levels in schools, and this standard has been adopted into law in some jurisdictions. The World Health Organization (WHO) has developed many noise standards for various purposes. In some cases it is useful to assess what percentage of syllables, words, or sentences would be intelligible in a given noise environment; two noise metrics used for this purpose are called the speech transmission index (STI) and the articulation index (AI). Various textbooks provide guidance on appropriate STI and AI values. There has also been some research into the percentage of people that would be "highly annoyed" or awakened by given noise levels. This research could be cited in the development of a noise criterion.

Appendix C – Precision of Predictions

It is not generally feasible to calculate the precision of a noise level or noise level reduction predictions. Unlike fields such as structural engineering, it is not typical practice to incorporate a specific margin of error in acoustical studies. Where possible, somewhat conservative assumptions were used in the outdoor noise level analysis. If a general margin of error were desired, it would be advisable to exceed the recommended acoustical performance (often expressed by the STC rating) of walls, windows, and doors by a couple of points. If you would like to incorporate a specific margin of error, please let us know and we could revise our analysis. Note that the noise levels presented in this report are based on the assumption that the rooms are furnished; noise levels in unfurnished rooms will be higher. Hush Acoustics LLC does not provide any warranty or guarantee as to the precision of the noise level or noise level reduction predictions or measurements.

Appendix D – Field Testing

As noted above there are local and state environmental noise policies which specify the maximum allowable indoor DNL or CNEL. Typically, there is no requirement for a field test.

County of Fairfax, Virginia

MEMORANDUM

DATE: April 27, 2016

TO: Erin M. Haley, Planner II
Department of Planning and Zoning

FROM: Samantha Wangsgard, Urban Forester II
Forest Conservation Branch, DPWES

SUBJECT: Clermont Section 1 Lot 37; VC 2016-LE-005

The following comments are based on a review of the Application for a Variance, VC 2016-LE-005 for the subject property, date stamped as received by the Department of Planning and Zoning on January 5, 2016 and Statement of Justification date stamped as received February 23, 2016.

1. Comment: It is unclear how tree resources and existing vegetation will be impacted by the construction of the proposed dwelling, addition, deck, roofed deck, accessory storage structure, and accessory structure.

    - The Urban Forest Management Division recommends that the applicant take reasonable steps to maximize the preservation of existing vegetation by minimizing soil disturbance to only that necessary to access the site and by providing tree protection fencing in the form of 14 guage welded wire fencing to protect trees that may be impacted by these activities.

    - Trees being removed should be removed by hand with no heavy equipment.

    - All efforts to minimize construction impacts to trees should be taken. This includes keeping heavy equipment as far from trees as possible.

Please contact me should you have any questions.

SW/tw

UFMDID #: 213420

cc: DPZ File

Department of Public Works and Environmental Services
Urban Forest Management Division
12055 Government Center Parkway, Suite 518
Fairfax, Virginia 22035-5503
Phone 703-324-1770, TTY: 711, Fax: 703-653-9550
www.fairfaxcounty.gov/dpwes

CHAPTER 597

*An Act to amend and reenact §§ **15.2-2201**, **15.2-2308**, **15.2-2309**, and **15.2-2314** of the Code of Virginia and to amend the Code of Virginia by adding a section numbered **15.2-2308.1**, relating to variances.*

[H 1849]

Approved March 26, 2015

Be it enacted by the General Assembly of Virginia:

1. That §§ **15.2-2201**, **15.2-2308**, **15.2-2309**, and **15.2-2314** of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered **15.2-2308.1** as follows:

§ **15.2-2201**. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Affordable housing" means, as a guideline, housing that is affordable to households with incomes at or below the area median income, provided that the occupant pays no more than thirty percent of his gross income for gross housing costs, including utilities. For the purpose of administering affordable dwelling unit ordinances authorized by this chapter, local governments may establish individual definitions of affordable housing and affordable dwelling units including determination of the appropriate percent of area median income and percent of gross income.

"Conditional zoning" means, as part of classifying land within a locality into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of the regulations provided for a particular zoning district or zone by the overall zoning ordinance.

"Development" means a tract of land developed or to be developed as a unit under single ownership or unified control which is to be used for any business or industrial purpose or is to contain three or more residential dwelling units. The term "development" shall not be construed to include any tract of land which will be principally devoted to agricultural production.

"Historic area" means an area containing one or more buildings or places in which historic events occurred or having special public value because of notable architectural, archaeological or other features relating to the cultural or artistic heritage of the community, of such significance as to warrant conservation and preservation.

"Incentive zoning" means the use of bonuses in the form of increased project density or other benefits to a developer in return for the developer providing certain features, design elements, uses, services, or amenities desired by the locality, including but not limited to, site design incorporating principles of new urbanism and traditional neighborhood development, environmentally sustainable and energy-efficient building design, affordable housing creation and preservation, and historical preservation, as part of the development.

"Local planning commission" means a municipal planning commission or a county planning commission.

"Military installation" means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under jurisdiction of the U.S. Department of Defense, including any leased facility, or any land or interest in land owned by the Commonwealth and administered by the Adjutant General of Virginia or the Virginia Department of

Military Affairs. "Military installation" does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.

"Mixed use development" means property that incorporates two or more different uses, and may include a variety of housing types, within a single development.

"Official map" means a map of legally established and proposed public streets, waterways, and public areas adopted by a locality in accordance with the provisions of Article 4 (§ **15.2-2233** et seq.) hereof.

"Planned unit development" means a form of development characterized by unified site design for a variety of housing types and densities, clustering of buildings, common open space, and a mix of building types and land uses in which project planning and density calculation are performed for the entire development rather than on an individual lot basis.

"Planning district commission" means a regional planning agency chartered under the provisions of Chapter 42 (§ **15.2-4200** et seq.) of this title.

"Plat" or "plat of subdivision" means the schematic representation of land divided or to be divided and information in accordance with the provisions of §§ **15.2-2241**, **15.2-2242**, **15.2-2258**, **15.2-2262**, and **15.2-2264**, and other applicable statutes.

"Preliminary subdivision plat" means the proposed schematic representation of development or subdivision that establishes how the provisions of §§ **15.2-2241** and **15.2-2242**, and other applicable statutes will be achieved.

"Resident curator" means a person, firm, or corporation that leases or otherwise contracts to manage, preserve, maintain, operate, or reside in a historic property in accordance with the provisions of § **15.2-2306** and other applicable statutes.

"Site plan" means the proposal for a development or a subdivision including all covenants, grants or easements and other conditions relating to use, location and bulk of buildings, density of development, common open space, public facilities and such other information as required by the subdivision ordinance to which the proposed development or subdivision is subject.

"Special exception" means a special use~~,~~ that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith.

"Street" means highway, street, avenue, boulevard, road, lane, alley, or any public way.

"Subdivision," unless otherwise defined in an ordinance adopted pursuant to § **15.2-2240**, means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided and solely for the purpose of recordation of any single division of land into two lots or parcels, a plat of such division shall be submitted for approval in accordance with § **15.2-2258**.

"Variance" means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the *shape,* size, or area of a lot or parcel of land~~,~~ or the size, *height,* area, bulk, or location of a building or structure

when the strict application of the ordinance would~~ result in unnecessary or unreasonable hardship to the property owner~~ *unreasonably restrict the utilization of the property*, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the~~ intended spirit and~~ purpose of the ordinance~~, and would result in substantial justice being done~~. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

"Zoning" or "to zone" means the process of classifying land within a locality into areas and districts, such areas and districts being generally referred to as "zones," by legislative action and the prescribing and application in each area and district of regulations concerning building and structure designs, building and structure placement and uses to which land, buildings and structures within such designated areas and districts may be put.

§ **15.2-2308**. Boards of zoning appeals to be created; membership, organization, etc.

A. Every locality that has enacted or enacts a zoning ordinance pursuant to this chapter or prior enabling laws, shall establish a board of zoning appeals that shall consist of either five or seven residents of the locality, appointed by the circuit court for the locality. Boards of zoning appeals for a locality within the fifteenth or nineteenth judicial circuit may be appointed by the chief judge or his designated judge or judges in their respective circuit, upon concurrence of such locality. Their terms of office shall be for five years each except that original appointments shall be made for such terms that the term of one member shall expire each year. The secretary of the board shall notify the court at least thirty days in advance of the expiration of any term of office, and shall also notify the court promptly if any vacancy occurs. Appointments to fill vacancies shall be only for the unexpired portion of the term. Members may be reappointed to succeed themselves. Members of the board shall hold no other public office in the locality except that one may be a member of the local planning commission. A member whose term expires shall continue to serve until his successor is appointed and qualifies. The circuit court for the City of Chesapeake and the Circuit Court for the City of Hampton shall appoint at least one but not more than three alternates to the board of zoning appeals. At the request of the local governing body, the circuit court for any other locality may appoint not more than three alternates to the board of zoning appeals. The qualifications, terms and compensation of alternate members shall be the same as those of regular members. A regular member when he knows he will be absent from or will have to abstain from any application at a meeting shall notify the chairman twenty-four hours prior to the meeting of such fact. The chairman shall select an alternate to serve in the absent or abstaining member's place and the records of the board shall so note. Such alternate member may vote on any application in which a regular member abstains.

B. Localities may, by ordinances enacted in each jurisdiction, create a joint board of zoning appeals that shall consist of two members appointed from among the residents of each participating jurisdiction by the circuit court for each county or city, plus one member from the area at large to be appointed by the circuit court or jointly by such courts if more than one, having jurisdiction in the area. The term of office of each member shall be five years except that of the two members first appointed from each jurisdiction, the term of one shall be for two years and of the other, four years. Vacancies shall be filled for the unexpired terms. In other respects, joint boards of zoning appeals shall be governed by all other provisions of this article.

C. With the exception of its secretary and the alternates, the board shall elect from its own membership its officers who shall serve annual terms as such and may succeed themselves. The board may elect as its secretary either one of its members or a qualified individual who is not a member of the board, excluding the alternate members. A secretary who is not a member of the board shall not be entitled to vote on matters before the board.~~ For~~ *Notwithstanding any other provision of law, general or special, for* the conduct of any hearing, a quorum shall be not less than a majority of all the members of the board *and the board shall offer an equal amount of time in a hearing on the case to the applicant, appellant or other person aggrieved under § **15.2-2314**, and the staff of the local governing*

body. Except for matters governed by § **15.2-2312**, no action of the board shall be valid unless authorized by a majority vote of those present and voting. The board may make, alter and rescind rules and forms for its procedures, consistent with ordinances of the locality and general laws of the Commonwealth. The board shall keep a full public record of its proceedings and shall submit a report of its activities to the governing body or bodies at least once each year.

D. Within the limits of funds appropriated by the governing body, the board may employ or contract for secretaries, clerks, legal counsel, consultants, and other technical and clerical services. Members of the board may receive such compensation as may be authorized by the respective governing bodies. Any board member or alternate may be removed for malfeasance, misfeasance or nonfeasance in office, or for other just cause, by the court that appointed him, after a hearing held after at least fifteen days' notice.

E. Notwithstanding any contrary provisions of this section, in the City of Virginia Beach, members of the board shall be appointed by the governing body. The governing body of such city shall also appoint at least one but not more than three alternates to the board.

§ 15.2-2308.1. Boards of zoning appeals, ex parte communications, proceedings.

A. The non-legal staff of the governing body may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. The applicant, landowner or his agent or attorney may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. If any ex parte discussion of facts or law in fact occurs, the party engaging in such communication shall inform the other party as soon as practicable and advise the other party of the substance of such communication. For purposes of this section, regardless of whether all parties participate, ex parte communications shall not include (i) discussions as part of a public meeting or (ii) discussions prior to a public meeting to which staff of the governing body, the applicant, landowner or his agent or attorney are all invited.

*B. Any materials relating to a particular case, including a staff recommendation or report furnished to a member of the board, shall be made available without cost to such applicant, appellant or other person aggrieved under § **15.2-2314**, as soon as practicable thereafter, but in no event more than three business days of providing such materials to a member of the board. If the applicant, appellant or other person aggrieved under § **15.2-2314** requests additional documents or materials be provided by the locality other than those materials provided to the board, such request shall be made pursuant to § **2.2-3704**. Any such materials furnished to a member of the board shall also be made available for public inspection pursuant to subsection F of § **2.2-3707**.*

*C. For the purposes of this section, "non-legal staff of the governing body" means any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to § **15.2-1542**. Nothing in this section shall preclude the board from having ex parte communications with any attorney or staff of any attorney where such communication is protected by the attorney-client privilege or other similar privilege or protection of confidentiality.*

*D. This section shall not apply to cases where an application for a special exception has been filed pursuant to subdivision 6 of § **15.2-2309**.*

§ 15.2-2309. Powers and duties of boards of zoning appeals.

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. *The determination of the administrative officer shall be presumed to be correct. At a hearing on an appeal, the administrative officer shall explain the basis for his determination after which the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence.* The board shall consider ~~the purpose and intent of~~ any applicable ordinances, laws, and regulations in making its decision. *For purposes of this section, determination means any order, requirement, decision or determination made by an administrative officer. Any appeal of a determination to the board shall be in compliance with this section, notwithstanding any other provision of law, general or special.*

2. ~~To authorize~~ *Notwithstanding any other provision of law, general or special, to grant* upon appeal or original application in specific cases ~~such~~ *a* variance as defined in § **15.2-2201** ~~from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship;~~, provided that ~~the spirit of the ordinance shall be observed and substantial justice done, as follows:~~ *the burden of proof shall be on the applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in § **15.2-2201** and the criteria set out in this section.*

~~When a property owner can show that his~~ *Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, and (i) the* property *interest for which the variance is being requested* was acquired in good faith ~~and where by reason of the exceptional~~ *and any hardship was not created by the applicant for the variance;* ~~narrowness, shallowness, size, or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.~~ *(ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § **15.2-2309** or the process for modification of a zoning ordinance pursuant to subdivision A4 of § **15.2-2286** at the time of the filing of the variance application.*

~~No such variance shall be authorized by the board unless it finds:~~

~~a. That the strict application of the ordinance would produce undue hardship relating to the property;~~

~~b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and~~

~~c. That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.~~

No variance shall be ~~authorized~~ *considered* except after notice and hearing as required by § **15.2-2204**. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

~~No variance shall be authorized unless the board finds that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.~~

In ~~authorizing~~ *granting* a variance, the board may impose such conditions regarding the location, character, and other features of the proposed structure or use as it may deem necessary in the public interest~~,~~ and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. Notwithstanding any other provision of law, *general or special,* the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance; however, the structure permitted by the variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the ordinance. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required.

3. To hear and decide appeals from the decision of the zoning administrator after notice and hearing as provided by § **15.2-2204**. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

4. To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owners of the property affected by the question, and after public hearing with notice as required by § **15.2-2204**, the board may interpret the map in such way as to carry out the intent and purpose of the ordinance for the particular section or district in question. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. The board shall not have the power to change substantially the locations of district boundaries as established by ordinance.

5. No provision of this section shall be construed as granting any board the power to rezone property or to base board decisions on the merits of the purpose and intent of local ordinances duly adopted by the governing body.

6. To hear and decide applications for special exceptions as may be authorized in the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

No special exception may be granted except after notice and hearing as provided by § **15.2-2204**. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately

across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

7. To revoke a special exception previously granted by the board of zoning appeals if the board determines that there has not been compliance with the terms or conditions of the permit. No special exception may be revoked except after notice and hearing as provided by § **15.2-2204**. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. If a governing body reserves unto itself the right to issue special exceptions pursuant to § **15.2-2286**, and, if the governing body determines that there has not been compliance with the terms and conditions of the permit, then it may also revoke special exceptions in the manner provided by this subdivision.

8. The board by resolution may fix a schedule of regular meetings, and may also fix the day or days to which any meeting shall be continued if the chairman, or vice-chairman if the chairman is unable to act, finds and declares that weather or other conditions are such that it is hazardous for members to attend the meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously advertised for such meeting in accordance with § **15.2-2312** shall be conducted at the continued meeting and no further advertisement is required.

§ **15.2-2314**. Certiorari to review decision of board.

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition that shall be styled "In Re: date Decision of the Board of Zoning Appeals of [locality name]" specifying the grounds on which aggrieved within 30 days after the final decision of the board.

Upon the presentation of such petition, the court shall allow a writ of certiorari to review the decision of the board of zoning appeals and shall prescribe therein the time within which a return thereto must be made and served upon the secretary of the board of zoning appeals or, if no secretary exists, the chair of the board of zoning appeals, which shall not be less than 10 days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

Any review of a decision of the board shall not be considered an action against the board and the board shall not be a party to the proceedings; however, the board shall participate in the proceedings to the extent required by this section. The governing body, the landowner, and the applicant before the board of zoning appeals shall be necessary parties to the proceedings *in the circuit court*. The court may permit intervention by any other person or persons jointly or severally aggrieved by any decision of the board of zoning appeals.

The board of zoning appeals shall not be required to return the original papers acted upon by it but it shall be sufficient to return certified or sworn copies thereof or of the portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

~~If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a commissioner to take evidence as it may direct and report the evidence to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the~~

~~determination of the court shall be made.~~ The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

In the case of an appeal from the board of zoning appeals to the circuit court of an order, requirement, decision or determination of a zoning administrator or other administrative officer in the administration or enforcement of any ordinance or provision of state law, or any modification of zoning requirements pursuant to § **15.2-2286**, the findings and conclusions of the board of zoning appeals on questions of fact shall be presumed to be correct. The appealing party may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. Any party may introduce evidence in the proceedings in the court. The court shall hear any arguments on questions of law de novo.

In the case of an appeal by a person of any decision of the board of zoning appeals that denied or granted an application for a variance, ~~or application for a special exception,~~ the decision of the board of zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by ~~showing to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or where the discretion of the board of zoning appeals is involved, the decision of the board of zoning appeals was plainly wrong and in violation of the purpose and intent of the zoning ordinance~~ *proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision*.

In the case of an appeal by a person of any decision of the board of zoning appeals that denied or granted application for a special exception, the decision of the board of zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by showing to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or where the discretion of the board of zoning appeals is involved, the decision of the board of zoning appeals was plainly wrong, was in violation of the purpose and intent of the zoning ordinance, and is not fairly debatable.

In the case of an appeal from the board of zoning appeals to the circuit court of a decision of the board, any party may introduce evidence in the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia.

Costs shall not be allowed against the locality, unless it shall appear to the court that it acted in bad faith or with malice. In the event the decision of the board is affirmed and the court finds that the appeal was frivolous, the court may order the person or persons who requested the issuance of the writ of certiorari to pay the costs incurred in making the return of the record pursuant to the writ of certiorari. If the petition is withdrawn subsequent to the filing of the return, the locality may request that the court hear the matter on the question of whether the appeal was frivolous.