APPLICANT: **Morning Brook, LLC**	**BEFORE THE**
REQUEST: A variance pursuant to Section 267-22G(4) of the Harford County Code to exceed 4 lots on a panhandle	**ZONING HEARING EXAMINER** **FOR HARFORD COUNTY** **BOARD OF APPEALS**
HEARING DATE: April 7, 2004	**Case No. 5399**

ZONING HEARING EXAMINER'S DECISION

APPLICANT: Morning Brook, LLC

LOCATION: 1800 block of Morning Brook Drive, Forest Hill
Morning Brook Farms II (Phase 3)
Tax Map: 39 / Grid: 1D / Parcel: 38 / Lots: 70-74
Fourth Election District

ZONING: RR / Rural Residential

REQUEST: A variance pursuant to Section 267-22G(4) of the Harford County Code to allow the subdivision of 5 panhandle lots in a group, exceeding the 4 lot limitation.

TESTIMONY AND EVIDENCE OF RECORD:

For the Applicant first testified Kevin Small, a landscape architect and land planner employed by Frederick Ward Associates, Inc. Mr. Small was offered and accepted as an expert in the fields of landscape architecture and land planning.

Mr. Small testified he has been working with the Morning Brook subdivision for almost ten years. The property which is the subject matter of this zoning request is located in the far southwestern part of the Morning Brook subdivision. Access to the subject property is off Morse Road and along Morning Brook Drive. The lots in question are known as Lots 70-74 and are shown on that "Plan to Accompany Variance Application" filed with the Application, and offered and accepted as Applicant's Exhibit No. 3. These lots have already received preliminary plan approval and are, accordingly, permitted lots. The "Approved Plan" for the lots, which shows them as being accessed by a public street, was offered and accepted as Applicant's Exhibit No. 4.

The approved lots are to be accessed by a new road to be constructed opposite Fallen Timber Court, as also shown on Applicant's Exhibit No. 4. The access road has also received preliminary approval.

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The Applicant is proposing that, instead of a public road built to County road standards, each lot be allowed to access Morning Brook Drive by way of a twelve and one-half foot (12 ½') panhandle, with the lots sharing the resulting common driveway. The proposed panhandles would replace the originally planned public road to the lots. According to Mr. Small, this issue was first raised by the Department of Planning and Zoning during its review process, when it expressed concerns about the proposed public road crossing the small creek on site. Frederick Ward Associates then reviewed their plan, in light of those comments, and came up with the design now before the Board of five panhandles sharing a common, private drive.

Mr. Small described the topography of the property through which the lot access must pass. The property lies at a substantially lower elevation then does Morning Brook Drive, with Morning Brook Drive being approximately seventy feet (70') above the center point of the stream over which the access road would pass. There also exist significant steep slopes and wet lands on site, particularly along both sides of the proposed stream crossing. The stream itself also runs through a valley which would cause additional difficulty in road construction. The entire site is wooded.

Mr. Small performed an analysis of the impact on the site by a road built to County road standards, as compared to a private driveway. A public road would be twenty feet (20') wide, open sectioned, with drainage ditches on both sides. Approximately twenty-two feet (22') of fill would be required on portions of the property. Compared to this would be a private driveway which would be approximately sixteen feet (16') wide, and needing about twelve feet (12') of fill.

Other differences between a public road and a private drive, identified by Mr. Small were as follows: a public road would require about an one hundred eighty feet (180') of pipe in the stream, whereas the private driveway would need about sixty feet (60') of pipe; a public road would require approximately 1.6 acres of trees to be cleared, while a private drive would require about 1.1 acres of trees to be cleared; approximately 21,000 square feet of the site would be disturbed by a public road, whereas about 7,820 feet would be disturbed by a private driveway.

Mr. Small stated that the granting of the variance would not allow any more lots than presently approved. The variance would, however, greatly reduce the amount of disturbance to the site with the resulting protection of environmental features. Mr. Small believes that the variance, if granted, would have no adverse impact on the neighborhood. Mr. Small believes the site is unusual for the following reasons: the property which is the subject of the variance application has significantly more steep slopes than other portions of the Morning Brook subdivision; a stream runs through the site; the property exhibits a lower elevation than other parts of this Morning Brook subdivision; and the developable area of the site has an unique geometric shape.

He believes that the impact of the Code is disproportionate on this site as a public road which must otherwise be constructed would impact environmental features and cause resulting development constraints. The difficulty of the Applicant is that he must comply with significant environmental constraints. Mr. Small believes that the public road requirement is an overkill; a public road is not necessary. The environmental features of the site can be protected by a private road which, in fact, would have less of an environmental impact than would a public road.

On cross-examination by People's Counsel, Mr. Small indicated, again, that the Department of Planning and Zoning concluded that the public road would represent too much disturbance to the subject property and indicated that there were no other restrictions to the construction of a road. The Corps of Engineers has not yet signed-off on any road construction in the area.

Mr. Small further indicated there would be no impediment to the flow of the stream regardless of whether public or private road is constructed. He indicated that there would be savings in costs if a private driveway were constructed instead of a public road. A private driveway would be $20,000.00 to $40,000.00, less than the cost of a public road.

If the variance is not granted, the Applicant would be required to either construct a public road, or construct four (4) lots only with panhandles.

For the Department of Planning and Zoning testified Anthony McClune. Mr. McClune, reiterating the findings of the Department, testified the property is unique based on topographical and environmental features. A public road would require additional tree clearing, additional piping in the stream, and additional fill material. The Department feels that a private driveway is most appropriate in order to reduce environmental impact.

Mr. McClune further testified upon examination by People's Counsel that the Department believes this to be a better plan. The Maryland Department of the Environment would be required to approve either plan. If only four (4) lots were constructed, these could be accommodated by a panhandle and no variance would be required.

The amount of disturbance for four (4) panhandle lots versus five (5) panhandle lots is the same.

If the Applicant requests approval for additional lots, an additional hearing would be required. Mr. McClune is aware of at least two (2) other properties for which approval has been granted for as many as seven (7) panhandle lots.

APPLICABLE LAW:

Section 267-11 of the Harford County Code allows the granting of a variance to the requirements of the Code:

> *"Variances.*
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> *A. Except as provided in Section 267-41.1.H., variances from the provisions or requirements of this Part 1 may be granted if the Board finds that:*
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> *(1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Part 1 would result in practical difficulty or unreasonable hardship.*

(2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.

B. In authorizing 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, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.

C. If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval."

The Applicant is requesting a variance to Section 267-22G(4) of the Harford County Code as follows:

"(4) Groups not exceeding four (4) lots may have two (2) lots on panhandles in accordance with the following criteria. Panhandle lots and subdivisions shall have, as a minimum, the following width:

(a) Single panhandles: twenty-five (25) feet.

(b) Double panhandles: Twelve and one-half (12 ½) feet each, for a total of twenty-five (25) feet."

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Applicant has secured preliminary plan approval for five (5) lots in the Morning Brook subdivision. The five (5) lots are to be accessed through existing subdivision streets, and then by a County approved public road approximately 600 feet long.

The Applicant has presented testimony that the required public road would cause more environmental impact than would a private road. If allowed to access the five (5) lots by panhandles (which would result in the lots being accessed by a commonly maintained, private drive, not built to County standards), less forest cover would be removed; less piping would be placed in the stream; there would be less disturbance to existing grades; and, in the opinions of both the Department of Planning and Zoning and the Applicant's expert witness, less environmental impact would result than if a public road were required. The Hearing Examiner accepts these statements as findings of fact.

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The Applicant further has presented testimony that the property on which the five (5) lots would be built, and through which the road is to be constructed, is unique in that it is different in topography, geometry, natural features, and elevation from other surrounding parts of the Morning Brook subdivision. While the evidence presented in this regard is less than overwhelming, the Hearing Examiner will accept, for the purpose of Applicant's argument, the assertions that the property has topographical and natural features different from the remaining portions of the Morning Brook subdivision.

The Applicant suggests that as a result of those unique features of the property, strict adherence with the County road requirements cause practical difficulty. In support of this argument the Applicant submits evidence that the construction of a road to County road standards would: (1) have a greater environmental impact; and (2) cause the Applicant more difficulty in meeting resulting development requirements. The Applicant summarizes its argument by stating "conformance with the Code is unnecessarily burdensome due to the amount of disturbance to the eco-system dictated by the construction of an approved public road." See page 9 of Applicant's brief.[1]

The sum and substance of the Applicant's position is that it is more environmentally harmful to construct a public street than a common drive. That common drive would be less costly, would have less of an impact on forest cover, would require less grading, and would present less of a potential impact to the stream. No doubt the Applicant is correct in these assertions.

However, even assuming the property has unique characteristics as set forth by applicable case law (see Cromwell v. North, 102 Md. App. 691 (1995), the Applicant must further meet the second necessary step of the variance provision of the Harford County Development Regulations that the literal enforcement of the Development Regulations would result in a practical difficulty or unreasonable hardship sufficient to justify the granting of the variance.

The Applicant is required to build a public road. All applicants in a similar situation within Harford County are required to build a public road. For the purposes of this opinion, it will be assumed that environmental features of the site will cause the Applicant to spend more on such a private road than if it were built at some other location without those environmental constraints. However, mere financial difficulty is typically not a legally sufficient reason for the granting of a variance. Accordingly, and obviously cognizant of this principle, the Applicant relies upon the greater impact to the environment of a public road compared to a private road construction. It is, in essence, the impact to the environment, and not to the Applicant, upon which the Applicant rests its argument.

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[1] Applicant also suggests at page 8 of its brief that ". . . . but for the uniqueness of the property and topographical conditions, these approved five lots would be accessed by a public road." There is no evidence that, if the variance were denied, the approved public road could not be built. The Applicant's position is that it does not wish to build a public road due to environmental impact and development constraints.

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The Applicant requests an extraordinarily broad interpretation of the Harford County variance statute. However, while variances of this nature are ordinarily very infrequently granted, at least one Maryland reported case did approve a requested variance for what appears to be environmental reasons. McLean v. Soley, 270 Md. 208 (1973) which has been referred to as "one of the few reported Maryland Appellate cases approving a variance" (See Cromwell v. Ward, supra) approved an area variance to the applicable side yard requirements, giving as its reasons that literal enforcement of the Code would have resulted in the destruction of extensive forest cover.

McLean v. Soley, however, differs from the instant case in that the Applicant in McLean agreed that his density would be reduced if its variance were granted. The Applicant in this case makes no such promise. Nevertheless, while the Applicant makes no promise to reduce density, clearly the variance, if granted, would allow a substantially reduced environmental impact.[2]

Nevertheless, and despite McLean, the variance provision of the Harford County Development Regulations does not specifically allow for environmental impact to be considered as evidence of practical difficulty or unreasonable hardship. The Applicant asks the Hearing Examiner to find and recommend that environmental impact is a practical difficultly which the variance provision is designed to alleviate. However, expanding the variance provision to allow arguments of environmental impact would establish a precedent of enormous potential. Building setbacks, height restrictions, impervious surface coverage, and a host of other issues could be subject to legitimate and successful variance requests by merely arguing that adherence to Code provisions would cause more of an environmental impact than if deviations to the Code were allowed. There exist hundreds if not thousands of possible scenarios which would result in arguments similar to the one being made by the Applicant. There could be, literally, no end of possible variance requests.

The Hearing Examiner is accordingly reluctant to recommend the variance on the basis suggested by the Applicant. It is commendable that an Applicant would wish to impact the environment in a less intrusive way. However, to allow that as the basis for the granting of a use or area variance would be to exponentially expand the application of Section 267-11, taking it well beyond its specific language. That is a decision which should be taken, if at all, by the legislative body.

McLean v. Soley, while helpful to Applicant's argument, will not be relied upon herein as justification for such an expansive, and potentially far reaching, interpretation of Section 267-11.

It is according found that the environmental impact caused by a public road, as compared to a private road, is not a practical difficulty within the provisions of Section 267-11 sufficient to justify the granting of the requested variance.

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[2] McLean itself called the decision before it ". . . a close case."

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CONCLUSION:

For the above reasons, it is recommended that the requested variance be denied.

Date: May 26, 2004

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner