

TOWN OF CARY
ZONING BOARD OF ADJUSTMENT QUASI-JUDICIAL HEARING
February 6, 2017

APPEAL OF CIVIL PENALTY WORKSHEET

IN THE MATTER OF:

CASE NO. 16-CP-01

TOWN OF CARY

STATE OF NORTH CAROLINA

APPLICANTS NAMES:

Blue Ridge Site Development Corporation
1513 Walnut Street, Ste. 100
Cary, NC 27511

and

Taylor Morrison of Carolinas, Inc.
C/o Thomas Reiland
211 James Jackson Avenue
Cary, NC 27513-3166

ADDRESS OF SUBJECT PROPERTY:

940 Uprock Drive
Cary, NC 27519

PROPERTY OWNER NAME/ADDRESS:

Taylor Morrison of Carolinas INC
211 James Jackson Avenue
Cary, NC 27513-3166

STAFF REPRESENTATIVE:

Contact: Debra Grannan, Senior Planner
Phone: (919) 460-4980
Email: debra.grannan@townofcary.org

REQUEST: The Applicant requests that that the Zoning Board of Adjustment reduce or waive the civil penalty of \$61,320.00 that was assessed as part of Zoning Violation 16-V-011.

CIVIL PENALTY THAT IS BEING APPEALED ("Decision"):

Fine of \$61,320.00 as assessed in Notice of Zoning Violation and Assessment of Fine, case number 16-V-011 issued by Michelle Realander, Development Compliance Officer of the Town of Cary on August 30, 2016 regarding the Illegal Removal of Tree Protection Fencing and Unauthorized Land Disturbance at 940 Uprock Drive, Cary, NC 27519.

LOCATION

The subject property is located on one parcel of land with the parcel address of 940 Uprock Drive.

THE APPEAL PROCESS is provided as required by N.C.G.S 160A-388 and Section 3.21 of the Cary Land Development Ordinance ("LDO"). In this case, the applicant is contesting only the amount of the civil penalty; therefore, as directed by LDO Section 3.21.4, in determining the penalty amount, the Board shall consider:

- (1) The gravity of the violation;
- (2) Any action taken by the violator to correct the violation;
- (3) The cost of the action to correct the violation; and
- (4) Any previous violation committed by the violator, on the same or different site.

[Exhibit 1](#): Vicinity Map

[Exhibit 2](#): Enclave at Weldon Ridge Site Plan 16-SB-010 dated September 23, 2014

[Exhibit 3](#): Enclave at Weldon Ridge Grading and Drainage 16-SB-010 dated September 23, 2014

[Exhibit 4](#): Enclave at Weldon Ridge Erosion Control Plan dated September 23, 2014

[Exhibit 5](#): Wake County Book of Maps 2016 Page 0124 Enclave at Weldon Ridge

[Exhibit 6](#): Notice of Zoning Violation 16-V-01, issued by Michelle Realander, Development Compliance Officer of the Town of Cary, dated August 30, 2016

[Exhibit 7](#): Appeal of Civil Penalty Application and Exhibits A, B, C and D dated September 30, 2016

[Exhibit 8](#): Revised Landscaping Plan Approved by Town of Cary dated November 9, 2016

[Exhibit 9](#): Photo of current conditions dated January 19, 2017

[Exhibit 10](#): Invoice from Wm. R. Curtis, Inc. Excavating and Grading dated January 18, 2017

[Exhibit 11](#): Invoice from Withers and Ravenel for services from October 1 to 31, 2016 dated January 26, 2017

[Exhibit 12](#): Invoice from Withers and Ravenel for services from November 1 to 30, 2016 dated January 26, 2017

[Exhibit 13](#): Notice of Violation 15-ZV-012 issued by Ann M. Reishus, Zoning Compliance Officer of the Town of Cary dated July 20, 2015

[Exhibit 14](#): Tree Survey from Enclave at Weldon Ridge Site Plan 16-SB-010 dated September 23, 2014

[Exhibit 15](#): Relevant sections of the Land Development Ordinance

BACKGROUND:

1. The subject property is described as follows:
 - Site Address: 940 Uprock Drive
 - Cary, NC 27519
 - Wake County PIN Number: 0724470980
 - Zoning District: Planned Development District (PDD) Major (Weldon Ridge)
 - Acreage: +/-2.12
2. On September 23, 2014 the Town of Cary Development Review Committee approved a Development Plan for the subject property which designated the subject property as Bonus Open Space. (Exhibit 2)
3. The approved Development Plan included a Grading and Drainage Plan (Exhibit 3) that noted the location of a Tree Protection Fence and described the limitations on the type of disturbances allowed on the subject property as follows: "5' MULCH TRAIL ON EXISTING GRADE LINE WITH RAILROAD TIES OR LOGS; CLEAR ONLY AS NECESSARY FOR THE TRAIL AND NO EQUIPMENT IS ALLOWED IN THE BONUS OPEN SPACE FOR TRAIL CONSTRUCTION"
4. The approved Development Plan included an Erosion Control Plan (Exhibit 4) that also noted the location of Tree Protection Fencing. This plan sheet also included the following related note: "22. TREE PROTECTION FENCING SHALL NOT BE MOVED AND THERE SHALL BE NO ENCROACHMENT INTO SUCH PROTECTED AREA(S) WITHOUT WRITTEN AUTHORIZATION OF THE TOWN'S ZONING COMPLIANCE STAFF. ANY ACTIVITY (LANDSCAPING, FENCING, OR UTILITY INSTALLATION) SHOWN ON THE APPROVED PLANS IN A TREE PROTECTION AREA, SHALL ALSO NOT OCCUR WITHOUT WRITTEN AUTHORIZATION FROM THE TOWN'S ZONING COMPLIANCE STAFF. ANY UNAUTHORIZED ENCROACHMENT OR DISTURBANCE WITHIN THE BOUNDARIES OF A TREE PROTECTION AREA SHALL AUTOMATICALLY RESULT IN FINES AND THE REPLACEMENT OF ANY DAMAGED VEGETATION IN ACCORDANCE WITH THE LAND DEVELOPMENT ORDINANCE."
5. The subject property is recorded in Wake County Book of Maps 2016 Page 0124. (Exhibit 5)
6. On July 20, 2016, Michelle Realander, Development Compliance Officer of the Town of Cary conducted a site visit to the subject property and noted that required tree protection fencing had been removed and vegetation had been disturbed.
7. LDO Section 7.2.13(A) states that owners of property are "responsible for the installation, preservation, and maintenance of all planting and physical features (installed or vegetated natural

areas) required under Sections 7.2.1 through 7.2.12 Damage to these areas shall result in revegetation requirements and fines or other penalties as required under this Ordinance.”

8. On August 30, 2016 Michelle Realander, Development Compliance Officer of the Town of Cary issued a Notice of Zoning Violation to the owners of the subject property which described the violation and assessed the fine of \$61,320.00. (Exhibit 6). According to the Notice of Violation, this fine was the sum of a base fine of \$2,000 for unauthorized disturbance and a fine of \$4.00 for every square foot of area from which vegetation was removed (calculated at 14,830 square feet).
9. On September 30, 2016 the owner of the subject property filed an Appeal Application with The Town of Cary asking for the civil penalty to be waived or reduced. (Exhibit 7)
10. The applicant does not contest issuance of the Notice of Zoning Violation, admits that trees were removed in violation of the LDO, and does not contest the calculation of the square footage of area affected.
11. On November 9, 2016 Michelle Realander approved a re-vegetation plan, prepared by Withers and Ravenel and submitted by the Applicant for the subject property. (Exhibit 8)
12. The approved re-vegetation plan was scheduled to be completed by December 1, 2016; however, the work was not actually completed until January 19, 2017.
13. On January 23, 2017 the applicant submitted a copy of an invoice from Wm. R. Curtis, Inc. Excavating and grading to Taylor Morrison which listed landscaping and plan material for The Enclaves Common Area. The total amount due was \$31,012.50. (Exhibit 10)
14. On January 26, 2017 the applicant submitted copies of two invoices from Withers and Ravenel for Professional Landscaping Design and Project Management Services. The first invoice was for \$2,145.00 for services rendered between October 1, 2016 and October 31, 2016. (Exhibit 11) The second invoice was for \$656.25 for services rendered between November 1 and November 30, 2016 (Exhibit 12).
15. There have been no previous zoning violations on the subject property. One of the applicants in this case, Blue Ridge Site Development, was mentioned in a previous Notice of Violation and Assessment of Fine (Case 15-ZV-012) (Exhibit 13) where a tree protection area was entered without authorization. The Compliance Officer determined that no disturbance of protected area had occurred and a fine of \$1,000.00 was assessed to the property owner K. Hovnanian Homes. At the time of this report, the Town has not received payment of this fee.
16. All documents and exhibits constituting the record upon which the action appealed from is taken are part of the record and have been provided to the applicant and the property owner.
17. Notice of the Appeal the Civil Penalty has been provided as required by law.

CRITERIA

The Board must consider the following factors when deciding whether to waive or modify the civil penalty amount:

- (1) The gravity of the violation;

Applicant Position: Applicant does not seek to deny the gravity of this violation. On the contrary, the removal of the trees is the unfortunate consequence of human error and the Applicant has taken all possible steps to correct the consequences of this mistake. In the area where clearing occurred, the only trees identified on the tree survey were 5 pines in the 15” diameter range. The remaining trees would have been mostly pines that were less than 12” in diameter.

Staff Comments: The violation resulted in the loss of several mature trees. It will take several years for the new plant material to mature. The Tree Survey from the Enclave at Weldon Ridge Site Plan (Exhibit 14) was not of sufficient legibility to verify the applicant’s description of the type or size of trees that were removed. The Town of Cary method for calculating the fine is based on the size of the disturbed area, rather the type of plant material.

- (2) Any action taken by the violator to correct the violation;

Applicant Position: Applicant has completed all requisite measures to remediate the harm caused by the unfortunate mistake.

Staff Comments: The applicant submitted a re-vegetation plan which was approved by The Town of Cary and the applicant has implemented the plan.

- (3) The cost of the action to correct the violation; and

Applicant Position: Applicant will pay \$2,801.25 to obtain a landscape design and \$31,012.50 to re-plant the area where the tree removal occurred.

Staff Comments: Staff has received a copy of the invoices to the applicant for landscaping design and for landscaping installation service the plant materials. The list of plants on the invoice from Wm. Curtis, Inc. (Exhibit 10) is consistent with the plant types, size and quantity shown on the re-vegetation plan that was designed by Withers and Ravenel.

- (4) Any previous violation committed by the violator, on the same or different site.

Applicant Position: Applicant has been in the industry for over 20 years. Applicant does not contend that this is the first error that Applicant has made; however, this is the first violation of this nature by Applicant.

Staff Comments: There have been no previous zoning violations on the subject property. One of the applicants in this case, Blue Ridge Site Development, was mentioned in a previous Notice of Violation and Assessment of Fine (Case 15-ZV-012) (Exhibit 13) where a tree protection area was entered without authorization. The Compliance Officer determined that no disturbance of protected area had occurred and a fine of \$1,000.00 was assessed to the property owner, K. Hovnanian Homes. At the time of this report that fee has not been paid.

MOTION – CIVIL PENALTY AMOUNT

If you are inclined to **MODIFY** the Civil Penalty:

For the reasons we discussed, I MOVE that we MODIFY the Civil Penalty amount and assess a Civil Penalty of \$_____.

If you are inclined to **AFFIRM** the Decision and **DENY** the APPEAL:

For the reasons discussed, I MOVE that we AFFIRM the Decision. The Civil Penalty remains at \$61,320.

(Note: Based on the action taken by the Board of Adjustment, staff will prepare a Resolution to be presented to the board at this or a future meeting for ratification.)