

DECISION
TALBOT COUNTY BOARD OF APPEALS
Appeal No. 16-1658

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals at the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland, beginning at 7:00 p.m., August 7, 2017, to consider the application of **RDC HARBOURTOWNE, LLC and RDC MELANIE DRIVE, LLC** (Applicant). The Applicant is requesting a special exception to permit the expansion of the Harbourtowne Golf Course onto a portion of the adjacent parcel of land shown as Lot 6 of Parcel 90 on Tax Map 23 for the purpose of creating a golf course driving range. The portion of Lot 6 of Parcel 90 where the golf course expansion is proposed will be consolidated into the adjacent golf course parcel shown as Parcel 1 on Tax Map 23. The Applicants are also requesting two variances to permit encroachments into the Shoreline Development Buffer (Buffer) expanded along a linear nontidal wetland. The requested variances are: (1) A variance to allow a 230 square foot encroachment into the Buffer for a golf cart path that is necessary to access the proposed driving range. At its closest point the encroachment will be 324 feet from MHW. (2) A variance to allow a 25 square foot encroachment into the Buffer for a required stormwater management outfall feature which at its closest point will be 700 feet from MHW. The property is located on 9789 Martingham Circle and 9599 Melanie Drive, St. Michaels, Maryland 21663 in the Rural Conservation/Western Rural Conservation (RC/WRC) zone. The property owner is RDC Harbourtowne, LLC. The request is made in accordance with Chapter 190 Zoning, Article VI, §190-139 C 2; Article VIII, §190-167 D; and Article IX, §190-180 and §190-182 of the Talbot County Code (Code).

Present at the hearing were Board of Appeals members Paul Shortall, Jr., Chairman, John Sewell, Frank Cavanaugh, Jeffrey Adelman and Greg Gannon. Zachary A. Smith, Esquire and Bruce C.

Armistead, Esquire, Armistead, Lee, Rust & Wright, P.A., 114 Bay Street, Building C, Easton, Maryland 21601, represented the Applicant. David R. Thompson, Esquire, P.O. Box 1747, Easton, Maryland 21601 represented Mark and Patti Eppard and Madeleine Homes. Stephanie Hambleton, Esquire, Hambleton Law, LLC, 1206 South Talbot Street, St. Michaels, Maryland 21663, represented Margaret Patrick. Glenn D. Klakring was the attorney for the Board of Appeals.

It was noted for the record that all members of the Board had individually visited the site.

The following exhibits were offered and admitted into evidence as Board's Exhibits as indicated:

1. Application for special exception and critical area variance with Attachment A.
2. Copy of a portion of the Talbot County tax map with the property highlighted.
3. Notice of Public Hearing.
4. Certificate of publication of the Notice of Public Hearing from the *Star-Democrat*.
5. Notice of hearing with a list of nearby property owners attached.
6. (6A) copy of critical area variance standards with the Applicant's response to each applicable requirement on Attachment B and (6B) copy of special exception or modification standards with the Applicant's response to each applicable requirement on Attachment C.
7. Staff Memo-Critical Area Variance and Special Exception dated June 21, 2017.
8. Planning Commission recommendation.
9. Sign maintenance agreement.
10. Site Plan by Lane Engineering, LLC, dated May 17, 2017.
11. Aerial photograph with proposed improvements by Lane Engineering, LLC, dated May 17, 2017.

12. Critical Area Commission comments dated June 26, 2017.
13. Maryland Department of the Environment Permit No. 15-NT-2080/201561153, effective April 14, 2017.
14. Authorization letter from David Rattner for Parcel 1.
15. Authorization letter from David Rattner for Parcel 90, Lot 6.
16. Independent Procedure Disclosure and Acknowledgement Form.
17. Aerial photograph.
18. Board of Appeals Decision No. 655.
19. Board of Appeals Decision No. 944.
20. Board of Appeals Decision No. 15-1641.
21. Letter from Vernon W. Cooper, dated July 28, 2017.

In his opening statement Mr. Smith described the application as consisting of a request for a special exception to expand the Harbourtowne golf course, an existing nonconforming use, with a new and relocated driving range and for two critical variances necessary for access to the proposed new driving range and for a necessary drainage structure.

He said that the golf course use has existed since the 1970s. The resort was acquired by the Applicant in March 2015. The Applicant began renovations to the resort in late 2015. The site of the proposed new driving range was previously used as the effluent spray field for the Martingham subdivision septic treatment facility. (The Martingham subdivision is co-located with the golf Harbourtowne golf course. The proposed site of the new driving range is adjacent to the subdivision and golf course but not a part of the original Martingham subdivision.) The need for the septic treatment facility ended when public sewer was made available to the property owners of Martingham.

Mr. Smith noted that the Talbot County Council had enacted a text amendment to the Code which permits the expansion of non-conforming golf courses.

He said the Applicant originally submitted the instant application last fall (2016). The original application provided for a driving range with two tee boxes on either end of the driving range. The Applicant subsequently modified that application, reducing it to one tee box on the northern end of the proposed range, eliminating the need for range user access to both ends of the range. He said that the Planning Commission has recommended approval of the current plans.

Mr. Smith concluded his opening remarks by stating that the proposed expansion is consistent with the Talbot County Comprehensive Plan. He quoted the Staff Report as support for his position.

The Applicant's first witness was John J. Mlynarski, 9645 Martingham Circle, St. Michaels, Maryland 21663. He has been a PGA golf professional for 30 years and is currently employed as the golf professional at the Harbortowne resort. He said the proposed range will be used by members and guests as a warm-up or practice area before a round of golf. He estimated that the number of users of the range would be about 70 to 90 golfers on weekends and 40 to 50 golfers on weekdays. He said that typically there is little noise created by activity on a driving range other than the sound of clubs striking golf balls.

Mr. Mlynarski said that there would be no access to the range by way of Melanie Drive. There would be no exterior lighting on the range. It would generally be staffed by one employee. He said he lived near the former driving range and it created no disturbances. The new range would not create any adverse impact on surrounding residential properties.

In response to questions from Board members Mr. Mlynarski said that there would be no refreshments or alcoholic beverages served at the driving range. He said that, other than normal grass

cutting and maintenance machinery, a gas powered cage car, similar in size to a golf cart, would be only machinery used on the range.

The next witness was Bill Stagg, Land Planner, Lane Engineering, LLC, 117 Bay Street, Easton, Maryland 21601. He first referred to an aerial photograph of the original golf course, a copy of which was admitted as Applicant's Exhibit No. 1. He said it shows the small size of the range resulting in many range balls being driven beyond the range onto nearby roadways and residential properties. It shows various distances to nearby houses. He compared that with an aerial photograph of the site of the proposed new range showing the distances to existing homes. It was admitted as Applicant's Exhibit 2. He explained that the distances from the proposed new range to existing homes are significantly larger and by contrast the residents of those homes are not likely to be impacted by the new range.

Mr. Stagg then described the site of the proposed new range. He mentioned that the effluent spaying on the property had ended about seven years ago and much of the property had subsequently been farmed.

He said that the Code permits an expansion of 20 percent. The proposed expansion is well within that limit.

The range is 300 yards from the back of the range to the front of the tee. It should be adequate to contain all of the drives within the range. Its width will permit no more than 20 golfers at a time. The range will be graded and contoured for drainage and to simulate a golf course. The tee area will be slightly raised and the site will be naturally screened by vegetation. Access to the range will be by way of golf carts from the pro shop.

The only impervious surface on the site will be the golf cart parking area on the north side of the property. Maintenance access will be from the south part of the lot.

The Applicant is adding vegetative screening along Melanie Drive and existing woods on the southern side of the range will remain.

The entire range will have drainage pipes into underground pipes. Fertilizer for the range will be applied in such a manner that all or most of it will be absorbed by the grass rather than draining off site.

Mr. Stagg said that the proposed golf cart crossing is designed to minimize impacts.

Mr. Thompson then made some opening remarks. He said he was representing Mark and Patti Eppard who lives on Melanie Drive and Madeleine Homes who also lives on Melanie Drive. Ms. Homes' house is the closest to the proposed new range.

He provided a copy of a plat of the Swan Point subdivision which he said is not a part of the Martingham subdivision. The plat was admitted as Homes and Eppard Exhibit No. 1. Lot 5 is owned by Ms. Homes and Lot C is owned by the Eppards. He said they are not in favor of the proposal. He said, in contrast to those who purchased homes or home sites in the Martingham subdivision, they did not buy into a golf course subdivision. The covenants of their subdivision do not specifically permit or prohibit golf courses but it is clear that they intended the subdivision be for residential and ancillary purposes. The site of the proposed new range is a part of Lot 6 of that residential subdivision. He suggested that the proposal is for a new golf course which is prohibited by the Code. Furthermore Lot 6 is improved by a residential structure and the proposed use is not a permitted accessory use.

Mr. Thompson offered a copy of a plat of the Martingham subdivision. It was admitted as Homes and Eppard Exhibit No. 2. He explained that it shows that the portion of Lot 6 to be used as the range was and is not a portion of Martingham.

He then offered a copy of the subdivision covenants of the Swan Point subdivision. It was admitted as Homes and Eppard Exhibit No. 3. He said that it is clear that the covenants were placed on

the subdivision to protect the owners from other than residential development. He suggested that the proposal is for commercial purposes related to the uses in the neighboring subdivision and it will adversely impact owners in the Swan Point subdivision.

Mr. Thompson then referred the Board to the Code that provides that when covenants are more restrictive than the Code the more restrictive covenants will apply. Thus, the commercial development proposed by the Applicant should be denied.

Mr. Thompson then asked some question of Mr. Stagg. Responding, Mr. Stagg said that the Applicant has completed some minor improvements to the site. He said that the County had not imposed any fines as a result of that preliminary activity. He suggested that the activity was merely to provide access to the property for its maintenance.

Mr. Thompson then called Madeleine Homes, 9605 Melanie Drive, as his first witness. She identified her property as Lot 5 on the Swan Point subdivision. She said that her home is her respite from where she works in Baltimore. She described her subdivision as a very quiet residential area. She was under the impression that the proposed site was zoned as for agriculture use.

She was concerned about the noise that will come from the site seven days a week. She is worried that her security will be compromised. She is also worried that the golf course chemicals will leach onto her property and into her well.

In response to a question from a Board member Mr. Thompson confirmed that all of the properties in the Swan Point subdivision are subject to the same restrictive covenants. In response to another question Mr. Thompson confirmed that Lot 6 is improved by a substantial residence. Ms. Homes said that she can hear equipment operating in Martingham.

There followed a general discussion during which Mr. Thompson said that the residence area of Lot 6 had been subdivided from the proposed driving range portion of Lot 6 but they are still under common ownership. Mr. Smith advised that there is a pending lot line revision which, if approved, will make the range a part of the Martingham subdivision.

Mr. Thompson then offered three State Department of Assessments status sheets showing the ownership of the Homes and Eppard lots and Lot 6, which is owned by RDC Melanie Drive, LLC. They were admitted as Homes and Eppard Exhibit No. 4.

In response to a question from Mr. Smith, Ms. Homes explained that she is familiar with driving ranges and she is convinced that the proposed use will result in more noise reaching her property,

The next witness was Mark Eppard, 9409 Melanie Drive. He confirmed his house is the second on the right of Melanie Drive. He said that the proposal will change the quiet and peaceful nature of his home. He felt it will increase noise, traffic and trash and will be used as a party location for young people in the community. He felt the proposal will adversely impact of his use and enjoyment of his property. He and his wife were aware of the covenants impacting the subdivision and they purchased the house because of the protections they afforded.

In response to questions from Mr. Smith, Mr. Eppard said he was aware that the Applicant is not proposing to access the driving range from Melanie Drive. He also said that he cannot see the driving range property from his property. He reaffirmed his concern that the range will attract young partiers.

The next witness was Patti Eppard, 9409 Melanie Drive. She suggested the proposal will interrupt their privacy and create a lot of additional noise. She said she can hear golfers on the existing Martingham course from her home.

Mr. Thompson then offered a copy of the deed of Lot 6 to RDC Melanie Drive, LLC showing that it is subject to the subdivision covenants. It was admitted as Homes and Eppard Exhibit No. 5. He also offered a copy of covenants which he argued prohibits the construction of any structures on the subject property. It was admitted as Homes and Eppard Exhibit No 6.

There followed some general discussion wherein Mr. Thompson argued that the proposed driving range is prohibited by the restrictive covenants and it is, in reality a new golf course, which is prohibited in the RC zone. He said that the Applicant is attempting to exploit a loophole by suggesting that the range is an expansion of an existing course. Mr. Smith argued that the covenants are not clear and, in any event, not an issue before the Board which determines issues in connection with the zoning ordinance and not private landowner agreements. He said that the County, which includes the Board of Appeals, is specifically precluded by its Code from enforcing private covenants. He referred to the Maryland Court of Appeals decision of *Perry v. County Board of Appeals for Montgomery County*, 211 Md. 294, 127 A.2d 507 (1956) as controlling.

The next person to appear was Stephanie Hambleton, Esquire, representing Margaret Patrick, 9450 Canvasback Way, St. Michaels. She confirmed that her client's property is in the Martingham subdivision. She said that her client is opposed to the proposal because the access road will have to be paid for and maintained by the Martingham residents through the homeowners association. She argued that the proposal is contrary to the Comprehensive Plan because it will convert agricultural land to a commercial use. She also said that the proposed use will result in a loss of privacy to her client because of the access road.

She then called Margaret Patrick as a witness. Ms. Patrick confirmed that she and her husband purchased their property with privacy in mind. She said that the golf course mowers will likely start

before the suggested seven a.m. starting time causing a lot of noise in the area of her home. She described Canvasback Drive as a quiet road with only five residents. She said that the access road will upset the quiet nature of that area.

Ms. Patrick also suggested that the increase in pesticide use at the proposed range will adversely impact the environment. She said that the golf course personnel who apply pesticides wear protective suits during the application process.

Ms. Hambleton then asked questions of Mr. Mlynarski. He said that the normal grass cutting of the driving range would not be early in the morning. The former range was mowed typically on Thursdays beginning about 11:00 a.m. He confirmed that the access drive does not have to be 14 feet wide to accommodate the golf carts. He could not comment on road width required by the mowers.

In response to a question from a Board member Mr. Stagg confirmed that employees who apply pesticides have to be licensed and are required to wear protective clothing. He also explained that the access drive could be as small as the Department of Public Works will allow. It does not have to be more than twelve feet.

Mr. Smith said that the Applicant has no hidden agenda to further develop the range property. He also confirmed that the access drive will not be conveyed to the Martingham community and the Martingham community will not be responsible for its maintenance.

The next witness was Vernon Cooper, 9723 Martingham Circle, St. Michaels. He said that golf courses are required to have only one licensed pesticide person who in turn supervises the staff. He said he had lived next door to the former driving range and it is noisy. He also said that the ball picker machine is noisy. In response to a question from Mr. Smith he confirmed that he enjoyed living near the driving range.

The next witness was Catherine A. Cooper, 9733 Martingham Circle, St. Michaels. She said that she lives near the site of the former range and enjoyed it.

Mr. Smith and Mr. Thompson then summarized their respective positions.

A Board member then moved that the Board meet in an executive session with counsel to discuss legal issues raised by the parties. The Board voted 5 to 0 to approve that motion and the Board then closed the meeting to meet with counsel. Following that executive session the Board reconvened in open session and discussed with the parties the possibility of continuing the meeting until August 21, 2017 at 7:00 p.m. to allow the Board members time to individually review the information and issues presented at the hearing. The parties were invited to submit written briefs regarding certain legal issues prior to the rescheduled meeting but no additional evidence would be permitted. The parties agreed and the meeting was continued as suggested.

Mr. Smith submitted a memorandum on August 15, 2017 and Mr. Thompson submitted a memorandum on August 16, 2017. Both are included in the Board's record.

On August 21, 2017 the Board reopened the meeting. A member then moved that the Board meet in executive session with counsel to further discuss legal issues raised by the parties in light of the memoranda submitted by the parties. The Board voted 5 to 0 to approve the motion and the Board closed the meeting to meet with counsel.

Following the closed session the Board met in open session and considered the application. The Chairman announced that the Board determines that it does not have the authority to consider the effects of or to enforce any private restrictive covenants that may impact the subject property. However, the Board does have to consider all of the special exception and variance requirements in connection with the

application and suggested that the Board go through and consider each standard starting with the special exception requirements.

Mr. Smith read into the record the Applicant's written response to each applicable special exception requirement. Andrew Adkins, Esquire, 111 East Dover Street, Easton, standing in for Mr. Thompson who was not available, objected and stated that the Board should not consider any additional evidence. The Chairman overruled as the written responses were already a part of the record and any further statements of counsel would be limited to legal argument only.

In connection with the evidence of consistency with the Comprehensive Plan Mr. Adelman commented that the subject property has not previously been used in any commercial capacity and it is not truly a redevelopment as encouraged by the Plan.

Mr. Adelman also pointed out that neighboring property owners testified at the hearing that the proposed use would constitute a nuisance. He said that the property had previously served as a buffer between the Martingham subdivision and the Swan Point subdivision. The former is a combined golf course and residential subdivision and the latter is solely a residential subdivision. He suggested that the proposed use is incompatible with the remaining property in the Swan Point subdivision.

The Board then considered the request for a special exception. Mr. Cavanaugh stated that he thought the Applicant had met all of the requirements for the requested special exception. He commented that the Board should not consider any private land restrictions. Mr. Sewell agreed. Mr. Gannon said that his only concern had been whether or not the proposal would constitute a nuisance but he was convinced by the evidence that it would not. Mr. Adelman said that he had no additional comments other than those he raised earlier in the hearing.

Thereafter Mr. Sewell moved that the Board grant the proposed special exception. Mr. Cavanaugh seconded the motion. The vote of the Board was 4 to 1 in favor of the motion to grant the special exception. Mr. Adelman voted against the motion.

The Board then considered the variance requests. Mr. Cavanaugh moved that the Board approve both variance requests. Mr. Sewell seconded the motion. The Board then voted 5 to 0 to approve both variance requests.

In connection with the special exception and variance requests the Board makes the following findings of fact and law:

1. All legal requirements pertaining to a public meeting were met.
2. The proposed use is consistent with the purposes and intent of the Talbot County Comprehensive Plan and complies with the standards of the land use district in which it is located. The Comprehensive Plan encourages the redevelopment and reinvestment in existing commercial centers. The neighboring property has been used as a large golf course and residential community for many years. The land suggested for use as a driving range was used by the residents of that community as an effluent dispersal area until recently when public sewer system was expanded to the community.
3. The proposed use will comply with the standards of the zoning district in which it is located, except as those standards may have been modified by the granting of a variance. The proposed use is permitted by the Code as a special exception use.
4. The scale, bulk and general appearance of the use will be such that the use will be compatible with adjacent land uses and with existing and potential uses in its general area, and will not be detrimental to the economic value of neighboring property. The

proposed use is compatible with the nearby residential, commercial, maritime, and agricultural properties. The property is of sufficient size to accommodate the proposed use and to provide effective visual and sound screening.

5. The use will not constitute a nuisance to other properties and will not have significant adverse impacts on the surrounding area due to trash, odors, noise, glare, vibration, air and water pollution, and other health and safety factors or environmental disturbances. The Applicant will not create any offensive noise or odor. Activities on the property will be during the day. The Applicant will not install lighting for evening use and the site's existing vegetation will provide effective screening between the activities on the site and nearby residential properties. The Applicant's site improvements will improve stormwater drainage.
6. The use will not have significant adverse impacts on public facilities or services including roads, schools, water and sewer facilities, police and fire protection, or other public facilities or services. Any traffic associated with the use will be minimal and can be accommodated by the existing public roads and driveway. Existing police and fire protection are sufficient for any foreseeable emergency needs created by the use.
7. The use will not have a significant adverse effect upon marine, pedestrian or vehicular traffic.
8. The use will not produce traffic volumes which would exceed the capacity of public or private roads in the area or elsewhere in the County, based on the road classifications established in Chapter 134, the Talbot County Roads and Bridges Ordinance, and other

applicable standards for road capacity. Traffic associated with the proposed use will be light and periodic.

9. Any vehicle access to proposed off-street parking areas and drive-in facilities are designed to minimize conflicts between vehicular, bicycle and pedestrian traffic and to minimize impacts on adjacent properties and on public or private roads. Other than a golf cart parking area there are no vehicle parking areas or drive in facilities proposed for the site. Access to the range will be by golf carts and golf cart pathway. Maintenance vehicles will use a separate and screened access pathway. The proposal will not result in a significant increase in commercial and truck traffic using residential streets and will not create a hazard to developed residential areas. There should be no commercial truck traffic associated with the range. All access to the property will be by way of privately maintained pathways.
10. The proposed use will not adversely affect wildlife with respect to the site's vegetation, water resources, or its resources for supplying food, water, cover, habitat, nesting areas, or other needs of wildlife. The site is currently an undeveloped field. The Applicant will regrade the field to create a driving range. When regraded and replanted it will remain an open field covered in grasses compatible with a golf range. To the extent there is any wildlife on the property it will not be impacted by the proposed use.
11. The proposed use will not adversely affect any adjacent existing agricultural uses.
12. Special conditions or circumstances exist that are peculiar to the land or structure such that a literal enforcement of the provisions of the ordinance result in unwarranted

hardship to the property owner. The variance will allow the Applicant to modify a very small portion of the property to allow access and promote proper drainage.

13. A literal interpretation of the ordinance will deprive the property owner of rights commonly enjoyed by other property owners in the same zone. The Applicant should be permitted reasonable access to the property and to provide for proper drainage.
14. The granting of the variance will not confer upon the property owner any special privilege that would be denied by the ordinance to other owners of lands or structures within the same zoning district. Given similar circumstances other property owners would likely have the same privilege.
15. The variance request is not based on conditions or circumstances which are the result of actions by the Applicant, including the commencement of development activity before an application for variance has been filed, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.
16. The granting of the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat, and the granting of the variance will be in harmony with the general spirit and intent of the state Critical Area Law and the Critical Area Program. The requested variances will have little, if any, adverse environmental impact.
17. The variance does not exceed the minimum adjustment necessary to relieve the unwarranted hardship.

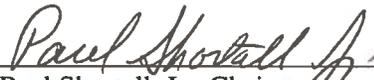
HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS, BY THE
TALBOT COUNTY BOARD OF APPEALS,

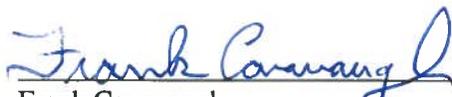
RESOLVED, that the Applicant, **RDC HARBOURTOWNE, LLC and RDC MELANIE DRIVE, LLC** (Appeal No. 17-1658) is **GRANTED** the requested special exception and variances, consistent with the evidence submitted to the Board of Appeals and subject to the following conditions. (The conditions set forth herein apply to the Applicant and to any of its successors or assigns.)

1. The Applicant shall obtain site plan approval prior to the issuance of any building permits.
2. The Applicant shall provide mitigation for any impacts to the buffer and vegetation at a ratio of 1 to 1 for any tree removal and 3 to 1 for any disturbance to the expanded buffer.

GIVEN OVER OUR HANDS, this 17TH day of NOVEMBER, 2017.

TALBOT COUNTY BOARD OF APPEALS

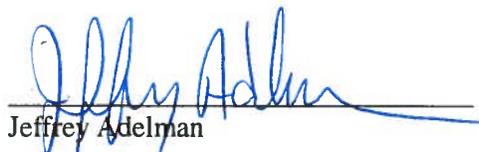

Paul Shortall, Jr., Chairman


Frank Cavanaugh


John Sewell


Greg Gannon

Mr. Adelman voted against the requested special exception. He found that the Applicant failed to meet the requirement that the application be consistent with intent and purposes of the Talbot County Comprehensive Plan. He further found that the Applicant provided insufficient evidence that the proposed use will not constitute a nuisance to other properties.


Jeffrey Adelman