



## Board of Appeals of Baltimore County

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September 17, 2015

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RE: In the Matter of: DMS Development – Legal Owner  
Case No: CBA-15-009

Dear Counsel:

Enclosed please find a copy of the Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all **Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington Han".

Krysundra "Sunny" Cannington  
Administrator

KLC/tam  
Enclosure  
Multiple Original Cover Letters

c: See Distribution List

- c: DMS Development
- John Canoles/Eco-Science Professionals, Inc.
- Matthew Bishop/Morris & Ritchie Associates
- The GTCCA
- Frederick Hofferbert, Jr./The American Legion Towson Post #22, Inc.
- Paul Moran/The American Legion Towson Post #22, Inc.
- Office of People's Counsel
- Arnold Jablon, Director/PAI
- Barry F. Williams, Director/Department of Recreation and Parks
- Lawrence M. Stahl, Managing Administrative Law Judge
- Nancy C. West, Assistant County Attorney
- Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF  
DMS DEVELOPMENT  
(aka 101 York Road)  
101 York Road  
Towson, MD 21204

RE: Local Open Space Waiver Request

\* BEFORE THE  
\* BOARD OF APPEALS  
\* OF  
\* BALTIMORE COUNTY  
\* Case No.: CBA-15-009

\* \* \* \* \*

### OPINION

This case comes before the Baltimore County Board of Appeals on appeal from a decision issued by the Department of Permits, Approvals and Inspections (“PAI”) approving a Local Open Space Waiver Request regarding the property currently known as 101 York Road.

The Board held a *de novo* hearing on this matter on April 23, 2015. Brian J. Murphy, Esquire represented Appellant, The Greater Towson Council of Community Associations (“GTCCA”). G. Scott Barhight, Esquire and Jennifer R. Busse, Esquire of Whiteford, Taylor & Preston, LLP represented Appellee DMS Development (“DMS”). J. Carroll Holzer, Esquire, represented The American Legion Towson Post #22 (“the Legion”). Following this hearing, counsel for GTCCA and DMS submitted memoranda in lieu of closing arguments. The Board publicly deliberated the appeal on June 2, 2015.

#### Facts

DMS is attempting to redevelop a property in Towson currently identified as 101 York Road. DMS seeks to construct an eleven story mixed-use Planned Unit Development (“PUD”) including retail/restaurant space, 248 residential units (611 beds) and a garage. The property, zoned BM, RAE-2, consists of approximately two acres. (Appellee Ex. 3).

DMS sought a waiver of the Local Open Space requirements otherwise applicable to this development. The County approved this waiver via a January 9, 2015 Memorandum signed by Arnold Jablon, Director of PAI and Deputy Administrative Officer for Baltimore County. (Appellee Ex. 2). The stated factors influencing the waiver decision were the assertions that 1) the project is located in a RAE zone or CT district, 2) the project is dormitories for the housing of not less than 50 students attending an accredited higher education institution, 3) the Department of Recreation and Parks determined there was no suitable land to meet the open space requirements and 4) there is no Master Plan and/or other County plan conflict. (*Id.*). Referencing Resolution 63-00, the January 9 Memorandum indicated further that the fee for such a waiver was \$0 (zero dollars). (*Id.*)<sup>1</sup>. The GTCCA filed a timely appeal of the decision granting the waiver and refusing to assess a fee in lieu of the open space. The Board directed the appeal to proceed *de novo*.<sup>2</sup>

### Evidence

As an initial matter, Appellee DMS filed a Motion to Dismiss Fee Portion of the Appeal. DMS argued that Baltimore County Code (“BCC”) §32-6-110 precludes an appeal of any fee established under BCC §32-6-108. Section 32-6-110 states “[t]he fees that are established under § 32-6-108 . . . and the fees that are paid by an applicant under this title are not appealable.” The Board heard argument on this issue and agreed that §32-6-110 precludes an appeal of the fees assessed in this matter. The Board therefore granted the Motion to Dismiss the fee portion of GTCCA’s appeal. The remaining issue concerned the decision to grant the waiver itself. The only

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<sup>1</sup> County Council Resolution 63-00, dated August 7, 2000 amends the schedule for fees to be paid in lieu of open space and states that for “dormitories for housing of not less than 50 student attending an accredited Higher education institution”, the “unit value/square foot” is \$ 0.

<sup>2</sup> The proceedings herein are somewhat muddled by a parallel PUD proceeding before Administrative Law Judge Beverungen in which the ALJ also touched upon some of the issues discussed herein. (PUD Case 09-0843). It should be noted GTCCA’s appeal was filed before the ALJ’s decision issued and, as stated above, the Board’s hearing was *de novo*, based solely upon the agency’s decision.

witness as to this issue was Arnold Jablon in his capacity as Baltimore County's Deputy Administrative Officer for Agency Accountability, and as the Director of PAI. (Transcript of April 23, 2015 hearing ("T." at 26).

As Deputy Administrative Officer Mr. Jablon supervises various county departments including PAI and Recreation and Parks ("R&P"). (Appellee's Ex. 1). According to Mr. Jablon, PAI is the gatekeeper for all development projects. Development plans are reviewed by various county agencies under the aegis of PAI and various sections of PAI examine substantive questions under review for such departments as Public Works or R&P (T. at 32-33). Jean Tansey is the PAI employee who determines whether submitted plans comply with R&P requirements. Ms. Tansey did not testify, but supervisor Jablon testified as to his confidence in Ms. Tansey's conclusions based on her years of experience reviewing requests for open space waivers, her familiarity with the requirements and process, and her diligence in reviewing plans. Mr. Jablon also testified as to the typical process Ms. Tansey employs in reviewing such plans and assessing compliance with BCC §32-6-108. (T. at 33-34, 39-40). According to Mr. Jablon, Ms. Tansey determines whether the subject property can satisfy the open space requirements on site, and if not, whether waiver requirements have been met. (T. at 35-36). In this case, Ms. Tansey checked the boxes indicating, *inter alia*, the project involved dormitories for the housing of students but Mr. Jablon does not know what particular information she considered in making that assessment. (T. at 49-51). Mr. Jablon did testify however that he believes Ms. Tansey would not have simply accepted the developer's labeling of this project as "dormitories" but would have considered the comments from other reviewing agencies. In this regard, he testified that the Zoning Office independently considered the project dormitories. (T. at 59-61).<sup>3</sup> Mr. Jablon stated Ms. Tansey bases the fee

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<sup>3</sup> The Development Plan Conference report identifies the project as consisting of "611 dormitory beds" and a "proposed dormitory". (Appellee's Ex. 3). The PDM-Zoning Review also proposed a notation that

recommendation on applicable county resolutions. (T. at 49-51). Upon completion of her review, Ms. Tansey sends her recommendations to Mr. Jablon. He does not review the computation of whether there is sufficient land for open space but does look at the recommended fee. (T. at 37). In the instant case, Mr. Jablon accepted Ms. Tansey's conclusions regarding compliance with waiver requirements, and following his limited review as to the fee, he directed Ms. Tansey to sign his name approving the request. <sup>4</sup> (Id. at 38, 43).

### Decision

Although it has appealed Mr. Jablon's decision approving the open space waiver request, GTCCA argues first that this decision is not in fact ripe for appeal. Citing Meadows of Greenspring Homeowners Ass'n, Inc. v. Foxleigh Enterprises, Inc., 133 Md. App. 510 (2000) GTCCA contends that Mr. Jablon's approval in the authorizing memorandum does not rise to the level of a final, appealable action. However, apart from Mr. Jablon's involvement, the situation here is not the same as that in Foxleigh. In Foxleigh, Mr. Jablon's letter was not an "operative event" that determined whether a proposed plan would be granted a license; rather, as the court noted, his letter was more informational in nature, notifying the developer that the proposal must undergo further review by another entity. Id. at 516. In the situation before this Board, however, Mr. Jablon's decision was akin to a final, administrative event. No further action was required before the open space waiver could be granted.

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"the dormitory rooms" shall be occupied as temporary housing by matriculating Towson University Students only." (Id.).

<sup>4</sup> Although agreeing with Ms. Tansey regarding the fee determination of \$0 based on the applicable council Resolution, Mr. Jablon separately assessed a \$60,000 "voluntary contribution" to be used in Towson. (Appellee Ex. 2, T. at 43).

GTCCA's argument regarding Mr. Jablon's authority to approve the waiver request also falls short. The governing statute states as follows:

1) The Department of Recreation and Parks may allow an applicant to pay a fee to the local open space revenue account instead of dedicating the first 650 square feet as required in subsection (c)(2) of this section if:

(i) The development is:

1. Located in a CT or CCC district or a RAE zone;
2. An elderly housing facility, as defined in the Baltimore County Zoning Regulations; or
3. Dormitories for the housing of not less than 50 students attending an accredited higher education institution; and

(ii) The Department of Recreation and Parks determines that there is no suitable land to meet the open space requirements.

BCC § 32-6-108(e). See also BCC § 32-6-108(g). Mr. Jablon is not the Director of R&P. However, that department is under his auspices as Deputy Administrative Officer. Further, he is also the Director of PAI, which is responsible for the review of plans and zoning and acts as gatekeeper for plan approvals and reviews. Testimony indicates PAI and R&P have long adhered to this method of administering the governing statute and that PAI employee Jean Tansey routinely reviews plans for compliance with R&P requirements. GTCCA did not offer testimony that the procedure employed in this case somehow differed from other, similar cases, nor did GTCCA offer testimony from an R&P employee or director contradicting Mr. Jablon's assertions as to the accepted review process for open space waiver requests.

GTCCA's argument that the factors set forth in 32-6-108(e) have not been met also fails. The property is zoned RAE-2 and contrary to GTCCA's argument that there is only a sliver of RAE zoned land here, there is no specified amount of land that must be zoned RAE in 32-6-108(e)(1)(i)1. An appropriate agency has determined there is no suitable land to meet the open space requirements. The Board gives great weight to such determinations and again, GTCCA has not offered any testimony to the contrary.

Because the Board has found that the Property has RAE zoning under 32-6-108(e)(1)(i)1, the Board need not make any findings with regard to whether this PUD involves dormitories under Subsection (e)(1)(i)3. Only one (1) of the alternative requirements in Subsection (e)(1)(i) need be met, in addition to the lack of suitable land to meet the open space requirements in Subsection (e)(1)(ii).

Based on the above facts, testimony, and law in this matter, the Board unanimously agreed to GRANT the Local Open Space Waiver Request.

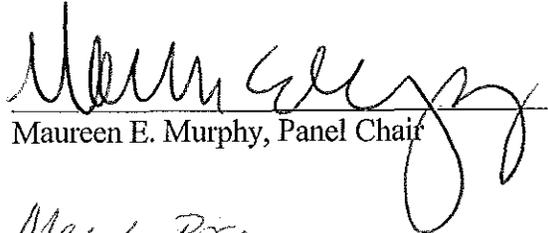
**ORDER**

**THEREFORE, FOR THE REASONS STATED ABOVE, IT IS THIS** 17<sup>th</sup> day of September, 2015 by the Board of Appeals of Baltimore County

**ORDERED** that the Local Open Space Waiver Request of Appellee DMS Development, LLC. be and is hereby **GRANTED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the Maryland Rules of Procedure.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
Maureen E. Murphy, Panel Chair

  
Meryl W. Rosen

David L. Thurston was Panel Chairman at the hearing on April 23, 2015 and public deliberation June 2, 2015. He resigned from the Board on June 15, 2015.