



Board of Appeals of Baltimore County

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October 5, 2015

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RE: *In the Matter of: DMS Development, LLC – Petitioner/Developer
(101 York PUD)*

Case No.: CBA-15-014

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".

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Multiple Original Cover Letters

c: See Attached Distribution List

DMS Development, LLC – Petitioner/Developer
(101 York PUD)
Distribution List
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Michael Ertel/DMS Development, LLC
David Shlachman/DMS Development, LLC
Wendy Crites/DMS Development, LLC
The American Legion Towson Post #22, Inc.
Frederick Hofferbert, Jr.
Paul Moran
Michael Parr
Kraig Dean
James Rebbert
John Adair
The Greater Towson Council of Community Associations
William Monk/Morris & Ritchie Associates
Matthew Bishop/Morris & Ritchie Associates
Michael Coughlin/Morris & Ritchie Associates
William Chaney/Jiffy Lube
Kenneth K. Sorteberg, Esquire
Kenneth Schmid
John Canoles/Eco-Science Professionals, Inc.
Paul Hartman
Gregory Bauer
Jim Cosgrove
Mary Carol Bruff
Tracey Marcantoni
Helen Keplinger
Joanne Simpson
G.T. Klepinger
Cornelia Vanderlain
Ned Renner
Maria Klusewitz
The Burkleigh Square Community Association, Inc.
Jill Sullivan/Loyola University
Tracy J. Layfield/EA Engineering, Science & Technology, Inc.
Ed Kilcullen
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Vincent J. Gardina, Director/DEPS
David Lykens, Deputy Director/DEPS
Arnold Jablon, Director/PAI
Jan Cook, Acting Development Manager/PAI
Dennis Kennedy, Development Plans Review/PAI
Lawrence M. Stahl, Managing Administrative Law Judge
John E. Beverungen, Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Lloyd T. Moxley/Department of Planning
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF DMS DEVELOPMENT, LLC
(aka 101 York Road PUD)
101 York Road
Towson, Maryland 21204

9th Election District
5th Councilmanic District

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO.: CBA-15-014

* * * * *

OPINION

This case comes to the Board on appeal of the Administrative Law Judge’s Order on Developer’s Motion for Reconsideration dated May 12, 2015 approving, with conditions, a Planned Unit Development known as the ‘101 York PUD.’

A public hearing was held before this Board on July 16, 2015. Developer/Applicant, DMS Development, LLC was represented by G. Scott Barhight, Esq. of Whiteford, Taylor and Preston, L.L.P (“DMS”). Protestant, The American Legion, Towson Post #22, Inc. (“American Legion”), was represented by J. Carroll Holzer, Esquire. Protestant, Greater Towson Council of Community Associations (“GTCCA”) was represented by Brian J. Murphy, Esquire. Oral arguments were heard, and briefs were submitted by all parties by August 17, 2015. A public deliberation was held by this Board on September 16, 2015.

PROCEDURAL HISTORY AND BACKGROUND

The property at issue is located at 101 York Road, Towson, MD (the “Property”). It is bounded on the east by York Road; to the north by Towson Run (a stream which runs between the Property and The American Legion property); to the west by West Burke Avenue; and to the south by the Marriott Hotel. The Property is split zoned BM (business major) and RAE-2 (residential

apartment elevator) with a T6 overlay (transect overlay). The site is known as the “Golden Triangle” and is referred to in Master Plan 2020 (Map 23, p. 81).

DMS proposed a mixed use, general development PUD consisting of a tower building of 11 stories overtop of a 2 story parking garage. The tower building would house 248 units to accommodate 611 students at Towson University. Also proposed as part of the PUD is 9,300 square feet of retail/restaurant space as well as 495 off-street parking spaces. Access to the PUD would consist of a single entrance/exit onto York Road. A redlined Plan prepared by engineers, Morris and Ritchie Associates, Inc., more particularly describes the PUD. (ALJ Dev. Ex. 1A-E).

The Baltimore County Council passed a Resolution 40-14 such that the PUD became eligible for review. Community Input meetings were held, and a Development Plan Conference was held on December 10, 2014. Subsequently, hearings before Administrative Law Judge Beverungen were held on January 12, 13, 14, 15, and 23, 2015.

After 5 days of hearings, the ALJ issued an Opinion on February 26, 2015, denying the 101 York Road PUD. The denial was based on the failure of DMS to obtain approval of a Storm Water Management Plan (“SWM Plan”) from the Department of Environmental Protection and Sustainability (“DEPS”) as required by Baltimore County Code (“B.C.C.”) Sec. 33-4-114 (b). The ALJ indicated that upon DEPS’ approval, the PUD would be approved subject to 4 conditions enunciated in that Opinion.

After securing approval of the SWM Plan by DEPS, DMS subsequently filed a Motion for Reconsideration with the ALJ. A hearing was held on May 8, 2015, and an Order on Developer’s Motion for Reconsideration was issued granting the 101 York Road PUD (the “Reconsideration Order”).

In addition to the approval of the PUD, the ALJ denied DMS' request to change the February 26, 2015 Opinion and Order in regard to the Local Open Space Waiver fee. The Reconsideration Order also granted the Forest Conservation Variance in regard to the removal of a sycamore tree as that issue was inadvertently not addressed in the February 26, 2015 Opinion and Order.

Also addressed by the ALJ in the Reconsideration Order was a finding as to the Modification of Standards as required by BCC §32-4-245(a)(3) and a finding as to the Community Benefit under BCC §32-4-245(b)(3)(iii). The ALJ denied DMS' request to change Condition No. 3 which stated that residency of the units be restricted to Towson University students. Finally, the ALJ agreed to clarify Condition No. 2 and incorporate the definitions of "tavern" and "night club" as those terms are defined in §BCZR 101.1.

STANDARD OF REVIEW

The law governing the Board's review of a PUD is found within Baltimore County Code ("BCC"), §32-4-245(d) which requires that any appeal of a PUD to this Board to be reviewed in accordance with BCC §32-4-281(e) which reads as follows:

§ 32-4-281. APPEAL TO THE BOARD OF APPEALS.

* * * *

(e) *Actions by Board of Appeals.*

- (1) In a proceeding under this section, the Board of Appeals may:
 - (i) Remand the case to the Hearing Officer;
 - (ii) Affirm the decision of the Hearing Officer; or
 - (iii) Reverse or modify the decision of the Hearing Officer if the decision:

1. Exceeds the statutory authority or jurisdiction of the Hearing Officer;
2. Results from an unlawful procedure;
3. Is affected by any other error of law;
4. Is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
5. Is arbitrary or capricious.

(2) Notwithstanding any provisions to the contrary, if the Hearing Officer fails to comply with the requirements of § 32-4-229(a) of this subtitle and an appeal is filed under § 32-4-229(a) of this subtitle, the Board of Appeals may impose original conditions as are otherwise set out in § 32-4-229(c) and (d) of this subtitle.

DECISION

In regard to the merits of the PUD, this Board is charged with reviewing the evidence presented to the ALJ and deciding whether each of the 5 factors set forth in BCC, §32-4-245(c) has been met. The ALJ must independently find evidence on each factor. BCC §32-4-245(c)(1)

- (5) states:

(c) *Basis for approval.* The Hearing Officer may approve a proposed PUD development plan only upon finding that:

- (1) The proposed development meets the intent, purpose, conditions, and standards of this section;
- (2) The proposed development will conform with Section 502.1.A, B, C, D, E and F of the Baltimore County Zoning Regulations and will constitute a good design, use, and layout of the proposed site;
- (3) There is a reasonable expectation that the proposed development, including development schedules contained in the PUD development plan, will be developed to the full extent of the plan;
- (4) Subject to the provisions of §32-4-242(c)(2), the development is in compliance with Section 430 of the Baltimore County Zoning Regulations; and

(5) The PUD development plan is in conformance with the goals, objectives, and recommendations of one or more of the following: the Master Plan, area plans, or the Department of Planning.

In our review of the record concerning these 5 factors, we find as follows:

§32-4-245(c)(1). Proposed development meets the intent, purpose, conditions and standards of this section.

In regard to Subsection (c)(1), the pertinent 'section' identified therein is BCC §32-4-245.

Subsection (a) of 245 directs that the ALJ shall conduct a PUD hearing the same way the ALJ conducts a hearing on a development plan as required by BCC §32-4-227 and §32-4-228. In Subsection (b), the ALJ reviews the PUD for compliance with both zoning and development regulations and may impose conditions if approved. Additionally, consistent with our prior PUD decision in *Galloway Creek, L.L.C., Case No. CBA-08-136*, this Board unanimously interprets Subsection (c)(1) as a broad, catch-all provision which generally requires conformance with remaining Subsections of 245(c).

In reviewing the record and evidence before the ALJ, all of the appropriate County agencies appeared and testified. Each of the County representatives indicated that the redlined Development Plan satisfied all of Baltimore County rules and regulations and each recommended approval of the plan. Notwithstanding the recommendation from DEPS, the ALJ originally denied the PUD for failure of DMS to obtain final SWM Plan approval as required by BCC 32-4-114(b).

That Section expressly states:

(b) Approval for planned unit developments. Notwithstanding any other provision of law, a planned unit development shall receive development stormwater management plan approval before final approval under §32-4-245 of the code.

As we see it, the ALJ's denial, in the face of DEPS' recommendation, is exactly the type of independent finding that the County Council envisioned when it designed §32-4-245(c)(1),

which Subsection, as we mentioned, necessarily includes §32-4-245(b)(1) (compliance with the development regulations).

In the Reconsideration Order, the ALJ appropriately found, after conducting a hearing on the Motion for Reconsideration on May 8, 2015, that the SWM Plan had received final approval. (DMS' Reconsider Hearing, Exs. 1-10). DMS called to testify on their behalf, at the Motion for Reconsideration hearing, Michael Coughlin, a licensed professional engineer who explained the SWM chronology from the concept plan to the final approval. *Id.*

While the Protestants called James Patton, PE to testify on their behalf at the Motion for Reconsideration hearing, his testimony centered on various alleged defects in with the SWM Plan. We find the final SWM Plan approval was the sole basis for the original denial by the ALJ and that hurdle was lifted when the approval was finalized.

In addition, our reasoning pertaining to the Subsections (c)(2) - (5) below are incorporated here as additional reasons supporting our conclusion that competent, material and substantial evidence was found in the record.

(2) - The proposed development will conform with Section 502.1 A, B, C, D, E and F of the B.C.Z.R. and will constitute a good design, use and layout of the proposed site.

Subsection (2) of BCC §32-4-245(c) has 2 parts. In the first part, the ALJ must review the PUD for conformity with 6 of the 9 special exception factors listed in Baltimore County Zoning Regulations §502.1 ("BCZR") (the "Special Exception" factors). In the second part, the ALJ must make specific findings about whether the proposal constituted a good design, use and layout.

The Court of Appeals, in *People's Counsel for Baltimore County v. Loyola*, 406 Md. 54, 62 (2008), affirming the holding in *Schultz v. Pritts*, 291 Md. 1, 22-23 (1981), analyzed each of the §502.1 factors in a special exception case and stated:

We now hold that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

The Court in *Loyola* explained that the adverse effects are inherent in all conditional or special exception uses.

Applying the holdings in *Loyola* and *Schultz* here, this Board must determine whether there are any facts and circumstances that show that the proposed PUD, at this Property, would have any adverse effects above and beyond those inherently associated with this type of PUD, irrespective of its location within the zone.

Loyola and *Schultz* inform us that, unless we find that there are specific facts or circumstances in this case which demonstrate that the adverse effects inherent with this PUD, at this location, are more adverse than the inherent effects generally with this type of PUD, we must find that the special exception factors set forth in §32-4-245(c)(2) have been met.

A special exception is a valid zoning mechanism that delegates to an administrative board a limited authority to permit enumerated uses which the legislature has determined can, prima facie, properly be allowed in a specified use district, absent any fact or circumstance in a particular case which would change its presumptive finding; and that the duties given the board are to judge whether the neighboring properties would be adversely affected, and whether the use in the particular case is in harmony with the general purpose and intent of the zoning plan. *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 262 A.2d 499 (1970); *Oursler v. Board of Zoning Appeals*, 204 Md. 397, 104 A.2d 568 (1954); *Montgomery County v. Merlands Club*, 202 Md. 279, 96 A.2d 261 (1953).

§502.1.A – Adverse Impact on Health, Safety or General Welfare of Locality.

The ALJ heard testimony from William Monk, a land planner with Morris Ritchie & Associates, who testified that the PUD would not have a greater detrimental impact here than it would elsewhere in the zone. There was no evidence presented by the Protestants that this PUD would have greater detrimental impact here than at other locations. It is not disputed that this PUD, consisting of student housing and retail/restaurant uses, will inherently bring more activity to the Property than currently exists. Indeed, the ALJ, in weighing the evidence before him, accepted the testimony of Mr. Monk and the Baltimore County agencies who recommended approval of the project.

In contrast, the Protestants through lay witnesses, objected to the PUD in general, some dissatisfied that the County Council deemed it eligible for review. However, they did not rebut the testimony of Mr. Monk or the County witnesses, as required under *Loyola* and *Shultz, supra*.

Said another way, the Protestants' collective complaints in regard to how the PUD would adversely affect their health, safety and welfare, were not unique to this Property but were universal to any student housing/mixed use project. In *Anderson v. Sawyer*, 23 Md. App. 612 (1974), the Court of Special Appeals described these types of conclusions as "amount[ing] to nothing more than a generalized fear unsupported by facts or reasons. It does not constitute probative evidence on the question of adverse effect." *Id.* at 622.

§502.1.B – Congestion in Roads.

Kenneth Schmid, PE, a traffic engineer with Traffic Concepts, Inc., testified on behalf of the Petitioner and submitted Traffic Impact Studies to State Highway Administration ("SHA") for the proposed use (the "Traffic Studies"). (Pet. Ex. 14 - 18). As of the date of the hearings, Mr. Schmid stated that he was working on the comments from SHA.

Mr. Schmid said that the Property is not in a deficient traffic area. The evening traffic in the area is at worst a C/D traffic rating. Mr. Schmid opined that the right in/right out turning access point onto York Road eliminates traffic problems. Making a left turn out of the Property would potentially cause traffic congestion and collisions. Mr. Schmid also opined, pursuant to the holdings in *Loyola* and *Schultz*, that while every development generates traffic, this use is a low intensity use and generates the least amount of traffic because students will walk from the PUD to Towson University via a walkway. He reasoned that a college student would not pay to park a car at the PUD and also pay to park at Towson University given the walkway. Additionally, he said that the parking at the PUD might be closer to the classroom buildings than are the University parking lots. The proposed retail space will have specialty stores, not grocery stores or big box stores which generate more traffic.

In short, while this use has some traffic inherent in its use, the design of the PUD prevents congestion in the roads. Other than lay witness testimony from the Protestants that the PUD would increase traffic generally, there was no testimony from a traffic expert that the traffic generated at this location would be any worse than in any other part of the zone. Under *Anderson, supra*, more is required from the Protestants to rebut this presumption. Accordingly, based on the weight of the evidence and our review of the record before the ALJ, we find that the decision of the ALJ in regard to §502.1B was supported by the evidence.

§502.1.C – Potential Hazard from Fire, Panic or Other Danger.

In our review of the record, there was no probative evidence that the proposed PUD would potentially cause fire, panic or other danger at this Property, any more than it would somewhere else in the zone. The evidence before the ALJ was that the proposed building and garage are employing state-of-art, high quality materials. The Protestants did not provide any probative

evidence on this issue. Consequently, the ALJ's finding that there was no potential for any hazard as a result of the proposed project was based on the evidence presented.

§502.1.D – Overcrowding of Land and Undue Concentration of Population.

Any residential/mixed retail development will increase the population on a property which had little to none. The ALJ applying *Loyola* and *Schultz* did not find that the proposed PUD, at this location, would cause an overcrowding of the land or undue concentration of population above and beyond the population inherently generated by a residential/mixed retail use. The Protestants did not provide expert testimony that DMS failed to satisfy Subsection D. The applicable legal standard in *Loyola* and *Schultz* demands more from the Protestants by way of evidence to rebut the presumption.

As explained by Lloyd Moxley of the Department of Planning, the T6 overlay has the highest density and is designed for an urban area where it is expected that the concentration of population will be more than in a rural setting. Based on our review of the record, the ALJ was correct in his finding as to §502.1D.

§502.1.E – Interference with schools, parks, water, sewerage, transportation or other public requirements, conveniences and improvements.

Mr. Moxley testified that there was no school impact analysis performed here by the Department of Planning because this use does not affect school age children. Thus, there is no impact on area schools. Likewise, there was no evidence of any impact on parks in this urban setting. Mr. Schmid opined that there is no adverse impact on transportation because the resident students would not be taking a public transportation to the University.

With regard to the potential impact on water, there is a SWM Plan which was prepared by William Monk and, as previously indicated herein, has been approved by DEPS. Currently, the

Property has no SWM facility. Testifying for DMS on this issue was John Canoles, an environmental engineer with Eco-Science Professionals. Mr. Canoles explained how storm water backs up onto the Property due to various sizes of pipes. The SWM Plan would improve that condition such that storm water would convey into a plunge pool at the rear of the Property.

As for sewage and transportation, the Property is located inside the URDL, where the sewage system and other public improvements are available and sufficient for the proposed use. There was no evidence that there would be any adverse impact on any public improvements. Thus, the ALJ's decision that §502.1.E was met, was supported by the evidence in the record.

§502.1.F – Interference with Light and Air.

On this issue, James Patton, PE did testify for the Protestants. He opined that the height tent regulations in BCZR §231.1.D have not been met which will obstruct adequate light and air for adjoining properties. He also said that DMS failed to seek a modification from the tent height standards. William Chaney, the owner of the Jiffy Lube located at 109 York Road stated that the PUD would block the view of his business.

In rebuttal, DMS called Matthew Bishop, a registered landscape architect, who testified that the height and area tent regulations were met and that a modification of standards for the height was sought due to the size and configuration of the Property. DMS did not have the option of expanding the building horizontally and had to build vertically. DMS secured a height modification from the County Council.

Under BCC §32-4-245(c), the ALJ is the fact finder and can judge the credibility of the witnesses and the opinions of experts. The weight of the evidence as to §502.1.F was in favor of DMS and we find that this factor was satisfied.

Whether the proposal constituted a good design, use and layout?

The second part of BCC §32-4-245(c)(2) requires the ALJ to decide whether the PUD constitutes a good design, use and layout. Submitted into evidence by DMS was the redlined Pattern Book which set forth in detail the design and layout for the project. The Department of Planning determined that the building would be using high quality materials and finishes. As testified to by Mr. Moxley in regard to compatibility, the design of the building in terms of size, massing, separation and spacing is appropriate and is consistent with the street scape and urban area.

There was no probative evidence provided by the Protestants that the Pattern Book did not provide a good design or layout. Consequently, the ALJ's finding that the project reflects a high quality design with quality materials and finishes was supported by the evidence.

(3) - There is a reasonable expectation that the proposed development, including development schedules contained in the PUD development plan, will be developed to the full extent of the plan.

As to the ALJ's finding that there was a reasonable expectation that the proposed development will be developed to the full extent of the plan, the evidence he heard from David Schlachman, a representative of DMS, was that DMS is a real estate development business for both commercial and residential projects. DMS purchased the Property in or about 2004. The ALJ heard testimony that DMS has developed 15 Walgreens, one of which is in Towson and one of which is in Timonium. Mr. Schlachman said that DMS' other projects include several mixed use projects in Owings Mills and Middle River.

Of import on this factor is that the Protestants did not provide evidence showing DMS' had a history of nonperformance. If the evidence presented by the Protestants was that the developer had failed to complete other projects, the ALJ may have found that this project did not have a great

likelihood of success. That was not the case here. The Petitioner's experience and track record does impact the ultimate success of a project. Thus, we affirm the ALJ's decision under BCC §32-4-245(3).

(4) - Subject to the provisions of §32-4-242(c)(2), the development is in compliance with Section 430 of the Baltimore County Zoning Regulations.

Section 430 of the BCZR is entitled "Planned Unit Developments" and is divided into 4 Subsections which describe the concept of a PUD. Under §430, this project was presented as a general development PUD, to be used for residential/retail purposes and located inside the URDL. Under §430.3.B.1, the residential uses permitted for a general development PUD are those uses permitted in any residential zone or non-residential zone, subject to Compatibility Requirements under BCC §32-4-402. Here, the Property is split zoned BM and RAO-2.

Under BCZR §430.C, as argued by Protestant GTCCA, the permitted density for a non-residential zone here (BM) is DR 16. However, Resolution 40-14, which authorized further review of the PUD, confirms that the County Council modified the residential density in exchange for the community benefit offered by DMS. Further, the T6 overlay is applicable here the highest density "urban core zone" recognized in the Master Plan 2020 and this Property was the only property with a T6 overlay in Baltimore County.

With regard to findings of Compatibility under BCC, §32-4-402, the Director of Planning made compatibility recommendations in a report dated December 10, 2014 to the ALJ prior to the hearing pursuant to BCC §32-2-402(c). At the ALJ hearing, Mr. Moxley, explained the Department of Planning's position as to the compatibility of this PUD on the surrounding area. He testified that the entire Planning staff provided input on compatibility at the staff meetings.

BCC § 32-4-402 reads in pertinent part as follows:

* * * *

(c) *Recommendations by Director of Planning.* The Director of Planning shall make compatibility recommendations to the Hearing Officer for:

- (1) A cluster subdivision;
- (2) A development in the RCC, R-O, OR-1, OR-2, O-3, SE, OT zones, the CR districts, or, except as provided for a development described in § 32-4-402, a Planned Unit Development; or
- (3) Alternative site design dwellings as provided in the comprehensive manual of development policies.

(d) *Compatibility objectives.* Subject to subsection (c) of this section, development of property shall be designed to achieve the following compatibility objectives in accordance with the guidelines in the comprehensive manual of development policies:

- (1) The arrangement and orientation of the proposed buildings and site improvements are patterned in a similar manner to those in the neighborhood;
- (2) The building and parking lot layouts reinforce existing building and streetscape patterns and assure that the placement of buildings and parking lots have no adverse impact on the neighborhood;
- (3) The proposed streets are connected with the existing neighborhood road network wherever possible and the proposed sidewalks are located to support the functional patterns of the neighborhood;
- (4) The open spaces of the proposed development reinforce the open space patterns of the neighborhood in form and siting and complement existing open space systems;
- (5) Locally significant features of the site such as distinctive buildings or vistas are integrated into the site design;
- (6) The proposed landscape design complements the neighborhood's landscape patterns and reinforces its functional qualities;
- (7) The exterior signs, site lighting and accessory structures support a uniform architectural theme and present a harmonious visual relationship with the surrounding neighborhood; and
- (8) The scale, proportions, massing, and detailing of the proposed buildings are in proportion to those existing in the neighborhood.

* * * *

Mr. Moxley testified that he personally walked the Golden Triangle area and studied both the Towson Plan and the Master Plan 2020 as it relates to the future plans for that area. He explained that, as stated in those plans, the goal is to create a pedestrian friendly link between Towson Town Center and Towson University. Master Plan 2020 provides for a high density development such as student housing or mixed use projects. The Department of Planning's position is that this project fits within the urban setting of the Golden Triangle. The ALJ had the benefit of aerial photographs of the area. (Pet. Ex. 6A, 6B).

Given that this PUD was the first urban PUD considered by the Department of Planning, Mr. Moxley was clear that in discussing compatibility, the Department of Planning agreed that the size of the proposed building was in keeping with the other buildings in the area, particularly the Marriott and Towsontown Center. The building materials were discussed and considered. The orientation, scale, separation from the street, and spacing of the proposed building to York Road supported the goal of a pedestrian movement to shops and restaurants. The T6 overlay is described in the Master Plan as having not only high density but tall buildings.

The Department of Planning also considered traffic and parking in the context of compatibility. The Department concluded that the proposed right in/right out turning access point from the Property onto York Road would direct traffic flow in an organized and controlled manner. The proposed parking is located behind the building which helps to define the street building line. Moreover, DMS complied with the County's Council request for more parking spaces.

Other than cross examination of Mr. Moxley and the testimony of lay witnesses, the Protestants did not offer expert testimony that any of the Compatibility factors were not met. As a result, we find that the ALJ was justified in accepting the recommendation of the Department of Planning that the compatibility factors were met.

(5) The PUD development plan is in conformance with the goals, objectives and recommendations of the Master Plan or area plans or the Department of Planning.

As to Subsection (5), we adopt our reasoning as to the Department of Planning's recommendation for approval of the PUD as set forth in the Department of Planning Report dated December 10, 2014 provided to the ALJ in addition to Mr. Moxley's testimony at the ALJ hearing. On this factor, DMS need only prove that there is conformance with the recommendations of one of the three sources listed, not each of the sources: (1) the Master Plan; (2) area plans; or (3) the Department of Planning. Here, the evidence showed conformance with all 3 sources. Mr. Moxley clarified that the Department of Planning's recommendation was based on their finding that the PUD was in conformance with the goals and objectives in both the Master Plan 2020 and the Towson Plan.

Forest Buffer Variance – CBA-15-004.

As noted by the ALJ in his decision, DEPS granted DMS a forest buffer variance and approved an alternatives analysis, subject to conditions, on October 24, 2015. The American Legion appealed that decision to this Board in Case No.: CBA-15-004. By Opinion and Order dated August 19, 2015, this Board granted the forest buffer variance.

Forest Conservation Variance – CBA 15-003.

DEPS also granted DMS a forest conservation variance permitting the removal of a sycamore tree on October 6, 2014. The American Legion appealed that decision to this Board in Case No.: CBA-15-003. On February 19, 2015, the American Legion withdrew that appeal prior to the start of the hearing. This Board concurred in the decision to withdraw the issue based on BCC §32-6-116(f) and §32-6-116(g)(2). BCC §32-6-116(f) provides that where a project will proceed before a Hearing Officer as part of a hearing for development approval, the Director of DEPS' decision will be forwarded to the Hearing Officer for inclusion in the Hearing Officer's

file. BCC §32-6-116(g)(2) states that where the Director's decision is to grant such a variance, that decision shall be considered a recommendation to the Hearing Officer, who may either grant or deny the requested variance. Accordingly, the appeal to this Board, by The American Legion as to the Forest Conservation Variance in Case No.: CBA 15-003, was premature.

The ALJ in the Reconsideration Order adopted DEPS' recommendation to grant the Forest Conservation Variance. In our review of the record, the Protestants did not present evidence opposing this variance. Accordingly, the ALJ's decision to grant the Forest Conservation Variance was supported by the record.

Local Open Space Waiver and Fee – CBA 15-009.

On January 9, 2015, the Director of PAI, the agency which oversees the Department of Recreation and Parks ("Rec. & Parks"), approved Rec. & Parks' recommendation to grant a local open space waiver request and imposed no fee in accordance with County Council Resolution 63-00. Dissatisfied with that decision, Protestant GTCCA appealed that decision to this Board in Case No. CBA 15-009.

Notwithstanding GTCCA's appeal to this Board, the ALJ decided, in his Opinion and Order, that while the waiver of the Local Open Space requirement may have been correctly granted, he found that the zero fee imposed was not correct. The ALJ concluded that the correct waiver fee for 236,000 sq. ft. @\$5.74 per sq. ft. was \$1,358,084.00. When the ALJ's Opinion and Order provided the increased fee, Protestant GTCCA sought to stay a decision by this Board in Case No.: CBA 15-009. We denied that request.

As with the Forest Buffer Variance, jurisdiction over the decision of PAI/Rec. & Parks to grant the local open space waiver was properly before this Board pursuant to the Baltimore County Charter, §602(c) and (d). As such, we disagree with the ALJ's Opinion and Order and

Reconsideration Order on that issue, and we reverse that decision on the basis that he exceeded the statutory authority or jurisdiction under BCC §32-4-281(e)(1)(iii)1.

We held a *de novo* hearing on April 23, 2015 in Case No. 15-009. An Opinion and Order was issued by this Board on September 17, 2015 granting the local open space waiver request. We granted DMS' Motion to Dismiss GTCCA's appeal of the waiver fee based on the express language found in BCC §32-6-110 which states that fees established under BCC §32-6-108 are not appealable. We incorporate herein that Opinion and Order.

Conclusion

Based on our review of the evidence presented, we find that the decision of the ALJ to approve the PUD was supported by competent, material and substantial evidence in light of the entire record submitted, with the exception of the Local Open Space Waiver and Fee.

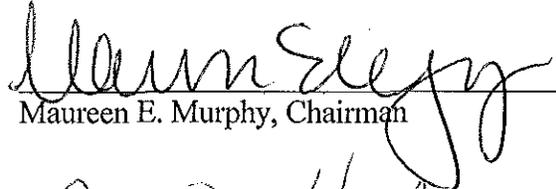
ORDER

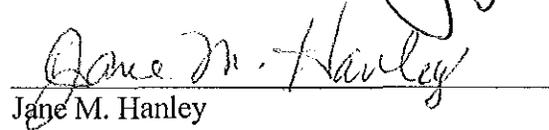
THEREFORE, IT IS THIS 5th day of October, 2015 by the
Baltimore County Board of Appeals,

ORDERED that the Administrative Law Judge's Order on Developer's Motion for Reconsideration dated May 12, 2015 approving the redlined PUD with conditions, is hereby **AFFIRMED** as to all issues except the Local Open Space Waiver and Fee. The Board reverses on that issue for the reasons set forth herein and we adopt our Opinion and Order on the Local Open Space Waiver and Fee in Case No. CBA-15-009 and incorporate the same herein.

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*.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**


Maureen E. Murphy, Chairman


Jane M. Hanley


Meryl W. Rosen