

IN THE MATTER OF	*	BEFORE THE
<u>PARAGON OUTLETS WHITE MARSH, LLC</u>	*	BOARD OF APPEALS
PUD – Paragon at Nottingham Ride, 1 st Amendment	*	
5355 Nottingham Drive	*	OF
Baltimore, MD 21236	*	
11 TH ELECTION DISTRICT	*	BALTIMORE COUNTY
6 th COUNCILMANIC DISTRICT	*	
	*	CASE No. CBA 15-005

* * * * *

OPINION AND REMAND ORDER

This case comes to the Board on appeal by the Protestants of the final decision of the Administrative Law Judge (the “ALJ”) approving the First Amendment to Planned Unit Development (a “PUD”).

A public hearing was held before this Board on February 10, 2015 wherein the Parties, through counsel, argued their respective positions with regard to the record before the ALJ. Paragon Outlets White Marsh, L.L.C. (“Paragon”) was represented by G. Scott Barhight, Esquire, Timothy M. Kotroco, Esquire and Whiteford, Taylor and Preston, L.L.P. Protestant, White Marsh Mall, L.L.C. (“White Marsh”) was represented by Edward J. Gilliss, Esquire, and Royston, Mueller, McLean & Reid, L.L.P. Protestants, Heather Patti, Judith Davies, Ray Miller, Cathy L. Miller and Jennifer Miller were represented by G. Macy Nelson, Esquire. A public deliberation was held on March 11, 2015.

The ALJ’s Opinion approving the Paragon PUD was dated October 21, 2014 and it restricted approval on two (2) conditions namely that: (1) The tower sign shown in the Pattern Book was to be no more than 75’ in height and that sign was not to display the names of retailers/tenants within the outlet center; and (2) The stormwater management (“SWM”) for the project must be in compliance with the 2000 Maryland Stormwater Design Manual.

On October 23, 2014, Paragon filed a Motion for Reconsideration of the ALJ's Opinion. Paragon argued that the SWM regulations applicable to the Paragon PUD were those in effect on June 27, 1991. The ALJ denied Paragon's Motion but clarified that condition by subsequent Order dated November 18, 2014 such that the Paragon PUD would be governed by the SWM laws and regulations in effect on June 14, 2002.

Dissatisfied with those conditions, on November 19, 2014, Paragon filed a Notice of Appeal. On January 14, 2015, Paragon withdrew its appeal. A hearing before this Board was held on January 16, 2015 in compliance with BCC §32-4-281. The individual Protestants and White Marsh-Cowenton Community Association, represented by G. Macy Nelson, Esquire, filed an appeal of the ALJ's decision on December 16, 2014. White Marsh Mall filed an appeal of the ALJ's decision on December 17, 2014. On February 4, 2015, White Marsh-Cowenton Community Association withdrew its appeal.

People's Counsel for Baltimore County filed an Entry of Appearance on December 10, 2014, as well as a Pre-Hearing Memorandum before this Board. Prior to the Board's hearing, People's Counsel withdrew his appearance by Notice of Withdraw dated January 20, 2015.

FACTUAL BACKGROUND

The subject property is an 88.8 acre +/- tract of land located in the White Marsh area of Baltimore County (the "Property"). It is bordered by MD Route 43 to the north, I-95 to the west, MD Route 7 to the east and White Marsh Run watershed which lies to the south. The zoning is M.L.-I.M. (Manufacturing, Light – Industrial, Major). As the Property exists today, it is improved with two (2) single story office buildings and associated parking.

The two (2) office buildings were part of a development plan proposed by Nottingham Properties ("Nottingham") and approved by the County Review Group ("CRG") on June 27, 1991

(the “Nottingham CRG Plan”). Prior to that, on June 21, 1989, Nottingham received a waiver under the 1984 Stormwater Management laws (“SWM”) from the Department Environmental Protection and Sustainability (‘DEPS’) (formerly known as Department Environmental Protection Resource Management ‘DEPRM’).

The Nottingham CRG Plan proposed to build 15 office buildings (630,000 sf) with 7 acres reserved for retail and services along MD Rt. 7. On or about October 22, 2000 (with revisions on Feb. 2, 2002 and June 14, 2002), the Sediment and Erosion Control Plan was approved for the Nottingham CRG Plan. On September 25, 2001, the SWM Plan was approved for the Nottingham CRG Plan.

In or about 2002, the Property was graded and an Erosion and Sediment Control Permit was issued for the Nottingham CRG Plan. On March 13, 2003, Nottingham was issued a SWM permit. Between 1991- 2008, only 2 of the 11 office buildings were constructed totaling 74,620 sf +/-.

On December 1, 2008, the County Council passed Resolution 105-08 to consider a PUD proposed by Corporate Office Properties Trust (‘COPT’) (the “COPT PUD”). The COPT PUD proposed:

- 1,500 dwellings in multi-family bldgs.
- 1,290,000 sf office
- 393,000 sf retail
- 500 hotel rooms in multiple bldgs.
- 82,000 sf restaurant
- 10,000 sf conference space
- 2 existing office bldgs. to be razed and rebuilt to LEED standards

On September 8, 2009, the County Council passed an amended resolution (Resolution 59-09) reducing the dwelling units from 1,500 to 1,250. On November 5, 2009, the Planning Board considered the COPT PUD at a meeting. On November 19, 2009, the COPT Concept Plan was

presented to the Planning Board. On May 4, 2010, an administrative waiver was granted allowing the COPT PUD to be governed by 2002 SWM regulations. On June 17, 2010, the Planning Board approved the COPT Concept Plan, subject to the conditions enumerated in the Planning Board Report, dated June 23, 2010. On July 13, 2010, Zoning Commissioner Wiseman affirmed the Planning Board's approval of the COPT Concept Plan. The COPT PUD was never constructed.

On December 3, 2013, the Paragon PUD was proposed which consisted of:

- 250 units in 4 multifamily bldgs.
- 16,000 sf retail space and rec bldg.
- 624,158 sf retail outlet center
- 130 room hotel
- 6,000 sf restaurant
- 2 existing office bldgs to be razed and rebuilt to LEED standards

On January 7, 2014, at a meeting of the Development Review Committee ("DRC") it was decided that the Paragon PUD was a 'material amendment' of the COPT PUD. The ALJ held hearings on the Paragon PUD on June 19, 2014, July 23, 2014, July 29, 2014, July 30, 2014, August 8, 2014, September 9, 2014, September 10, 2014 and September 11, 2014.

STANDARD OF REVIEW

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

BCC § 32-4-245(c) permits the ALJ to approve a proposed PUD only upon finding that the PUD meets all of the following 5 factors:

- (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 B.C.Z.R. 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 the Master Plan, area plans, or the Department of Planning.

DECISION

In our review of the record concerning these 5 factors, we find the case should be remanded to the ALJ under BCC, § 32-4-281(e)(1)(i) to take additional evidence regarding the issues of: (1) storm water management; and (2) forest conservation. In addition, the ALJ should determine, based on the evidence presented, the area that constitutes the “neighborhood.”

(1) Storm Water Management.

By withdrawing its appeal of the ALJ’s decision, Paragon agrees with the ALJ’s Revised Order dated November 18, 2014 that the Paragon PUD will be governed by the SWM laws and regulations in effect as of June 14, 2002, which is the date that the Sediment and Erosion Control Plan for Nottingham CRG Plan was approved. Those regulations went into effect on July 1, 2001 when the County Council enacted Bill 53-01. The Protestants have argued that the Paragon PUD should be governed by the most recent 2009 SWM laws and regulations as the Paragon PUD is a different ‘project’ than the Nottingham CRG Plan and COPT PUD.

Specifically, there is a disagreement between the Parties about when SWM plans and erosion and sediment control plans are grandfathered under BCC 33-4-114(c). Section 33-4-114(c) provides:

(c) *Authority to comply with former requirements.*

(1) Any site with an approved erosion and sediment control plan and stormwater management plan approved by the Department before May 4, 2010 shall be governed by the stormwater management law and regulations in effect at the time of the approval.

Specifically, the term “site” is defined in §33-4-101(11) as:

(11) *Site.* “Site” means any tract, lot, or parcel of land, or combination of tracts, lots or parcels of land, that are in one ownership, or are contiguous and in diverse ownership, where development is to be done as part of a unit, subdivision, or project.

Likewise, the term “development” is defined in §33-4-101(I) as:

(I) *Development*. “Development” means to change the stormwater runoff characteristics of a parcel of land in conjunction with residential, commercial, industrial, institutional, or governmental construction or alteration.

At the ALJ hearing, DEPS, through representative David Lykens, testified as follows in regard to the SWM issue:

“...it already has an approved stormwater management, sediment control and grading plan and permit. So, therefore, it is not subject to the current stormwater management regulations. It is subject to the ones that have already been approved with the permit.”

(T. 28). When asked ‘by whom’ the SWM was approved, Mr. Lykens said:

“Storm Water Management Review in our office. I believe it was in 2000-2002 maybe.”

When asked for a copy of the application and calculations, Mr. Lykens responded that a request would have to be made through the department of Permits, Approvals and Inspections (“PAI”).

(T. 31).

At the hearing before this Board, Paragon argued that DEPS agreed with Paragon’s interpretation of the BCC §33-4-114(c), that this was the policy and/or practice of DEPS when that department reviews SWM and erosion and sediment control plans, and that this interpretation was supported by the evidence before the ALJ. In our review of the transcript and the evidence submitted, there was merely a conclusory statement by Mr. Lykens as above, without explanation as to DEPS’ policy/practice in relation to the provisions regarding SWM and erosion and sediment control contained within BCC, Title 4.

The issue of grandfathering SWM plans and Erosion and Sediment Control plans appears to one of first impression when either a development plan or a PUD is proposed. Upon information and belief, neither this Board nor the ALJ (or under the former Zoning Commissioner

system) have rendered Opinions on this issue. In the Board's view, the ultimate decision is one of significance that has implications not only for the Paragon PUD, but for future projects in Baltimore County. Thus, the Board finds that it is important to have evidence in the record that adequately addresses these issues so that an informed decision can be made by the ALJ.

On remand, the ALJ should require DEPS and/or the appropriate Baltimore County representatives (hereinafter collectively referred to as "DEPS") to provide evidence, through testimony and documentation, including, but not limited to, the following:

- (1) The SWM and erosion and sediment control history of the Property beginning with the Nottingham CRG Plan and the COPT PUD.
- (2) Does DEPS consider the Paragon PUD to be the same 'project' as Nottingham CRG Plan as that term is found throughout the SWM Title of the BCC (§33-4-101 *et seq.*)?
- (3) Does DEPS consider the Paragon PUD to be the same 'project' as the COPT PUD as that term is found throughout the SWM Title of the BCC (§33-4-101 *et seq.*)?
- (4) When the COPT PUD was approved, did DEPS review the SWM under that proposed PUD and if so, did DEPS recommend to the Planning Board that the SWM and erosion and sediment control issues were grandfathered?
- (5) Does the fact that PAI found the Paragon PUD to be a 'material amendment' of the COPT PUD on or about January 7, 2014, (as the term 'material amendment' is defined in BCC §32-4-245(e)), require the Paragon PUD to have a Sediment Control Plan and/or SWM Plan that comply with the most recent laws/regulations?
- (6) Does DEPS define the Paragon PUD as "development" or "redevelopment" under the SWM Title of the BCC (§33-4-101 *et seq.*)?
- (7) Discuss DEPS policy and practice when reviewing sediment and erosion control plans and SWM plans in light of the legislative history of BCC §14-155(f) entitled '*Previously approved plans*' and recodified as BCC §33-4-114(c)?

(8) Discuss the SWM Waiver dated June 21, 1989 granted to “Nottingham 600 tract” by DEPS under §2-150.3(c)(1) of the Baltimore County Storm Water Management Policy and Design Manual (ALJ Dev. Ex. 23) and its impact, if any, on the Paragon PUD.

(9) Discuss the Administrative Waiver granted on April 28, 2010, its impact, if any, on the Paragon PUD and whether that waiver expired on May 4, 2013 as identified on the Paragon PUD Plan.

(10) Explain the difference between, the significance of, and the impact on SWM in general when DEPS grants a ‘waiver’ under BCC §33-4-112 and an ‘administrative waiver’ under BCC §33-4-112.1.

(11) Do ‘waivers’ apply only to specific ‘projects’?

(12) Is Paragon prohibited from applying for a ‘waiver’ under BCC §33-4-112 or an ‘administrative waiver’ under BCC §33-4-112.1 and if so, would Paragon be entitled to receive either?

(13) Does the fact that all phases of the Nottingham CRG Plan were not constructed (*i.e.* only 2 of the 11 office buildings were constructed) affect the ‘Regulatory Requirements’ under BCC §33-4-112(g) for a phased development project which was granted a ‘waiver’?

(14) Is it DEPS’ policy/practice that if the Paragon PUD is not developed, or is only partially developed, any proposed development on the Property after Paragon will be grandfathered under the Nottingham Erosion Sediment Control Plan and Nottingham SWM Plan?

(15) In reviewing the Paragon PUD in terms of sediment control and SWM, what factors in addition to impervious surface, if any, are considered by DEPS?

(16) Did the Nottingham Erosion and Sediment Control Permit issued in or about 2002, expire under BCC §33-4-108(e)? If it expired, what effect, if any, does the expired permit have on the Paragon PUD?

(17) Did the Nottingham SWM Permit issued on or about March 13, 2003, expire under BCC §33-4-108(e)? If it expired, what effect, if any, does the expired permit have on the Paragon PUD?

(18) Have all of the SWM facilities on the Property been constructed pursuant to the SWM Permit? Describe specifically, the SWM facilities as they exist today on the Property.

(19) Has all of the work on the Property under the Nottingham Erosion and Sediment Control Permit taken place? Describe specifically, the erosion and sediment conditions as they exist today on the Property.

(20) Explain and identify what version of SWM laws and regulations as well as their effective date, apply to the SWM facilities which currently exist on the Property.

(21) Provide any and all information not requested herein or otherwise provided that pertains and/or relates to the issues of SWM plans and/or Erosion and Sediment Control plans which affect the Paragon PUD.

(2) Forest Conservation.

In regard to compliance with the most recent forest conservation regulations, Paragon asserts on its Plan that the Paragon PUD is exempted from forest conservation requirements under BCC §33-6-103(b)(15) by virtue of the 1991 Nottingham CRG Plan approval and that the Property is covered under an existing open grading permit B435001 (Dev. Ex. 13A).

At the hearing before the ALJ, Mr. Lykens testified that the Paragon PUD is exempted from the Forest Conservation Regulations because the Nottingham CRG Plan predated those regulations which became effective in Baltimore County by Bill 224-92 on January 19, 1993. (T. 28).

As with the SWM and Erosion and Sediment Control grandfathering, this Board finds, in review of the transcript and evidence before the ALJ, that more information from DEPS is necessary in order for the ALJ to make an informed decision on this issue. On remand, the ALJ should require DEPS to produce evidence that addresses the forest conservation grandfathering, including, but not limited to, the following:

(1) Provide the forest conservation history of the Property beginning with the Nottingham CRG Plan and the COPT Plan.

(2) Does DEPS view the Paragon PUD to be the same ‘development’ as Nottingham CRG Plan as that term is found in BCC, §33-6-103 *et seq.*?

(3) Does DEPS view the Paragon PUD to be the same ‘development’ as the COPT PUD as that term is found in BCC, §33-6-103 *et seq.*?

(4) Does the fact that PAI found the Paragon PUD to be a ‘material amendment’ of the COPT PUD on or about January 7, 2014, (as the term ‘material amendment’ is defined in BCC §32-4-245(e)), require the Paragon PUD to comply with the most recent Forest Conservation laws/regulations?

(5) Is it DEPS’ policy/practice that if the Paragon PUD is not developed or is only partially developed, any proposed development on the Property after Paragon will be grandfathered under the BCC §33-6-103(b)(15)?

(6) Describe all Forest Conservation work which is in place on the Property.

(7) Provide any and all information not requested herein or otherwise provided that pertains and/or relates to the issue of Forest Conservation which affects the Paragon PUD.

(3) Neighborhood.

BCC §32-4-245(c) provides that a hearing officer can approve a proposed PUD only upon a finding that, *inter alia*, “the proposed development will conform with Section 502.1.A,B,C,D,E and F of the Baltimore County Zoning Regulations....” In making this determination, one focus is whether the proposed special use will adversely affect neighboring properties in the general neighborhood. *See Schultz v. Pritts*, 291 Md. 1, 11 (1981). According to the Court, the appropriate standard is “whether there are facts and circumstances that show 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.”

Id., 291 Md. at 22-23. More recently, the Court of Appeals clarified that “[i]t is clear in examining the plain language of *Schultz*, and the cases upon which *Schultz* relies, that the *Schultz* analytical overlay for applications for individual special exceptions is focused entirely on the neighborhood involved in each case.” *People’s Counsel for Baltimore County v. Loyola College*, 406 Md. 54,102 (2008). Given these holdings, it is important for an ALJ to make a finding as to what area constitutes the ‘neighborhood’ at issue.

The Board reviewed the transcript and the evidence presented to the ALJ concerning the relevant neighborhood. Mr. Monk, an expert in land planning, zoning and development testified on behalf of Paragon that “[Paragon] [was] the neighborhood.” (ALJ Opinion at 9). Thus, according to Mr. Monk, the ‘neighborhood’ is essentially identical to the Property itself. *Id.* The ALJ recognized that Mr. Monk conceded that “if the ‘neighborhood’ was redrawn to include a larger land area, that there could ‘possibly’ be adverse effects above and beyond” the Property. *Id.* The ALJ also recounted the testimony of Professor Cowley, a professor of land use and land use law and a city and regional planner. She was accepted as an expert in the field of land planning on the Protestants’ behalf. Professor Cowley testified concerning the definition of ‘neighborhood’ for purposes of the special exception standards. (ALJ Opinion at 12, 13). According to Professor Cowley, the Developer had incorrectly defined the boundaries of the neighborhood. She concluded that the neighborhood more appropriately included an area larger than simply the Property itself, and was bounded by Cowenton Avenue, Perry Hall Blvd, Campbell Blvd and Pulaski Highway. *Id.* at 13-14.

In the Board’s view, while the ALJ summarized certain testimony about the area constituting the ‘neighborhood’, the ALJ did not make a factual finding in this regard. Thus, on

remand, the ALJ should make a factual finding as to what constitutes the ‘neighborhood’ involved in this case.

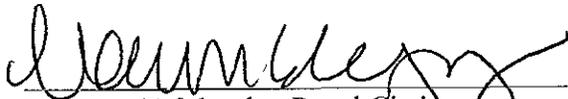
ORDER

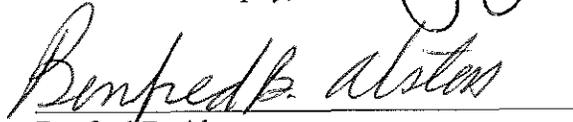
THEREFORE, IT IS THIS 27th day of March, 2015, by the Board of Appeals for Baltimore County,

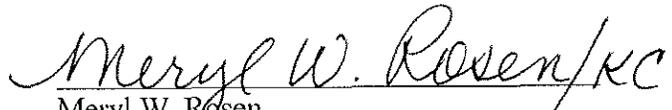
ORDERED, that this case is **REMANDED** to the Administrative Law Judge to hear evidence consistent with the provisions set forth herein and to make a factual finding in regard to the area which constitutes the ‘neighborhood.’

ORDERED, that a final Opinion will be issued by this Board after review of the requested information and any further proceedings this Board determines is necessary, with no further action to be taken on this Ruling until such time as the Board's final decision is issued.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**


Maureen E. Murphy, Panel Chairman


Benfred B. Alston


Meryl W. Rosen



Board of Appeals of Baltimore County

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March 26, 2015

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RE: *In the Matter of: Paragon Outlets White Marsh LLC*
PUD – Paragon at Nottingham Ridge, 1st Amendment
Case No.: CBA-15-005

Dear Counsel:

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

Pursuant to the enclosed, this Order is not a final decision of the Board of Appeals for Baltimore County and does not constitute an appealable event at this time. This matter will be held open on the Board's docket until such time as a final opinion can be issued.

Should you have any questions, please do not hesitate to contact us.

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

c: Paragon Outlets White Marsh, LLC
White Marsh Mall, LLC
Heather Patti
Judith Davies
Ray Miller
Cathy Miller
Jennifer Miller
Peter and Janet Terry
Gerald Welsh
John McCormack
Ray and JoAnn Paris
John Piskor and Diane Devlin-Piskor
Jason Samios-Uy
Eileen Robier
Carolyn Smith
Susan Smith
Laura Varanko
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Dennis Kennedy, Development Plans Review/PAI
Jan Cook, Acting Development Manager/PAI
Lawrence M. Stahl, Managing Admin. Law Judge
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Angie McQueeney
Glen and Mary Ellen Bradshaw
Tim Syzek
Milos Jovanovic
Mohammed Alkhalidi
Lisa Murphy
Frank and Christine Strim
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Anna Shea
Joanne Weyant
Andrew and Maria Kowalevicz
Emily Blackner/East County Times
Maria Paul
Kraig Martin
Louis J. Carletti
Ken Tilton
Nicholas King
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White Marsh-Cowenton Community Association
Pamela Wood/The Baltimore Sun
Adam Bednar/The Daily Record