



Board of Appeals of Baltimore County

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December 3, 2015

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RE: *In the Matter of: Glen Arm Homes, LLC – Legal Owner*
Craftsmen Developers, LLC – Applicant/Developer
Osprey Pointe (f/k/a Cape May Cove)

Case No.: CBA-16-001

Dear Counsel:

Enclosed please find a copy of the final 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
Duplicate Original Cover Letter

c: See Attached Distribution List

Craftsmen Developers, LLC
Glen Arm Homes, LLC
Rockaway Beach Improvement Association, Inc.
Bauernschmidt Manor Improvement Association, Inc.
David and Rita McCann
Russell Schiesser
Leroy and Carol Ogle
James Strom
Carl Maynard
Mary Mitchell
Kevin M. and Trish McDonough
Kimberly Goodwin-Maigetter
Anna Renault
Robert Bendler, President/Essex Middle River Civic Council
Rita M. Kurek, Vice President/Holly Neck Conservation Association, Inc.
Carl Maynard, President/Back River Neck Peninsula Community Assn.
Charles and Evelyn Reed
Mary Frances Duerr
Carolyn Collini
Henry Miller
Sharon Miller
Catherine Travis
Ricardo and Cecelia Yazigi
Michelle and Evan Darling
Nancy and Vince Zellinger
Pamela Bennett
Scott Sewell
Joe and Joyce Eiben
Devin Crum
Patricia McDonough/New Haven Woods Community Assn./c/o Community Association Management, LLC
Office of People's Counsel
Lawrence Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Jeff Livingston/DEPS
Vincent Gardina, Director/DEPS
Jan Cook, Acting Development Manager/PAI
Arnold Jablon, Deputy Administrative Officer, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF:	*	BEFORE THE
GLEN ARM HOMES, LLC	*	BOARD OF APPEALS
(Legal Owner)		
CRAFTSMEN DEVELOPERS, LLC	*	OF
(Applicant/Developer)		
OSPREY POINTE	*	BALTIMORE COUNTY
(f/k/a Cape May Cove)		
	*	CASE NO: CBA-16-001
1630 Turkey Point Road		
15 th Election District; 7 th Councilmanic District	*	
HOH Case No. 15-075		
	*	

* * * * *

OPINION

This case comes before the Baltimore County Board of Appeals on appeal of a Development Plan Opinion and Order issued by Baltimore County Administrative Law Judge John Beverungen (“ALJ”) on June 18, 2015 in accordance with the development review and approval process contained in Article 32, Title 4 of the Baltimore County Code (“B.C.C.”). The ALJ’s Opinion and Order (the “ALJ Opinion”) approved a development plan after referral and consideration by the Baltimore County Planning Board pursuant to B.C.C. §§ 32-4-231 and 32-4-232. The red-lined Development Plan for “Osprey Pointe f.k.a. Cape May Cove” was filed by Glen Arm Homes, the legal owner of the subject property, and Craftsmen Developers, LLC, the developer of the property (collectively the “Petitioners”). This appeal was filed by Rockaway Beach Improvement Association, Inc., Bauernschmidt Manor Improvement Association, Inc., David and Rita McCann, Russell Schiesser, Leroy and Carol Ogle, James Strom, Carl Maynard, and Mary Mitchell (collectively “the Protestants”). At the hearing before this Board, the Petitioners were represented by John Gontrum, Esquire and Whiteford, Taylor & Preston, LLP and the Protestants were represented by Francis X. Borgerding, Jr., Esquire.

STATEMENT OF FACTS

Petitioners filed for approval of a red-lined development plan for a property known as Osprey Pointe (f.k.a. Cape May Cove) located on the north side of Turkey Point Road east of Back River Neck Road (“the Property”). The gross area of the Property, which is mostly wooded and now unimproved, is approximately 6.8 acres. The Property is zoned D.R. 3.5, which would allow a maximum density of 23 single-family dwellings. Petitioners proposed 16 such units on the Property and did not request any zoning variances.

In accordance with B.C.C. §32-4-227, the ALJ conducted hearings on the proposed Development Plan on February 19, 2015 and April 27, 2015. Representatives, counsel, and witnesses on behalf of Petitioners and Protestants attended these hearings, as did People’s Counsel Peter Zimmerman. Representatives of various Baltimore County agencies that reviewed the Development Plan also attended and testified regarding their review of the plan and whether or not it complies with applicable laws and regulations.

Pursuant to B.C.C. §32-4-227 and 32-4-228, the ALJ identified and considered all unresolved or open comments and issues. According to the ALJ Opinion, “[a]ll County agency representatives indicated the Plan addressed any comments submitted by their agency, and they each recommended approval of the Plan.” (ALJ Opinion at 3). In particular, Lloyd Moxley of the Department of Planning opined that his department approved the Development Plan and Pattern Book for the development. (*Id.*) Mr. Moxley also “presented a school analysis . . . indicating that while the elementary school in the district . . . is currently operating above State Rated Capacity (SRC), there is sufficient capacity at several adjacent elementary schools, such that the school analysis was acceptable.” (*Id.*). Jean Tansey, the County’s landscape architect, testified as to open space issues. Ms. Tansey indicated that an Open Space Waiver was appropriate for this Property

and that Petitioners were to pay a fee of \$55,040 in lieu of providing the open space. (*Id.*). Jeff Livingston from the Department of Environmental Protection and Sustainability testified that his agency approved a concept stormwater management plan. (ALJ Opinion at 3.).

Another aspect of the hearing concerned whether there existed a conflict between the Master Plan 2020 and the Lower Back River Neck Community Action Plan. (“Community Plan”). This Community Plan, adopted by the Baltimore County Council in 2010, notes that “[t]he zoning classifications currently used in this sensitive area permits the inclusion of wetlands, buffer areas and other normally unbuildable land when calculating density. This potential increase in human activity in this region is not in keeping with the intent of the Chesapeake Critical Bay Area law.” (Protestants ‘Ex. 5). Accordingly, the Community Plan recommends that “[a]ll density calculations in the district should have this unbuildable square footage removed from this density calculation.” (*Id.*).

Protestants argued that the Development Plan conflicts with the Master Plan and the Community Plan and that the Community Plan’s language restricts the number of buildable lots to 13.3, not 16. However, Mr. Moxley of the Department of Planning testified that the project at issue is “in conformity with Master Plan 2020 and the Community Plan incorporated therein.” (*Id.*). In support of his conclusion, Mr. Moxley noted that the Property is inside the Urban Rural Demarcation Line (“URDL”), located in Growth Tier 1, transect T-3 (suburban) and within a priority funding area. According to Mr. Moxley, the state and county encourage development in these regions in order to reduce the impact of development in rural areas outside of the URDL. (ALJ Opinion at 3-4). When cross-examined as to the Development Plan’s conformity to the Master Plan (given the above quoted language of the Community Plan), Mr. Moxley testified that he did not believe the Community’s Plan language regarding unbuildable areas was applicable and that it

should be disregarded since it conflicted with the manner in which density is calculated under the Baltimore County Zoning Regulations, growth tiers, etc. (*Id.* at 4). John Motsco, a licensed professional engineer testifying on the Petitioner's behalf, opined that the Community Plan's provision was only a "recommendation" and not binding on the developer. (*Id.*). The Protestants did not provide any expert witness testimony on this issue.

Based on concern as to the potential conflict with the Development Plan and the Master Plan, ALJ Beverungen referred the issue to the Planning Board per B.C.C. § 32-4-231(a)(1). The Planning Board held open hearings attended by, *inter alia*, representatives for the Protestants and the Petitioners. At its June 4, 2015 meeting, the Planning Board voted and concluded that the Development Plan does indeed conform to Master Plan 2020. By letter dated June 15, 2015, the Planning Board communicated its determination to ALJ Beverungen, noting the following reasons for its conclusion: the project is within the Growth Areas defined by the URDL and Growth Tier I mapping area and will be served by available infrastructure including water and sewer, thereby minimizing impacts on the Chesapeake Bay; the project is within the Priority Funding Area allowing the development proposal to make the most efficient use of tax monies spent; no major expansion of road networks or other basic services is required and the project will not overburden existing services; the provision of housing opportunities outside the Coastal Rural Legacy Area helps maintain the rural character of the county; the location outside the Chesapeake Bay Critical Area ensures the meeting of Master Plan 2020's environmental concerns; and the development is within the T-3 Sub-Urban transect wherein the proposed low density single family homes is an appropriate form and element. (Protestants' Ex. 2). This letter indicates it was copied to various County authorities including all members of the County Council.

In his decision, ALJ Beverungen noted that the Planning Board's decision is binding upon an ALJ and is to be incorporated into a Final Order. *See* B.C.C. § 32-4-229(b). He also stated that the Code mandates that the hearing officer "shall" grant approval of a development plan that complies with development regulations and applicable policies, rules and regulations. *See* B.C.C. § 32-4-232(f)(1). Finding that the Development Plan satisfied the applicable requirements and that the Petitioner satisfied its burden of proof, ALJ Beverungen approved the Development Plan.

STANDARD OF REVIEW

This Board's review of the Hearing Officer's decision is governed by B.C.C. §32-4-281(e) which states that on appeal from a development plan approval the Board 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.

The Court in *Monkton Preservation Ass'n v. Gaylord Brooks Realty Corp.*, 107 Md. App. 573, 581 (1996) explained that as to the Board's authority for reversing or modifying a decision of a Hearing Officer:

The first three of these reasons involve errors of law, and, as to them, no deference is due to the hearing officer. The Board clearly must make its own independent evaluation. That is also true with respect to paragraph (e)-whether the hearing officer's decision is arbitrary or capricious. When it comes to reviewing the factual basis for the hearing officer's decision, however, the standard is the traditional one of looking only to whether there is substantial evidence to support the findings. In that examination, the

Board does *not* make independent evaluations, for to do so would require the Board to make credibility decisions without having heard the testimony.

Further, with respect to reviewing development plans, a county board of appeals

is not vested with broad visitatorial power over other county agencies, but acts rather as a review board, to assure that lower agency decisions are in conformance with law and are supported by substantial evidence.

Id. at 580. The Board must examine the record as a whole to determine whether or not substantial evidence exists to support the findings of the Hearing Officer, and if so, the Board may affirm those findings. Toward that end, "substantial evidence" has been defined to mean more than a "scintilla of evidence." *Prince George's County v. Meininger*, 264 Md 148, 152 (1972). An agency's fact-finding is based on substantial evidence if "supported by such evidence as a reasonable mind might accept as adequate to support a conclusion." *People's Counsel for Balt. County v. Surina*, 400 Md. 662, 681 (2007) (citations omitted). Further, an administrative agency's interpretation of a regulation with respect to which the agency has a special expertise is entitled to considerable weight and deference. *Angelini v. Harford Cty.*, 144 Md. App. 369, 373 (2002).

OPINION

Protestants argue that the decision below is flawed for the following reasons: (1) the Development Plan conflicts with the Community Plan with regard to density limits; (2) the Planning Board did not provide adequate findings of fact or legally sufficient reasons relative to the possible conflict with the Community Plan; (3) the Planning Board's decision is defective because the Planning Board members did not sign the decision; (4) the Planning Board's decision is incomplete because it was not reviewed by the County Council; (5) ALJ Beverungen failed to make adequate findings of fact regarding his conclusion as to the open space waiver; (6) the ALJ did not perform the required exercise of discretion to determine the appropriateness of utilizing

other schools in the district instead of the local elementary school; and (7) Council Bill 67-08 is unconstitutional because its title is inadequate and is arbitrary and capricious.

As to the Protestant's first issue, this Board finds no grounds to reverse or remand the ALJ's decision below. There exists substantial evidence in the record below to support his decision. In addition to Mr. Moxley's testimony as to the conformance between the Master and Community Plans, which is given deference, the Planning Board agreed upon a similarly reasoned conclusion (after multiple hearings) that the Development Plan "conforms to the Master Plan 2020." As noted above, the ALJ was bound to accept this decision. *See* B.C.C. § 32-4-229(b).¹

This Board similarly finds no error with regard to the Planning Board's findings of fact and conclusions. B.C.C. 32-4-232(b) states that with respect to issues regarding possible Master Plan conflicts, the Board shall "file a written decision with the Hearing Officer that includes the reasons for the decision." While Protestants may disagree with the Planning Board's conclusions and findings, that Board's signed letter decision of June 15, 2015 did provide an adequate statement of its findings and the reasons for those findings. (Protestants' Ex. 2). Further support is found in the minutes of the various meetings, demonstrating that the Planning Board members debated the merits of the question before it. (Protestants' Ex. 1). Similarly, although Protestants claim that the Planning Board never filed its decision with the County Council, the June 15 letter states on its face that it was copied to all Council members and other Council personnel. Protestants have not provided any testimony or indicia to rebut this assertion or legal support demonstrating that such a filing is insufficient to meet the requirements of B.C.C. § 32-4-232(b)(3). Nor have Protestants

¹ Protestants also could not provide an accepted or statutory definition of the ambiguous phrase, "normally unbuildable land," as used in the Community Plan. Moreover, the Community Plan language as to density is itself labeled a "recommendation" only. Finally, Baltimore County Zoning Regulations refer to "gross density" in calculating residential density. See § 1B01.2A

given any basis for their claim that the absence of the individual Planning Board member's signatures on this letter render the decision legally defective.

Protestants next assert that the ALJ did not make adequate findings of facts to conclude there was a sufficient legal basis for the open space waiver granted Petitioners. The developer sought an open space waiver pursuant to B.C.C. § 32-6-108. This provision allows for the waiver of the open space requirement in certain circumstance, accepting an applicant's payment of a fee in lieu of dedicating the open space to the county. According to the January 13, 2015 Memorandum from the Bureau of Development Plans Review for the Department of Recreation and Parks, the Open Space requirement for sixteen (16) units is 16,000 square feet (approximately 1/3 acre). This Memorandum states further that the applicable law permits the payment of a fee in lieu of dedicating such a small parcel of land and that such a fee "is appropriate for this site." (This Memorandum is included in Protestants' Ex. 7, the entire file from earlier proceedings). Jean Tansey of the Department of Permits, Approvals and Inspections, confirmed in her testimony before the ALJ that open space of less than 20,000 square feet, as is present here, provides limited recreational opportunities and warrants the granting of a waiver. (ALJ Opinion at 3). The ALJ cited Ms. Tansey's testimony and her conclusion that the waiver and fee satisfied agency requirements. Substantial evidence supports this agency's determination and we have no reason to reverse it.

The ALJ's determination as to school capacity also was not in error. ALJ Beverungen cited the testimony of Mr. Moxley of the Department of Planning to the effect that a school analysis was performed, and that while the district elementary school is currently above the State Rated Capacity, "there is sufficient capacity at several adjacent elementary schools, such that the school analysis was acceptable." (ALJ Opinion at 3). This is in accord with B.C.C § 32-6-103(f)(3). That section permits the Department of Planning to grant development approval in an

overcrowded school district if a school in an adjacent district has sufficient capacity to render the overcrowded school less than 115% of the state-rated capacity. Protestants did not offer any testimony or evidence to rebut Mr. Moxley's conclusions. The ALJ's recitation of supporting testimony for his decision is both appropriate and sufficient to affirm his findings. See Critical Area Comm'n for Chesapeake & Atl. Coastal Bays v. Moreland, LLC, 418 Md. 111, 134 (2011).²

Protestants' final argument is that County Council Bill 67-08, repealing a minor subdivision restriction, is unconstitutional. According to Protestants, the bill violates due process because its title is inadequate and incomplete. The Board need not address this argument because we lack the jurisdiction to determine the constitutionality of a legislative act; State law and the Baltimore County Charter limit our jurisdiction and scope of review. See Md. Code Ann., Local Gov't § 10-305; Baltimore County Charter § 602; United Parcel Serv., Inc. v. People's Counsel for Baltimore Cty., 336 Md. 569, 587 (1994); Baltimore Cty. v. Batza, 67 Md. App. 282, 308 (1986).

The ALJ heard extensive testimony and all parties had the right to examine and cross-examine witnesses, to subpoena witnesses, and to produce documentary evidence. As required, ALJ Beverungen heard from the County agencies on any "unresolved comments or issues." All County agencies recommended approval of the plan. Protestants failed to present sufficient, or at times any, evidence that rebutted or called into question the validity of the various agencies' conclusions as to the Plan's compliance with applicable regulations and policies. See People's Counsel for Baltimore Cty. v. Elm St. Dev., Inc., 172 Md. App. 690, 705 (2007); People's Counsel v. Mockard, 73 Md.

² Though the ALJ was not required to identify the alternative schools in his decision, it should be noted that Protestants' Exhibits 6-8 below (PAI#15-0757) speak directly to the issue of school overcrowding and identify eight nearby elementary schools with sufficient capacity to handle the limited number of students arising from the development.

App. 340, 349 (1987). The ALJ's decision is supported by the law and by substantial evidence. Applying the standard of review as set forth in B.C.C. §32-4-281 and the case law as to whether the decision of the Hearing Officer (1) exceeded statutory authority; (2) resulted from an unlawful procedure; (3) was affected by any other error of law; (4) is unsupported by competent, material, and substantial evidence; or (5) was arbitrary and capricious, and without giving any deference to the Hearing Officer, this Board finds that the decision was not in error for the reasons set forth herein.

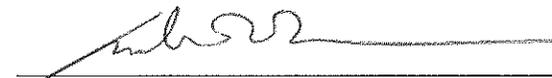
ORDER

THEREFORE, FOR THE REASONS STATED ABOVE, IT IS THIS 3rd day
of December, 2015 by the Board of Appeals of Baltimore County

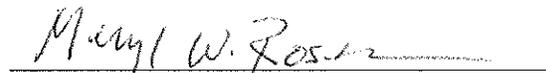
ORDERED that the June 18, 2015 decision of the Hearing Officer approving the red-lined Development Plan known as "Osprey Pointe f.k.a. Cape May Cove", be and it is hereby **AFFIRMED.**

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**



Andrew M. Belt, Panel Chair



Meryl W. Rosen



Jane M. Hanley