

IN RE: PLANNED UNIT DEVELOPMENT & PETITION FOR SPECIAL HEARING	*	BEFORE THE
E side of York Road, N of	*	OFFICE OF
Halesworth Road		
8 th Election District	*	ADMINISTRATIVE HEARINGS
3 rd Councilmanic District		
(Anderson GM – 10111, 10125, 10131 York Road & 10 Halesworth Road) - 2nd Material Amendment	*	FOR
	*	BALTIMORE COUNTY
Anderson Motors, LLC, <i>Developer</i>	*	CASE NOS. 08-796 and
Wawa, Inc., <i>Lessee</i>		2012-0150-SPH

* * * * *

ADMINISTRATIVE LAW JUDGE’S OPINION AND ORDER ON PLANNED UNIT DEVELOPMENT (PUD) AND PETITION FOR SPECIAL HEARING

This matter comes before the Office of Administrative Hearings (OAH) for a hearing pursuant to Section 32-4-227 of the Baltimore County Code (B.C.C.). In accordance with the development regulations codified in B.C.C. Article 32, Title 4, the Developer seeks approval of a Development Plan (the "Plan") prepared by Matis Warfield, for the proposed development of Lot 4 – Automotive Display and Lot 5 (the "subject property"). The proposed development is more particularly described on a four-paged redlined Plan submitted into evidence and marked as Developer's Exhibits, 1A through 1D.

The Developer is also requesting certain zoning relief and has filed a Petition for Special Hearing pursuant to Section 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) for:

- The amendment of the Anderson GM PUD previously approved in Deputy Zoning Commissioner Thomas H. Bostwick’s Revised Hearing Officer’s Combined Zoning Relief and Development Plan Opinion and Order (“Order”), dated March 3, 2010 (Zoning Case No. 2010-0161-SPH), in accordance with B.C.Z.R. Section 430 and Baltimore County Code (B.C.C.) Section 32-4-241, et seq.; and
- The material amendment of the Order and non-residential Development Plan (HOH Case No. 08-796) for the Anderson GM PUD in accordance with Section 32-4-262(1); and

- For such other and further relief as the Administrative Law Judge may require.

The zoning and development history of the subject property and the adjoining parcels owned by the same Developer was thoroughly detailed by former Deputy Zoning Commissioner Bostwick in an Order dated March 3, 2010, and will not be repeated here.

The Developer desires to sublease approximately 1.6 acres of the Anderson of Hunt Valley campus to Wawa. Wawa will operate a fuel service station and convenience store from this portion of the PUD authorization area, shown as Lot 5 on Exhibit 1A. The balance of the undeveloped property, approximately .8120 acres of land, will be utilized as a vehicle storage/parking lot (shown on Exhibit 1A as "Proposed Lot 4") for Anderson of Hunt Valley. Following an adjustment of the lot lines, the Wawa will be located at 10111 York Road (proposed Lot 5), while the vehicle storage/parking lot for Anderson will be located at 10 Halesworth Road (proposed Lot 4). There will be a 50 to 100 foot wide landscape buffer with abundant landscaping to provide ample screening to the adjacent residential community. There are no environmental constraints on the site.

A Development Plan Conference (DPC) was held between the Developer's consultants and various Baltimore County agencies, to consider the amended development proposal. In this case, the DPC was held on January 25, 2012. At the DPC, the Baltimore County agencies responsible for the review of the Development Plan submit written comments regarding the compliance of the Development Plan with the various Baltimore County regulations governing land development in the County. The Hearing Officer's Hearing was held before me on February 17 and April 10, 2012.

Appearing at the public hearing on behalf of the Developer were Bruce Rice and Ed Iobst with Wawa, Bruce Mortimer, property owner, James E. Matis, P.E. with Matis Warfield, the engineering firm that prepared the Plan, Glenn Cook with The Traffic Group. David K. Gildea,

Esquire and Jason Vettori, Esquire with Smith, Gildea & Schmidt, LLC appeared as counsel for the Developer.

Also appearing were Eric Rockel, president of the Greater Timonium Community Council (GTCC); Jim Rogers, Sr., John Sankonis, Chris Harvey, residents from Daventry Drive; Hiren Shah, and Manoj Alharya. Appearing in opposition to the Developer's request was J. Carroll Holzer, Esquire, on behalf of Lisa Tomlinson, Doug Miller, and Andy Tawney. In addition, Deborah Dopkin, Esquire attended and represented Logwood, LLC.

Representatives of the various Baltimore County agencies who reviewed the Plan attended the hearing, including the following individuals from the Department of Permits, Approvals and Inspections (PAI): Colleen Kelly, Project Manager; Jeff Perlow, representative of the Office of Zoning Review; Dennis A. Kennedy, Development Plans Review (DPR); and Ron Goodwin, Real Estate Compliance. Also appearing on behalf of the County were Lloyd Moxley, Department of Planning; David Lykens, Department of Environmental Protection and Sustainability (DEPS). Bruce Gill, Department of Recreation and Parks (R&P)/Development Plans Review (DPR), had been excused (no open space issues in a commercial project). Richard Zeller of the State Highway Administration (SHA) was also in attendance. Don W. Muddiman, Baltimore County Fire Marshall's Office, was represented at the hearing through prior correspondence. All Baltimore County representatives indicated – during the “informal” phase of the case – that the amended Development Plan satisfied all Baltimore County rules and regulations, and their agencies recommended approval of the Plan.

COUNTY WITNESSES

Dave Lykens, from DEPS, was the first County witness to testify in this matter. Mr. Lykens indicated that in this Development, two (2) sets of regulations were at issue; those concerning storm

water management and forest conservation. Mr. Lykens indicated that DEPS had approved this project at an earlier stage (the first amendment to the PUD) and that his agency did not need to conduct an additional review. Mr. Lykens confirmed that DEPS recommends approval for the project, although he advised that reviewer Brice Savage would be the employee with the most first-hand knowledge concerning the project. In response to Mr. Holzer's questions on cross-examination, Mr. Vettori submitted Developer's Exhibit 14, a letter from Al Wirth dated January 17, 2012. In that correspondence, Mr. Wirth indicated that the project was vested or grandfathered, and as such was reviewed under the earlier (2000) version of the storm water management regulations.

Dennis A. Kennedy was the next witness to testify, and he indicated that the DPR recommended approval of the PUD Development Plan. Mr. Kennedy indicated that within the last few days before the hearing, County bureau of traffic officials had met with the Developer's representatives and recommended certain traffic improvements along Halesworth Road, and Mr. Kennedy indicated those were reflected as redlined revisions on Developer's Exhibit 1B. Mr. Kennedy indicated that his agency was not concerned with what version of the PUD law would apply to this project. Instead, he indicated that his department is concerned solely with sewers, roads, drains, and water.

The next representative to testify was Richard Zeller, from the SHA. Mr. Zeller indicated that by correspondence dated January 24, 2012, he issued a development plan comment on behalf of the SHA. Specifically, Mr. Zeller indicated that the SHA has withheld approval of the project until it has had an opportunity to review the traffic study submitted by the Developer. Mr. Zeller indicated that the State's sole concern is whether the entrance/exit on York Road is sufficient, or whether improvements or changes would be needed.

The next County representative was Lloyd Moxley, with the Department of Planning. Mr. Moxley indicated that his agency had no outstanding issues concerning the project, and recommended approval of same. Mr. Moxley indicated that the Developer addressed the Department of Planning's comments in the Development Plan and Pattern Book. Mr. Moxley also confirmed that the Developer's proposal satisfied the compatibility requirements set forth at Baltimore County Code (B.C.C.) § 32-4-402, and was also consistent with the Hunt Valley-Timonium Master Plan.

Ron Goodwin, from the Department of Real Estate Compliance, was the next County witness to testify. Mr. Goodwin indicated that he had only one "advisory" comment concerning the plan, and that was with respect to the labeling of certain easements on the Development Plan. Mr. Goodwin said that his comment and suggested revisions would facilitate the later conveyance to Baltimore County of the easement shown on the Plan, but Mr. Goodwin stressed that his comments were advisory only and not binding.

The final County witness was Jeff Perlow, from the Office of Zoning Review. Mr. Perlow indicated that the County had no outstanding zoning issues with respect to the project, provided the Developer is granted the relief it seeks in Case No. 2012-0150-SPH.

DEVELOPER'S CASE

At the outset of Developer's case, Mr. Vettori indicated that this proceeding was in fact the second amendment of an earlier approved PUD. Mr. Vettori indicated that on the PUD plan approved in 2010 by Deputy Zoning Commissioner Bostwick, the parcel at issue in this case was vacant and the plan contained a notation indicating that the property would be developed at a later date. Developer's counsel conceded that his client must satisfy the criteria set forth at B.C.C. § 32-

4-245 for approval of this PUD, and he also clarified that no modification of standards (i.e., variances) were being sought in this proceeding.

The first witness in Developer's case was James Matis, a professional engineer who was accepted as an expert witness in development and land use planning. The first issue Mr. Matis discussed concerned the adequacy of the posting used in this case, which apparently used the incorrect case number for the proceeding. Mr. Matis stressed that this was a minor error and he opined that it was harmless, especially since all of the surrounding community associations and residents were well aware of the case.

Mr. Matis next testified that Note 39 on Developer's Exhibit 11 (the Development Plan approved in the First Amended PUD) provides that the property in question will be subject to future development, and that this was the purpose of the present proceeding. Mr. Matis opined that the Developer's proposal met all of the standards set forth at B.C.C. § 32-4-245. Mr. Matis further opined that, as outlined in the Pattern Book, the Developer's proposal satisfies each of the special exception standards set forth in B.C.Z.R. § 502, and he also opined that the project will be developed to the full extent of the plan. Finally, Mr. Matis opined that the development proposal complies with B.C.Z.R. § 430, and that the project was compatible with the applicable Master Plan(s).

Upon cross-examination by Mr. Holzer, Mr. Matis advised that there was no County Council resolution issued for this second amended PUD proceeding, proposing the development of a Wawa convenience store and gas station on the site. Mr. Matis also advised that a Community Input Meeting (CIM) and Concept Plan Conference (CPC) were not held in the case. Rather, he indicated that the project proceeded to a Development Plan Conference (DPC), and that no additional community benefit (beyond that specified in the original PUD) had been proposed by the

Developer. Finally, Mr. Matis confirmed that single-family dwellings were located to the east of the subject property, and he conceded that someone on the second floor of such homes could see the proposed Wawa building from their dwelling.

The next witness called in Developer's case was Chris Harvey, who resides at 10105 Daventry Drive, located immediately east of the subject property. Mr. Harvey testified that he was the secretary for the Monterey Improvement Association, comprising 89 houses located to the east of the proposed Wawa. Mr. Harvey indicated that his association had many meetings and discussions with the Developer and its representatives, and that the association supported the project.

John Sankonis, who resides at 10111 Daventry Drive, was the next witness in Developer's case. Mr. Sankonis indicated that he is the president of the Monterey Improvement Association, and stated that his organization supports the development proposal in this case.

Eric Rockel, who is president of the Greater Timonium Community Council (G.T.C.C.), was the next witness to testify. Mr. Rockel indicated that the Developer had been very responsive and forthcoming concerning the proposed Development, and he indicated that the GTCC is supportive of the project.

The final witness in Developer's case was Ted Iobst, a real estate engineer for WAWA. Mr. Iobst described in general terms the area surrounding the subject site, and indicated the WAWA would be constructed to a high design standard and at a much greater cost than traditional retail properties. He also indicated that WAWA has funds earmarked for this development, so he believed that there was certainly a reasonable expectation the project would be completed.

At this juncture, Mr. Holzer indicated that the Protestants would not be presenting any witnesses or introducing evidence. Rather, he advised that Protestants' case in chief would consist

of legal argument concerning certain alleged procedural shortcomings, which issue is discussed in greater depth immediately below.

At the conclusion of the public hearing in the above-captioned matter, counsel for Protestants made an oral motion to dismiss the Petitions, arguing that a County Council Resolution was required as a prerequisite to amending the PUD Development Plan in this case. The very narrow issue in this case is: whether a County Council Resolution is required prior to the material amendment of a non-residential PUD Development Plan. All parties agree that the amendment proposed in this case is in fact “material” and it is also clear that a public hearing was held to consider the propriety of the amendment and its compliance with the Baltimore County Zoning Regulations (“B.C.Z.R.”) and County development regulations.

Even though the motion involves an extremely narrow issue, it is nonetheless a complex question that is not easily answered. Indeed, in their briefs each of the parties have cited instances where PUDs have been amended without a new County Council Resolution, as well as instances where such a Resolution was obtained. This conflicting institutional precedent is an important issue, in that it renders, at least in my opinion, the regulations and ordinances at issue ambiguous.

While such a finding of ambiguity frequently leads to an examination of legislative history, I do not believe that would be instructive or fruitful in this case, especially given the predictable lack of any such information for local regulations and ordinances. Rather, I believe that the regulations in question are ambiguous concerning the proper method of amending a PUD, and that Baltimore County (and its citizenry and People’s Counsel, who are deemed to be in privity with the County) should be estopped from insisting that a Council Resolution be obtained in the first instance. WSSC v. TKU Assoc., 281 Md. 1, 20 (1977) (government and its citizens may be in privity).

As a general matter, it is clear that the doctrine of equitable estoppel applies to a municipal corporation more narrowly than it would to a natural person or business corporation. *City of Hagerstown v. Long Meadow*, 264 Md. 481 (1972). In *Permanent Financial Corporation v. Montgomery County*, 306 Md. 239 (1986), the Court of Appeals held that the County was estopped from revoking a building permit by contending that the height of the structure in question violated the applicable zoning laws. In the opinion, the Court noted that County zoning officials had uniformly interpreted the ordinance in one fashion, while the County's Planning Board and Planning Commission "held quite a different view." *Id.* at 246. Of particular relevance to this case, the Court of Appeals found that the zoning provision in question (i.e., the regulation by which a building's height was determined) "was open to at least two reasonable and debatable interpretations." *Id.* at 251.

I believe the same can be said in this matter; i.e., it is reasonable and debatable to contend that a Council Resolution is required prior to an amendment, or that such a resolution is not required provided that the requisite community notification and public hearing is held. In fact, and as noted by Developer's counsel, the very same PUD Development Plan at issue in this case was amended in 2010 without the necessity of a Council Resolution, and it therefore seems perfectly reasonable that the Petitioners would believe it could be amended in a similar fashion two years later.

There is another way to resolve this question, although it ultimately yields the same answer. While the nomenclature was different under prior versions of the law, it is now clear that the end result of a PUD proceeding is a PUD "development plan." B.C.C. § 32-4-245; B.C.C. § 32-4-101(q). Whether or not a project is processed through the more traditional regulations found in part 3 of Title IV (B.C.C. § 32-4-221 et seq.) or under the specific Planned Unit Development regulations found in part 4 of that Title (B.C.C. § 32-4-241 et seq.) the end result is the approval of

a development plan, and the County Code and B.C.Z.R. contemplate only one type of “development plan.” Viewing the issue from this perspective, the Petitioners seek the amendment of a “development plan,” which under B.C.C. § 32-4-262 “shall be reviewed and approved in the same manner as the original plan.”

In this matter, there have been a series of PUD development plans, but in his Order dated March 3, 2010, former Deputy Zoning Commissioner Thomas Bostwick consolidated the plans and files in these cases such that there is at this point only a single Development Plan which encompasses all of the prior approvals on this site. Thus, the “original plan” was amended through the process of a Hearing Officer’s Hearing, as also occurred in this case.

Other County Code provisions lend support to the argument that B.C.C. § 32-4-262 controls when a PUD Development Plan is amended. B.C.C. § 32-4-241 provides that a PUD shall be submitted and reviewed “in accordance with the procedures of this title.” Of course, B.C.C. § 32-4-262 is found within Title 4, governing “Development.” B.C.C. § 32-4-245(d) provides that an appeal in a PUD case is filed and processed in the same manner as a “regular” development plan, under § 32-4-281. It seems logical that since the processing and review of a PUD shares so many of the attributes and procedures used in traditional Development Plan hearings, the method of amending such plans would also be done in a similar fashion. The rule would obviously be otherwise if the property shown on the amended Development Plan was not included within the boundaries of the original PUD resolution, which is not the case here.

So in the end, whether the doctrine of equitable estoppel is applied, or B.C.C. § 32-4-262, the result is the same: Petitioners did not need to secure a new County Council Resolution for the amendment of the PUD Development Plan at issue in this case, involving the construction of the WAWA convenience store and gas station on the vacant parcel designated as Lot 5. Exhibit 1A.

The Hearing Officer can approve a PUD Development Plan only upon finding:

- (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 the Master Plan, area plans, or the Department of Planning.

B.C.C. § 32-4-245(c)(1)-(5).

In this case, the Developer presented uncontroverted evidence establishing each of these elements. Mr. Moxley of the Department of Planning testified the PUD Development Plan was in conformance with the Master Plan (and the Hunt Valley-Timonium Plan), and that it also satisfied the compatibility requirements of the B.C.C. Mr. Iobst testified that WAWA has sufficient funding to complete this project, so B.C.C. § 32-4-245(c)(3) is satisfied. Finally, Mr. Matis testified the project satisfied the B.C.Z.R. § 502 special exception requirements, complied with B.C.Z.R. § 430 (governing PUDs) and met the intent and standards set forth in the B.C.C. and B.C.Z.R.

In light of this testimony, and given the strong support of the community groups in the area, the Amended PUD Development Plan shall be approved. In essence, the Developer proposes to

construct a gas station and mini mart on the site, which is the exact same use that existed on this parcel pursuant to a special exception granted in 1990 (Case 90-81-X), which was formally abandoned in 2007 (Case 07-346-SPH). That such a use existed for over 17 years on this site is persuasive evidence that the WAWA store will likewise not be detrimental to the health, safety or welfare of the surrounding community.

Pursuant to the zoning and development regulations of Baltimore County, the PUD Development Plan (Developer's Exhibits 1A-1D) shall be approved consistent with the comments contained herein and the enumerated conditions.

THEREFORE, IT IS ORDERED by this Hearing Officer/Administrative Law Judge this ___16___ day of May, 2012, that the four sheet redlined Development Plan identified herein as Developer's Exhibits 1A and 1B, be and is hereby APPROVED;

IT IS FURTHER ORDERED that the Petition for Special Hearing pursuant to Section 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") seeking approval for:

- The amendment of the Anderson GM PUD previously approved in Deputy Zoning Commissioner Thomas H. Bostwick's Revised Hearing Officer's Combined Zoning Relief and Development Plan Opinion and Order ("Order"), dated March 3, 2010 (Zoning Case No. 2010-0161-SPH), in accordance with B.C.Z.R. Section 430 and Baltimore County Code (B.C.C.) Section 32-4-241, et seq., and
- The material amendment of the Order and non-residential Development Plan (HOH Case No. 08-796) for the Anderson GM PUD in accordance with Section 32-4-262(1),

be and is hereby GRANTED.

The relief granted herein is expressly conditioned upon the State Highway Administration's approval of the project.

Any appeal of this Order shall be taken in accordance with Baltimore County Code, Section 32-4-281.

Signed _____
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/dlw