IN RE: DEVELOPMENT PLAN HEARING	*	BEFORE THE
3rd Election District		
2nd Councilmanic District	*	OFFICE OF
10100 Reisterstown Road		
(Foundry Row)	*	ADMINISTRATIVE HEARINGS
GGCV Real Estate, LLC		
Owner/Developer	*	FOR BALTIMORE COUNTY
	*	**HOH CASE NO. 03-0496**

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ADMINISTRATIVE LAW JUDGE'S
DEVELOPMENT PLAN OPINION & ORDER

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County for a public hearing on a development proposal submitted in accordance with the development review and approval process contained in Article 32, Title 4, of the Baltimore County Code ("B.C.C."). GGCV Real Estate, LLC ("GGCV"), the developer of the subject property (hereinafter "the Developer"), submitted for approval a six (6) sheet redlined Development Plan prepared by Century Engineering, known as "Foundry Row."

The Developer is proposing to develop 364,480 sq. ft. of retail/restaurant space and 60,000 sq. ft. of office space on 49.5 +/- acres of land zoned BM. There is an existing vacant warehouse of 241,603 sq. ft. that will remain for future development. The entire site is developed with an unused warehouse, storage, manufacturing and office buildings all associated with the former Solo Cup factory. Most of the mentioned buildings will be razed to allow for the proposed development.

The property was rezoned to BM, pursuant to the 2012 Comprehensive Zoning Map Process (CZMP) and Baltimore County Council Bill No. 54-12, which took effect on September 10, 2012. This zoning change, while not an aspect of this development case, is nonetheless a pivotal issue in the chronology of this project.

Details of the proposed development are provided on the six-sheet redlined Development Plan that was marked and accepted into evidence as Developer's Exhibit 4A – 4F. The property was posted with the Notice of Hearing Officer's Hearing on June 9, 2013 for 20 working days prior to the hearing, in order to inform all interested citizens of the date and location of the hearing.

Appearing at the hearing in support of the Development Plan on behalf of the Developer and property owner was Brian Gibbons and Brian Gibbons, Jr., John W. Ranocchia, Sr. and Michael J. Pieranunzi, both with Century Engineering, the consulting firm that prepared the site plan, and Mickey A. Cornelius, with the Traffic Group. David K. Gildea, Esquire and Lawrence E. Schmidt, Esquire, both with Smith, Gildea & Schmidt, LLC, appeared and represented the Developer.

Also in attendance was G. Scott Barhight, Esquire with Whiteford, Taylor & Preston, LLP, representing Painters Mill Executive Office Park Partnership, LLP and Garrison Realty Investors, LLC. In addition, Stuart D. Kaplow, Esquire appeared and is representing 100 Painters Mill, LLC.

In addition, several citizens from the area attended the hearing, and their names are reflected on the sign-in sheets.

County Review

Numerous representatives of the various Baltimore County agencies, who reviewed the Development Plan, also attended the hearing, including the following individuals from the Department of Permits, Approvals and Inspections (PAI): Darryl Putty, Project Manager, Dennis Kennedy (Development Plans Review [DPR]), LaChelle Imwiko, Real Estate Compliance, and Joseph C. Merrey (Office of Zoning Review). Also appearing on behalf of the

County were Glenn Shaffer from the Department of Environmental Protection and Sustainability (DEPS), and Jenifer Nugent, from the Department of Planning (DOP).

The role of the reviewing County agencies in the development review and approval process is to perform an independent and thorough review of the Development Plan as it pertains to their specific areas of concern and expertise. The agencies specifically comment on whether the plan complies with all applicable Federal, State, and/or County laws, policies, rules and regulations pertaining to development and related issues. In addition, these agencies carry out this role throughout the entire development plan review and approval process, which includes providing input to the Hearing Officer either in writing or in person at the hearing. Continued review of the plan occurs after the Hearing Officer's Hearing during the Phase II review of the project. This continues until a plat is recorded in the Land Records of Baltimore County and permits are issued for construction.

Pursuant to §§ 32-4-227 and 32-4-228 of the B.C.C., which regulate the conduct of the Hearing Officer's Hearing, I am required first to identify any unresolved comments or issues as of the date of the hearing. At the hearing, each of the Baltimore County agency representatives identified above indicated that the redlined Development Plan addressed any and all comments submitted by their agency, and they each recommended approval of the plan.

Developer's Case

In the "formal" portion of the case, the Developer presented the testimony of Michael J. Pieranunzi, a Landscape Architect who was accepted as an expert. Mr. Pieranunzi indicated he visited the site on many occasions, and he described the project in some detail. Mr. Pieranunzi indicated that his work on this project began in the fall of 2011, at which time he mapped the existing conditions of the former Solo Cup factory site, and began working with his client and

the sub-consultants on this project.

Mr. Pieranunzi indicated that the tract is approximately 50 acres, and is zoned BM throughout the entire site. The witness stated that there is a significant grade change (approximately 50') from the entrance to the site off of Reisterstown Road to the low point near the railroad tracks at the back of the site. Mr. Pieranunzi indicated that there are no significant environmental features on the site.

Thereafter, Mr. Pieranunzi described the access points to the project, and began by indicating that the access points on Reisterstown Road will match what exists today. He indicated that there is a signalized access point across from Garrison View Road, and further south is a private road next to the St. Thomas Shopping Center which also provides access to the site. The witness explained that Painters Mill Road will also have two access points. There will be a signalized access point at the rear of this site near Building "B" (as shown on the Development Plan), and access will also be provided near the proposed Wegman's store, which will be of a right-in/right-out configuration.

Mr. Pieranunzi explained that there was originally proposed a fifth means of access for the site, via a roadway positioned along the railroad tracks at the south end of the site. Mr. Pieranunzi explained that this roadway was the subject of litigation filed in the Circuit Court for Baltimore County, and as such the Developer has included as a redlined change on the Development Plan gates which prevent this from being used as a means of ingress/egress to the site. Mr. Pieranunzi further indicated that the Developer would be dedicating roadway frontage along Painters Mills Road (approximately .3 acres) as well as a 30' wide right-of-way along Reisterstown Road for highway widening. The witness indicated that the existing water and sewer service on the property will be sufficient for the proposed project. In conclusion, Mr.

Pieranunzi opined that the six-sheet redlined Development Plan (marked as Developer's Exhibits 4A – 4F) satisfied all Baltimore County laws, rules and regulations pertaining to the approval of commercial development projects.

On the second day of the hearing (July 11, 2013), five citizens (George Harman, Ruth Goldstein, Cheryl Aaron, Aaron Plymouth, and Noel Levy) and community association leaders testified. Each of the witnesses expressed enthusiastic support for the project, and also believe that the access road referenced earlier (the subject of Circuit Court litigation) would be a nice amenity to have for the site, although they each believe the project could succeed without such access being provided.

The final witness in Developer's case in chief was Mickey A. Cornelius, a licensed professional engineer, who was accepted as an expert witness. Mr. Cornelius indicated that he began his work on the project in July, 2011, and met early on (a "scoping" meeting) with Baltimore County and State Highway Administration (SHA) officials to allow each of the government agencies to indicate what features and specifics they would require for the project. Mr. Cornelius indicated that he was made aware early on that the access road issue was in litigation, and therefore indicated (*See* Developer's Exhibit 11) that his studies and reports on the case would not assume that the private road would be used for the project.

In describing the current conditions at the site, Mr. Cornelius indicated that there were no intersections rated "D", "E" or "F", and the witness also explained that the property is currently served by two points of access on Reisterstown Road, and one point of access from Painters Mill Road.

Mr. Cornelius next explained the traffic impact studies that he prepared for the case, which evaluated existing roads and projected traffic of the proposed development. Mr. Cornelius

explained that Baltimore County uses a "loaded cycle" methodology in evaluating traffic, while the SHA uses a process known as the "critical lane" methodology. In this case, Mr. Cornelius indicated that he employed the critical lane method, which evaluates existing traffic conditions, considers "background conditions," which means the impact of those approved projects currently in the development process, and then arrives at a "projected total" for the traffic conditions in the area. Mr. Cornelius stated that his studies evaluated three time periods to measure the traffic conditions at the project. The witness explained that he also conducted an evaluation of the traffic using the "Highway Capacity Manual," (HCM) which is a detailed operational analysis of traffic at any given location. The SHA requested that Mr. Cornelius perform such a study using the Synchro software package to simulate or evaluate the potential traffic impacts at the site, and the witness explained that the Synchro software uses a HCM analysis.

Using that analysis (as reflected on Developer's Exhibit 15), the results indicated that in the study area, the lowest grade or level of service (LOS) would be a "D". The witness indicated that both Baltimore County and the SHA approved these findings, and also approved, at least conceptually, the roadway improvements proposed by the Developer. Mr. Cornelius indicated that the Developer has not yet secured an access permit from the SHA, which the witness explained was understandable given that such permits are never granted before Development Plan approval, and are issued at the final stage of the project just prior to construction. In conclusion, the witness indicated that the Developer plans to have the project completed in 2015, and the witness opined that the proposed highway improvements shown on the Development Plan are appropriate and will improve the safety and sufficiency of the roads. Developer's Exhibits 16A and 16B highlight the proposed roadway improvements, which will be at the Developer's expense. More specifically, the witness opined that Developer's Exhibit 4A – 4F

(the redlined Development Plan) satisfied all rules and regulations for Baltimore County traffic and roadway requirements.

On cross examination, the witness advised that Baltimore County (unlike the SHA) has no written standards or policies concerning traffic. The witness indicated that Baltimore County for the most part follows SHA guidelines.

Mr. Cornelius next described the "other approved developments to be considered," (i.e., background traffic) and indicated that he spoke with Darrell A. Wiles, at Baltimore County Bureau of Traffic Engineering & Transportation Planning, for confirmation of those matters to include. The witness said that Mr. Wiles indicated the studies should include Owings Mills Metro Center project, south parcel (for 2015) and for 2020 the rest of the Owings Mills Metro Center project, as well as the T. Rowe Price project. The witness explained that the Owings Mills Metro Center project was slated for a 20-year build-out, and as such Baltimore County indicated that only the south parcel should be included.

The witness was next shown a development plan for the Owings Mills Metro Center, marked as Protestants' Exhibit 1, and was questioned concerning certain amendments thereto, including an addition of 1,200 townhouses. The witness explained that he did not think such an amendment would have any impact on traffic, given that although the number of dwellings was increasing, there was in his opinion an offsetting and commensurate reduction in the amount of retail and office space. Mr. Cornelius next described the Synchro software package, and described the variables which are input for analysis. The witness indicated that such variables include geometrics, speed, as well as the concept of "lost time," which is that period of time before cars start moving at an intersection following a signal change. Mr. Cornelius explained that SHA provided to him the Synchro model that the Traffic Group was instructed to use for the

Traffic Impact Study (TIS). Concerning the roadway improvements shown on Developer's Exhibits 16A and 16B, Mr. Cornelius explained that there was sufficient existing right-of-way for the improvements to Reisterstown Road, except for perhaps a small portion of property located off of the Developer's property. Mr. Cornelius also confirmed during cross examination that his traffic studies did not use or rely on any SHA improvements to the roadway network, and also did not take into account the vacant warehouse (Building "J") shown on the Development Plan. Mr. Cornelius was the final witness called in Developer's case in chief.

Protestants' Case

The first witness called in the Protestants' case was Joseph Merrey, a Planner at the County's Zoning Review Office. Mr. Merrey indicated that he is a licensed attorney, and has worked at the Zoning Review Office since 1984.

Mr. Merrey testified that the project under consideration qualified as a "shopping center" under the zoning regulations, and that for purposes of parking calculations, the Developer could at its option chose to provide five spaces per 1,000 sq. ft. or add up the component elements and uses to arrive at a required parking figure. In this case, Mr. Merrey explained that the Developer chose to do the latter, and that a sufficient number of parking spaces are shown on the Plan, which his office did not independently verify.

Thereafter, the witness was asked several questions concerning whether or not Buildings "A" or "N" shown on the Plan would contain drive-thru restaurants. Mr. Merrey explained that simply because a drive-thru feature is shown, the building would not necessarily need to be a restaurant; for example, he indicated it could be a drive-thru Walgreens. Thereafter, the witness discussed the front averaging setbacks required by Baltimore County Zoning Regulations (B.C.Z.R.) § 303.2, and initially he believed Building "L" shown on the Plan would need

variance relief. However, upon being shown an aerial photo by Mr. Schmidt during cross examination, the witness conceded that he had overlooked certain pad site developments in the area which, when employing the front averaging setback regulations, meant that variance relief was in fact not required. The witness also responded to questions concerning the vacant warehouse building, which he indicated did not require a loading zone.

Dennis Kennedy was the next witness called in the Protestants' case, and he has been a licensed professional engineer since 1984, and has been employed by Baltimore County since 1986. Mr. Kennedy's current position is Engineer IV in the Bureau of Development Plans Review. Mr. Kennedy confirmed that a traffic impact statement was required for this project, and he also indicated that he reviewed each of the four TIS submitted in this case. *See* Developer's Exhibits 17A – 17C; 18A - 18C; 19 and 20A.

Colleen Kelly was the next witness to testify, and she indicated that she is employed by Baltimore County as a Development Manager, a position she has held for the past five years. Ms. Kelly indicated that although she receives traffic studies for commercial projects, she does not review them, and she clarified that she had "very little" involvement with the Foundry Row project. The witness indicated she did attend a meeting early in the process with the development team (on or about July 7, 2011), but was not in attendance at the "scoping meeting" referenced in Developer's Exhibit 11. In addition, Ms. Kelly confirmed that she was not involved in selecting which projects should be included in the background traffic category for the studies.

Greg Carski, an Engineer III in the County's Bureau of Traffic Engineering, was the next witness presented in the Protestants' case. Mr. Carski indicated that he is responsible for reviewing traffic studies, signals and similar matters concerning County roadways, and indicated

at the outset that he had "minimal" involvement with the Foundry Row project. The witness confirmed that he received each of the traffic studies prepared by Traffic Group, but indicated that he distributed these for review to Kristoffer Nebre. The witness stated that at present, his bureau was reviewing the latest traffic study dated July 12, 2013. Mr. Carski also indicated that in a recent meeting with the Department of Public Works (DPW) Director Edward C. Adams, Jr., it was agreed by all in attendance that the improvements shown along Painters Mill Road, to be provided by the Developer, were acceptable to Baltimore County. In response to questions from Developer's counsel, the witness indicated that he has not spoken with or met Mr. Cornelius or anyone from the Traffic Group concerning this case, and also indicated that in a project or study of this magnitude Baltimore County would defer to the findings and conclusions of the SHA.

Kristoffer Nebre, an Engineer I in the Bureau of Traffic Engineering, was the next witness in the case. Mr. Nebre indicated that he has been employed by Baltimore County since 2009, and, among other duties, reviews traffic studies and other matters delegated to him by Mr. Carski. Mr. Nebre stated that he was responsible for reviewing the Foundry Row TIS, and that his comments concerning the February 2013 submission (marked as Developer's Exhibits 18A – 18C) were set forth in a memorandum marked as Protestants' Exhibit 7. The witness indicated that his review took approximately 4 or 5 hours over a 2-week time span, and he indicated that he had skimmed through the most recent TIS (marked as Developer's Exhibit 20A), but had not to this point reviewed the study in detail. Mr. Nebre stated he had no involvement in determining which projects should be included in the background development portion of the TIS. In referring to his review of the February 2013 TIS, Mr. Nebre stated that he does not believe the Traffic Group used "existing times" for its calculations, and he did not believe that the figures shown in the TIS "match what we have in the field." *See* Protestants' Exhibit 7,

Bullet Point 1. In response to a question on cross examination from Developer's counsel, Mr. Nebre confirmed that there are not at present (nor are there projected to be) any failing intersections in the vicinity of the Foundry Row project.

Geoffrey Rice was the next witness called in the Protestants' case, and Mr. Rice indicated that he has been employed by Baltimore County for over 17 years. The witness indicated that he prepared the Concept Plan comments and Development Plan comments for the Bureau of Development Plans Review. Mr. Rice indicated that at present he has not received anything in writing from the Bureau of Traffic Engineering concerning the traffic studies performed in this case. The witness stated that he was asked by Mr. Carski to determine the appropriate "background traffic" to be used for the studies, and that Mr. Kennedy also asked him to verify the background development information included in the studies prepared by the Traffic Group.

The witness explained how he performed this task, and began by explaining the grid system his agency employs in these matters. *See* Protestants' Exhibits 11, 12, and 13A – 13J. Mr. Rice indicated that for this task he considered only projects approved since 2006 which generated greater than 50 average daily vehicle trips. The witness referred to the traffic study marked as Developer's Exhibit 17, and stated that he agreed with the inclusion of the three "major" projects shown therein. Upon further questioning, the witness indicated that although the T. Rowe Price project is shown in the Traffic Group studies, it was in fact "outside these maps," and he confirmed that as such he would not have included it in the study. The witness was next questioned concerning the sight lines along Painters Mill Road, and he advised that during a recent site visit he confirmed that (with the possible exception of the obstruction presented by the railroad bridge) the sight distances for the access points along Painters Mill Road were satisfactory.

The next witness was Steven D. Foster, a 38-year employee of the State Highway Administration. Mr. Foster indicated that his current title with SHA is Development Manager, which requires that he review proposed developments and considers the impact upon and access to the State highway system. Mr. Foster stated that it is only on rare occasions that the SHA would perform its own analysis of the appropriate "background traffic" to be included in a TIS. The witness stated that the SHA will review a TIS submitted by a traffic consultant, and thereafter confirm with Baltimore County officials that the appropriate projects have been included in the background traffic analysis portion of the study.

Mr. Foster testified he does not recall whether or not he reviewed the redlined Development Plan (Developer's Exhibits 4A – 4F), but he indicated that the Developer did address the comments and concerns raised by the SHA. In response to questioning from the Protestants' counsel, Mr. Foster stated that he was not a traffic engineer, and was not familiar with the details of the Synchro software package, or the critical lane volume (CLV) methodology frequently used in traffic studies. The witness was later shown a Reisterstown Road Corridor Study prepared by the SHA, and marked as Protestants' Exhibit 15, and Mr. Foster advised that the roadway improvements shown to Maryland Route 140 (Reisterstown Road), which the Developer would provide, are in fact the same improvements referenced as being necessary in the aforementioned study.

The Protestants next presented the testimony of Ann M. Randall, a transportation planner employed by Wells and Associates. Ms. Randall began by explaining her education and employment background, and a copy of her C.V. was admitted as Protestants' Exhibit 16. The witness began her testimony by describing certain terminology, including the critical lane method, HCM, and Synchro analysis.

Ms. Randall explained that although a traffic engineer and transportation planner perform similar functions when evaluating the capacity of an intersection, it is only the transportation engineer that is authorized to prepare and seal plans for the roadway improvements in question. Ms. Randall was accepted as an expert witness in the area of transportation planning.

The witness indicated she was retained approximately two years ago by Garrison Realty to evaluate the re-development potential of the subject property. The witness indicated that she relied upon Protestants' Exhibit 15, a report to the Legislature from the SHA. Ms. Randall indicated that the report was relevant because the SHA acknowledged that numerous intersections on the Reisterstown Road corridor would function at a LOS of "D", "E", or "F". Based upon her analysis and review in this case, the witness identified three issues or categories of testimony she would discuss:

1. Lane utilization
2. Pedestrian phasing
3. Lost time

With regard to the first issue, Ms. Randall made reference to Developer's Exhibits 16A and 16B, which describe and depict the proposed roadway improvements to be made by the Developer. Specifically, Ms. Randall indicated that the proposed right turn/thru lane at southbound Reisterstown Road and Painters Mill Road has a very short queue which could hold five cars at a maximum. The witness explained that this short section of road (approximately 120 feet long) has little ability to handle traffic, which caused her to make a "lane utilization" adjustment to the findings presented by the Traffic Group. Ms. Randall, referencing scenario #1 on a table presented as Protestants' Exhibit 19, indicated that when this adjustment is taken into consideration, the LOS at the intersection would in fact be an "E", while the SHA regulations mandate a "D" LOS or better.

The witness next explained scenario #2 on the table (Protestants' Exhibit 19) and indicated that it referred to the Synchro analysis performed by the Traffic Group. Ms. Randall testified she and her staff reviewed the analysis prepared by the Traffic Group, and determined the pedestrian signal timing had not been "turned on." Ms. Randall explained that the SHA requires compliance with the Americans with Disabilities Act (ADA), and that when the pedestrian signal phasing is considered, it changes the LOS found in the Traffic Group study, resulting in a deficiency at the intersection.

Ms. Randall indicated that scenario #3 shown on the table represents a combination of the factors discussed above in scenarios #1 and #2. The witness indicated that using data provided by the SHA and Traffic Group, the LOS at the Reisterstown Road/Painters Mill Road intersection would be "E" or "F".

The witness next discussed the issue of lost time, and indicated that her staff compared the files prepared by the SHA and Traffic Group, and found a discrepancy. Specifically, Ms. Randall indicated the "phasing" will change at the intersection when the proposed improvements are constructed. After she and her staff performed the lost time analysis, Ms. Randall determined that the northbound double left turn on Reisterstown Road is in conflict with the southbound traffic, in that the lost time figures used by the Traffic Group would in fact envision motorists running through red lights. In addition, Ms. Randall indicated that the Traffic Group modeling is such that a motorist would be making a left hand turn from Reisterstown Road at the same time a pedestrian would be crossing the street.

In summary, the witness opined that the proposed roadway improvements to be completed by the Developer would not alleviate the congested and unacceptable traffic conditions. Ms. Randall further opined that the Reisterstown Road/Painters Mill Road

intersection does not meet the "safe and convenient" requirement set forth in B.C.C. § 32-4-405.

On cross examination, Ms. Randall confirmed that she did not prepare a written report in this case, other than the tables admitted as Protestants' Exhibit 19. The witness agreed that exhibit presents a "snap shot" of proposed conditions at the time the Foundry Row project would be complete. Ms. Randall stated she did not perform an analysis of the current traffic conditions at this intersection. Ms. Randall testified she has had no contact with SHA and/or Baltimore County officials concerning this project. Finally, the witness conceded that none of her investigation or analysis attempted to isolate the impact of only the Foundry Row project (as opposed to other "background traffic conditions") to consider its effect on the proposed traffic conditions.

Thereafter, the Developer presented a brief rebuttal case, first recalling landscape architect Michael J. Pieranunzi. Mr. Pieranunzi was questioned concerning the testimony of County employee Joseph Merrey, regarding certain aspects of the Development Plan. Mr. Pieranunzi confirmed that the drive-thru lanes shown on the Development Plan (at Buildings "A" and "N") comply with the stacking requirements set forth in the B.C.Z.R., and that the warehouse (Building "J") does not have a loading dock proposed, but that one could be accessed and utilized if necessary.

The final aspect of Mr. Pieranunzi's rebuttal testimony concerned the issue of whether a variance would be required for Buildings L, M, N, F, and A as shown on the Development Plan. These buildings would face Reisterstown Road, and are therefore subject to the County's front yard averaging regulations. The witness indicated that the purpose of those regulations is to ensure that commercial buildings are constructed in a somewhat uniform pattern and distance from the adjoining roadway. Mr. Pieranunzi indicated that the buildings in question were set

back from Reisterstown Road at least as far as are the buildings found in the adjacent shopping center. Finally, Mr. Pieranunzi explained that if required the Developer could change the orientation of these buildings, such that the "front" would not face Reisterstown Road. The witness marked the Development Plan (Developer's Exhibit 4A through 4D) to highlight how a reorientation of the building front yard would obviate the need for variance relief.

The final witness in the Developer's rebuttal case was traffic engineer Mickey Cornelius. Mr. Cornelius indicated that following his initial testimony in the case, he conducted another Synchro analysis of the intersection without any lost time adjustment. He stated the LOS remained the same, and would function at a grade "D" or better. The witness confirmed that the traffic studies he prepared did not make any adjustment for pedestrian phasing. He stated that although the Developer would obviously need to comply with ADA requirements for pedestrian access, staff at the SHA informed him that such an adjustment was not required for the TIS. Finally, Mr. Cornelius conceded that the shared through/right turn lane shown on the plan would not alleviate in any significant way the traffic congestion at the intersection.

On the final day of the hearing (September 24, 2013) two employees from the SHA (Kelly Kosino and Cedric Ward) provided testimony in response to a subpoena issued by Protestants' counsel, which was upheld by Order of Circuit Court Judge John J. Nagle, III.

Ms. Kosino indicated that she worked in the Access Management Division of the SHA for most of the time during which she reviewed the Foundry Row project. Ms. Kosino stated that she is a licensed professional engineer, and that she reviewed all four of the traffic impact studies submitted by the Developer. The witness explained that the CLV methodology is a tool to measure how well an intersection works, and that Synchro is a modeling tool that would provide an idea of the efficiency and performance of a future roadway network. The witness

stated that she has conducted CLV analyses on many occasions, but has only worked with others in reviewing or conducting a Synchro analysis.

Ms. Kosino was shown a copy of the Development Plan, and indicated that she had not prior to the hearing seen or reviewed the document, nor could she state whether anyone at SHA had reviewed the Plan. The witness explained that the concept of "lost time" at signalized intersections involves the analysis of the brief period of time in which vehicles do not move after the traffic signal has changed. Ms. Kosino indicated that she reviewed in a general fashion the Synchro analysis in this case, but added that she could not answer any questions concerning a lost time element in that analysis.

Ms. Kosino was next shown several letters authored by the SHA expressing concern with the traffic study submitted by Mr. Cornelius and the Traffic Group. Ms. Kosino indicated that the Developer has been coordinating with the SHA, and she believed that each comment raised in the referenced correspondence had been resolved. In response to a question from Developer's counsel, Ms. Kosino emphasized that Steven Foster was at all relevant times her supervisor, and that her job was to assist in providing him with the necessary background and comments which were incorporated into the SHA response letters bearing his signature.

The second SHA witness, who was also the final witness in the case, was Cedric Ward. Mr. Ward testified that he is the Director of the SHA Office of Traffic and Safety, and by reference to an internet printout (Protestants' Exhibit 26) he described in general terms the functions of that office. Mr. Ward confirmed that he did not review any of the traffic impact studies in this case, and that he also could not provide any comment on the CLV or Synchro analysis that was performed.

Issues Identified by Protestants

In their memorandum in lieu of closing argument, the Protestants have identified a variety of issues which they believe should result in the denial of the Plan, or at least the imposition of conditions concerning same. Those issues will be addressed in the order in which they were raised.

Proposed Road Improvements are not "safe and convenient"

Protestants contend the road system shown on the Plan is neither safe nor convenient, citing B.C.C. § 32-4-405. This provision is found in Subtitle 4 of the laws governing development, entitled "General Design Standards and Requirements." The "safe and convenient" language highlighted by the Protestants is a generic statement found in subsection (a) of that ordinance, which is followed by additional subsections contain more specific requirements.

Whether or not the Developer has satisfied this provision is difficult to analyze, given that the terms are nowhere defined in the B.C.Z.R. or B.C.C. Nor (based on the undersigned's research) are their prior administrative orders addressing the concept. Very little (if any) of the testimony in this case addressed traffic "safety," as opposed to operational efficiency, which is arguably relevant in determining if a roadway network is "convenient." Indeed, scholars have argued that the HCM should incorporate safety aspects into its evaluation of traffic conditions and corresponding levels of service. *See* "Integration of Safety and the Highway Capacity Manual," Transportation Research Circular EC018, July 2000, by Gary S. Spring, Univ. of Missouri.

Since no evidence was presented that the proposed traffic system is unsafe, I do not believe the Plan can be denied on that basis. The Protestants did not present lay or expert testimony on the safety issue. In addition, many of the particulars that will impact traffic safety

– – such as the design and placement of traffic signals and signs, and the engineering plans for the roadways themselves – – will occur in a subsequent phase of the development process, as described by Messrs. Kennedy and Foster.

As for whether the roadways are "convenient," this strikes me as a very subjective determination that would be hard to quantify. To the extent that the level of service for the signalized intersection at Reisterstown and Painters Mill Roads is an appropriate barometer, I do not believe the Plan can be denied on this basis. Under the B.C.Z.R., development is halted only when an intersection functions at a LOS of "E" or "F". B.C.Z.R. § 4A02.4.D. According to the 2013 Transportation Basic Services Map, none of the intersections in the vicinity is rated at an "E" or "F" LOS. *See* Developer's Exhibit 13. In addition, Mr. Nebre estimated that he spent approximately five (5) hours reviewing the traffic studies, and he stated that none of the signalized intersections were deficient, nor did he believe that any of the intersections would become deficient as a result of this project.

Both the Developer and Protestants offered expert testimony concerning the projected LOS for the intersection. The projections considered existing traffic, approved projects in the "pipeline" (background traffic), and arrived at a figure for total future traffic. As one might expect, Developer's expert opined that there would not be a LOS "E" or "F", while Protestants' expert opined to the contrary. Having observed both of these witnesses, I find Mr. Cornelius' testimony to be more credible and persuasive than Ms. Randall's. Mr. Cornelius is a licensed professional engineer (Ms. Randall is not) and as part of his review he completed a total of 4 comprehensive traffic studies. Thus, I believe his opinions were thoroughly considered and based upon rigorous analysis. Ms. Randall, though an impressive witness, did not produce a report of her findings and could therefore not document the validity of her opinions.

Even so, as with many of the other issues, I believe the Protestants may have "jumped the gun" on the LOS analysis. Under the B.C.Z.R., the transportation maps must be adopted by the Baltimore County Council every year, B.C.Z.R. § 4A02.3, and this project will not be completed until 2015. As such, the Council will adopt a new map on or before May 31, 2014, and this will provide a sufficient means to determine whether the intersection is functioning at a LOS of "E" or "F". Furthermore, the regulations provide that development is only intended to be restricted where there is a "substantial probability" that the intersection will be rated at LOS "E" or "F". Neither the experts nor lay witnesses in this case expressed their opinions or conclusions to this degree of probability, which is yet another reason why the Plan cannot be denied on this basis. Finally, this regulation does not provide that an applicant may not seek plan approval even in the case where a deficient (level-of-service "E" or "F") intersection exists in the plan area. It is the issuance of grading and/or building permits (i.e., development) that is restricted.

The Protestants argue that both the SHA and DOP required pedestrian facilities and crosswalks to be shown on the plan. Mr. Foster of the SHA required crosswalks to be shown on the plan, but his August 1, 2013 letter stated the comment (along with several others) "must be addressed as the project moves through the Pre-Permit Engineering Plan Review Phase." Developer's Exhibit 20B. Likewise, the DOP required detailed information regarding pedestrian access and safety, but "recognized that certain levels of specificity are not available at this stage of the development review process and may more appropriately be evaluated through the grading plan, landscape plan and additional submittals." Baltimore County Exhibit 1B. As such, these details will be provided at a later stage of the review process, and their absence at this juncture does not require that the Plan be denied.

Development Plan fails to comply with the American Disabilities Act (ADA)

In this portion of their memorandum, the Protestants contend that the Plan fails to account for the appropriate pedestrian crossings and pedestrian phasing as required by the SHA. During his rebuttal testimony, Mr. Cornelius testified that a SHA representative informed him that when performing the traffic studies he did not need to incorporate the pedestrian crossing or pedestrian phasing analysis which Ms. Randall testified was omitted in this case. Mr. Cornelius' testimony was admitted over a hearsay objection, and Maryland law provides that hearsay is admissible in an administrative hearing, and in fact the decision in such a case can rest on hearsay evidence. *Hammen v. Baltimore County*, 373 Md. 440, 453-54 (2003). SHA representatives have testified that the Plan complies with its requirements, and to the extent that any additional pedestrian crossings or other infrastructure improvements are required at the intersection, the SHA will no doubt insist upon same during the design review phase before the issuance of an access permit. Simply put, the Developer will be required to comply with the ADA (a federal statute that has spawned a multi-volume set of regulations containing mind-numbing details on pedestrian access issues), but that issue will be determined in a subsequent phase of the development process, when additional details and plans will be evaluated by State and County officials. To eliminate any doubt on the issue, Plan approval will be conditioned upon the Developer's compliance with Title II of the ADA concerning all roadway, sidewalk and pedestrian access issues associated with the project.

Parking shown on the Plan does not comply with County Regulations

Protestants contend that the parking chart and calculation shown on the Development Plan are insufficient, and that the Plan must therefore be disapproved. The Protestants have presented no testimony in support of this proposition, but simply advance a legal argument that

the Plan fails to comply with the relevant sections of B.C.Z.R. § 409.

Joe Merrey of the Zoning Review Office was questioned at length concerning the parking shown on the Plan, and he believed it to be sufficient and in compliance with the B.C.Z.R., and his agency recommended approval of the Plan. In addition, Mr. Pieranunzi testified that in his opinion the Plan complied with all County requirements, and during his rebuttal testimony he stated that although no loading dock or loading areas were shown on the Plan, such features could be added and accessed if needed. As such, I do not believe this argument has any validity.

Plan fails to comply with front yard setback requirements

As Mr. Merrey noted during his testimony, the pad sites at the front of the project are subject to the "front yard averaging" requirements of the B.C.Z.R. Though there was some back and forth on the question, Mr. Merrey ultimately opined that the pad site buildings shown on the Development Plan satisfied the front yard setback requirements of the regulations. Moreover, in the event it was later determined that there was a deficient front yard setback for any of these buildings, Mr. Pieranunzi testified in Developer's rebuttal case that the orientation of any such building could be changed such that the "front yard" would no longer face Reisterstown Road, obviating the need for any variance relief.

Incomplete information concerning the warehouse

In the next portion of the memorandum, the Protestants contend that the vacant warehouse, identified on the Plan as Building "J", represents "an intentional deception" on the part of the Developer. Memorandum, p. 12. Although I believe the use of invective in this scenario is regrettable, I nonetheless think the Protestants have a valid point on this issue.

As they point out, the warehouse footprint occupies 5.55 acres, and is therefore the largest building on the site. Although Mr. Merrey testified that labeling the warehouse "vacant,"

and attributing only one parking space to the use, was appropriate, it at the same time presents an incomplete (and perhaps distorted) view of the proposed build-out for the site.

While the Developer correctly asserts that the future use of the vacant warehouse is not at issue in the present case, the property is shown on the Development Plan for which approval is sought. While I certainly do not believe that the Plan can (or should) be denied on this basis, I do believe a condition is warranted that would deem any future use of the warehouse to be a "material" amendment of the Plan, and require that the Developer seek and obtain approval for such an amendment at a public hearing. *See* B.C.C. § 32-4-106.

Redlined Development Plan is not sealed

The Protestants next contend that Mr. Pieranunzi made revisions to the Development Plan during the course of the hearing, and that the Plan reflecting those changes was never sealed. Of course, the original Plan was signed and sealed by Mr. Pieranunzi, and it was he that during the course of the hearing made the referenced changes to the Plan. While it does not occur in every case, I would venture to say that similar amendments are made to plans in most development hearings, often in response to a community or County concern raised during the hearing. This is accepted practice in Baltimore County, and is reflective of the fact that the development process is ongoing and plans change as a project moves through the process and comes closer to actual construction. The Plan as modified is in fact sealed, and under State law Mr. Pieranunzi is responsible for the representations contained thereon. Md. Bus. Occ. & Prof. Code Ann, § 9-501. As such, this point cannot be the basis for Plan denial.

Background development studies not rationally based

The Protestants contend that the approved background development included in the traffic studies is incomplete and unreliable. This assertion is at odds with the evidence in the

case. During his cross-examination testimony, Mr. Cornelius stated that Darrell Wiles of Baltimore County met with him and advised which other approved developments should be considered in the process. Mr. Wiles told Mr. Cornelius to include the Owings Mills Metro Center South Parcel project and the T. Rowe Price project. Greg Carski, who works for the County's Bureau of Traffic Engineering, also indicated that the SHA asked him to confirm that the appropriate background development was utilized in the traffic studies. Finally, Steven Foster of the SHA indicated that after receiving a traffic study from a consultant (such as Mr. Cornelius) he or his staff will confirm with Baltimore County officials that the appropriate information has been included, and only in rare instances does the State conduct its own background traffic study or investigation.

In these circumstances, there was an abundance of factual testimony in the case to establish that the "background traffic" issue was considered by the consultant, State and local governments, and the Protestants' arguments to the contrary are not convincing.

Baltimore County has not completed review of the Development Plan

Citing the testimony of certain County employees, the Protestants contend that Baltimore County has not completed its review of the 4th revised traffic study, and that the Plan must therefore be disapproved. Kristoffer Nebre, an engineer employed by Baltimore County, stated that he only "skimmed" through the 4th study, and that he anticipated he will review and comment on same. Mr. Carski also confirmed that Mr. Nebre had not yet completed review of the 4th study, identified as Developer's Exhibit 20A.

But Mr. Carski also testified that during a meeting at the end of July 2013 with DPW Director Edward C. Adams, Jr., all in attendance agreed that the improvements to Painters Mill Road (the only thoroughfare under the County's jurisdiction) were sufficient and that the

Department of Public Works continues to recommend approval of the Plan. Protestants contend that no evidence was presented establishing that Messrs. Kennedy and/or Adams ever reviewed the traffic studies prior to making these recommendations. The Protestants have it backwards.

Under Maryland law, a government employee is presumed to have properly performed his duties, and while county agencies must review and comment on development proposals, they need not provide a detailed explanation or rationale for same. *People's Counsel v. Elm Street Dev., Inc.,* 172 Md. App. 690 (2007). It is the Protestants' burden to rebut this presumption, and Mr. Adams could have been called as a witness and cross-examined on this issue, but he was not. Mr. Kennedy testified he in fact did review the traffic studies in this case. The Protestants' arguments cannot suffice for admissible evidence in the case. In these circumstances, I do not believe that the Protestants' argument can be credited.

No rational basis for construction timing and design year

In this portion of its memorandum, the Protestants contend that it is unrealistic and highly unlikely that the project will be completed by the end of 2015. Again, the Protestants merely argue that the proposed year of completion is irrational, but they provide no admissible evidence (i.e., from shopping center operators and/or commercial construction professionals) to establish that the design year was improperly or over-optimistically chosen. Of course, and as noted by Developer's counsel, the various appeals and litigation surrounding the project could well extend the date of completion, although it is the Protestants, not the Developer, that would be occasioning such delay.

The testimony established that the design year of 2015 was selected, and neither the State nor Baltimore County expressed concern with the issue. Indeed, Mr. Foster testified that only in the event the project was delayed for 3-5 years beyond 2015 would the SHA require that revised

traffic studies be performed. In these circumstances, this argument cannot serve as the basis for Plan denial.

In the final portion of their memorandum, the Protestants set forth a list of conditions which they contend should be included in any Final Order granting approval of the Plan. As noted earlier, a condition regarding future development of the now vacant warehouse will be included. In addition, Condition No. 6 (Protestants' Memorandum, p.20) concerning completion of roadway improvements (at least those to be performed by the Developer, at its own cost) before issuance of a Use and Occupancy Permit is also reasonable and will be included in the Final Order.

In its response memorandum, the Protestants contend the Development Plan cannot be approved so long as the consent order in Case No. 12-CV-3194-WDQ is in place. See Memo, p.15. But the federal court did not stay this proceeding, and such courts are loathe to do so given the federalism and comity principles underlying the various abstention doctrines.

Plan Approval under the Baltimore County Code

The Baltimore County Code provides that the "Hearing Officer shall grant approval of a development plan that complies with these development regulations and applicable policies, rules and regulations." B.C.C. § 32-4-229. After due consideration of the testimony and evidence presented by the Developer and Protestants, the exhibits offered at the hearing, and confirmation from the various agencies that the development plan satisfies Baltimore County requirements, I find that the Developer has satisfied its burden of proof and, therefore, is entitled to approval of the redlined Development Plan, subject to the conditions noted below.

THEREFORE, IT IS ORDERED by this Administrative Law Judge/Hearing Officer for Baltimore County, this **16th** day of October, 2013, that the **"FOUNDRY ROW"** Development

Plan, marked and accepted into evidence as Developer's Exhibit 4A – 4F, be and is hereby **APPROVED**, subject to the following:

1. All roadway improvements to be completed by Developer and shown on the Development Plan must be completed prior to the issuance of a Use and Occupancy permit for the development or any portion thereof.

2. Any future improvements to, or change in use of, the "vacant" warehouse shown on the Plan as "Building J" shall be deemed a "material amendment" of the development plan and must comply with the B.C.C. requirements concerning such amendments.

3. Developer must comply with Title II of the ADA concerning all roadway, sidewalk and pedestrian access issues associated with the project.

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

_____Signed_____
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/dlw