

IN RE: PLANNED UNIT DEVELOPMENT	*	BEFORE THE
(5355 Nottingham Drive)		
11 th Election District	*	OFFICE OF
5 th Councilmanic District		
(Paragon at Nottingham Ridge,	*	ADMINISTRATIVE HEARINGS
1st Amendment)		
Paragon Outlets White Marsh, LLC	*	FOR
<i>Developer/Applicant</i>		
	*	BALTIMORE COUNTY
	*	PUD Case No. 11-1091

* * * * *

**ADMINISTRATIVE LAW JUDGE’S
SUPPLEMENTAL OPINION AND ORDER**

By Order dated October 21, 2014, the undersigned approved the Paragon PUD in the above case. Appeals were taken from that Order, and the Baltimore County Board of Appeals (BOA), in an Opinion and Order dated March 26, 2015, remanded the case to this office. The BOA’s Opinion identifies three (3) areas (storm water management, forest conservation and the definition of “neighborhood”) on which it believed further information was required to enable the Administrative Law Judge (ALJ) to make an “informed decision.” With regard to storm water management and forest conservation “grandfathering,” the BOA posed 28 questions on which the “ALJ should require DEPS” to provide input. But the Order which follows expressly provides only that the ALJ “should make a factual finding in regard to the area which constitutes the ‘neighborhood’.”

It would appear as if the BOA references “neighborhood” in connection with the special exception standard in Baltimore County Zoning Regulations (B.C.Z.R.) § 502.1, even though that provision uses the word “locality,” not neighborhood. It is within the context of the “compatibility” analysis (Baltimore County Code [B.C.C.] § 32-4-402) that one must define the

scope of a “neighborhood.”

The Code provides a specific definition of what constitutes a “neighborhood” for purposes of the compatibility analysis. B.C.C. § 32-4-402 (a). Both Bill Monk (a witness for Developer) and Professor Cowley (a witness for Protestants) testified the terms “locality” (as used in B.C.Z.R. § 502.1) and “neighborhood” (in B.C.C. § 32-4-402) were analogous, *See*, ALJ Opinion, p. 14, and I concur, at least for purposes of this proceeding.

The BOA correctly noted the undersigned, after recounting the conflicting testimony on the issue, failed to make a factual finding regarding the area constituting the “neighborhood.” This finding can be made without receiving additional testimony or evidence.

The 88 +/- acre parcel of land involved in this case is of course the same property that comprised the Nottingham Ridge PUD approved by former Zoning Commissioner Wiseman on July 13, 2010. In that case, the Department of Planning (DOP), Planning Board and Zoning Commissioner all concurred that the “neighborhood” was in fact the 88 +/- acre subject parcel. The Pattern Book approved in connection with that case provided that “the +/- 88 acres that comprise Nottingham Ridge can be considered an island within the nearly 1,800 acres of land that encompass the White Marsh Community.” Nottingham Ridge PUD Compatibility Report, p. 42 of the Pattern Book.

This “neighborhood” as defined in the 2010 case is identical to the “neighborhood” described in Bill Monk’s testimony. *See*, ALJ Opinion at pp. 8-9. I found Mr. Monk’s testimony to be persuasive. His testimony regarding the “neighborhood” was consistent with the definition provided in B.C.C. § 32-4-402, and he has many years of experience as a land planner in the Baltimore region. Professor Cowley’s testimony on this issue was not persuasive. The witness was not familiar with the Baltimore metropolitan region and she conceded the

boundaries of the “neighborhood” she described were provided to her by Protestant’s counsel.

As such, I find as a matter of fact the “neighborhood” at issue in this case (for purposes of both B.C.Z.R. § 502.1 and the compatibility analysis) is the 88 +/- acres of land bounded by I-95 to the west, Md. 43 to the north, Md. Route 7 to the east and White Marsh Run to the south. These boundaries are delineated by “arterial street[s]” and a “major natural feature” (i.e., White Marsh Run) in accordance with B.C.C. § 32-4-402(a).

I would make the same determination as a matter of law, based on the findings, compatibility report and pattern book approved by the Zoning Commissioner in the Nottingham Ridge PUD case. That Order was not appealed, and under the prior litigation concepts of res judicata, collateral estoppel and/or law of the case, it is binding and applicable in the present case as well. Seminary Galleria, LLC v. Dulaney Valley Improvement Association, 192 Md. App. 719, 735 (2010) (res judicata is applicable in determinations by administrative tribunal).

The remaining issues identified by the BOA concern storm water management and forest conservation “grandfathering.” The BOA found that Mr. Lykens (of DEPS) provided “merely a conclusory statement ... without explanation” regarding the grandfathering of these plans. BOA Opinion at p. 7. But under applicable case law, that is all he was obligated to do. In People’s Counsel v. Elm Street, 172 Md. App. 690, 702-03 (2007), the Court of Special Appeals held that in the context of a development plan hearing Baltimore County agency witnesses are not required to articulate the facts and reasons underlying their decisions. The court stated as follows:

“ ... once the Directors had made their recommendations, it was not necessary for [the developer] or the agencies to produce evidence supporting those decisions. Instead, it was then up to the appellants to produce evidence rebutting the Director’s recommendations.”

Id. at 703.

In light of the above, I do not believe that DEPS is required to respond to the inquiries posed in the BOA Remand Opinion. The ALJ determined Developer must satisfy the 2000 Maryland storm water management regulations, based upon B.C.C. § 33-4-114. If the BOA believes that determination is incorrect, it should reverse the ALJ. Should the BOA feel additional testimony on the storm water management issue is required, it has the discretion to receive “additional evidence and testimony.” B.C.C. § 32-4-281(d)(2). Other than a note on the Development Plan, none of the parties presented testimony or evidence regarding forest conservation. As such, I do not believe that issue is preserved in an “on the record” appeal.

THEREFORE, IT IS ORDERED by this Hearing Officer/Administrative Law Judge that the hearing file and a copy of this Opinion be returned to the BOA for further proceedings consistent with its Order dated March 26, 2015.

04/29/2015
DATE

Signed
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:dlw