

IN RE: PLANNED UNIT DEVELOPMENT	*	BEFORE THE
(101 York Road)		
9 th Election District	*	OFFICE OF
5 th Councilmanic District		
(101 York PUD)	*	ADMINISTRATIVE HEARINGS
DMS Development, LLC	*	FOR
<i>Developer/Applicant</i>		
	*	BALTIMORE COUNTY
	*	PUD Case No. 09-0843

* * * * *

ADMINISTRATIVE LAW JUDGE’S OPINION AND ORDER
ON PLANNED UNIT DEVELOPMENT (PUD)

This matter comes before the Office of Administrative Hearings (OAH) for a hearing pursuant to § 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/Applicant seeks approval of a Development Plan (the "Plan") prepared by Morris & Ritchie Associates, Inc., for the proposed mixed-use Planned Unit Development (“PUD”).

The Developer/Applicant proposes a mixed use, general development PUD consisting of 611 dormitory beds, 9,300 square feet of retail/restaurant space and 495 off-street parking spaces. The site is on the west side of York Road and north of West Burke Avenue and is located entirely within the area referred to in Master Plan 2020 (Map 23, p. 81) as the “Golden Triangle.” The PUD will be accessed via a single entrance onto York Road and a single entrance over and across an easement established on the adjacent State of Maryland property onto West Burke Avenue. There is a stream, Towson Run, along the northern tract boundary. The proposed development is more particularly described on the five-sheet redlined Plan submitted into evidence and marked as Developer's Exhibit 1A-1E.

PROJECT HISTORY

The Baltimore County Council (“Council”) passed Resolution 40-14 on July 7, 2014 which determined that the 101 York PUD project was eligible for County review. Three (3) Community Input Meetings (CIM) were held [September 9, 2014, October 6, 2014 and October 28, 2014] to discuss this PUD.

A Development Plan Conference (DPC) was then held between the Developer’s consultants and various Baltimore County agencies, to consider the project. In this case, the DPC was held on December 10, 2014. 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 regulations governing land development in the County. A Hearing Officer’s Hearing was held on the following dates: January 12, 2015, January 13, 2015, January 14, 2015, January 15, 2015, and January 23, 2015.

Appearing at the public hearing on behalf of the Developer was David Schlachman, Michael J. Ertel, Wendy Crites, Bill Monk, Matt Bishop, John Canoles, and Ken Schmid. G. Scott Barhight, Esquire and Jennifer Busse, Esquire, both with Whiteford, Taylor, & Preston, LLP, appeared as counsel for the Developer/Applicant. Brian Murphy, Esquire, represented the Greater Towson Council of Community Associations (GTCAA) and various individual Protestants, and J. Carroll Holzer, Esquire, represented the American Legion Post, an adjacent property owner.

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): Jan M. Cook, Project Manager; Joe Merrey, Zoning Review, Dennis Kennedy, Development Plans Review (DPR); and LaChelle Imwiko, Real Estate

Compliance. Also appearing on behalf of the County were Lloyd Moxley, Department of Planning (DOP); Jeff Livingston, Department of Environmental Protection and Sustainability (DEPS), and Jean Tansey, Department of Recreation and Parks (R&P)/Development Plans Review (DPR). All Baltimore County representatives indicated that the redlined Development Plan (1A-1E) satisfied all Baltimore County rules and regulations, and their agencies recommended approval of the Plan. Mr. Merry, from the Office of Zoning Review, recommended that approval be withheld for any proposed signage until the permit review phase, and that a note be added to the Plan restricting residency to Towson University students.

DEVELOPER'S CASE

David Schlachman was the first witness in the Developer's case in chief. Mr. Schlachman explained that he is a principal in the developer entity DMS Development, LLC, and is proposing a 248 unit dormitory on the site, which would accommodate 611 students. He explained that the complex would feature a tower building of 11 stories, over a two-story parking garage structure. Mr. Schlachman explained that Towson University prepared a study concerning student housing needs, which it shared with the Developer. He testified that Towson University is "filled up," and wants to grow by 500 students per year. As such, Mr. Schlachman believes that the dormitory proposed would fill a market need.

In response to cross-examination questions, Mr. Schlachman stated that he did consider a smaller building for the site but determined that the "economics don't work." The witness agreed that the Developer was "using a lot of the site," but he did not think the proposal would overcrowd the site. With regard to parking provided at the facility, Mr. Schlachman stated that as concerned visitors, the details would need to be worked out, and he would "have to see how it goes once we get going." The witness testified that security guards would not be provided at the

facility, but that an employee would always be stationed at the front desk of the dormitory. Mr. Schlachman explained that the project will cost approximately \$75M while the community benefit proposed in the PUD would be roughly \$50,000, a figure the witness did not believe was low or insignificant.

The next witness in Developer's case was John Canoles, an environmental engineer with Eco-Science Professionals. Mr. Canoles explained that he visited the property and determined the environmental constraints at the site. Mr. Canoles referred to plans and described how storm flows backup onto the site because of different sized drainage piping currently in place. The witness explained that the Developer would construct new stormwater management features which would improve conditions on the site, and that the stormwater would ultimately be conveyed to a plunge pool at the rear of the site. In conclusion, the witness opined that the project would not have a detrimental environmental impact, and he believed that environmental conditions on site would be improved under the current proposal. In response to questions on cross-examination, the witness explained that the Towson Run floodplain would not be impacted by construction on this site, and Mr. Canoles also testified that there are no wetlands on the subject property.

Kenneth Schmid, a traffic engineer with Traffic Concepts, Inc., was the next witness in the Developer's case. Mr. Schmidt explained that he has over 20 years of experience in the traffic engineering field, and that he prepared traffic impact studies in this case. Mr. Schmid testified that the site is not within a deficient traffic service area, and that the York Road access would be right in/right out only, and that elimination of left turns out of the site would improve the existing conditions in that regard. Mr. Schmid conceded that evening traffic in the vicinity is problematic, but he advised that it is rated "C"/"D" at the worst. Mr. Schmid testified that the

Developer will not “have a hard time convincing the State (SHA) this is a good thing.” In conclusion, the witness opined that the proposed dormitory project qualified as a “low intensity traffic use,” and that the development would not have a “noticeable” impact on area roadways. While he agreed that the project looks massive, the witness advised that it generates the least amount of traffic that could be generated from a commercial use at the site.

In response to questions on cross-examination, the witness advised that a dormitory use generates less vehicle trips than would an apartment building. A similar conclusion was reached in an Auburn University study, which determined that “student-oriented apartment buildings” generate “one-third the amount of traffic as generic apartments.” Developer’s Exhibit 14. Mr. Schmid agreed that his traffic study was predicated upon an assumption that the college students in the dormitory would frequently walk to classes at the nearby university and commercial outlets in the immediate vicinity. In addition, Mr. Schmid advised that the Towson Row project was not included in his firm’s traffic impact analysis, and he agreed that the signalized intersection at York Road and Burke Avenue was currently rated “F” by Baltimore County.

Bill Monk, a land planner and principal with Morris, Ritchie & Associates, was the next witness in Developer’s case. Mr. Monk explained that engineers in his firm prepared the stormwater management and civil engineering plans for the project, while landscape architect Matt Bishop prepared the landscape plans. Mr. Monk began his testimony by noting that the subject property is not within the CT District, which does not extend south of Towsontown Boulevard. The witness explained that this was a “site of limited size which has limited options,” and that the Towson Run at the rear of the site limits the depth of the commercial development available. Mr. Monk explained that the dormitory, parking and retail uses proposed

are permitted by right in the BM zone. The witness explained that the Developer was seeking modifications of standards concerning setbacks and building height, among other things.

Mr. Monk believed that traffic from the project would be dispersed by restricting the left hand turning movements from the site. In addition, Mr. Monk advised that even if this was an apartment building, the Developer would be providing a sufficient number of parking spaces. The witness testified that the proposal is consistent with Master Plan 2020, and he cited page 28 of that plan and noted that this is a T6 Transect Overlay, which is the most intensive of all transects in the Master Plan. Mr. Monk agreed that the structure proposed is not a standard “suburban building,” but he believes the project is consistent with the Marriott Hotel next door, and with page 86 of Master Plan 2020, which identifies the triangular area where the site is located (referred to therein as the “Golden Triangle”) as being appropriate for “student housing.” Mr. Monk explained that the Walkable Towson plan encouraged the positioning of buildings closer to the right-of-way with off-street parking being located behind or under the buildings so as not to be visible from the main thoroughfare; i.e., York Road.

Thereafter, the witness opined that the project satisfied the special exception standard set forth at Baltimore County Zoning Regulations (B.C.Z.R.) § 502.1, and he did not believe that the project would have a greater detrimental impact here than it would elsewhere in the zone. Mr. Monk also testified that with regard to the modification of standards sought by the Developer, he concurs with the Department of Planning’s comments in that agency’s final report, which recommended approval of same. The witness believed that the proposal constitutes a good “site design solution,” and he believed it would be developed to the full extent of the plans given the great demand for student housing. In conclusion, Mr. Monk opined that the proposal satisfied

the PUD regulations and standards, and that the requests for modifications of standards are appropriate and will provide necessary flexibility in completing the project.

In response to questions on cross-examination, Mr. Monk testified that he did not believe this project would be more complicated if it was pursued as a “standard” development project, rather than a PUD. The witness conceded that if this case did not involve a PUD, the Developer would need to seek 14 variances for what are now captioned as “modifications of standards.” Mr. Monk testified that while page 17 of the Towson community plan contained recommendations concerning building height and continuity of landscaping and setbacks that would be disregarded in this matter, he believed that the new urban design rules for this area “trump” the Towson plan, which is 20+ years old. The witness also agreed that the subject property is a small site that is “difficult to develop,” and he also advised that the Councilman’s request for more parking on-site necessitated a number of the modifications of standards sought by the Developer.

PROTESTANTS’ CASE

Ed Kilcullen, who lives approximately ¼ mile from the site in Towson Manor Village, was the first witness in the Protestants’ case. Mr. Kilcullen explained that he has lived in the neighborhood since 2001, and has actively participated in his community association and on the County’s Urban Design Assistance Team. Mr. Kilcullen testified that he was a member of the Triangle Committee formed by Councilman Marks, and he advised that the committee opposed the York 101 PUD. Mr. Kilcullen believes the project is too large for the site and that insufficient parking is provided, such that there would be spillover parking into the nearby communities. Mr. Kilcullen testified that the Bozutto Homes Towson Green PUD located nearby was processed in a “starkly” different manner, and that Bozutto developed the project in

collaboration with the community, while he believed the development in this case is being “crammed down our throats.”

The next witness in Protestants’ case was Michael P. Ertel, Sr., who is the President of the Greater Towson Council of Community Associations (GTCCA). Mr. Ertel explained that the GTCCA voted unanimously on two occasions to oppose the York 101 PUD. The witness explained that the GTCCA was primarily concerned with the following:

1. Insufficient parking;
2. Proposed building is too large for the site;
3. No security is planned for the building; and
4. The possibility that the retail aspect of the development would include a bar or tavern.

While Mr. Ertel conceded that the GTCCA was “happy” that the number of parking spaces for the project was increased, he stated that the Developer at the same time increased the number of dormitory units.

Another community member, Paul Hartman, testified in the Protestants’ case. Mr. Hartman advised that he has lived in Aigburth Manor for over 26 years, and he testified that the “Marriott was a mistake” and he believed that this project would likewise be a mistake next door to it. The witness stated that the Cardiff Hall and Donnybrook Apartments are now fully leased by Towson University students, and that there is insufficient parking for the student population. Mr. Hartman also advised that he does not believe the current proposal constitutes a dormitory, and he also stated that open space waiver fees should be required.

AMERICAN LEGION

Several witnesses testified on behalf of the American Legion (“Legion”), which has its post (constructed in 1950) immediately adjacent to the subject property. While the American

Legion originally had a 9-acre site, the tract is now approximately 4 ½ acres, following Baltimore County and State of Maryland acquisitions for roadway and infrastructure improvements.

The first witness from the Legion was Paul Moran, who described the various events held at the Legion property and the uses made of the facility. Mr. Moran testified that the Legion donates over \$65,000 per year to community groups, and he believed that it was adding “insult to injury” for the Developer to propose a 13-story structure just one foot from the Legion property.

Jim Rebbert was the next witness on behalf of the Legion, and Mr. Rebbert described the layout of the Legion property and noted that it has just a single entrance off of York Road with 200 parking spaces. The witness stated that if this project is constructed, the Legion would be facing an enormous wall of the dormitory building, and he worried that the Post would be “squeezed and forced out” of its current location. Mr. Rebbert testified that he was “astonished” that the County Council voted in favor of the PUD and he worries that the students and their visitors would negatively impact the Legion by, among other things, parking on its property and generating litter and other nuisance concerns. With regard to the project itself, Mr. Rebbert described it as a “10 lb. building on a 5 lb. site,” and he believed that while this proposal may be appropriate in Baltimore City, it was not appropriate for Towson.

Fred Hofferbert was the next witness to testify, and he is the commander of the Towson American Legion. Mr. Hofferbert stated that he opposed the project, and did not understand how the triangle area could be exempted from the Basic Services Map legislation based on a 1975 plan. The witness also testified that the setbacks and proposed height of the building were inappropriate, and he indicated that the Legion felt “disrespected” by the one foot side yard setback proposed where the project adjoins the Legion property.

Similar testimony was provided by Kraig Dean and John Adair, both of whom are also members of the Legion. Mr. Dean indicated that security was the main area of his concern, and he advised that the Towson Police Precinct did not have sufficient manpower to respond to the underage drinking and other calls for service that would be generated by the proposed dormitory. Mr. Adair, who resides in the Palisades apartment complex, testified that he was concerned with nuisance issues arising out of the dormitory proposal, and he believed that housing 611 college students in a single building was a “big mistake.”

The final witness in the Legion’s case was James Patton, a professional engineer accepted as an expert. Mr. Patton identified several issues in the current proposal which he believed were deficient. Initially, Mr. Patton advised that there was no evidence the Developer had dedicated a lane along York Road for a circulator bus stop, as referenced at page 4 of the PUD Resolution (No. 40-14). Mr. Patton also opined that the Developer had failed to take into consideration the height tent regulations found at B.C.Z.R. § 231.1.D, which are designed to ensure that adequate light and air exist for adjoining properties. The witness opined that these regulations are applicable, and that the Developer failed to seek a modification of standards for same.

Mr. Patton also testified that the calculations for the green roof proposed by the Developer were inaccurate, given that they failed to take into consideration the mechanical equipment shown on the Development Plan (Developer’s Exhibit 1C). In addition, Mr. Patton opined that the size of the green roof would also be smaller if and when the height tent rules were applied. The witness also believed that while it might be possible to perform the grading and construction of this project just one foot from the Legion property, he opined that it would be extremely expensive and hard to do without negatively impacting the Legion. In addition, the

witness believes that a landscape buffer should be provided along the rear of the site adjoining the Legion property.

William Chaney, the owner of the Jiffy Lube franchise at 109 York Road, was the next witness to testify. Mr. Chaney, who has owned the business for over 10 years, worries that the proposed dormitory would block the view of his Jiffy Lube store from motorists traveling along York Road. Mr. Chaney stated that at present customers have difficulty getting in and out of his site, and he is concerned that these difficulties will be exacerbated if the project is approved.

BALTIMORE COUNTY AGENCY WITNESSES

Several Baltimore County employees were called to testify as adverse witnesses on behalf of the Protestants. Lloyd Moxley, an employee of the Department of Planning (DOP), was the first County witness to testify. Mr. Moxley testified that he was responsible for reviewing this proposal on behalf of the DOP and advised that the “primary goal” of his agency was creating a pedestrian friendly link between the Towson Center and Towson University. Mr. Moxley noted that Master Plan 2020 calls for student housing and mixed use development within the area which includes the subject property, and he opined that the proposed “plan” fits within the urban setting that the triangle is envisioned to be.

In response to questions from Mr. Holzer, Mr. Moxley stated that each project and site needs to be viewed individually, and in that regard he emphasized that the Triangle is in a T6 transect, which is the highest density “urban core zone” recognized in the Master Plan. In fact, Mr. Moxley advised that the Triangle is the only T6 transect located within Baltimore County.

Mr. Moxley next described the “ghost town characteristics along York Road at the site,” and advised that a 155 foot tall building would be consistent with other buildings in the vicinity. With regard to the scale of the buildings and the minimal setback from the street right-of-way,

Mr. Moxley advised that the proposed structure is consistent in such an urban setting, and the DOP's final report (p. 5) noted that the "building location creates the street wall."

Dennis Kennedy, from the Bureau of DPR, was the next Baltimore County witness to testify. Mr. Kennedy was first questioned whether a public street known as "Mays Road" was shown on a tax map as bisecting the subject property. Mr. Kennedy advised that he was unaware of such a road, and stated that the Bureau of Highways would be able to determine whether in fact such a road was listed among the County inventory. With regard to stormwater management requirements, Mr. Kennedy advised that the Developer's consultants have planned for a "plunge pool" on the subject property, to which the stormwater runoff from the site would be conveyed. Mr. Kennedy testified that in his opinion this would constitute a "suitable outfall."

The final witnesses in the case were several employees of the Department of Environmental Protection and Sustainability (DEPS), including Messrs. Lykens (Deputy Director), Koepenick, Shaffer and Quelet. Messrs. Lykens and Koepenick provided brief testimony concerning their involvement in the project, and Mr. Shaffer advised that the Developer was granted a forest buffer variance on October 24, 2014, and that off-site mitigation will be required given the "tight site constraints."

The final County agency witness was Kevin Quelet, a licensed professional engineer with a degree from Drexel University. Mr. Quelet indicated that he was responsible for reviewing the stormwater management plans for the project, and he testified that at present only the concept plan stormwater management plan was approved (American Legion Exhibit Nos. 14 and 15), and that his agency had made no "final determination" regarding a suitable outfall, but he indicated that what he has seen thus far is "pretty favorable." Mr. Quelet also acknowledged that his Development Plan Conference comments, dated December 10, 2014, stated that the Developer

has not at this time satisfied the requirements for approval of a Development Plan Stormwater Management Plan.

The Developer then presented one rebuttal witness, registered landscape architect Matt Bishop. Mr. Bishop emphasized that as shown on Developer's Exhibit 29, the triangle area (of which the subject property is a part) is not included within the shaded area of the 2014 Basic Services Map which identifies "F" rated or deficient traffic areas. Mr. Bishop also testified that, contrary to Mr. Patton's testimony, the Developer satisfied the height and area regulations found at B.C.Z.R. § 231.1, and did seek a modification of standards for the height of the proposed dormitory. Finally, the witness presented aerial photos and a schematic plan (Developer's Exhibit 31) which show that the sightline for motorists along York Road (to identify the Jiffy Lube franchise) would in fact be improved under the current proposal when compared to the sightline when the Junior Press building stood next door.

LEGAL ISSUES

A. Traffic

Protestants and the American Legion raised several legal issues, one of which concerned whether the project would cause an already troublesome intersection to become worse. The Protestants noted that for many years Baltimore County Department of Public Works has rated as failing (i.e., an "F" level of service) the intersection at York Road and Bosley Avenue. But at the same time, the Towson Community Plan (Protestants' Exhibit 4) which is incorporated into Master Plan 2020 provides that "the exemption from Basic Services legislation in Towson for transportation should remain in place." *Id.* At 58. Recent case law holds that master plans are binding in Baltimore County development hearings. HNS Dev., LLC v. People's Counsel, 425 Md. 436 (2012).

In addition, the Baltimore County Council did not place that intersection within the deficient traffic shed identified on the 2014 Basic Services Transportation Map. Developer's Exhibits 28 and 29. Whether or not doing so was logical is beside the point; the growth management legislation expressly provides that the moratorium provided for thereunder is applicable only when "there is a substantial probability that an arterial collector intersection situated within the mapped area will, on the date the map becomes effective, be rated at level-of-service "E" or "F"." B.C.Z.R. § 4A02.4.D.1.

Protestants also point to B.C.C. § 32-4-245, which incorporates the B.C.Z.R. special exemption standards and requires (among other things) that the project will not create "congestion in roads, streets or alleys." It seems obvious that a project of this magnitude, with 611 student beds and nearly 10,000 sq. ft. of retail space would certainly cause "traffic congestion." But the law requires that a Protestant make a stronger showing based upon the judicial "overlay" from Shultz v. Pritts, 291 Md. 1 (1981). That case, and others decided more recently, have held that a Protestant must show that the inherent adverse effects associated with a particular use would be greater at the proposed location than at other similarly zoned properties throughout the County.

In this regard, both Ken Schmid and Bill Monk opined that the Developer had satisfied the special exception standards, and that the project would not cause a greater detrimental impact upon the area roadways than would be the case at other similarly zoned properties throughout the County. In fact, Mr. Schmid opined that the student housing use (permitted by right in the zone) proposed would have far less of an impact upon traffic than would other commercial and office uses also permitted by right in the zone.

The Protestants and witnesses on behalf of the Legion disagreed of course, and expressed dismay that Baltimore County and the State Highway Administration (SHA) would permit such a project at this particular location. In fact, the SHA recently submitted a letter (dated January 13, 2015) indicating it “concur[s] with the [Schmid] report findings” and “believes all intersections will continue to operate at acceptable levels of service.” Developer’s Exhibit 23. While I have no doubt that the intersection, especially during the evening commute, is gridlocked and problematic, the lay testimony offered by the Protestants is insufficient as a matter of law to rebut the findings in Mr. Schmid’s report. Indeed, in Anderson v. Sawyer, 23 Md. App. 612 (1974), the Court of Special Appeals noted that opponents of a development project could not rely upon lay witness testimony to rebut the expert testimony of a traffic engineer provided in the Developer’s case in chief. Rather, the Court held that the opponents would likewise need to present expert testimony in such a case, and the Protestants and American Legion have failed to do so.

B. Zoning Density

In their Memorandum, the Protestants contend that the 246 dwelling units proposed at the project “significantly exceeds the permitted residential density for this PUD.” See, Memorandum, p.10. Citing B.C.Z.R. § 430.3.C.5, the Protestants argue that the calculation of density may not exceed that permitted in the D.R. 16 zone, which is in fact an accurate recitation of the law.

However, as it is permitted to do, the County Council in adopting the resolution authorizing further review of this PUD expressly modified the density for this project. In Resolution No. 40-14, the Council stated that “due to the public policy and community benefits that stem from the PUD, the County Council approves the proposed density for the proposed

PUD to permit a total of 611 dormitory beds on the property.” Developer’s Exhibit 4, p. 4.4. Thus, I do not believe this argument has merit.

C. Local Open Space

Admitted as Baltimore County Exhibit 1 was a document approving a waiver of the Local Open Space requirements that would otherwise be applicable to this development. Therein, Ms. Tansey (the County’s Landscape Architect), citing Resolution 63-00 (Developer’s Exhibit 19), stated that a waiver of the Local Open Space requirements was justified and that the fee for such a waiver was zero. Protestants contend that such a conclusion was erroneous, and I agree.

As an initial matter, the Baltimore County Charter provides that “the word ‘resolution’ shall mean a measure adopted by the County Council having the force and effect of law but of a temporary or administrative character.” Baltimore County Charter, § 1009(c) (emphasis added). In this case, the resolution in question is neither administrative nor temporary: it is nearly 15 years old and is substantive in nature, given that it purports to regulate certain fees in development cases. Case law from other jurisdictions is to similar effect, and the McQuillin treatise also provides a discussion concerning the distinctions between resolutions and ordinances. McQuillin, The Law of Municipal Corporations, § 15:2 (3rd ed. 2014); Glasscock Co. v. Sumter Co., 604 S.E.2d 718 (S.C. 2004) (county council resolutions do not normally have mandatory or binding effect but are generally considered to be merely directory).

In addition, in Resolution 63-00, the County Council purported to adopt in the first instance a fee structure for open space waivers. This is at odds with County law, which requires that such fees be determined and set by the County Administrative Officer, to then be adopted by the Council via resolution. B.C.C. § 32-6-108(1)(1)-(5). The law also requires that such fees be re-examined every two years, which would ensure that the fees reflect accurately market value

for the acquisition of property in any given zone. Assuming such fees are reevaluated as required, they would fluctuate with the real estate market and the resolution approving the fees set by the executive branch would in that scenario be “temporary” in character, as required by the County Charter.

In these circumstances, I do not believe that Resolution 63-00 is applicable in this case, and while the waiver of the Local Open Space requirement may have been correctly granted, I do not believe that the fee associated therewith was. Ms. Tansey’s memorandum indicated that the regulations would require the Developer to provide 236,600 sq. ft. of Local Open Space. Under the B.C.Z.R., it is the DR 16 zone that provides for the most intense residential development, and it also has the highest corresponding Local Open Space waiver fee of \$5.74 per sq. ft. per Resolution 43-13. As such, the correct Local Open Space waiver fee in this case is 236,600 sq. ft. x \$5.74 per sq. ft., yielding a total fee in the amount of \$1,358,084.

D. Signage

As noted at the outset, Joe Merrey from the Office of Zoning Review recommended that approval for signage be withheld until a later date. Mr. Merrey explained that at present his office was not provided with sufficient detail and elevation drawings of the proposed signage to enable it to determine with any degree of confidence whether a variance / modification of standards would be necessary for any of the signs proposed. I concur, and based upon Mr. Merrey’s suggestion, the Order which follows shall specify that any permits or decisions regarding the signage proposed at the project shall be deferred until a later date.

E. Stormwater Management

As recounted earlier, Messrs. Canoles, Kennedy and Quelet provided testimony concerning the stormwater management facilities planned for this project. They explained that

the surface water from the site would be collected and conveyed to a plunge pool where it will join the Towson Run water course or tributary at the rear of this property. Mr. Kennedy opined that the Developer has established a “suitable outfall” for the stormwater, and Kevin Quelet, the project reviewer from the Stormwater Management Bureau of DEPS, testified that his agency has approved a Concept Plan Stormwater Management Plan for the project. And therein lies the rub.

The American Legion contends that under County law, “a Planned Unit Development shall receive development stormwater management plan approval before final approval under § 32-4-245 of the Code” B.C.C. § 33-4-114(b). A “Concept Stormwater Management Plan means the first of three required plan approvals that contain information necessary to allow an initial evaluation of a proposed project.” B.C.C. § 33-4-101(h). A “Development Stormwater Management Plan means the second of three required plan approvals that contains information necessary to allow a detailed evaluation of a proposed project.” B.C.C. § 33-4-101(m). A “Final Stormwater Management Plan means the last of three required plan approvals that contains the information necessary to allow approvals and permits to be issued by the Department.” B.C.C. § 33-4-101(v).

At this juncture, it is clear based upon the testimony of Mr. Quelet that DEPS has not approved for this project a “Development Stormwater Management Plan,” which means (at least based upon the statutory definition) that the Department does not have information sufficient to “allow a detailed evaluation of a proposed project.” While it may be the case that in garden variety development hearings not involving PUDs, a Concept Plan Stormwater Management Plan would suffice, the County Council expressly provided a different rule for Planned Unit Developments. As such, the Developer is not at this point entitled to approval of the PUD

Development Plan under B.C.C. § 32-4-245 given that DEPS has not approved a Development Plan Stormwater Management Plan.

F. Procedural Irregularities

In their Memorandum, the Protestants contend that the Development Plan must be denied because the County failed to adhere to certain procedural requirements set forth in the B.C.C. Specifically, Protestants contend that a “schematic representation” of the project was not posted on the County Council website, such that “the community was not afforded an opportunity to see what the project would look like prior to the Resolution being approved.” Memorandum, p. 6. In addition, the Protestants contend that County agencies issued their DPC comments prior to reviewing the Minutes for the three Community Input Meetings (CIM) held in this case. The Protestants presented exhibits showing that the CIM Minutes were received by the Department of Planning approximately one month after that agency’s DPC comments were submitted. See, Protestants’ Exhibits 6-8.

While this may be the case, I do not believe that these procedural irregularities dictate that the Development Plan must be denied. The purpose of the CIM and Council Resolution process is to afford the public an opportunity to voice its concerns with a proposed project, and to allow those concerns to be addressed, to the extent possible, through the development process. As of December 1, 2014, the date of the DPC, it was well known that the community opposed this project, as was made clear at each of the three CIMs. The reality is that there is nothing the reviewing agencies could have done, even if they had the approved Minutes from the CIMs, to “resolve” the concerns and comments raised by the community. As such, I do not believe these irregularities violated the due process rights of the community, and this argument therefore lacks merit. See, Pollock v. Patuxent Institution Board of Review, 374 Md. 463, 488-

492 (2003) (agency's failure to comply with its own rules nullifies its action only where the rule and regulation is promulgated to preserve fundamental rights derived from the Constitution).

G. Dormitory vs. Apartment

Much of the testimony in the case and the legal arguments focused upon whether the residences in question constitute a "dormitory," given that it is not proposed to be constructed on the campus of a college or university. The B.C.Z.R. is of little assistance in this regard given that it does not contain a definition for the term. But in the end, this really is an issue of semantics, given that the nomenclature employed is not outcome determinative.

The community contends that the Developer couched this project as a dormitory to avail itself of Resolution 63-00, which provides for a Local Open Space waiver fee of \$0 for such uses. While that may be the case, the Developer here will be obligated to pay a Local Open Space Waiver fee. The fee will be required given that, in the opinion of the undersigned, Resolution 63-00 is inapplicable as a matter of law; whether or not the building qualifies as a dormitory is irrelevant.

Likewise, the community contends that the Developer promoted this project as a dormitory to avail itself of the less stringent off-street parking requirements found in B.C.Z.R. § 409 when compared to apartments. Again, while this may be the case, the Developer has increased the number of off-street parking spaces since the inception of this project, and the Development Plan indicates that 495 spaces will be provided. Mr. Monk testified (without contradiction) this is more than a sufficient number of spaces, even if the project were considered to be an apartment complex rather than a dormitory. It is therefore irrelevant whether the project is considered a dormitory or apartment for purposes of the off-street parking analysis. I am sympathetic to the community's concerns regarding illegal student parking in adjacent

neighborhoods, and the substantial resources dedicated to curbing such practices. But I am not at liberty to withhold project approval in such a scenario, wherein the Developer has complied with the off-street parking regulations.

BASIS FOR APPROVAL

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 § 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 § 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).

Each of these elements will be discussed below.

- (1) This provision requires the Applicant to prove the project meets the purpose, conditions and standards “of this section.” The pertinent “section” is B.C.C. § 32-4-245, which sets forth technical requirements for PUD approval. The

Code indicates that compliance with the development regulations is sufficient to fulfill the broadly worded policies and purposes set forth at the outset of Article 32, Title 4. As recounted above, Messrs. Monk, Schmid and Bishop opined the Developer satisfied all County regulations, as did all County reviewing agencies. Based on this evidence, I find the “proposed development meets the intent, purpose, conditions and standards” of the development regulations, a conclusion which will be elaborated upon below.

- (2) This provision requires the Applicant to satisfy the § 502.1 special exception standards and prove the project will be well-designed. With regard to the latter requirement, the Pattern Book (Developer’s Exhibit 4) reflects the project will be of a high-quality design prepared by a respected architectural firm, and will employ quality materials and finishes as determined by the DOP. With regard to the § 502.1 standards, the Developer enjoys a presumption under Maryland law that the project is in the public interest, and I do not believe Protestants successfully rebutted that presumption. As such, I find the Developer has satisfied B.C.C. § 32-4-245(c)(2).
- (3) This provision requires the Applicant to prove there is a “reasonable expectation” the project as planned will come to fruition. Mr. Schlachman provided testimony regarding his firm’s experience and other successful projects, and Protestants have not adduced evidence to the contrary. As such, this requirement is satisfied.
- (4) This provision requires that the proposed development complies with B.C.Z.R. § 430. That section of the zoning regulations contains certain technical

requirements for all PUDs. Here, the project is located within the Urban Rural Demarcation Line (URDL), and the apartment/dormitory use is permitted in the Business, Major (B.M.) zone, subject to a compatibility finding. In its report, the DOP determined the project satisfied the “compatibility” objectives of B.C.C. § 32-4-402.1. Finally, the residential density was approved by Council Resolution 40-14. These are the discrete requirements set forth in B.C.Z.R. § 430, and I find that B.C.C. § 32-4-245(c)(4) is therefore satisfied.

- (5) The final requirement is that the project be in conformance with the goals and recommendations of the “Master Plan, area plans, or the Department of Planning.” This issue was discussed in an earlier section of this Order. For present purposes, it will suffice to say that the DOP has recommended approval of the PUD, which is all that is required under B.C.C. § 32-4-245(c)(5).

THEREFORE, IT IS ORDERED by this Hearing Officer/Administrative Law Judge this **26th** day of **February, 2015**, that the five-sheet redlined Development Plan identified herein as **101 YORK PUD** (Developer’s Exhibit 1A-1E), be and is hereby DENIED, given that DEPS has not yet approved a Development Stormwater Management Plan for the project.

If and when Development Plan approval is granted in a subsequent Order, such approval shall be subject to the following conditions:

1. Developer shall pay a Local Open Space waiver fee in the amount of \$1,358,084.
2. A bar, tavern and/or nightclub shall not be permitted on the subject property.
3. The 248 student housing units shall be restricted to undergraduate and graduate students attending Towson University.

4. Development Plan approval shall not constitute approval of any signage for the PUD project, including but not limited to those signs identified as Modifications to Standards Nos. 8-11 as shown on p. 4.7A of the Pattern Book. Approval of signage and issuance of permits for same shall be deferred until Phase II of the project, at which time the Department of PAI can determine whether or not variance or other zoning relief is required for any particular sign.

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