

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 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 seeks approval of a Development Plan (the "Plan") prepared by Matis Warfield, Inc., for the proposed mixed-use Planned Unit Development (“PUD”) on approximately 83 acres zoned ML-IM.

PROJECT HISTORY

The Baltimore County Council (“Council”) passed Resolution 105-08 on December 1, 2008 stating that the proposal for the Nottingham Ridge PUD is eligible for County review. This resolution was amended by a subsequent Resolution 59-09, which limited the permitted density of the proposed Nottingham Ridge PUD from 1,500 residential units to 1,250 residential units, at least 35% of which were required to be owner occupied units. The resolution passed on September 8, 2009. A Community Input Meeting (CIM) was held on April 30, 2009 to discuss this PUD.

At the November 5, 2009 meeting of the Baltimore County Planning Board (“Board”), the initial staff report of the (now) Department of Planning (“DOP”) dated November 5, 2009

was introduced. The PUD Applicant presented the Nottingham Ridge PUD Concept Plan to the Board for consideration at the November 19, 2009 Board public hearing. Further consideration and deliberation of the Nottingham Ridge PUD occurred at the January 7, 2010 Board meeting, and the Plan was approved by the Board on June 17, 2010. On July 13, 2010, the Hearing Officer approved the Concept Plan for Nottingham Ridge PUD, subject to conditions set forth in the Board's Approval dated June 17, 2010. On June 4, 2014, Baltimore County approved the "*Development Plan for Planned Unit Development, Nottingham Ridge*" PAI No. XI-1091. And that is where things stand as far as the original PUD project.

A request for an amendment of the Development Plan was discussed at the Development Review Committee (DRC) meeting on January 7, 2014, DRC Item 010714G. The DRC considered the request a "material amendment" of the Plan. Subsequently, on January 8, 2014 the Director of Permits, Approvals and Inspections (PAI) issued a letter to the Honorable County Council Chairwoman, Cathy A. Bevins and concluded that the changes constitute a "material amendment". The Council had 14 days after the receipt of the notice from the Director of PAI to place the Director's decision on the Council agenda for approval or disapproval. The Council took no action. As such, the *Paragon at Nottingham Ridge PUD, First Amendment*, is evaluated under § 32-4-245(e)(5) of the B.C.C.

The Developer proposes in the amendment request a mixed-use PUD. The proposed improvements (which would be constructed in phases) include the following: 250 dwelling units in four (4) multi-family buildings, two of which have in aggregate 16,000 sq. ft. retail space with ancillary amenity recreation building, two general office buildings totaling 250,000 sq. ft., a retail outlet center of 568,408 sq. ft., 39,750 sq. ft. of other retail, 130 room hotel, and 6,000 sq. ft. of restaurant space. The site is currently improved with two single story office

buildings enclosing 74,620 sq. ft. in total and associated parking. The subject tract contains no wooded areas or wetlands, and has adequate and available public water and sewer. The proposed development is more particularly described on the three-sheet redlined Plan submitted into evidence and marked as Developer's Exhibit 13A – 13C.

A Development Plan Conference (DPC) was held between the Developer's consultants and various Baltimore County agencies, to consider the project. In this case, the DPC was held on May 21, 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 Baltimore County regulations governing land development in the County. A Community Input Meeting (CIM) meeting was not held in regard to the proposed amendment of the PUD Plan. A Hearing Officer's Hearing was held on the following dates: June 19, 2014, July 23, 2014, July 29, 2014, July 30, 2014, August 8, 2014, September 9, 2014, September 10, 2014, and September 11, 2014.

Appearing at the public hearing on behalf of the Developer was R. Kelvin Antill. G. Scott Barhight, Esquire and Timothy M. Kotroco, Esquire, both with Whiteford, Taylor, & Preston, LLP, appeared as counsel for the Developer/Applicant. Edward J. Gilliss, Esquire, with Royston, Mueller, McLean & Reid, LLP, appeared on behalf of General Growth Properties, and G. Macy Nelson, Esquire appeared on behalf of Heather Patti and Judith Davies.

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): Darryl D. Putty, Project Manager; Joseph C. Merrey, Zoning Review, Dennis Kennedy, Development Plans Review (DPR); and Brad Knatz, Real Estate Compliance. Also appearing on behalf of the County were Lloyd Moxley, Department of

Planning (DOP); David Lykens, 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 (Exhibit 13A – 13C) satisfied all Baltimore County rules and regulations, and their agencies recommended approval of the Plan. The only “open issue” concerned the proposed 75 ft. sign tower, which the DOP objected to in its final report dated June 13, 2014. This issue will be discussed in greater detail in a subsequent portion of this Order.

DEVELOPER’S CASE

The Developer presented several witnesses in its case in chief. The testimony of these witnesses was recorded and transcribed by a court reporter, and what follows is merely a synopsis of their testimony.

- Kelvin Antill

Mr. Antill is a partner with the Paragon firm, and he practiced law for many years in Baltimore City prior to joining Paragon. Mr. Antill explained that Paragon has not yet completed a retail project in Baltimore, but he discussed several of the firm’s successful projects throughout the United States. The witness explained that in general, outlet malls are now locating closer to population centers, where previously these centers were located in rural or remote areas off of interstate highways.

Mr. Antill explained in general the project, and indicated that the outlet portion of the development would contain national retailers that would be familiar to most shoppers. The witness explained that the project will be constructed in phases, and he briefly described the potential timetable for such a build out. Mr. Antill testified that in terms of a community benefit from the PUD, the Developer would provide \$200,000 for capital improvements to the

intersection of Ebenezer Road and Route 40. Mr. Antill testified that the Developer met with representatives of the Essex-Middle River Civic Council and the Bird River Association, but did not meet to discuss the project with nearby business owners. Mr. Antill testified that the first phase of the project would represent a \$100 M investment, and Paragon would expect \$180M in yearly sales from the first phase outlet mall operation. In response to a question on cross-examination, the witness estimated that the outlet mall would have approximately 3 - 4 million visitors on an annual basis.

- Wayne Lingefelter

Mr. Lingefelter is a principal with the Corporate Office Properties Trust (“COPT”). At present, COPT owns the 85-acre site, including the two (2) one-story office buildings shown on the Plan. COPT is under contract to sell the land to Paragon, but it will retain ownership of the office buildings. Mr. Lingefelter testified that in a subsequent phase of the project, COPT would demolish and rebuild the two (2) office buildings, which would be five (5) stories or 75 ft. in height. The witness explained that the office buildings would be LEED certified and constructed of environmentally sensitive materials, which would also provide an additional community benefit. In response to a question on cross-examination, Mr. Lingefelter confirmed that both the retail (outlet mall) and residential phases of the project would be completed before the office buildings were razed and reconstructed. Although he could not provide a precise timetable, the witness agreed that the office buildings might not be constructed until 2019 or beyond.

- Salem LaHood

Mr. LaHood, a licensed architect, is a partner in charge of design with Paragon. Mr. LaHood described the mixed use project proposed by Paragon, which he testified was consistent with the goals of Master Plan 2020. Mr. LaHood explained that the project incorporates

elements of sustainable design, and also makes significant use of brick as a primary material, given that he identified such an element as being fundamental to historical Baltimore architecture, and that incorporating such local elements is an important goal.

In response to questions on cross-examination, Mr. LaHood explained that the goal of using local architectural influences is to make the project look and feel familiar to people from the area. Mr. LaHood was also questioned concerning the 75 ft. tall sign, to which the DOP noted an objection in its June 13, 2014 final report. The witness stressed that technically speaking the 75 ft. tall structure was unlike a pylon sign, and was in fact an integrated element of the project that was “vitaly important” to the national retailers who would lease space at the center. Mr. LaHood explained that the sign would be well over 400 ft. from the edge of Route 95, and that in his opinion (which is contrary to the conclusion reached in the DOP final report) the sign would not be too large and would not be out of proportion to the other elements in the project.

- James E. Matis

Mr. Matis, a licensed professional engineer, was accepted as an expert witness. Mr. Matis testified that he began work on this project in 2013, and that his firm prepared the three-page redline site plan. Mr. Matis testified that Exhibit 13A depicts the existing conditions on site, Exhibit 13B provides additional engineering detail including grading and utilities, while Exhibit 13C provides details concerning the signage, residential density and dedications to Baltimore County. The site is approximately 83 acres and is zoned ML-IM. Mr. Matis testified that in his opinion, Developer’s Exhibit 13 satisfies all Baltimore County rules and regulations.

Thereafter, Mr. Matis explained that the site is not located in an area with deficient public services, as shown on the 2014 Baltimore County Basic Services Map, marked as Developer’s

Exhibit 14. The witness stated that the stormwater management facilities on site are less than 15 years old, and he described them as “like new.” Mr. Matis also stated that from a civil engineering perspective, the project satisfies each of the standards set forth in B.C.Z.R. § 502.1.

On cross-examination, the witness conceded that he is not at all familiar with the concerns raised by the State Highway Administration (SHA), although he is generally aware that a ramp is proposed to be constructed between Routes 43 and 7. Mr. Matis testified that the site was mass graded in 2001-2002, and currently has three (3) stormwater outfalls on the south side of the site.

- Wes Guckert

Wes Guckert, President of Traffic Group, Inc., testified that he has been involved for many years with this property, including the original PUD Development Plan approved in 2010. The witness explained that the property is accessed from State Route 7. Mr. Guckert testified that his firm prepared a Traffic Impact Study and has submitted that to the SHA seeking an access permit. Mr. Guckert testified that the subject property is not located in a deficient (i.e., level of service D, E, or F) traffic shed, and (at least with respect to the internal roads shown on the Development Plan) the Developer has satisfied all Baltimore County rules and regulations. In that regard, Mr. Guckert opined that the road system was “safe and convenient” as required by the B.C.C., and also satisfies, from a transportation planning perspective, the factors set forth in B.C.Z.R. § 502.1. The witness also opined there will be less traffic associated with the current project than with the previous PUD Development Plan approved in 2010.

On cross-examination, the witness conceded that there were certainly “challenges” in dealing with traffic conditions along Route 7. The witness also testified that under Baltimore County rules and regulations, only the current traffic conditions (rather than future projected

conditions) are analyzed in deciding whether a development project may be approved. Mr. Guckert stated that the SHA access permit process is a matter entirely separate from the current proceeding, and he testified that his staff is currently at work trying to satisfy the SHA concerns raised in its most recent letter dated May 14, 2014. In response to a question from counsel, Mr. Guckert testified that the Saturday AM peak would be the busiest time for the outlet mall, and his study predicted 810 daily inbound trips at that time.

- Bill Monk

Mr. Monk, an urban design and land planning specialist, was accepted as an expert witness in the Developer's case. Mr. Monk explained that he has nearly 40 years of experience in this field, and has served on Baltimore County Design Review Panel. Mr. Monk described the overall layout of the site, and explained that there were essentially four (4) "pods" where the project would be constructed in phases. Mr. Monk opined that the Developer satisfied all B.C.Z.R. § 502.1 standards, and that the development would be consistent with Master Plan 2010, Master Plan 2020, and the White Marsh Community Plan. The witness stated that the previous iteration of this development was to have 80 – 85% impervious surface, and the stormwater management facilities were approved on that basis. Mr. Monk explained that the current project would have much less impervious surface, and he therefore believed that the stormwater management system would be more than sufficient.

Concerning the specific requirements for PUDs, Mr. Monk opined that the project was a good high quality design as set forth in the Pattern Book, and that the Developer also satisfied the requirements set forth in B.C.Z.R. § 430. Mr. Monk also opined that the project satisfied the compatibility requirements set forth in B.C.C. § 32-4-402, and in that regard he explained that the project was a "self contained" community or neighborhood for purposes of the compatibility

analysis. Mr. Monk explained that the neighborhood was defined by the surrounding road networks and the White Marsh Run, and he stated in conclusion that “we [Paragon] are the neighborhood.”

On cross-examination, Mr. Monk agreed the project would create additional traffic on Route 7, but did not know if that would constitute an “adverse impact” for purposes of a special exception analysis. He also believes the same criteria to determine the boundaries of a “neighborhood” are used in both the compatibility and special exception analysis. In response to a question posed by Mr. Nelson, the witness conceded that if the “neighborhood” was redrawn to include a larger land area, that there could “possibly” be adverse effects above and beyond the smaller neighborhood described by the witness, which is essentially the Paragon site.

Thereafter, Mr. Monk was questioned concerning a provision in the development regulations which provides that all development projects shall preserve and protect existing businesses. The witness stated that it was unclear what was meant about “protecting” existing businesses. The witness stated that in his opinion the statute could not be intended to keep out competition, in which case it would “override the free market system”.

In response to cross-examination questions from Mr. Gilliss, Mr. Monk agreed that land planning was not practiced in a vacuum, and that the goal is to not harm other properties or property owners. Mr. Monk agreed that no Community Input Meeting (CIM) was held in this matter, and concerning the volume of traffic generated by the project, Mr. Monk stated that he could not answer for certain but he opined that it would be much less than with the prior approved PUD. With respect to the phasing of the project, Mr. Monk advised that he was not sure as to the proposed timing, but stated that the outlet mall would be constructed first. As far as the community benefit required for the PUD, Mr. Monk stated that the office buildings

proposed for the site would be LEED certified. Finally, the witness stated that he had no opinion on whether the proposed 75' tower would distract drivers on I-95.

COMMUNITY CONCERNS

At various times throughout the hearing in this case, numerous citizens testified about their concerns with the project. While there were obviously variations in their testimony, they shared a common core of concerns including traffic, flooding around White Marsh Run, overcrowded schools, empty retail stores and office buildings in the area, lack of adequate infrastructure, increased crime, damage to the Chesapeake Bay with increased runoff, and light pollution from the additional outdoor lighting proposed for the project.

In addition to area residents, several business owners and employees testified regarding their concerns with the Paragon project. The manager of the Boscov's department store (Les Verhoek) testified that he believed the project would render area roadways virtually impassable, and he also believed that the project would harm other retailers in the area. Michael Della Rose, who has been in the restaurant business since 1961, advised that his restaurant (which is located on The Avenue in White Marsh), would suffer given the competition from the proposed new restaurants in the Paragon project. Mr. Della Rose indicated that he favored the original PUD plan for the Nottingham Ridge, given that it proposed more residential units which would provide additional customers for area businesses.

Michele Belcastro, the store manager of the Limited in the White Marsh Mall, stated that traffic in the area is already horrendous, and she fears that the Paragon project would make things worse. She explained that White Marsh is a "family mall," and that the Paragon project would force small merchants in the mall to close.

Lisa Bisenious, the general manager of the White Marsh Mall, testified that the mall owners had no prior notice concerning the Paragon outlet project. Ms. Bisenious believes that the PUD will harm the community, and would not protect existing businesses as required by County regulations. In addition, echoing similar concerns as other witnesses, Ms. Bisenious stated that process was in fact a major issue, and she advised that the businesses at the mall were indignant that there was no public input or comment period prior to the consideration of the Paragon PUD.

Kathy McLaren, the regional property manager for Federal Realty, testified on behalf of the Protestants. Ms. McLaren explained that at present she manages over 2.5 million sq. ft. of retail space. Ms. McLaren testified that Federal Realty opposes the project, and she cited concerns very similar to those articulated by other community members; i.e., traffic, retail saturation, and flooding issues. On cross-examination, Ms. McLaren conceded that in Boston, her company is currently developing an outlet center project near its own enclosed shopping mall facility.

EXPERT TESTIMONY ON BEHALF OF PROTESTANTS

- Michael Maris

Michael Maris, a traffic consultant who was accepted as an expert, testified on behalf of the White Marsh Mall. The witness was asked to evaluate the impact of the Paragon project upon the Mall. Mr. Maris explained that he reviewed the materials and study prepared by the Traffic Group, and he believed that study did not extend far enough beyond the site, to include Route I-95 and westward. In referring to a May 9, 2014 letter of the SHA [Protestants' Exhibit 11], Mr. Maris stated that the points raised therein were very basic and fundamental, and he could not believe such questions had not yet been answered at this stage of the process.

Thereafter, the Mall asked Mr. Maris to perform his own traffic study, which he did at four (4) key intersections surrounding the site. Mr. Maris performed traffic counts in April, 2014 at peak periods. The witness stated that Route 43 and Honeygo Boulevard was the “worst by far,” and that while the SHA plans improvements for the intersection, such projects had not received funding. Mr. Maris also stated that Route 43 and Perry Hall Boulevard currently functions at an F level of service, and will only get worse if the Paragon project is built. With regard to the intersection at Honeygo and Campbell Boulevards, Mr. Maris stated that only one turning movement at that intersection is deficient, and he testified that the intersection at Honeygo and Perry Hall Boulevard (the 4th and final intersection in the study) was functioning at an acceptable level of service. In conclusion, the witness stated that the proposed Paragon PUD would cause the already unacceptable traffic conditions at the intersections of Route 43 and Honeygo Boulevard and Route 43 and Perry Hall Boulevard to become worse.

- Jennifer Cowley

Jennifer Cowley, a city and regional planner, was accepted as an expert witness. Dr. Cowley is a college professor, and presently teaches courses in land use and land use law at Ohio State University. Dr. Cowley testified that the currently approved Nottingham Ridge PUD is “office focused,” while the Paragon PUD is “retail focused.” Dr. Cowley opined that the proposed PUD is not consistent with Master Plan 2020, given that White Marsh is designated there under as a Community Conservation area, and is no longer designated as a Growth Area. She also opined that the one-story buildings proposed herein were also inconsistent with the multi-level developments encouraged in Master Plan 2020.

Dr. Cowley also criticized the traffic study prepared by Mr. Guckert (Traffic Group), which she believes was not prepared in accordance with proper procedures. Although that study

employed the correct land use designation from the Institute for Traffic Engineers (ITE) [Manual's land use No. 823], the proposed development far exceeds the 340,000 sq. ft. maximum referenced therein. As such, Dr. Cowley opined that the Developer was obliged to collect local data for its analysis, rather than relying on the chart found at page 1571 of the ITE Manual.

The witness made reference to B.C.C. § 32-4-103(a)(6), and indicated that the provision addresses economic concerns, and is designed to avoid vacancies. Dr. Cowley also referenced the White Marsh study (Protestants' Exhibit 16), which she explained also raised concerns about the potential displacement of existing businesses. Dr. Cowley stated that the "preserve and protect" language from the aforementioned County Code provision was somewhat unique, and was not found in the laws and/or regulations of 12 other Maryland localities that she researched. She opined that the Developer in this case has not satisfied the requirements set forth in B.C.C. § 32-4-103(a)(7). In support of this opinion, Dr. Cowley noted that the White Marsh study (Protestants' Exhibit 16) indicates that the Paragon project would result in \$88 million in sales lost at the White Marsh Mall, and the witness also noted that the retail portion of the project has doubled since the original PUD plan was approved for Nottingham Ridge. The witness also testified that she had "serious concern" that the Developer was in compliance with B.C.C. § 32-4-103(a)(9) given the number of failing intersections in the vicinity of the project.

Dr. Cowley next testified concerning the definition of "neighborhood" for purposes of the special exception standards found at B.C.C. § 32-4-245(c)(2). The witness testified that the Developer had incorrectly defined the boundaries of the neighborhood, which she believed, by relying upon U.S. Census data, was described by the following boundaries: Cowenton Avenue – Perry Hall Boulevard – Campbell Boulevard – Pulaski Highway. Dr. Cowley opined that the

Developer had not satisfied B.C.Z.R. § 502.1(a), (b), and (e), given that the study performed by the Traffic Group was flawed and it is impossible to determine how much traffic will be generated by the project, nor can one determine the extent of the harm upon existing traffic.

On cross-examination, Dr. Cowley conceded that the Department of Planning has approved the amended Plan, as referenced in B.C.C. § 32-4-245(c)(5). In regard to B.C.Z.R. § 502.1, which uses the term “locality,” Dr. Cowley indicated that she equates that term to “neighborhood.” Dr. Cowley stated that she did not review Master Plan 2020, and that the boundaries of the community found on Page 11 of the Report were provided to her by Mr. Nelson after consultation with his clients. Finally, Dr. Cowley testified that market competition is certainly an acceptable concept, but she believes the focus of B.C.C. § 32-4-103(a)(7) concerns the proper amount of retail space for any given area.

- Heather Arnold

Ms. Arnold, a retail market analyst employed by Street Sense, was accepted as an expert witness on behalf of the White Marsh Mall. Ms. Arnold explained that she was hired to determine whether or not the market area surrounding the White Marsh Mall can absorb more retail operations. She studied the White Marsh area market, and considered both iterations of the PUD plans for the Nottingham Ridge property. The witness described the terminology and methodology used in her line of work, including the concepts of primary trade area, secondary trade area and tertiary trade area.

Ms. Arnold made reference to the report she prepared (admitted as Protestants’ Exhibit 16), and she indicated that she studied the area both on the internet and in the field. Her report designates the relevant trade areas for White Marsh Mall, and contains various tables and charts showing the potential impact upon the Mall of the Paragon project. In conclusion, Ms. Arnold

testified that the White Marsh Mall would suffer a 15% reduction in retail sales due to the opening of the Paragon outlet, which she opined would cause a corresponding 15% vacancy rate at the Mall. She also testified that the Mall would lose roughly \$50 million in sales on a yearly basis due to the opening of the Paragon outlet.

On cross-examination, Ms. Arnold testified that a “healthy” mall has a vacancy rate of approximately 6%, and that a vacancy rate above 10% causes the operation “to slide.” She also testified that the original PUD Plan would have a \$45 million sales impact upon nearby retail centers including the White Marsh Mall, while the amended PUD Plan, with more than twice the amount of retail space, would have an \$88 million sales impact upon adjacent retail centers.

- Daniel O’Leary

Daniel O’Leary, a licensed professional engineer who was accepted as an expert, testified on behalf of the Protestants. Mr. O’Leary began his testimony by describing his educational and professional background, which included several years of employment with the SHA. Mr. O’Leary explained that he specializes in water resources, and his testimony in this case focused upon the stormwater management aspects of the development.

The witness testified that stormwater management regulations were first adopted in Maryland in 1982, in the wake of Hurricane Agnes. Mr. O’Leary explained that these regulations were primarily aimed at flood control, but that they eventually were amended to address water quality issues, and not just the quantity of water on any particular site.

Thereafter, the witness explained that Maryland adopted a 2001 Stormwater Management Design Manual, which was stricter than the 1982 regulations, both in terms of qualitative and quantitative requirements. Mr. O’Leary explained that the 2001 Design Manual targeted the first inch of stormwater runoff on a site, which would address the majority of storms.

The witness then testified that in 2009 the Environmental Site Design (“ESD”) regulations were adopted in Maryland, pursuant to the Stormwater Management Act of 2007. Mr. O’Leary explained these are the strictest of the regulations, and that the goal is for a site to mimic the pre-development hydrologic conditions.

Mr. O’Leary opined that in this case the 2009 regulations are applicable, given that although a plan has previously been approved for the site, there has never been any construction or build out of the project. Mr. O’Leary explained that the SHA in the 1990’s performed environmental restoration work on White Marsh Run, and he also believed that the existing stormwater management pond on site (shown in the photographs marked as Protestants’ Exhibit 33) was filled with sediment and is not functioning effectively. The witness explained that the Developer’s failure to comply with the 2009 requirements would cause adverse effects in the White Marsh Run, including more sediment being deposited into the river, which would cause a corresponding increase in nitrogen levels. In conclusion, the witness opined that the project (assuming Developer does not comply with the 2009 ESD regulations) would be detrimental to the health, safety and welfare of the community.

On cross-examination, the witness conceded that if the Developer does in fact have a permit and/or approval from the Army Corps of Engineers, the Developer would then be in compliance with the 1982 stormwater management regulations.

- Lei Zhang

Lei Zhang, an Associate Professor of Engineering at the University of Maryland, was accepted as an expert witness in the Protestants’ case. Dr. Zhang explained that he prepared a report identifying the traffic concerns with the project, which was marked and accepted as Protestants’ Exhibit 38. The witness began his testimony by explaining the various “slides”

which comprised his report, and for the base year of 2015, the witness opined that the proposed development will produce negative impacts on several roadways in the area. Looking 20 years into the future (i.e., 2035) Dr. Zhang explained that even if the proposed traffic improvements noted in his report are completed, the development will still have a negative impact upon the surrounding roadways, which of course would be much worse if the roadway improvements were not completed.

On cross-examination, the witness advised that in 2035, his report concluded that the average delay per vehicle/user, assuming this project is not constructed, would be 89 seconds. For the same year (i.e., 2035) Dr. Zhang opined that in the “worst case” scenario, wherein this project was completed but no roadway improvements were constructed, the average delay per vehicle/user would be 104 seconds. Dr. Zhang, in response to questions on cross-examination, explained that engineers no longer believe that there is a positive correlation between speed and the severity and number of motor vehicle accidents. Instead, the witness stated that the current thinking is that it is the speed differential among the vehicles that leads to deadly accidents.

At the conclusion of his testimony, Dr. Zhang explained that the evidence concerning the average vehicle delay was somewhat misleading, and he requested the opportunity to double check his work when he returned to campus. Thereafter, by letter dated September 12, 2014, Protestants’ counsel, G. Macy Nelson, Esq. submitted to the OAH a memorandum from Dr. Zhang dated September 11, 2014. Therein, Dr. Zhang again included the delay per vehicle figures for 2015 (no-build), 2015 (build), and 2035 (no-build). The witness explained that he could not “re-run” all of the scenarios with the computer model, but he also explained that “the average delay increase shown in the table is very significant for traffic engineering analysis.” Dr. Zhang also stated in that memorandum that “it is absurd to argue that it is not an issue [i.e.,

traffic delays] because once we average out the delay to all drivers in the Baltimore area, the average delay increase would be less than a sec.”

By letter dated September 12, 2014, Developer’s counsel filed a Motion to Strike a portion of Dr. Zhang’s e-mail attachment, arguing it was not responsive to the questions posed to the witness on cross-examination. Having reviewed Mr. Barhight’s September 12, 2014 letter, as well as Mr. Nelson’s September 16, 2014 response thereto, I am inclined to agree that the three (3) sentences in Dr. Zhang’s September 11, 2014 memorandum are not admissible, since it is testimony given after the conclusion of the hearing. I will however admit and consider the average delay table shown at the top of Dr. Zhang’s September 11, 2014 memorandum/e-mail.

DEVELOPER’S REBUTTAL CASE

- James Matis

Mr. Matis was recalled in the Developer’s rebuttal case, to address the flooding concerns raised by the community. Mr. Matis described the various branches of the White Marsh Run in the vicinity of the project, and he stated that no rain water that falls on the Paragon site would travel to the culvert on Maryland Route 7, the location of the flooding identified by the community.

- Wes Guckert

Mr. Guckert was recalled as a witness in the Developer’s rebuttal case, and was asked to respond to the testimony given by Mr. Maris, the Protestants’ traffic expert. Mr. Guckert explained that three (3) of the four (4) intersections studied by Mr. Maris are not listed on the 2014 Baltimore County Basic Services Map, and that none of those intersections was in a deficient traffic shed. Mr. Guckert also opined that the proposed PUD amendment would have

less impact upon the community in terms of traffic than would the presently-approved PUD, which provides for a larger share of office space on the site. Finally, Mr. Guckert opined that the Paragon project would have no greater impact upon traffic congestion at this location than it would at other areas within Baltimore County where the use would be permitted.

On cross-examination, Mr. Guckert indicated that the Developer is awaiting a response from the SHA, which he believed would be received in the next month or so. The witness also conceded that he misspoke in his earlier testimony, and that the 9th Edition of the ITE Manual, for the factory outlet center use, relied upon three (3), not 14 studies for its conclusions. Finally, the witness again stated that the Paragon project is not located within any failing or deficient traffic shed as shown on the 2014 Baltimore County Basic Services Map, marked and admitted as Developer's Exhibit 18.

- Nicholas King

The final witness in the Developer's rebuttal case was Nicholas King, a principal with Paragon. Mr. King explained that he is responsible for the overall outlet business at Paragon, and indicated that he previously worked for Prime Retail. The primary thrust of Mr. King's testimony was to respond to the report and testimony of Heather Arnold, the Protestants' retail market analyst. Mr. King testified that in general Paragon was pleased with Ms. Arnold's report, inasmuch as it showed that the relevant market is large and underserved, and that the area contains many "brand aware" consumers. Mr. King testified that he could not argue with Ms. Arnold's testimony regarding the potential loss of sales at White Marsh Mall, and in response stated that shopping centers always need to compete and re-invent themselves in the marketplace. Finally, Mr. King believed that the 15% vacancy rate forecasts in Ms. Arnold's report was "naïve."

LEGAL ISSUES

A. TRAFFIC

Protestants raised several legal issues in their post-hearing memorandums. The first issue concerned whether the project would cause traffic congestion. It is undisputed that the project is not located within a deficient traffic shed identified on the 2014 Transportation Map. Developer's Exhibit 18. Instead, Protestants point to B.C.C. § 32-4-245, which incorporates the special exception standards of B.C.Z.R. 502.1 which require (among other things) that the use not create "congestion in roads, streets or alleys."

As an initial matter, it is clear the project will result in traffic congestion; Mr. Guckert in essence conceded that point during his rebuttal testimony. And intuitively, it seems obvious that a large retail outlet center will result in traffic congestion, and if that was all that was required to be proven, no commercial enterprise of any magnitude could obtain special exception relief. But I do not believe that is the standard.

Protestants argue that the judicial "overlay" from People's Counsel v. Loyola College is not applicable in this PUD case as it would be in a run-of-the-mill special exception case. I disagree, largely for the reasons alluded to above. Maryland cases – interpreting B.C.Z.R. § 502.1 – make clear that the special exception ordinance should be construed as if the nine (9) injunctions set forth were qualified by the language that the detrimental impact would be "greater than or above or beyond the impact inherent in such a use, regardless of its location." This "overlay" is engrafted upon B.C.Z.R. § 502.1, and there is nothing within B.C.C. §32-4-245 (or the development regulations in toto) that would require a different interpretation.

As such, the pertinent question is whether the project will lead to traffic congestion above and beyond that inherent in the operation of an outlet mall, regardless of its location. Mr.

Guckert opined that the answer to this inquiry is “no,” and neither of the Protestants’ traffic experts (Messrs. Maris and Zhang) or the citizen witnesses provided evidence or testimony to the contrary. Special exception uses are presumed proper under Maryland law, and courts are much more lenient in evaluating petitions for special exception than they are in variance cases.

The seminal special exception case, Schultz v. Pritts, 291 Md. 1 (1981), is illustrative on this issue. There, neighbors opposed an industrial project, citing traffic concerns with large trucks traversing insufficient roadways. The court held the trial judge was correct in comparing the traffic problems that might arise under the proposed use and traffic problems that could arise from the usage of the premises now permitted by law. *Id.* at 18-19. More to the point, the court held “traffic impact on an application for a special exception ought to be measured against that which could arise under permissible use, and not merely on existing traffic loads around the undeveloped premises.” *Id.* (emphasis added).

In reviewing the testimony and exhibits, I believe the citizen witnesses and Protestants’ traffic experts considered only the impact of the projected outlet mall traffic upon the existing roadway network. While that is a perfectly logical and understandable comparison, and I have no doubt that traffic during peak periods is challenging, the law requires me to consider the permissible uses of the property as the benchmark for a traffic comparison. The only evidence in this regard was provided by Messrs. Monk and Guckert, both of whom testified that the traffic generated by the Paragon PUD would be less than that associated with the currently-approved PUD. In light of this uncontradicted testimony, I find Developer has satisfied its burden regarding traffic conditions associated with the project. As noted by the Schultz court, “[w] here, as here, the potential volume of traffic under the requested use would appear to be no greater

than that which would arise from permitted uses, we believe it arbitrary, capricious and illegal to deny the application for the special exception on vehicular traffic grounds”. Id. at 18.

B. STORMWATER MANAGEMENT

Many citizen witnesses as well as Dan O’Leary (Protestants’ stormwater expert), testified regarding concerns with the potential environmental impact of the project. Nearby residents described the degradation of White Marsh Run and the Bird River (and hence the Chesapeake Bay) by increased sediment and stormwater runoff. Mr. Leary opined that the Developer was obligated to satisfy the current stormwater management regulations, which mandate ESD techniques. Nearby residents highlighted the seeming incongruity of “grandfathering” the project (i.e., applying the 1980’s regulations) at the same time Baltimore County and the State of Maryland were investing millions of dollars on stream restoration projects in the area.

While I cannot disagree with the spirit and substance of this testimony, I am bound to apply the law as written, not as I would like it to be. In that regard, a sediment and erosion control plan for the Nottingham Ridge property was approved by the Baltimore County Soil Conservation District in 2000, and revised in 2002. Developer’s Exhibit 13A. Mr. Matis confirmed the site was “mass graded” in 2001-02. The B.C.C. provides that “any site with an approved erosion and sediment control plan and stormwater management plan approved by the Department [DEPS] before May 4, 2010 shall be governed by the stormwater management law and regulations in effect at the time of the approval.” B.C.C. § 33-4-114(c)(1). The law in effect in 2002, when the approved plan was revised, was the 2000 Maryland Stormwater Design Manual. Protestants’ Exhibit 31. I believe it is these regulations the Developer must satisfy, and a condition to that effect will be included in the Order which follows.

C. MASTER PLAN

Protestants contend the application should be denied since Developer failed to prove the project is in conformance with the Master Plan, as required by B.C.C. § 32-4-103(a)(2). Though I agree with Protestants that the “Applicant presented little evidence on the Master Plan issue” (See Citizens’ Memo, p. 21), the scant evidence provided – in my opinion – satisfies the PUD requirements.

The County Code requires that all development conform to the Master Plan and community plans, “[s]ubject to the limitations in the Charter and this Code.” B.C.C. § 32-4-102(a). One such limitation is found in B.C.C. § 32-4-245(c)(5), which requires the Developer to prove the project is “in conformance with the goals, objectives and recommendations of one or more of the following: The Master Plan, area plans, or the Department of Planning.” Here, even if Professor Cowley’s testimony is credited (i.e., that the PUD is inconsistent with the Master Plan’s call for multistory in-fill development), the Developer can nonetheless satisfy B.C.C. § 32-4-245(c)(5). Mr. Moxley submitted a final report from the DOP (County Exhibit 2) indicating that agency recommended approval of the PUD. The law is stated in the disjunctive, and is satisfied if Developer proves the plan conforms to the “goals, objectives and recommendations” of ... “the Department of Planning.” Of course, one of those “recommendations” concerned the proposed tower sign, which will be discussed below.

D. “PRESERVE AND PROTECT EXISTING BUSINESS”

Of all the legal issues presented in the case, this one is the most confounding. As might be expected, there is no case law interpreting the provision, nor is there institutional precedent or policy which would aid in interpreting the statute. If all development approved in Baltimore County would need to “preserve and protect existing business,” it seems clear that no Wal-Mart

or other “big box” retailer could locate within the County. Whether or not the express mission of these businesses is to drive competing retailers out of business, that is surely what history has shown. Such an interpretation would be at odds with our free market economy and is well beyond the ken and scope of an administrative agency charged with enforcement of zoning and development laws.

The language in question is found within a prefatory section of the development regulations, which state in broad and ambitious language the purposes to be served by such provisions. B.C.C. § 32-4-103. These set forth the framework for the numerous sections which follow, many of which provide specific requirements for development projects. But the “preserve and protect” language is, in my opinion, more of a generic statement or platitude that is not capable of administrative and/or judicial enforcement. Also, Maryland courts have held that the “prevention of competition is not a proper element to be considered in zoning decisions.” Superior Outdoor Signs v. Eller Media Co., 150 Md. App. 479, 500-01 (2003). As such, I do not believe the interpretation urged by Protestants is supported by Maryland law.

E. TOWER SIGN

While the DOP recommended approval of the PUD, it did not support the proposed tower sign. Mr. Moxley objected to both the “joint identification” aspect of the sign, as well as the height (75’) proposed. He noted that the proposed sign does not conform to the height, type and sign face area requirements of the B.C.Z.R. While he agreed the Administrative Law Judge (ALJ) might approve such a sign in a PUD case, he emphasized that Baltimore County has “kept its arterial highways unencumbered with signage, especially signage on a massive scale.” County Exhibit 2, p. 4.

I am persuaded by Mr. Moxley's testimony, especially as concerns the "joint identification banding." Id. In fact, I believe it is the content of the proposed sign, rather than its height, that is of utmost concern. I agree with Mr. Moxley that such signage (identifying the premier tenants in the center) in essence constitutes advertising. This would be a billboard along the highway, albeit an attractive and well-built one.

I do not believe the proposed height implicates the same concerns. Both Mr. LaHood and Mr. Monk testified that the height would not be excessive and that the sign would serve as a landmark of sorts to allow motorists to identify the Paragon Outlets. The testimony and evidence also showed the sign would be located 200' from the property line and 690' from the edge of the roadway. Developer's Exhibit 21. In these circumstances, I agree that the tower's distance from the roadway lessens the visual impact which would otherwise be felt from a sign of this size. Therefore, I believe the sign height proposed is acceptable, but it should be a commercial enterprise sign only (i.e., "Paragon Outlets") without the "joint identification" aspects (i.e., names of tenants).

F. PUD AMENDMENT PROCESS

Until 2012, the procedure was unclear for amending a previously-approved PUD. As noted by Developer's counsel, the undersigned determined in the Anderson Motors case that a Hearing Officer's Hearing was the appropriate mechanism for amending a PUD, and that a new County Council Resolution was not required. By Opinion dated October 7, 2014, the Court of Special Appeals agreed. Tomlinson v. BKL York, LLC. No. 1533.

But in 2012, the County Council enacted Bill 42-12 [now codified at B.C.C. § 32-4-245(e)], which clarified the process. It may be, as the Protestants charge, the current rule does not provide for sufficient notice and community input in a scenario involving the amendment of

such a large scale project. But there is no dispute that the Developer complied with the dictates of the law, and the County Council elected not to place the matter on its agenda, as the law allows. In such a scenario, B.C.C. § 32-4-245(e)(5) provides that the amendment should be considered by the ALJ at a public hearing, as was done here.

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, and reflects the Council's desire for innovative and well designed projects. 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. The DOP noted in its report the Developer complied with the applicable regulations, and it recommended approval. Mr. Monk likewise opined the Developer satisfied all County regulations. 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, I found Mr. LaHood's testimony persuasive, and the Pattern Book also reflects the attractive and well-designed nature of this development. Both Mr. Monk and Mr. Matis opined the Developer satisfied the § 502.1 standards, and I concur. 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. It is true, as Protestants note, the Developer does not have a rigid timetable for when it would complete all elements of the project. But there is no such requirement in the regulations, and as noted in the DOP's report and Mr. Lingefelter's testimony,

some flexibility is required in light of market conditions and the fluctuating demand for office space.

As Mr. Lingefelter testified, the project will be completed in phases, with the retail and residential portions first, followed by the office space. This type of “phasing” is common in large commercial projects. Messrs. LaHood and Antill also described their wealth of experience in the retail sector, and described many of Paragon’s successful projects throughout the United States. In light of this testimony and evidence, I find there is a “reasonable expectation” that the project will be developed as shown on the plans.

- (4) This provision requires that the proposed development complies with B.C.Z.R. § 430. That section of the zoning regulations contains certain “nuts and bolts” requirements for all PUDs. Here, the project is located within the Urban Rural Demarcation Line (URDL). Residential uses are permitted in the Manufacturing, Light – Industrial, Major (ML-IM) 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(d). Finally, the residential density was approved by Council resolution, and any type of dwelling is permitted in a PUD. 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).

Even so, the DOP report found that the plan “retains the quality and vitality of a vibrant mixed-use development located within an established growth area in a positive response to the visioning of the Master Plan 2020”. Mr. Monk also opined the Plan was consistent with Master Plan 2020. I am mindful of Dr. Cowley’s testimony that White Marsh is no longer designated a growth area in Master Plan 2020, and that multi-level developments were encouraged in the area. In point of fact, while the outlet aspect will be one-story, the hotel, office and mixed use elements shown in the Pattern Book would be “multi-level.” While I do not believe it to be required by the regulations, I nonetheless find based on the testimony and evidence that the project conforms to Master Plan 2020 and that the Developer has satisfied B.C.C. § 32-4-245(c)(5).

THEREFORE, IT IS ORDERED by this Hearing Officer/Administrative Law Judge this 21st day of October, 2014, that the three-sheet redlined Development Plan identified herein as **PARAGON OUTLETS WHITE MARSH, LLC PUD PROJECT, 1st AMENDMENT** (Developer’s Exhibit 13A – 13C), be and is hereby APPROVED.

The approval granted herein is subject to the following conditions:

1. The tower sign shown in the Pattern Book shall be no more than 75’ in height. The sign shall not display the names of retailers/tenants within the outlet center.
2. The Developer shall provide stormwater management for the project in compliance with the 2000 Maryland Stormwater Design Manual.

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