

IN RE: DEVELOPMENT PLAN HEARING	*	BEFORE THE OFFICE OF
2609 – 2615 Caves Road		
3 rd Election District	*	ADMINISTRATIVE HEARINGS
2 nd Councilmanic District		
(2609 – 2615 CAVES ROAD)	*	FOR
2627, LLC	*	BALTIMORE COUNTY
<i>Owner / Developer</i>		
	*	HOH Case No. 03-0499

* * * * *

**ADMINISTRATIVE LAW JUDGE’S
DEVELOPMENT PLAN OPINION & ORDER**

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County for a public hearing on a development proposal submitted in accordance with the development review and approval process contained in Article 32, Title 4, of the Baltimore County Code (“B.C.C.”). 2627, LLC, the owner/developer of the subject property, (hereinafter “the Developer”) submitted for approval a three-sheet red lined Development Plan (“Plan”) prepared by KCW Engineering Technologies, Inc., known as “2609 – 2615 Caves Road.”

The project proposes four single-family detached residential lots on 24.18 acres of RC 5 land. The four dwellings will be accessed from Caves Road by way of a shared driveway. The site is currently unimproved and is primarily wooded with ponds and a stream on the western and southern portions of the property. The Stemmer House (a Baltimore County Landmark) and delineated historic environment setting are adjacent to the site.

Details of the proposed development are more fully depicted on the red lined and blue lined three-sheet Development Plans that were marked and accepted into evidence as Developer’s Exhibits 1A-1C and 20A-20C. The property was posted with the Notice of Hearing Officer’s Hearing on October 4, 2015 for 20 working days prior to the hearing, in order to inform all interested citizens of the date and location of the hearing. The undersigned conducted the hearing

on November 5, 2015, January 20, 2016, January 21, 2016, February 5, 2016, and March 24, 2016, in Room 205 of the Jefferson Building, 105 West Chesapeake Avenue, Towson, Maryland.

In attendance at the Hearing Officer's Hearing (HOH) in support of the Plan on behalf of the Developer and property owner was Howard P. Sugarman, Douglas L. Kennedy, professional engineer with KCW Engineering Technologies, Inc., the consulting firm that prepared the site plan, and Sally Malena from Human & Rohde, Inc., landscape architect. Christopher D. Mudd, Esquire and David Karceski, Esquire with Venable, LLP, represented the Developer. Michael R. McCann, Esquire appeared on behalf of Protestants.

Numerous representatives of the various Baltimore County agencies who reviewed the Plan also attended the hearing, including the following individuals from the Department of Permits and Development Management: Jan M. Cook, Project Manager, Dennis A. Kennedy and Jean M. Tansey (Development Plans Review [DPR]), Lachelle Imwiko, Real Estate Compliance, and Leonard Wasilewski (Office of Zoning Review). Also appearing on behalf of the County were Jeff Livingston from the Department of Environmental Protection and Sustainability (DEPS) and Lloyd Moxley, from the Department of Planning (DOP).

In the initial portion of the hearing, all Baltimore County agency representatives indicated the Plan addressed all comments submitted at the Development Plan Conference (DPC) by their agency, and they each recommended approval of the Plan. Mr. Moxley indicated that a school analysis was pending at the time of the hearing, although the OAH received from the DOP on November 13, 2015 a School Impact Analysis (Baltimore County Exhibit 2) which reflects that none of the school enrollments (Fort Garrison Elementary School, Pikesville Middle School and Owings Mills High School) will exceed state rated capacity. Mr. Moxley also addressed the RC5 performance standards, and stated that the DOP would upon application for building permits

ensure the Developer satisfied these standards. Ms. Tansey, the County's landscape architect, testified the Developer was granted a waiver under the Local Open Space regulations, and will provide a payment in the amount of \$4,400 in lieu of providing 4,000 sq. ft. of open space. Baltimore County Exhibit 1. Ms. Tansey also testified her agency reviewed and approved a final landscape plan on October 7, 2015. At this stage of the proceedings, the "development plan is deemed Code-compliant in the absence of evidence to the contrary." People's Counsel v. Elm Street Dev., Inc., 172 Md. App. 690, 703 (2007).

DEVELOPER'S CASE

In the "formal" portion of the case, the Developer presented several expert witnesses. First was professional engineer Douglas L. Kennedy. Mr. Kennedy explained in detail the development proposal, which is reflected on the Plan marked as Developer's Exhibit 1A-1C. Mr. Kennedy reviewed the "red line" changes on the Plan, which he explained were made in response to County agency comments. The witness also discussed the historical environmental setting which was created on the adjacent property in 2006, surrounding the Stemmer House, which is on the Baltimore County Final Landmarks List. Mr. Kennedy testified that the environmental easements created at the site (forest buffer easement and forest conservation easement) will exceed 8 acres, and that an underground storm water management system would be provided, so that an outfall would not be created on a steep slope which exists on portions of the site. The witness opined the Developer satisfied all Baltimore County rules and regulations.

Henry A. Leskinen, an environmental specialist with Eco Science Professionals, was the next expert witness to testify in the Developer's case. Mr. Leskinen indicated the Developer would be required to obtain a special variance from DEPS to remove one specimen tree from the area where the shared use driveway will be created. Developer's Exhibit 7. The witness noted that by

doing so, the Developer will avoid having to disturb approximately ¼ acre of forest to gain access to the single-family dwellings, as reflected on Developer's Exhibit 8. Mr. Leskinen also testified that he was previously involved in a 2004 project proposed for this site, which was not approved by the Deputy Zoning Commissioner.

The next portion of Mr. Leskinen's testimony concerned forest harvesting activities which took place on the site prior to 2013. The witness stated that the former owner (Barbara Holdridge) contracted with a logging company to cut oak trees out of the forest, which the witness indicated was a change (for the worse). Mr. Leskinen stressed that other than the one tree noted above (referenced on the Plan as "Tree T") no Priority I forest will be cleared by the Developer. In connection with the aforementioned logging activities, Mr. Leskinen opined that in or about 2004 the property had 80% canopy coverage, while at the current time the coverage is approximately 45%.

Sally Malena, a registered landscape architect accepted as an expert, was the next witness to testify on behalf of the Developer. Ms. Malena reviewed and explained a plan depicting the landscaping to be provided along the shared access road, which will screen the Stemmer House at 2627 Caves Road from the proposed dwellings. Developer's Exhibit 11. Ms. Malena also prepared and explained an exhibit concerning the sight lines from Caves Road into the property. Developer's Exhibit 10. Based on that exhibit, Ms. Malena opined that proposed Lots 3 and 4 (2609 and 2611) would not be visible to motorists traveling along Caves Road due to the grade change at the site.

The Developer next presented the testimony of Mitchell Kellman, a land use and zoning planner accepted as an expert witness. Mr. Kellman testified that he drives by this property on a daily basis, and noted that it is outside of the Urban Rural Demarcation Line (URDL), but inside

the Metropolitan District. The witness stated that the lot sizes proposed in this project are similar to existing properties and homes located to the southeast of Caves Road. Mr. Kellman testified that Master Plan 2020 designates the site as a “rural residential area” (Developer’s Exhibit 17) and that the site is located within the T2R transect. Developer’s Exhibit 18. In reliance upon these documents, and his familiarity with the site, Mr. Kellman opined that the proposed development was consistent with Master Plan 2020 and satisfied all requirements of the zoning regulations.

Kathryn Kuranda, an architectural historian accepted as an expert, was the next witness in Developer’s case. Ms. Kuranda explained that she has over 30 years of experience in this field, and has reviewed in excess of 300 projects during her career. The witness testified that the Caves Valley Historic District (“District”) was listed in 1988, and she explained that the District contains approximately 2,100 acres. Ms. Kuranda explained that the National Register of Historic Places is a planning tool, and does not restrict in any way an owner’s right to use their property. Ms. Kuranda presented a series of exhibits (Developer’s Exhibit Nos. 24, 26A and 26B) which reveal new development that has taken place in the Caves Valley Historic District since its designation in 1988. She testified that new construction does not automatically harm or negatively impact an historic district. With regard to this case, Ms. Kuranda opined that the District still retains the qualities for which it was nominated; i.e., rural open space and agriculture. The witness testified that the four (4) proposed building lots would be on the edge of the District in a currently forested area, and she was unable to locate any documentation which would show this area to be of any particular significance. She believes that the proposed construction can take place with “appropriate guidelines,” and though there is no requirement that it do so, the Developer submitted a proposed list of covenants which would be recorded among the Land Records (Developer’s Exhibit 28). Assuming such a covenant agreement was to be recorded, Ms. Kuranda opined that

there would be no adverse effect to the historic district, and that the proposed construction would be compatible with other residential properties in the vicinity.

Ms. Kuranda next testified she was aware that the Baltimore County Landmarks Preservation Commission (LPC) designated an historic environmental setting for the Stemmer House. She explained that such a designation helps a property retain its integrity, and she indicated that the setting is all that is required to protect the resource. In this regard, Ms. Kuranda noted that if the LPC wanted the environmental setting protection to encompass the entire property, it would have so indicated in its Order. The witness explained that only portions of the proposed access driveway and certain storm water features would be located within the environmental setting, and that no structures are proposed therein, so that LPC review would not be required. In response to questions on cross-examination, the witness stated that the Caves Valley District was “not freeze dried after the 1988 designation,” as evidenced by the construction of the cell towers and Caves Valley Golf Course project, both of which were constructed after that date. The witness conceded that the Historic District nomination documents do reference “forested ridges,” but she believes those ridges can be preserved with appropriate covenants. With regard to the historic environmental setting surrounding the Stemmer House, Ms. Kuranda testified that the proposed access driveway and storm water management devices would not be considered “structures,” and as such LPC review would not be required. The witness elaborated upon that point and noted that in her opinion there would be at most “temporary” impacts upon the historic environmental setting during the construction phase of the project.

At this point, the Developer presented an amended blue lined Plan, which was marked as Developer’s Exhibit 20A-20C. The Developer recalled professional engineer Douglas Kennedy to provide testimony concerning the amended Plan. Mr. Kennedy explained that his firm

overlooked a 20 ft. ingress and egress easement on the subject property, which required the Developer to reconfigure slightly Lots 1 and 4. Mr. Kennedy explained that the blue lined changes on the Plan were in response to revised agency comments (Developer's Exhibit 21A and 21B), and he opined that the blue lined Plan satisfied all County requirements.

In response to questions on cross-examination, Mr. Kennedy explained that he first learned of the access easement on or about November 11, 2015, and submitted the new blue lined development Plan on January 7, 2016. Mr. Kennedy believes the earlier development case involved a "totally different piece of property," and that he did not consider that case in preparing the present Plan. With regard to the RC 5 Performance Standards, Mr. Kennedy explained that Note 28 on the Plan references an agreement with DOP whereby that agency will evaluate the Developer's compliance at the time of building permit application.

The Developer next recalled environmental specialist Henry Leskinen, who also provided testimony concerning the impact of the newly-discovered easement. Mr. Leskinen testified that he had to reconfigure the forest conservation easements on the site. Specifically, the witness stated that forest conservation easement Nos. 1 and 2 got slightly smaller, while forest conservation easement No. 3 was expanded to "make up" for the area within the access easement, some of which was within a forest conservation easement as shown on the original Development Plan. Mr. Leskinen explained that 8.1 acres of the site will be dedicated to Baltimore County and subject to environmental easements.

PROTESTANTS' CASE

The first witness in the Protestants' case was Barbara Holdridge, who for 40 years lived in the historic Stemmer House located adjacent to this project. Ms. Holdridge sold the property in 2012, and explained that in 2004 she was in fact seeking development approval for her property.

Ms. Holdridge explained that in retrospect she regrets her involvement in the 2004 development proposal, which called for 14 single-family dwellings on the site. Ms. Holdridge fears that the construction activities and heavy equipment associated with this project could harm the walls and gardens surrounding the Stemmer House and she is also concerned with the disruption of wildlife in the area and the impact upon a pond she can constructed on the site, which is apparently not shown on the Development Plan. The witness stated that while she does not want to see the proposed homes constructed on this site, she does not see how their construction would impact or alter the nature of the National Historic District. On cross-examination, Ms. Holdridge stated that during the time she lived at the property she undertook three timber harvests to thin the forest and provide some much needed income.

The Protestants next presented testimony from several residents in the area who opposed the development project. Residents expressed concern with storm water run-off and degradation of the rural setting and displacement of wildlife. In addition, area residents testified that constructing four homes in this location would have a significant and irreversible impact upon the Caves Valley historic district. Community witnesses testified the historic designation “ought to have some weight” and that constructing four single family dwellings was “asking too much of the site,” as Deputy Zoning Commissioner Murphy held in the 2004 case. These witnesses also stated that unlike the Caves Valley Golf Course development, in which the Developer placed environmental easements on large portions of the site, this project has no upside or trade off to mitigate the negative impacts of the new dwellings.

Tom Finnerty, President of the Greater Greenspring Association (GGA), testified that the GGA opposes this project. Mr. Finnerty made reference to the prior case involving this property, and believes that the proposed homes are too close to the Historic District, which he believed was

the basis for former Deputy Zoning Commissioner Murphy's Order. Mr. Finnerty testified that he is an antique dealer, and that the "patina" of the Stemmer House would be negatively impacted by the four (4) new homes, which would be visible from the second floor of the Stemmer House. He also opined that the proposed access driveway is too steep to provide appropriate access for the proposed dwelling.

The next witness in Protestants' case was Janet Davis, an historic preservation specialist accepted as an expert. Ms. Davis explained her extensive background in the historic preservation field, and she noted that she drafted Frederick County's first historic preservation ordinance. Ms. Davis also testified that she was hired by the Valleys Planning Council (VPC) in the 1980's to prepare the Caves Valley Historic District nomination. She presented a copy of the nomination materials (Protestants' Exhibit 33) and explained that this submission took approximately four (4) months to prepare. Ms. Davis noted that the Stemmer House is one of only three (3) "A" rated structures within the Historic District, and the only structure on the east side of Caves Road. The witness explained that the Stemmer House was relocated in or about 1930 from eastern Baltimore County, and that while that was "not the best thing" to do, the move was largely successful. Ms. Davis opined that the Caves Valley District has "extraordinarily high" integrity. The witness further opined that the proposed development would negatively impact the Historic District, primarily because the proposed homes are on the ridgeline, which is a prime element of the Historic District. In addition, she noted that the proposed dwellings are close to the Stemmer House, and that the driveway would in essence be a road. Ms. Davis believes that the historic environmental setting should encompass the entire property as represented by the 1931 property boundary when the Stemmer House was moved to the site.

Protestants next presented the testimony of Michael Brassart, a filmmaker who prepared aerial photography and video using a drone which flew over the property at a height of approximately 83 feet. The 2 ½ minute video was submitted as a DVD (Protestants' Exhibit 25) and a series of still photographs were submitted as Protestants' Exhibit 27A-27D. In response to questions on cross-examination, Mr. Brassart testified that he was hired by the VPC. Mr. Brassart explained that the drone flew over the subject property for approximately 30 minutes, and he also noted the VPC engaged him to prepare a similar video for a zoning case involving the proposed Hunt Valley Baptist Church.

The next witness was Phillip Jones, an architect accepted as an expert witness. Mr. Jones explained that he was provided the aerial footage taken by Mr. Brassart, and that based on that footage and the Development Plan, he prepared a rendering (using computer modeling software). Mr. Jones explained that the renderings, submitted as Protestants' Exhibits 29 and 30, show the height of the proposed dwellings and their location on the lots. In response to questions on cross-examination, Mr. Jones conceded that he had never visited the site and could not determine or calculate how large (in square footage) the houses depicted on Protestants' Exhibits 29 and 30 would be.

Daniel J. O'Leary, a professional engineer accepted as an expert, was the next witness in Protestants' case. Mr. O'Leary began his testimony by noting a discrepancy between the initial Development Plan in this case (Developer's Exhibit 1B) which indicated a driveway profile of 566.6 ft. at the peak, and the blue lined Plan marked as Developer's Exhibit 20A which listed the peak at 568.0 ft. The witness explained that such a discrepancy could alter the projected drainage areas, and he therefore opined that the drainage map (admitted as Protestants' Exhibit 43) was therefore incorrect. Mr. O'Leary believed that all three drainage areas would be altered and that

drainage area 2 shown on the Plan should be divided into two separate sub-watersheds, given that the majority of the development would occur in that area.

Mr. O'Leary next expressed doubt that the curb cuts shown on the access driveway to the site would be effective as stormwater management devices. The witness stated that the driveway would have a level profile, and that the surface water would be required to make a left turn to enter through the curb cuts, which he believed was not realistic. Indeed, the witness opined that the curb cuts would need to be between 32 and 45 ft. wide to effectively capture 100% of the surface water runoff. The witness explained that the State Highway Administration (SHA) would consider a 10 ft. curb cut to be wide, and employing that figure he believes that stormwater runoff to Caves Road will have an effect on the receiving stream located adjacent thereto.

Mr. O'Leary next expressed concern with the trenches and porous pavers that will be used to provide stormwater management for each of the residential lots. Mr. O'Leary testified that the use of trenches as a stormwater management device has generated lots of complaints, and he noted that leaves and other yard waste will frequently clog the inlets, rendering these devices ineffective. He noted that the Plan reveals slopes greater than 25% which he does not believe would cause a catastrophic slope failure, but could cause surface water runoff and erosion issues which again could undermine the effectiveness of the trenches. He also questioned whether the trenches were uniformly distributed throughout the site, given the incorrect alignment of the drainage areas discussed earlier in his testimony. Finally, the witness opined that Lot 4 was not eligible for a disconnection credit (a facet of environmental site design) since the driveway is recessed and exceeds 75 ft. in length, which would prevent the sheet flow of water across an impervious surface and onto an area of vegetation.

In response to questions on cross-examination, Mr. O’Leary agreed that the design and implementation of a stormwater management plan is an evolving “dynamic” process. Mr. O’Leary agreed that following the approval of a conceptual stormwater management plan there would be further review and analysis before the County approved a final design. The witness described the area of the site as rural in nature, and he noted that stormwater management practices have now shifted responsibility to the homeowner individually, which raises maintenance concerns. In referring to Protestants’ Exhibit 49 (Stormwater Design Guidance from the Maryland Department of the Environment), the witness conceded that the guidance does not require that the trenches and stormwater management devices be “uniformly distributed,” such that the “runoff curve number method” is not applicable in this setting.

The next witness in Protestants case was Elizabeth Watson, a planner with Heritage Strategies, LLC. Ms. Watson explained that she prepares plans for national heritage areas and that there are 49 such areas in the United States. Ms. Watson explained that she is a strategist and planner, and she described in some detail the definition of a “cultural landscape,” a term used by other witnesses in the case. Ms. Watson testified that the Caves Valley Historic District is one of Baltimore County’s most protected landscapes, and she believes that the VPC was in the vanguard by preserving this area. Ms. Watson testified that there is a continuous “band of trees” at this site, and that the proposed homes would alter the tree line, which she described as a “new phase.” Ms. Watson testified that the Caves Valley Golf Course development was well designed, while the proposed development would essentially be chopping into a preserved forest area.

Ms. Watson opined that there was a small market of potential purchasers for the Stemmer House, and that if the development was approved it would destroy the value and experience of this historic landmark. She also testified that the LPC was incorrect for not adhering to the property

boundary lines when designating the historic environmental setting for this site. In response to questions on cross-examination, Ms. Watson testified that “what is missing here are rules of the game” to protect these viewsheds and historic settings. She stated that she was not familiar with the zoning of properties in this district, but noted that she did not believe many houses were built in the area following the historic district designation.

The next witness was Margaret De Arcangelis who is employed by Preservation Maryland, a non-profit founded in 1931. Ms. De Arcangelis explained that she is an advocate for historic properties, and her organization has concerns about this proposed development and its impact on the historic setting for the Stemmer House. Specifically, the witness stated that the proposed access driveway would bring vehicular traffic to the area, which would negatively impact the setting of the Stemmer House.

The final witness in Protestants’ case was Bruce Doak, a property line surveyor accepted as an expert. Mr. Doak first testified that the Developer has not complied with the requirements set forth in B.C.C. § 32-4-409 concerning panhandle driveways. The witness testified that there is nothing in the record to indicate that the DOP has reviewed and/or approved the panhandles in this case (which would serve Lots 1 through 3), and the witness also noted that the Developer did not submit a neighborhood plan, photo montage and written narrative to justify the panhandles. He stated that in his experience the DOP requires such materials to be submitted prior to approving such driveways.

The witness next opined the Developer has not satisfied the performance standards set forth at B.C.Z.R. § 1A04.4, which are applicable in the RC 5 zone. Mr. Doak testified that at this point in the process there should have been written comments provided by the DOP. In addition, Mr. Doak noted that in his experience the DOP would require preliminary elevation drawings and other

materials to be submitted for review so that it could make a finding under this regulation, and he explained that was not done in this case.

DEVELOPER'S REBUTTAL CASE

The Developer presented in its rebuttal case additional testimony from Mitchell Kellman and professional engineer Douglas Kennedy. Mr. Kellman explained that during the course of the hearing in this case, he visited the site and took a series of photographs (Developer's Exhibit 38), many of which featured the Caves Valley Golf Course property. Mr. Kellman explained that the photographs were taken during the weekday morning rush hour, from approximately 7:30 A.M. to 8:00 A.M.

Mr. Kennedy testified the Developer would be granting easements to Baltimore County (for inspection and/or maintenance if necessary) in connection with all structural stormwater management facilities at the project. Mr. Kennedy noted that such easements are shown in detail on the Plan (Developer's Exhibit 20B), and he underscored that if a homeowner does not maintain the facilities the county would be authorized under such an easement to step in and perform the necessary repairs or maintenance. The final portion of Mr. Kennedy's testimony concerned the distinction between the various types of stormwater management plans submitted during the development process. Mr. Kennedy stressed that at this phase a concept stormwater management plan has been approved, and that it will "evolve" prior to the ultimate approval of a final development stormwater management plan. The witness noted there are invariably changes and amendments made following the approval of a concept stormwater management plan and before approval of a final stormwater management plan.

LEGAL ISSUES

A. Res Judicata

The Protestants on the first day of the hearing made a preliminary motion to dismiss the case based on res judicata. According to Protestants, former Deputy Zoning Commissioner Murphy's denial of the development plan in Case No. 3-462 (Protestants' Exhibit 9) should bar Developer from submitting another Plan and re-litigating issues already decided. The Protestants' motion was denied, and I do not believe res judicata is applicable.

As an initial matter, the 2004 case involved a 73-acre tract on which 14 single family dwellings were proposed. Here, the tract is one third that size (i.e., 24 acres) and only four single family dwellings are proposed. While res judicata is applicable in the context of administrative hearings, it does not apply where there is significant change in circumstances between the earlier and subsequent actions. Alvey v. Hedin, 243 Md. 334, 340 (1966). In addition, a change in substantive law (as occurred here) renders the doctrine of res judicata inapplicable. Gertz v. Anne Arundel County, 339 Md. 261, 271-72 (1995); Woodlawn Area Association v. Prince George's County, 241 Md. 187, 197 (1966); Jack v. Foster Branch Homeowner's Assoc., 53 Md. App. 325, 333 (1982). Here, as acknowledged by Protestants' counsel, the B.C.C. provision cited in Deputy Zoning Commissioner Murphy's 2004 Order (B.C.C. § 32-4-416, Protestants' Exhibit 10, p.10) was repealed. As such, res judicata is not applicable here.

B. Stormwater Management

Protestants raised several other issues throughout the hearing and in their memorandum. They contend (citing the testimony of Mr. O'Leary) that the stormwater management plan for the project is defective, and that the devices proposed will be inadequate, problematic and/or subject to a lack of maintenance by the ultimate homeowner. As an initial matter, the trenches and

pervious pavement shown on the Plan are deemed acceptable by Maryland Department of the Environment (MDE) and DEPS; whether or not Mr. O’Leary regards them as desirable is beside the point. With regard to the other shortcomings alleged by Protestants, they too miss the mark. At this stage of the process, DEPS has approved a “concept” stormwater management plan. As the title implies, the design at this juncture is merely conceptual, and as recognized by Messrs. O’Leary and Kennedy, the design will evolve throughout what they described as a “dynamic” process. Monkton Preserv. Assoc. v. Gaylord Brooks, 107 Md. App. 573, 584-85 (1996) (describing development process as “ongoing process”).

As Mr. Kennedy correctly noted, the “concept stormwater management plan” is “the first of three required plan approvals that contains information necessary to allow an initial evaluation of a proposed project.” B.C.C. § 33-4-101(h). Among other things, this conceptual plan must show the “type, size and location of proposed ESD practices, supporting computations, and all points of discharge from the site.” B.C.C. § 33-4-107(b)(2). The concept plan (Protestants’ Exhibit 8) contains these details, and based on that exhibit, the testimony of Mr. Kennedy, and the review by DEPS, I believe the Developer has satisfied the requirements of the B.C.C. See, B.C.C. § 32-4-224(a)(10).

C. Historic Preservation Issues

A large part of the testimony from both parties concerned historic preservation issues. This is understandable, given the Stemmer House is listed as a Baltimore County landmark, and the Caves Valley Historic District is a recognized and notable example of a picturesque “cultural landscape.” While the concerns expressed by the community are valid and appropriate, I do not believe they can serve as a basis to deny the Development Plan. The Administrative Law Judge (ALJ) is not permitted to deny a development proposal that offends his/her sensibilities or aesthetic

judgment. Rather, a Protestant must identify a specific shortcoming in the Plan. People's Counsel v. Elm Street Development, Inc., 172 Md. App. 690, 703 (2007).

Here, the LPC established an historic environmental setting (HES) surrounding the Stemmer House. Under the B.C.C., that “means the property or lot or portion thereof, as delineated by the Commission, which is historically, architecturally, archeologically, or culturally related to the historic significance of a landmark structure.” B.C.C. § 32-7-101(p). Members of the community and Protestants’ experts were extremely critical of the LPC’s failure to designate the entire Holdridge property as constituting the HES, and they noted that the LPC did not provide any rationale for its decision to delineate an area smaller than the entire tract.

Whether or not that decision is or was well-reasoned is unimportant; it is binding on the ALJ and the LPC process is the exclusive avenue to address these issues. B.C.C. § 32-7-301(h). The property upon which the four (4) single family dwellings would be constructed is not within the HES, and is therefore not deemed to be “connected to the historic significance of a landmark structure.” B.C.C. § 32-7-101(p). In an analogous setting involving an expansion of the Broadmead retirement community in Hunt Valley, the former Chief of the DOP’s Bureau of Preservation Services (Karin Brown) noted that as long as “the future comprehensive care center is built outside the bounds of the HES [of the Holly Hill House], the LPC has no purview over the design or siting of the proposed structures.” See letter dated March 9, 2012 from Karin Brown to Richard F. Compton.

In a similar vein, Protestants note that former Deputy Zoning Commissioner Murphy, in denying the Holdridge Development Plan in 2004, found that the construction of the dwellings at this site would have a negative impact upon the Stemmer House and the historic district. Of course, that Opinion and Order was issued prior to the delineation of the HES surrounding the Stemmer

House. But more importantly, the Code provision relied upon by the Hearing Officer (former B.C.C. § 32-4-416) was repealed by the Baltimore County Council. That section required each development plan to “preserve historic sites and structures,” and the Hearing Officer in the 2004 case did not believe that provision was satisfied. Protestants’ Exhibit 10, pp. 19-20.

Protestants’ counsel notes he was involved in the 2004 development case and “can confirm ... he cited” B.C.C. § 32-4-102 in a post-hearing memorandum and argued that statute provided authority for the Deputy Zoning Commissioner to deny the plan. Protestants’ Memo, pp. 27-28, n. 31. But it is undisputed the Deputy Zoning Commissioner cited only B.C.C. § 32-4-416 in his opinion, and that law has been repealed. As the court of special appeals held in a similar scenario, counsel’s familiarity with the underlying facts in a prior case or what was argued to the trial judge is “of no value in evaluating the holding” unless it is set forth in the opinion itself. Murphy v. Balto. County, 118 Md. App. 114, 120 n. 2 (1997).

Simply put, there is no provision in the B.C.C. or B.C.Z.R. which requires the ALJ to “preserve” historic sites, nor is there any code or regulation which imposes any particular requirements for a development project proposed in the vicinity of a historic district or structures. As the historic preservation witnesses noted, the federal historic district designation is merely a planning tool and does not regulate how an owner is permitted to use his or her property. Elizabeth Watson, who testified for Protestants, lamented that Baltimore County does not provide “rules of the game” concerning how best to preserve historic districts and viewsheds. Without such rules, the ALJ cannot deny a plan proposing single family dwellings outside of the HES surrounding a County landmark and adjoining the Caves Valley Historic District.

Red Line Policy

Protestants complain that the Developer submitted amended red and blue lined Plans after the hearing began, ostensibly in violation of the Development Management Policy Manual. Apparently, such an argument was rejected by the court of special appeals in an unreported 2012 opinion. FRCA v. Maryvale Prep. School, No. 400, Sept. Term 2011 (July 10, 2012). It is now commonplace, as both parties are aware, for development plans to be amended on the first day of an HOH, and sometimes at a later juncture of the proceedings. The real issue is whether a party is prejudiced by the amendments, such that it cannot prepare a defense or have the revised plan reviewed by consultants. While it may be that violation of the policy could be a valid issue in certain instances, it is not here. As Developer notes, Protestants had over two months to review the amended blue lined Plan (Developer's Exhibit 20A-20C), and Mr. O'Leary's testimony focused upon various aspects of that Plan. There simply was no prejudice, and this argument does not have merit.

Panhandle Lots

Protestants contend the Developer does not satisfy the standards required for panhandle lots, mandating denial of the Plan. Unlike other sections of the Code which specifically require an agency to make findings or recommendations to the ALJ or Hearing Officer (i.e., B.C.C. §§ 32-4-402 and 402.1, both of which are also found in Subtitle 4, General Design Standards), the section on panhandle lots contains no such requirement or procedure. B.C.C. § 32-4-409. Nor does the Comprehensive Manual of Development Policies (CMDP) shed further light on the subject. That manual simply notes "panhandle lots are not considered matters of right but rather a project design solution that may be approved under the proper circumstances." CMDP, p. 15. It is therefore unclear how such a mandate is to be enforced.

Developer contends that by approving the Plan, the County implicitly approved the panhandle lots shown thereon, and that nothing further is required. Protestants elicited testimony from Bruce Doak, a property line surveyor, wherein he described how in his many years of experience panhandles are approved after meeting and consulting with the DOP. While that may be the case, that testimony does not change the fact that the statute is silent on the issue, and § 32-4-409 does not specify an applicant must submit a “neighborhood map” or “photo montage,” as described by Mr. Doak. Protestants’ Memo, p.38. Lloyd Moxley testified and indicated the DOP recommended approval of the Plan, and the ALJ is entitled to give “considerable weight” to the testimony and opinions expressed by agency representatives. Caldes v. Elm Street Dev., 415 Md. 122 (2010). “Administrative officers are presumed to have properly performed their duties” and it was Protestants burden under the case law to elicit testimony from the witness to establish that the panhandle lots (shown on the Plan since it was first submitted) were overlooked by the DOP. People’s Counsel v. Elm Street, 172 Md. App. at 703-05. Without such evidence, I do not believe the Development Plan can be denied on this basis.

RC 5 Performance Standards

Protestants contend the Plan should not be approved because Developer has not complied with the “performance standards” in B.C.Z.R. § 1A04.A. Having reviewed the regulations, I believe this argument has merit. While it is abundantly clear the DOP has adopted a practice whereby it defers analysis of the performance standards until building permit application, and the undersigned has in many uncontested matters granted zoning relief on such terms, such an administrative interpretation cannot alter the clear language of the statute. The regulations expressly require the DOP to submit to the ALJ “findings” on the performance standards, and the Hearing Officer is obligated to “adopt the findings presented by the Department of Planning.”

B.C.Z.R. 1A04.4.C. Mr. Moxley testified he met with Developer's consultants and that the discussion concerning the performance standards was "more extensive" than usual. Even so, the DOP did not submit "findings" on the issue, and Mr. Kennedy testified the review would be deferred "until better information is known."

I am mindful of Developer's argument that the proposed homes would be custom and orientation and other design aspects could change at the time of construction. And it certainly seems logical that a developer would not engage design experts at this early stage of the process, so that all site details would not be finalized. But the law is unambiguous and requires these findings even for single lots in the RC 5 zone.

In addition, these regulations are especially apropos in this case, since they require panhandle lots to conform to B.C.C. § 32-4-409 and the CMDP. While I do not believe (as discussed in the preceding section of this memorandum) as a general matter panhandle lots require any specific findings or method of approval, the RC 5 regulations indicate panhandles must be addressed as an aspect of "site planning" when the DOP prepares its performance standards findings. B.C.Z.R. § 1A04.4.D.4. Without such findings I do not believe the Development Plan can be approved.

THEREFORE, IT IS ORDERED by this Administrative Law Judge/Hearing Officer for Baltimore County, this 28th day of **April, 2016**, that the "**2609 – 2615 CAVES ROAD**" red and blue lined Development Plan, marked and accepted into evidence as Developer's Exhibit 1A-1C and 20A-20C, be and is hereby **DENIED**.

IT IS FURTHER ORDERED that the Petition for Special Variance, to remove one (1) specimen tree from the site in the area of the proposed access driveway, be and is hereby **GRANTED**.

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