IN RE: DEVELOPMENT PLAN HEARING 2804 York Manor Road 10th Election District 3rd Councilmanic District **(VERNON SMITH PROPERTY)** S.W. York Manor, LLC Owner / *Developer*	* * * * * *	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS FOR BALTIMORE COUNTY **HOH Case No. 10-0466**

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ADMINISTRATIVE LAW JUDGE'S
DEVELOPMENT PLAN OPINION & ORDER

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County for a public hearing on a development proposal submitted in accordance with the development review and approval process contained in Article 32, Title 4, of the Baltimore County Code ("B.C.C."). S.W. York Manor, LLC, the owner/developer of the subject property, (hereinafter "the Developer") submitted for approval a one-sheet redlined Development Plan ("Plan") prepared by Little & Associates, Inc., known as "Vernon Smith Property."

The project proposes 14 single-family dwellings on 72.86 gross acres, more or less, of land zoned RC 4 and RC 6 with 53 acres of (unimproved) conservancy area. In a letter dated May 9, 2013, the Baltimore County Department of Permits, Approvals and Inspections (PAI) confirmed that this subdivision was "grandfathered" such that it was not subject to the Sustainable Growth and Agricultural Preservation Act of 2012 (Senate Bill 236) (hereinafter, "SGAP"). This is one of the primary legal issues raised by the community, and it will be addressed in much greater detail below.

Details of the proposed development are more fully depicted on the redlined one-sheet Development Plan that was marked and accepted into evidence as Developer's Exhibit 1. The property was posted with the Notice of Hearing Officer's Hearing on April 30, 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 hearings on June 11, 2015 and September 10, 2015, both at 10:00 AM, Room 205 of the Jefferson Building, 105 West Chesapeake Avenue, Towson, Maryland.[1]

In attendance at the Hearing Officer's Hearing (HOH) in support of the Plan on behalf of the Developer and property owner was G. Dwight Little, P.E. with Little & Associates, Inc., the consulting firm that prepared the site plan. Howard L. Alderman, Esquire with Levin & Gann, P.A., represented the Developer. Michael R. McCann, Esquire represented the Old York Manor – Pheasant Hill Estates Community Association and various individuals who live in close proximity, all of whom oppose the project.

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]), Brad Knatz, Real Estate Compliance, and Jason Seidelman (Office of Zoning Review). Also appearing on behalf of the County were Jeff Livingston from the Department of Environmental Protection and Sustainability (DEPS), and Brett M. Williams from the Department of Planning (DOP).

The role of the reviewing County agencies in the development review and approval process is to perform an independent and thorough review of the Development Plan as it pertains to their specific areas of concern and expertise. The agencies specifically comment on whether the Plan

[1] Post hearing briefs were submitted by the parties on October 2, 2015. Thereafter, on October 6, 2015 Developer submitted correspondence (in the nature of a motion to strike) concerning an attachment to Protestants' brief, to which Protestants' counsel responded by correspondence dated October 13, 2015. This Order is being issued within 15 days of Mr. McCann's correspondence, as required by the County Code.

complies with all applicable Federal, State, and/or County laws, policies, rules and regulations pertaining to development and related issues. In addition, these agencies carry out this role throughout the entire development plan review and approval process, which includes providing input to the Hearing Officer either in writing or in person at the hearing. Continued review of the Plan is undertaken after the Hearing Officer's Hearing during the Phase II review of the project. This continues until a plat is recorded in the Land Records of Baltimore County and permits are issued for construction.

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. 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).

In the "formal" portion of the case, the Developer presented one witness: professional engineer G. Dwight Little. Mr. Little explained in detail the development proposal, which is reflected on the Plan marked as Developer's Exhibit 1. Mr. Little reviewed the "redline" changes on the Plan, which he explained were made in response to County agency comments. The witness opined the Developer satisfied all Baltimore County rules and regulations.

Several members of the community testified in Protestants' case, and each described certain concerns they had with the project. Although many witnesses had unique perspectives on the proposal, nearly all community members expressed concern with traffic conditions and safety, loss of forested, unimproved land, water well problems and reduced quality of life. Protestants also presented the testimony of Bruce Doak (a licensed surveyor) and Richard Hall (former Director of the Maryland Department of Planning). These witnesses focused upon whether or not

the project was "grandfathered" under the SGPA. Protestants also called as an "adverse witness" environmental specialist Henry Leskinine. Mr. Leskinine testified that he prepared a forest conservation plan for the property and sought from the County a variance to remove 26 "specimen" trees. Protestants' Exhibit 30. DEPS ultimately granted the variance to remove 20 of the 26 trees requested, by letter dated April 30, 2015.

In a brief rebuttal case the Developer presented two witnesses. Traffic planner J. Mark Keeley opined that the Developer satisfied all County standards and that there was adequate sight distance at the ingress/egress point on Paper Mill Road. Amy Parrish, a registered sanitarian, testified Developer will need to satisfy all current regulations regarding well spacing and depth. She explained that the wells in the adjacent community were dug prior to the adoption of the 1984 regulations, and that in general they were not as deep or separated from one another as the wells in the proposed development would be. She opined that adherence to the modern regulations would result in fewer incidents of well failures.

Sustainable Growth and Agricultural Preservation Act (SGPA)

As noted earlier, the primary legal issue in this case concerns whether or not the Developer has satisfied the requirements for "grandfathering" under the SGPA. Post-hearing memoranda were submitted on the issue, and after reviewing those materials and the applicable law, I do not believe the Developer has satisfied the requirements set forth in the State law.

Specifically, a Plan is grandfathered under SGPA if:

> "By October 1, 2012, a submission for preliminary plan approval is made to a local jurisdiction that includes, at a minimum, the preliminary engineering, density, road network, lot layout, and existing features of the proposed site development."

Md. Envir. Code Ann. § 9-206(b)(2)(i)(1).

According to the Developer the 2003 percolation (hereinafter "perc") plat it filed with Baltimore County satisfied all of the requirements of the above-quoted State law, such that the subdivision is not subject to the limitations of the SGPA. I do not believe that to be the case, for several reasons.

First, while the testimony in the case made clear that the State law's reference to "preliminary plan" does not square exactly with any of the nomenclature found in the Baltimore County development regulations, it is equally clear that the septic plat submitted by the Developer in 2003 is not the same thing as a "submission for 'preliminary plan' approval". That much is made clear by the text of the SGPA, which expressly identifies both "soil percolation tests" and "preliminary plans" as separate milestones within the land development process. Indeed, the Implementation Guidance for SGAP issued by the Maryland Department of Planning (MDP) [Ver. 2.0, Aug. 1, 2012] provides that local jurisdictions should record certain information "for each application for a soil percolation test approval and every submission for preliminary plan approval." Id. at p. 17.[2] Even though witness testimony established that Baltimore County is not one of the jurisdictions which requires soil perc tests prior to the filing of a "preliminary plan," the point is that the State law (and Baltimore County law) recognizes there is a distinction between a soil perc test and accompanying plan and a preliminary plan seeking development approval.

In addition to the foregoing, testimony and exhibits established that Baltimore County maintained a list of plans that were allegedly grandfathered under the SGPA, and that list and the accompanying plats and plans were maintained in the Department of PAI. The Protestants submitted a copy of this list, along with letters to the property owners in question from the Director

[2] Developer's counsel filed a motion to strike MDP's Implementation Guidance, which was attached as an exhibit to Protestants' brief. Such guidance and policy documents are frequently issued by State and County agencies, and courts have found such interpretations to be persuasive is construing statutes. Haigley v. DHMH, 128 Md. App. 194, 217 (1999). As such that motion will be denied.

of PAI. The subject property was not included therein. This is significant in that the MDP guidance encouraged local subdivisions to track two types of developments: "existing pipeline" and "new". Id. at 17. In other words, the State encouraged counties to track "all subdivisions going through the review/approval process" as of October, 2012, and while it appears Baltimore County did so, the Vernon Smith property was not identified as being such a project. Thus, as far as Baltimore County was concerned, as of October, 2012 the Vernon Smith property was not among those projects grandfathered under the SGPA.

The narrative as this point becomes somewhat convoluted. Protestants presented a letter from Mr. Little to Mr. Rosenblatt of PAI, concerning the grandfathered status of this property. That letter was dated April 25, 2013, which is well beyond the October 1, 2012 date provided by the SGPA. Protestants' Exhibit 12. The letter contained attachments, including the perc test application, paid receipt and perc test plat. There was no evidence presented to establish that prior to receipt of Mr. Little's April 25, 2013 letter any County agencies or departments had in their possession either the application or perc test plan referenced in that correspondence. In fact, the evidence presented by Protestants—including e-mails and a response to a public information request—indicates the County had no record in 2015 of the filing, 12 years earlier, of the perc test application and plan. See Protestants' Exhibit 6, at Tabs 3-7.

Even so, Mr. Little asserted in the letter that the property was grandfathered "based on the fact that an application for percolation test approval was filed on November 7, 2003…." Id. (emphasis added). As the underscored language makes clear, the November 2003 filing by Developer was not for purposes of "preliminary plan approval," as required by the SGPA. Instead, it was for "percolation test approval." This is more than an issue of semantics. Soil perc tests are discussed in Section 34-3-105 of the County Code, and the substantive requirements pertaining to

septic systems and wells are found in Articles 33 & 34 of the County Code. The development regulations, on the other hand, are found in Article 32 of the Code, and address an entirely different aspect of the land development process. Applying for soil perc testing, even if the plan accompanying such an application arguably includes some or all of the elements identified in the SGPA, does not transmogrify that filing into one seeking "preliminary plan approval."

Mr. Little testified the perc tests were never in fact conducted at the property. In addition, the 2003 perc test application (which itself requires the simultaneous filing of four "plot plans") states on its face that "Application expires one year from date of issue." As such, even though the DEPS indicated in November 2003 that it was "O.K. to file" the application and plat, the tests were never conducted and the application "expired" as of November 2004. Thus, as of October 1, 2012, there was simply no extant perc application and/or accompanying "plot plans" filed with Baltimore County that would entitle this property to be grandfathered under the SGPA.

While it is true Baltimore County sent to Mr. Little correspondence (Protestants' Exhibit 8) indicating the property was grandfathered, I disagree for the reasons discussed above. In addition, Mr. Rosenblatt's letter was dated May 9, 2013, and I do not believe a local jurisdiction can retroactively grandfather a property under the SGPA. I base this finding on the evidence presented, which establishes that the owners of each of the 24 properties included on the County's "list" submitted plans on or before October 1, 2012 and the Director of PAI responded by letter confirming the grandfathered status of the property, also on or before October 1, 2012. This is persuasive evidence concerning how the County interpreted and implemented the SGPA, and Mr. Rosenblatt's letter (which as Protestants note is the only correspondence regarding grandfathered plans not issued by the Director of PAI, which itself presents a legal question as to whether he possessed the requisite authority to make such a determination) dated nearly 7 months after the

deadline imposed by the SGPA is defective as a matter of law.

Covenant Agreement

Evidence was presented by both parties concerning a declaration of covenants and agreement by and between Vernon Smith and Sunnybrook Community Association. Protestants contend the agreement allows only five single-family dwellings, while the Developer contends the agreement was amended in 2014 and would permit the 14 lots shown on the development plan.

This is a private agreement entered into between the parties (and their successors). The County is not a party to the agreement, and such agreement has not been incorporated into any orders granting development or zoning approvals for the property. As such, the OAH is without "jurisdiction" or authority to consider this issue, which is one for the circuit court rather than an administrative agency. Blakehurst Life Care Community v. Baltimore County, 146 Md. App. 509 (2002).

Special Variance

As noted above, the Developer was granted a special variance permitting removal of 20 specimen trees at the site. The application for special variance was thoroughly reviewed by DEPS, as evidenced by Mr. Gardina's detailed letter addressing the issue, and the fact that DEPS denied the request with respect to 6 of the trees (the original request sought removal of 26 trees). Mr. Leskinen provided testimony regarding the standards required for granting such variances, and I am convinced that the Developer has satisfied its burden. As noted in developer's brief, the law requires an applicant to show "unwarranted hardship" by satisfying just one of the three standards, which are stated in the disjunctive in B.C.C. §33-6-116(d)(1-3). Even assuming for sake of argument the Developer failed to show that it would be denied a reasonable return on its investment, I believe it has established (through the variance application prepared by Mr.

Leskinen) that the grant of relief will not alter "the essential character of the neighborhood." As such, I will accept the recommendation of the DEPS and grant the special variance as described in Mr. Gardina's April 30, 2015 correspondence. Protestants' Exhibit 30.

Pursuant to the advertisement, posting of the property, and public hearing held thereon, the requirements of which are contained in Article 32, Title 4, of the Baltimore County Code, the "Vernon Smith Property" Development Plan shall be disapproved.

THEREFORE, IT IS ORDERED by this Administrative Law Judge/Hearing Officer for Baltimore County, this **20th** day of **October, 2015**, that the **"VERNON SMITH PROPERTY"** redlined Development Plan, marked and accepted into evidence as Developer's Exhibit 1, be and is hereby **DENIED**.

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