

IN RE: PLANNED UNIT DEVELOPMENT &  
PETITION FOR SPECIAL HEARING  
E. Side of York Road,  
N of Halesworth Road  
8<sup>th</sup> Election District  
3<sup>rd</sup> Councilmanic District  
(Anderson GM – 10111,10125, 10131  
York Road & 10 Halesworth Road) -  
2<sup>nd</sup> Material Amendment  
Anderson Motors, LLC, Developer

\* BEFORE THE  
\* BOARD OF APPEALS  
\* OF  
\* BALTIMORE COUNTY  
\* CASE NO.: CBA-12-061  
\* (PDM 08-796) AND  
\* 12-150-SPH

\* \* \* \* \*

### OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge of Baltimore County in which Protestants’ Motion to Dismiss was denied and the Petitioner’s Request for approval of an amendment to an approved Planned Unit Development (a “PUD”) and a Petition for Special Hearing relief was granted.

A public hearing was held before this Board on August 9, 2012 where the Protestants’ Motion to Dismiss was heard on oral argument. The Petitioner was represented by Jason Vettori, Esquire, David K. Gildea, Esquire and the Law Offices of Smith, Gildea & Schmidt, LLC. The Protestants, Lisa Tomlinson and Douglas Miller, were represented by J. Carroll Holzer, Esquire. Public Deliberation was held on September 6, 2012.

### FACTUAL BACKGROUND

The Petitioner is collectively BKL York, I, LLC, BKL York III, LLC, Logwood, LLC and lessee Wawa, Inc. (hereinafter the “Petitioner”). The Petitioner seeks to sublease a vacant parcel of land comprising approximately 1.6 acres of the Anderson of

Hunt Valley site to Wawa, for use as a convenience store and gas station (the "Property"). This same type of use existed at the site in Case No.: 90-81-X by way of special exception. However, this use was formally abandoned in 2007 (Case No.: 07-346-SPH). Under the Amendment, the Wawa would be located at 10111 York Road (proposed Lot 5) as reflected on the Petitioner's redlined Development Plan (ALJ Exh. 1A).

The Property is currently used as a GM car dealership. The proposed location for the Wawa is within the PUD authorization area as previously approved by then Deputy Zoning Commissioner Bostwick in his Revised Hearing Officer's Combined Zoning Relief and Development Plan Opinion and Order dated March 3, 2010 (Zoning Case No.: 2010-0161-SPH). Commissioner Bostwick's Order contains an extensive zoning and development history. As the title of his Order suggests, it combined and amended two (2) previous PUD approvals. For the sake of brevity, this Board incorporates Commissioner Bostwick's Order herein.

### **STANDARD OF REVIEW**

The law governing the Board's review of a PUD is found within Baltimore County Code ("BCC"), §32-4-245(d) and requires any appeal of a PUD to this Board to be reviewed in accordance with BCC §32-4-281 which reads as follows:

#### **§ 32-4-281. APPEAL TO THE BOARD OF APPEALS.**

\* \* \* \*

(e) *Actions by Board of Appeals.*

(1) In a proceeding under this section, the Board of Appeals may:

- (i) Remand the case to the Hearing Officer;
- (ii) Affirm the decision of the Hearing Officer; or
- (iii) Reverse or modify the decision of the Hearing Officer if the decision:

- 1. Exceeds the statutory authority or jurisdiction of the Hearing Officer;
- 2. Results from an unlawful procedure;
- 3. Is affected by any other error of law;
- 4. Is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
- 5. Is arbitrary or capricious.

(2) Notwithstanding any provisions to the contrary, if the Hearing Officer fails to comply with the requirements of § 32-4-229(a) of this subtitle and an appeal is filed under § 32-4-229(a) of this subtitle, the Board of Appeals may impose original conditions as are otherwise set out in § 32-4-229(c) and (d) of this subtitle.

### **ISSUES**

Before this Board are two (2) issues:

I. What is the procedure for filing a material amendment to a previously approved PUD?

II. Did the ALJ have before him sufficient evidence to approve the amendment to the PUD under the requirements set forth in BCC, §32-4-245(c)?

DECISION

I. Material Amendment of an Approved PUD.

The only issue raised by the Protestants was the argument that, because the proposed use was changing from an automobile dealership to a gas station/convenience store, it was a material amendment to a previously approved PUD, and therefore required the Petitioner to submit an application and obtain a new County Council resolution in accordance with BCC, §32-4-241 *et seq.*

The Protestant's issue is one of statutory construction. Under BCC§ 32-4-281(e), this Board must review the ALJ's interpretation of the PUD statute to determine whether there was an error of law. The ALJ held that an amendment to a PUD did not require a petitioner to start the PUD process over by filing an application or obtaining a new County Council Resolution. The ALJ found that whether the process used was for a traditional development plan under §32-4-221 *et seq.*, or under the PUD statute, the end result in both instances was the "approval of a development plan." He concluded that BCC §32-4-262(1) controls material amendments of both traditional development plans and PUDs, and permits such amendments to be reviewed and approved in the same manner that the original plan was approved.

We agree. First, it was undisputed between the Parties that the instant request concerned a material amendment. Second, it was also undisputed between the Parties that the PUD statute does not contain any provisions regarding how to amend a PUD.

Yet, in reviewing the PUD statute, we found several instances where the PUD statute refers to the traditional development plan regulations, namely:

(1) §32-4-243(a) states that the informal meeting with County agencies for a PUD is conducted in the same way that a traditional concept plan is reviewed under §32-4-211.

(2) §32-4-243(c) requires a PUD to have a Concept Plan conference in accordance with development regulation §32-4-216.

(3) §32-4-243(d) provides that the Community Input Meeting for a PUD be held in accordance with development regulation §32-4-217.

(4) §32-4-243(e) states that after community input meeting, an applicant for a PUD shall file a development plan in accordance with the development regulations.

(5) §32-4-245(b), the ALJ must review the PUD to determine whether it is in compliance with the requirements of the development regulations;

These provisions in the PUD statute make it clear to this Board that the County Council drafted the PUD statute around the existing development plan regulations found in the other provisions of Part 4, Title 32. It follows that the referrals to traditional development plan regulations found throughout the PUD statute, as set forth above, solidifies the ALJ's decision that the procedure for amending a PUD, is the same procedure for amending a traditional development plan found in §32-4-262(1). Section 32-4-262(1) provides:

(1) Any material amendment to an approved non-residential Plan shall be reviewed and approved in the same manner as the original Plan.

We add that if the County Council had intended for previously approved PUDs to be amended in the same manner that a PUD application is initially started (i.e. commencing with a PUD application followed by another County Council Resolution), then the Council would have drafted a specific provision in the PUD statute which required the same. Because amendments of development plans are commonplace, we believe that our analysis of the PUD statute also makes the most practical sense. We further recognize that the very same development plan at issue here was amended in 2010 without the necessity of a Council Resolution. This fact lends further support for our interpretation.

However, without overstating the obvious, we add that the property which is being amended must be included within the original PUD boundaries (also commonly referred to as the 'PUD Authorization Area'). If the property to be amended is located outside of the original PUD boundaries, the Protestants' argument would carry considerable weight because the property at issue was never considered by the Council as part of the original plan.

As a result, because BCC §32-4-262(1) contains the procedure for amending a non-residential previously approved PUD, we find that the Petitioner followed the appropriate procedure here and sought to have its amendment approved in the same manner that the original plan was approved. Accordingly, we agree with the ALJ's decision to deny the Protestants' Motion to Dismiss.

**II. Did the ALJ have before him sufficient evidence to approve the material amendment to the PUD under the requirements set forth in BCC, §32-4-245(b)?**

In regard to the merits of the Petitioner's PUD amendment, this Board is charged with reviewing the evidence presented to the ALJ and deciding whether each of the 5 factors set forth in BCC, §32-4-245(c) has been met. Notwithstanding that the Protestants did not present any evidence to contradict the Petitioner's case, the ALJ must independently find evidence on each factor. We find that the Petitioner has satisfied its burden of proof.

BCC § 32-4-245(c) permits the ALJ to approve a proposed PUD only upon finding that the PUD meets all of the following 5 factors:

- (1) The proposed development meets the intent, purpose, conditions and standards of this section;
- (2) The proposed development will conform with Section 502.1 A, B, C, D, E and F of the B.C.Z.R. 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 Section 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 or area plans, or the Department of Planning.

In our review of the record concerning these 5 factors, we find as follows:

- (1) Proposed development meets the intent, purpose, conditions and standards of this section.

In regard to Subsection (1), while the ALJ did not provide a specific heading for this Subsection in his Opinion, he did address Subsection (1) indirectly by his detailed

discussion of the remaining 4 factors. Consistent with our prior PUD decision in *Galloway Creek, L.L.C.*, Case No., 08-136, this Board unanimously interprets Subsection (1) as a broad, catch-all provision which generally requires conformance with remaining Subsections. We refer to our rulings on each of the subsequent 4 factors.

- (2) The proposed development will conform with Section 502.1 A, B, C, D, E and F of the B.C.Z.R. and will constitute a good design, use and layout of the proposed site.

Subsection (2) of BCC §32-4-245(c) has 2 parts. In the first part, the ALJ must review the PUD for conformity with 6 of the 9 special exception factors listed in Baltimore County Zoning Regulations §502.1 (“BCZR”) (the “Special Exception” factors). In the second part, he must make specific findings about whether the proposal constituted a good design, use and layout.

The ALJ heard testimony from James E. Matis, P.E., with Matis Warfield, the Developer’s engineer, who testified as an expert in development and land use planning. Mr. Matis first explained that the zoning on the property is mixed with MLIM on the northern part of the Property as well as a strip of land zoned BMAS. The area which is the subject of this amendment is zoned BRIM and ML. He then described the improvements on the Property as well as its history and various uses.

Mr. Matis testified that in his opinion the proposed development would not only meet all of the 6 special exception factors but would also achieve a higher design standard. He explained that the special exception factors and design use and layout were more specifically described in the PUD Pattern Book which was admitted into evidence as County’s Exhibit 2. Mr. Matis oversaw the work contained in the PUD pattern book.



Mr. Matis' testimony with regard to the special exception factors was supported by the testimony of a neighbor and two (2) community group leaders who testified in support of the PUD amendment.

On cross examination, Mr. Matis added that the Pattern Book at page 4 showed photographs of the front and side elevations of the proposed Wawa building. By way of example, he noted that the building would be designed with additional glazing and some stone banding at the canopy. He explained that Wawa provided the plans for the building and that, in his opinion, the design standard was "pretty high." (T. p. 105). In addition, the Wawa building did not require any area or height variances.

The ALJ also heard from Lloyd Moxley with the Department of Planning who confirmed that there were no outstanding issues concerning the project and that any prior concerns from his Department were adequately addressed in the Development Plan (Petitioner's Exh. 1) and the Pattern Book (County Exh.2). Mr. Moxley also indicated that the compatibility requirements in BCC §32-4-402 were met.

Dennis Kennedy of Development Plans Review testified before the ALJ that he recommended certain traffic improvements along Halesworth Road which were addressed in the redlined Development Plan. Richard Zeller of State Highway Administration ("SHA") was in the process of reviewing the traffic study submitted by the Developer. It was for this reason that the ALJ conditioned approval of the relief upon the approval from SHA which is authorized under BCC, §32-4-245(b)(3).

Finally, Ted Iobst, a real estate engineer for Wawa, testified that the Wawa would be constructed to a high design standard and at a much greater cost than traditional retail properties. Based on this evidence, we find that Subsection (2) was satisfied.

(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.

Mr. Matis testified that, based on his relationship with the prior owner of the Property Mr. Mortimer, and Wawa representatives, he believed that the project would be developed to the full extent of the plan. He pointed out that Wawa was financially solvent. Mr. Iobst also emphasized that Wawa had set aside funds to make certain that this project would be completed as designed. We find that the ALJ was presented with sufficient evidence to satisfy Subsection (3).

(4) Subject to the provisions of §32-4-242(c)(2), the development is in compliance with Section 430 of the Baltimore County Zoning Regulations.

The County witnesses who testified before the ALJ each stated that the Plan complied with the BCZR, that their respective agencies had no outstanding issues and that they recommended approval of the amendment to the Plan. Mr. Matis added that the Plan complied with §430.2.A.1 in that it was a “general development plan.”

(5) The PUD development plan is in conformance with the goals, objectives and recommendations of the Master Plan or area plans or the Department of Planning.

Mr. Matis testified that the PUD amendment was in conformity with the goals, objectives and recommendations of the Master Plan and that this analysis is contained within the PUD Pattern Book. Given the Department of Planning’s role in drafting the

Master Plan and any applicable area plan, if there had been any conflict between the proposal and these documents, the Department of Planning through Mr. Moxley, would have highlighted those conflicts and recommended disapproval of the amended Plan.

In review of the evidence presented, we find that the ALJ was correct in his analysis of the 5 factors in 32-4-245(c) to the facts here.

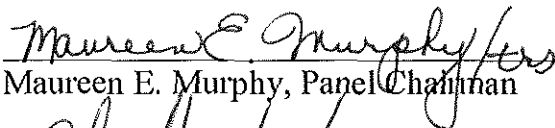
**ORDER**

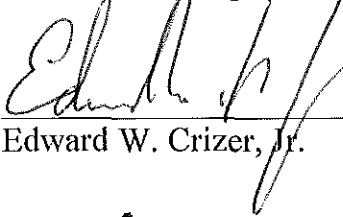
THEREFORE, IT IS THIS 21<sup>st</sup> day of September, 2012 by  
the Baltimore County Board of Appeals,


**ORDERED** that the Administrative Law Judge's Opinion and Order on Planned Unit Development (PUD) and Petition for Special Hearing dated May 15, 2012 is hereby **AFFIRMED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
Maureen E. Murphy, Panel Chairman

  
Edward W. Crizer, Jr.

  
Andrew M. Belt



# Board of Appeals of Baltimore County

JEFFERSON BUILDING  
SECOND FLOOR, SUITE 203  
105 WEST CHESAPEAKE AVENUE  
TOWSON, MARYLAND, 21204  
410-887-3180  
FAX: 410-887-3182

September 21, 2012

Jason Vettori, Esquire  
David K. Gildea, Esquire  
Smith, Gildea & Schmidt, LLC  
600 Washington Avenue, Ste 200  
Towson, MD 21204

J. Carroll Holzer, Esquire  
508 Fairmount Avenue  
Towson, MD 21286

RE: *In the Matter of: Anderson GM PUD*  
Case No.: CBA-12-061 and 12-150-SPH

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Theresa R. Shelton  
Administrator

TRS/klc  
Enclosure  
Duplicate Original Cover Letter

c: BKL York I, LLC/Bruce Mortimer  
Douglas Miller  
Glenn Cook  
Jim Rogers, Sr.  
Haren Shah  
David Lykens, Department of Environmental Protection and Sustainability  
Dennis Kennedy, Development Plans Review/PAI  
Ron Goodwin, Zoning Review/PAI  
Office of People's Counsel  
John E. Beverungen, Administrative Law Judge  
Andrea Van Arsdale, Director/Department of Planning  
Michael Field, County Attorney

BKL York III, LLC/Bruce Mortimer  
Bruce Rice  
James Matis/Matis Warfield  
John Sankonis  
Andrew Tawny

Lisa Tomlinson  
Theodore Iobst  
Eric Rockel  
Chris Harvey  
Rich Zeller, SHA/AMD

Lloyd Moxley, Department of Planning  
Colleen Kelly, Project Manager/PAI  
Lawrence M. Stahl, Managing Administrative Law Judge  
Arnold Jablon, Director/PAI  
Nancy C. West, Assistant County Attorney