

IN THE MATTER OF
FIVE M, LLC/AKA THE RIDGE
AT OLD COURT
HOH FILE NO. : 03-490
S/S OLD COURT ROAD; E OF
SPRINGBRIAR LANE

3RD ELECTION DISTRICT
2ND COUNCILMANIC DISTRICT

* BEFORE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO. CBA-12-009

RE: DEVELOPMENT PLAN DECISION

* * * * *

OPINION AND ORDER

This matter came before the Board on an appeal from the decision of the Administrative Law Judge's (hereinafter "ALJ") with respect to the red-lined Development Plan (the "Plan") prepared by Advanced Engineering Consultants, PC, for the proposed development of six (6) single family dwelling on approximately 8 acres. The matter was heard for three full days of public hearings, ending on May 26, 2011. The ALJ issued his decision on June 27, 2011. A timely appeal was filed and a hearing on the record (oral argument) was held before the Board on November 10, 2011. Counsel for the parties agreed to waive the time frames imposed by *Baltimore County Code* ("BCC") §32-4-281. Closing Briefs were filed by Counsel on December 16, 2011. A public deliberation on the issues took place on January 18, 2011.

The Developer was represented by Howard L. Alderman, Esquire of Levin & Gann. The appeals were filed by Pikesville-Greenspring Community Coalition, Inc., Old Court Greenspring Community Assoc., Greenspring East Homeowner's Association, Tom Skarzynski, Neville Jacobs, Dr. Ronald Diener, Mitch Barker, Ron Dondroff, Dr. and Mrs. Paul Leand, and Phillip P. Weiner, Protestants, were represented by J. Carroll Holzer, Esquire.

FACTS

The property consists of approximately eight (8) acres zoned DRI. The subject property is located off Old Court Road east of Greenspring Avenue. The Developer proposes a residential development with six (6) single family homes. While the acreage of the property and applicable zoning classification would permit eight (8) homes. Lot sizes will be approximately one-half (1/2) acres, and will be served by public systems.

A review of the record reveals that the subject property was timely posted with the notice of hearing as required by the *Baltimore County Code*, and all procedural prerequisites were satisfied.

In the present case, the following individuals appeared during the three (3) day hearing and testified that the red-lined development plan satisfied all agency requirements and that the agency therefore recommended approval of the Plan: Jeffrey Perlow-Zoning Office; Bruce Gill-Recreation and Parks; Brad Natz-Real Estate; Curtis Murray-Office of Planning; Dennis Kennedy-Development Plans Review; and Jeffrey Livingston and Robert Wood-Department of Environmental Protection and Sustainability (DEPS).

The Developer called just one witness, Mostafa Izadi with Advanced Engineering Consultants. Mr. Izadi testified that the Developer had originally proposed eight (8) lots, but through the course of the Concept Plan and Development Review Process, that number was reduced to six (6) single family dwellings. Mr. Izadi testified that the proposed stormwater management facility is designed to handle a one hundred (100) year flood, and that it will be owned by the homeowner's association, not Baltimore County. Mr. Izadi also pointed out that of the eight (8) acre site, nearly 5.5 acres will be dedicated to Baltimore County for environmental and other open space purposes.

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On cross examination, Mr. Izadi testified that the property slopes significantly toward the rear of the property, and he would estimate a sixty (60) foot of drop off from Lots one (1) and six (6) to the stormwater management area. Mr. Izadi further testified that such a drop off “as an engineer, that is nothing.” Mr. Izadi also testified that there will be a retaining wall within the stormwater management facility, and as such, it would be owned by the Homeowners Association. Mr. Izadi also indicated that the pattern book for this project was submitted after the DPC, and that the houses are now smaller than originally proposed.

The Protestant called five (5) adverse witnesses during the three (3) day hearing. The first “adverse” witness was Curtis Murray, from the Office of Planning. Mr. Murray testified that in his opinion the lot sizes proposed on the Plan were compatible with the neighborhood but recognized that the Plan will certainly impact the scenic road (Old Court Road). Mr. Murray concluded that in his opinion the neighborhood would retain its “estate” character, and that there would still be a “park like” setting in this corridor.

The next witness called by Protestants was Dennis Kennedy, of the Bureau of Development Plans Review. Mr. Kennedy testified that surface water will be diverted in connection with the proposed development, and he advised that the Developer requested that the County Department of Public Works (DPW) approve the diversion after the Development Plan conference in this case. Mr. Kennedy advised that due to Protestant's inquiries, he required the Developer to satisfy the requirements for diversion approval set forth in the new DPW design manual even though this project was in fact grandfathered under the earlier regulations. Mr. Kennedy further testified that Ed Adams, by letter dated April 28, 2011, approved the drainage diversion in this case.

The next witness was Dave Snook, an engineer from the Department of Public Works.

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Mr. Snook testified that the Director of DPW, Ed Adams, issued a letter approving the drainage diversion and that the “case” was therefore closed in his mind.

The next witness called by Protestants was Michael Viscarra from the Department of Permits, Approvals and Inspections. Mr. Viscarra testified that he first reviewed the drainage diversion analysis during March, 2011, well before the April 28 date on Mr. Adams’ letter allowing the diversion.

The final adverse County witness called by Protestants was Robert Wood, from DEPS. Mr. Wood reviews stormwater management and grading plans for compliance with Baltimore County requirements. Mr. Wood testified that the stormwater management facility proposed in this case was acceptable and met all Baltimore County requirements. Mr. Wood testified that the County could not own the stormwater management pond because it was designed with a retaining wall. Mr. Wood expressed that he originally had concerns with the outfall of stormwater for the project, but believes that the issue has been addressed satisfactorily in the revised Plan. Mr. Wood testified that he visited the site several times and was very familiar with the Plan. Mr. Wood next testified that the Developer’s proposal would not comply with Maryland’s new stormwater management regulations, but that this project was grandfathered given that the Developer had submitted sufficient information prior to May 4, 2010 so as to constitute “preliminary project approval”.

Upon further questioning from Developer’s counsel, Mr. Wood testified that residential developments frequently have privately owned and maintained stormwater management ponds, and he confirmed that if a privately owned facility is not maintained, Baltimore County will cause such work to be performed and charge the owners for the repairs. Mr. Wood testified that the houses in the vicinity of the subject property are served by public water, and that the

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recharging of groundwater is a more important issue when a property is served by a well.

Protestants expert witness was James Patton, a professional engineer. Mr. Patton testified that he disagreed with Curtis Murray and did not feel that the proposal was 'compatible' with the existing neighborhood. Mr. Patton described Mr. Murray's portrait of the neighborhoods as "lacking" and described the proposed Plan as a "rural pathway" through a residential area. Mr. Patton described the Plan as defective in that it did not depict "private yard areas" as many of the proposed dwellings had 3:1 slopes in the rear yard areas. Mr. Patton opined that the decks may be the only realistic way to meet the five hundred (500) square foot yard area.

Mr. Patton testified that to have a suitable outfall from the stormwater management facility, the Developer must demonstrate an ability to discharge appropriately the stormwater from the site. Mr. Patton indicated that his review of the stormwater drainage from this site revealed a "questionable section" on the Plan, given that there were no documents to show that an adjoining owner has granted approval for the Developer to cross its land to reach Pond #3 of Greenspring East. As such, Mr. Patton opined that a suitable outfall was not depicted on the Plan, and that in his opinion, the Plan could not be approved.

Mr. Patton next described what he explained were very significant errors on the Developer's plans delineating the steep slopes on the site constraints map. Mr. Patton tested that his own steep slopes analysis revealed slopes of greater than twenty-five (25%) percent in the area of Lots two (2) and five (5). According to Mr. Patton, has these slopes been properly delineated on the site constraints map, it would have caused "great concern" to DEPS.

Mr. Patton also advised another problem with the Developer's site constraint plan, which failed to show that a "major cut" would be required near the Leand property line, and that this could cause trees to fall and water to be diverted from the Leand property to the Developer's

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stormwater management system. Finally, Mr. Patton opined that more dense landscaping was required between the proposed houses and Old Court Road and the Leand's adjoining property.

On cross examination, Mr. Patton conceded that the public storm drain, into which the Developer's proposed stormwater management facility will flow, is not over burdened. Mr. Patton agreed that the Developer's schematic landscape plan shows trees buffering the houses closest to Old Court Road, and he confirmed that there were no scenic easements in existence along this stretch of Old Court Road. Mr. Patton also conceded as to the compatibility issue that the homes built in the last ten (10) to twenty (20) years have been two story single family dwellings. Mr. Patton also stated that the small lots proposed in the final development plan were enabled by the provision of public sewerage, and that the surrounding homes were on larger lots and had septic waste systems.

Mr. Patton conceded that there was no requirement in the County regulations concerning the active or passive nature of this yard area, unlike the Baltimore County Open Space Regulations, which contain such a delineation.

In its rebuttal case, the Developer called John C. Canoles, who was accepted as an expert natural resources consultant. Mr. Canoles testified he visited the site approximately twelve (12) times. He also testified that he prepared the site constraint map, as well as, the forest buffer and forest conservation plans, all of which were approved by DEPS. Mr. Canoles testified that the forest on this site is rated "high priority" and that "to the extent possible" the majority of this forest is protected and deeded to Baltimore County. Mr. Canoles conceded that roughly half of the forest (3.8 acres) would need to be cleared for the development. Mr. Canoles stated it was preferable to clear forest inside the URDL rather than in a rural area outside the URDL, such as northern Baltimore County.

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The Developer recalled Mr. Izadi as the final rebuttal witness. Mr. Izadi presented a letter from Carrollton wherein the bank approved an easement for the developer to cross the property with the piping from the stormwater management facility to Greenspring Pond #3. Mr. Izadi further testified that portion of the subject property would drain into Greenspring Pond #3, and a portion of the property would bypass Greenspring Pond #3 on its way to the Point of Interest and the stormwater management facility. Mr. Izadi also testified that the diversion of surface water that has historically flowed onto the Leand's property, that the Plan includes four or five dry wells near the Leand's property line to collect and allow for absorption of rainwater.

ISSUES

Protestants raised the following issues to be determined by the Board.

1. Did the ALJ's summary of the facts presented in his Opinion and Order fail to accurately depict the testimony of various witnesses throughout the three (3) day hearing?
2. Did the ALJ err in determining that the Ridge at Old Court Plan is grandfathered from compliance with new Maryland Storm Water Regulations?
3. Did the ALJ err in his conclusion that the Greenspring East Pond #3 was a suitable outfall for the proposed SWM pond?
4. Did the ALJ err in his approval of the Steep Slope Analysis and the impact of a Faulty Steep Slope Analysis submitted by the Developer and reviewed by EPS?
5. Did the ALJ err both factually and legally in concluding that the proposed six (6) home subdivision was "compatible" with the neighborhood and scenic Old Court Road?

FINDINGS

Issue No. 1 – Did the ALJ's summary of the facts presented in his Opinion and Order fail to accurately depict the testimony of various witnesses throughout the three (3) day hearing?

The Board's review of an approved Development Plan is set forth in the Baltimore County Code at 32-4-281 (e) (iii) (4) and (5). The Board has the authority to modify or remand the case if it finds the decision of the ALJ is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or is arbitrary or capricious. After a review of the testimony and exhibits we find that the ALJ's decision was supported by the facts and find no error of law. The Developer presented substantial and credible evidence in support of the Development Plan.

Issue No. 2 - Did the ALJ err in determining that the Ridge at Old Court Plan is grandfathered from compliance with new Maryland Storm Water Regulations?

Under Maryland regulations, a development project which has "received a preliminary project approval prior to May 4, 2010" may be granted an administrative waiver from compliance with the State's newly-enacted stormwater management regulations. COMAR Section 26.17.02.01-2. The Baltimore County Council belatedly enacted Bill 25-10, which was codified at B.C.C. § 33-4-112.1, governing stormwater management waivers. A review of the record reveals both the comments at the Development Plan Conference as well as the Development Plan itself reflect that a "preliminary approval" of the concept stormwater management plan was granted by the Department of Environmental Protection and Sustainability (DEPS), Stormwater Management Division on May 4, 2010. We agree with the findings of the ALJ that the Plan in this case need not comply with the new Maryland stormwater management regulations.

Issue No. 3 - Did the ALJ err in his conclusion that the Greenspring East Pond #3 was a suitable outfall for the proposed SWM pond?

One of the principle disputes concerning the stormwater management was

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whether or not the Developer was able to use Greenspring East pond #3 (an in-stream stormwater management device) for the surface water drainage generated by the proposed development. Mr. Bondroff testified that the homeowner's association which owns the pond voted to prohibit the Developer from discharging any water into it or making any use thereof. However, the Developer correctly asserts that when the stormwater management plan for Greenspring East was approved by Baltimore County on May 29, 1990, an easement for the stormwater drainage of upstream properties -- including most of the property owned by the Developer -- was noted thereon. See Protestants' Exhibit 14. The Developer of Greenspring East was obliged to construct that stormwater facility in such a fashion to accommodate the amount of runoff generated by "the entire upstream area" as if that area were "fully developed in accordance with the Baltimore County Zoning Regulations." B.C.C. § 32-4-410(c). Further, Maryland common law also permits a landowner to discharge stormwater onto lower lying properties, and correspondingly, prevents owners of those lower lying properties from erecting barriers to prevent the flow of that water. *Baer vs. Board of County Commissioners of Washington County*, 255 Md. 163 (1969). The testimony indicates that the surface/storm water from the subject property has always flowed downgrade and that post-development such flow will be less in velocity and quantity.

The other issue in connection with the stormwater management plan was whether or not the Developer had proposed a "suitable outfall." Both Developer's engineer (Mustafa Izadi) and Mr. Wood from DEPS opined that a suitable outfall

was in fact demonstrated on the Plan, which received County approval. Protestants' engineer conceded that the public stormwater system into which the runoff would flow was not "overburdened" but he testified that there was a "questionable section" of private land between the Developer's property and pond #3, and that it was unclear whether the Developer had approval to cross that party's land. Research showed Carrollton Bank was the owner of the private land in question. Developer was able to produce credible evidence that Carrollton Bank has granted the Developer an easement to make use of its property for the stormwater management conduits, upon a payment of twenty thousand dollars (\$20,000).

Issue No. 4 - Did the ALJ err in his approval of the Steep Slope Analysis and the impact of a Faulty Steep Slope Analysis submitted by the Developer and reviewed by EPS?

The Protestants also raised concerns over alleged errors made in the Developer's plans where slopes of greater than 25% were not specifically identified. Mr. Patton testified that between Lots 2 and 5 on the Plan and the roadway adjacent thereto slopes of greater than 25% existed, yet were not indicated as such on the Plan. The Developer's natural resources consultant, John P. Canoles, testified, he does take slopes into consideration when preparing forest buffer and forest conservation plans, and uses three ranges which have scores associated therewith, as follows: 0-10%; 10-20%; and slopes greater than 20%. These are the very same scales set forth in the B.C.C. in connection with the preparation of forest buffer plans. B.C.C. § 33-3-111.

Mr. Canoles did reference and demarcate those areas where slopes were

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greater than 20%, which of necessity would encompass those slopes of greater than 25% which Mr. Patton contends exist on the subject property. Mr. Patton acknowledged that DEPS' analysis included all slopes in excess of 20% , and therefore , slopes of 25% where included in the analysis.

Issue No. 5 - Did the ALJ err both factually and legally in concluding that the proposed six (6) home subdivision was "compatible" with the neighborhood and scenic Old Court Road?

All Development plans are subject to the performance standards set forth in B.C.Z.R. § 260. Those regulations seek to ensure that “residential development in Baltimore County conforms with a higher quality of design,” and that the proposed buildings and site improvements “complement those in the surrounding neighborhood.” Curtis Murray from the Office of Planning testified that in his opinion the Plan satisfied the performance standards set forth at B.C.Z.R. § 260, and his agency recommended approval. The Protestants faulted Mr. Murray’s analysis and criticized him for never visiting the site. Mr. Murray testified Diane Itter, had significant input into this proposal and that she is intimately familiar with this area. Protestants also raised concerns that two story homes are being proposed for the Ridge at Old Court subdivision, whereas the majority of surrounding homes are one story. While that may in fact be the case, Protestants’ expert, James Patton, conceded that within the last 10 to 20 years only two story homes have been constructed in the vicinity of this project, reflecting a more modern trend in home construction. The Protestants also raised concerns over the lot sizes as the six homes planned for the subdivision would each have an approximately half-acre lot while those homes in the surrounding area have an

acre or more. A review of the evidence reveals that while most of the homes along this portion of Old Court Road in fact have one acre or larger lots, that is certainly not the case for the adjoining Greenspring East subdivision, which contains over 300 homes. Whether or not a development is “compatible or incompatible” with the surrounding neighborhood, or would preserve the “estate like” character of the neighborhood, is a subjective judgment call. Mr. Murray conceded as such in his testimony, and absent compelling testimony to the contrary, the Board will not substitute its personal judgment for that of the Office of Planning which has particular expertise in these matters, or the ALJ.

DECISION

In accordance with § 32-4-281, the Board of Appeals is limited in its review of the ALJ's decision. Section 32-4-281(e) states:

(e) Actions by the Board of Appeals.

1. In a proceeding under this section, the board may:

- (i) Remand the case to the hearing officer;**
- (ii) Affirm the decision of the hearing officer; or**
- (iii) Reverse or modify the decision if a finding, conclusion, or decision of the hearing officer:
 - (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.****

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The Board has considered the issues raised by Protestants and has concluded that there is insufficient evidence to overturn the Opinion of the Administrative Law Judge in this case.

ORDER

IT IS THEREFORE this 22nd day of March, 2012 by the Board of Appeals of Baltimore County

ORDERED that the Development Plan for the Five M, LLC, AKA The Ridge at Old Court, identified as Developer's Exhibit No. 1B, in HOH Case No.: 03-490 and Board of Appeal Case No.: CBA-12-009, issued in the Administrative Law Judge's Opinion and Development Plan Order, dated June 27, 2011 be and is hereby **APPROVED**; and it is further

ORDERED that the decision of the Administrative Law Judge, dated June 27, 2011, in HOH Case No.: 03-490 be and the same 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*.

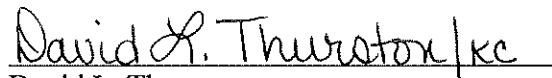
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Andrew M. Belt, Panel Chairman



Wendell H. Grier



David L. Thurston