IN RE: PLANNED UNIT DEVELOPMENT Southwest Physicians Pavilion S/S Kenwood Avenue, N/S I-695 1st Election District 1st Councilmanic District	*	BEFORE THE BOARD OF APPEALS OF
	*	BALTIMORE COUNTY
Whalen Properties Limited Liability Company, Catonsville *Developer*	*	Case No.: CBA-13-025 PDM NO.: I-570

* * * * * * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge John E. Beverungen, dated January 29, 2013, granting an application for a Planned Unit Development ("PUD") as proposed by Applicant Whalen Properties LLC's, (herein referred to as "Petitioner"). The appeal was heard before this Board on the record. A hearing was held before the Board on April 23, 2013 and was publicly deliberated on May 23, 2013. Petitioner was represented by G. Scott Barhight of Whiteford, Taylor and Preston, LLP and Deborah C. Dopkin, Esquire. Appellants were represented by J. Carroll Holzer, of Holzer and Lee.

PROCEDURAL HISTORY& BACKGROUND

The Petitioner proposes a four story medical office building over a three-story structured parking garage for a total of seven stories. The total building area will be approximately 89,110 square feet. The three levels of parking will provide approximately 400 parking spaces. The building is to be designed to a minimum LEED silver standard and 85-90% of the uses in the building will be "medical occupancy" uses such as physician's offices, ambulatory surgical centers, urgent care facilities, imaging center and other ancillary medical uses such as medical laboratories, optometrist, physical therapy, etc. Improvements to the surrounding road and sidewalk networks are also proposed as part of this PUD and will add to the overall proposal of

the project as well as improve the access within and throughout the immediately adjacent community. (Ex. 1, Developers Ex. 4 from Hearing before the ALJ)

The procedural history for this matter, as with all PUD matters, began with a Resolution by the County Council. October 17, 2011 the County Council passed Resolution No.: 108-11, finding PDM: 1-570 eligible for County review in accordance with §32-4-242 of the Baltimore County Code. This resolution was introduced by Baltimore County Councilman for the 1st District, Thomas Quirk.

Interwoven into the procedural history of this matter is the fact that on December 20, 2012 the Office of the State Prosecutor filed a Criminal Information against the developer, and Petitioner is this case, Stephen W. Whalen, Jr., alleging that he had made unlawful contributions through third parties to the campaign finance entity of the County Councilman for the First District, Thomas Quirk. These contributions were alleged to have been made on August 31, 2011, prior to the introduction of County Resolution No:: 108-11. On January 3, 2013, Mr. Whalen pleaded guilty to these charges in the Circuit Court for Baltimore County. (Ex 2, Statement Of Facts for January 13, 2013 Guilty Plea of Mr. Whalen and Criminal Information filed against Mr. Whalen by Office of the State Prosecutor).

In the course of the State Prosecutor's investigation, it came to light that Mr. Whalen had engaged in e-mail communications with Councilman Quirk regarding campaign donations which also alluded to the PUD at issue. As outlined in the statement of Facts read into the record by the State Prosecutor on the day of Mr. Whalen's Guilty Plea:

> On August 8, 2011, Mr. Whalen sent Councilman Quirk an e-mail declining an invitation to attend an event at the Maryland Association of Counties (MACO) meeting in Ocean City, Maryland on August 18, 2011, saying, "Thanks, Tom, but I have too much damn work to do in the next 30 days . . . something about

a PUD. . . whatever that is . . .". Councilman Quirk replied on the same day, saying "Here's another event I'm doing in Landsdowne on 8/27 at Leadership Through Athletics if you can stop by or help sponsor. How do things look with the PUD? How's Planning/". A copy of a flyer announcing a fundraising event for Councilman Quirk to be held on August 27, 2011 was attached.

On August 24, 2011, at about 10:21, pm, Councilman Quirk, via e-mail to Mr. Whalen, expressed concern about how his campaign fund report would look next to that of Councilman Marks, saying in part, "Steve-let's meet up real soon and talk about Marks event and how his report will look vs. mine. . .". At approximately 10.27pm, Mr. Whalen replied (In pertinent part) "Happy to do so whenever you'd like, Tom. Pick one day next week. . . .if you want to jump on this soon, it should be next week, unless you want to wait till the last few days of September. . . Whatever I can do, of course, Steve." Councilman Quirk replied "I was hoping all the new members would be close in reports. That clearly has been unbalanced now."

At 10:55 pm, Mr. Whalen responded (in part) "Wait a minute, Tom You HAVE a fundraiser this Saturday. That is a big opportunity. . .IF you want to make it so, even at this late date. We can help you, completely legally of course within the bounds of campaign finance requirements, raise $$$ to boost the returns shown for this event. Maybe it takes an extra week or two for $$ to trickle in afterwards, but, so what?" Let me find out what Scott raised for our Fifth District friend tonight, and see if we can't get you to approximately the same ball park. . . ."

On August 25, 2011, at approximately 6:15pm, Mr. Whalen sent an e-mail to Councilman Quirk, saying:
"Whenever you want, Tom. You da boss. And, FYI, I talked to Scoot B. a couple of hours ago. The DM "David Marks" fundraiser brought in "just under $15K". More than I thought but less than you did. The truth usually resides somewhere in the middle, right? H will be calling you to talk a bit about the rec component at SGHC "Spring Grove State Hospital" apropos of the3 upcoming MEDCO study, and . . . your favorite topic. If you want us to raise some $$ for you by next Wed, you need to let me know asap. . .like by tomorrow."

> At about 8:50 pm Councilman Quirk replied "Yes. . .that would be great."

(Exhibit 2, Statement of Facts).

As agreed to in Statement of Facts read into the record during Mr. Whalen's Plea Hearing in the Circuit Court for Baltimore County, on August 30, 2011, Stephen Whalen Jr. withdrew $8,500.00 in cash from the bank account of Whalen Properties via counter check that was then distributed through several individuals who were instructed to deposit the funds in their own accounts and then write checks payable to "Friends of Tom Quirk". The State Prosecutor's Criminal Information against Mr. Whalen specifically mentions that no evidence was uncovered indicating that Councilman Quirk or his campaign officers were aware that the contributions procured by Mr. Whalen were unlawful. (Exhibit 2, Statement of Facts).

Not mentioned in the State Prosecutor's Criminal Information against Mr. Whalen, but noted by the Appellants, is the fact on June 6, 2012 Bill 38-12 was passed by the County Council which was to be applied to any PUD for which a hearing before the Administrative Law Judge commences after the effective date of the Act. The PUD at issue, hence, would fall under the purview of this Bill. Appellants argue that components of this Bill which were amended to correlate directly to the approval of the PUD at issue and were introduced by Councilmen Olszewski, Oliver, Huff and Marks.

On August 17, 2012 the Baltimore Sun published an article reporting that the Office of the State Prosecutor had summoned eight (8) Baltimore County Agencies for records on the PUD at issue. (Ex. 3, August 17, 2012 Article from the Baltimore Sun). Consequently, on August 20, 2012, Counsel for the Appellants requested a postponement of the August 23, 2012 Development Plan Hearing before the Administrative Law Judge arguing that it would be a violation of "due

process" to continue the development process in the case while the State investigation was being conducted. This request was denied by ALJ Beverungen and the case proceeded as scheduled. Counsel alleged that the County Attorney advised each of the County Departments that they were not to divulge what was contained in the State Prosecutor's Summonses and what County material was provided to the State Prosecutors by their Departments. Counsel for Appellants noted a continuing objection regarding this matter during the course of the five day hearing.

Consequently, Counsel for Appellants called witnesses from each of the Departments involved in reviewing the PUD, including Planning, Public Works, DEPS, Zoning, during the hearing, all of whom confirmed that Counsel was being denied the right to review of the documents requested by the State Prosecutor and the witnesses would not answer questions regarding the matters posed to them under cross-examination.

STANDARD OF REVIEW

An appeal before this Board, a development plan is heard on the record of the ALJ pursuant to BCC, §32-4-281(d). The standard of review of the ALJ's decision is governed by BCC, §32-4-281(e) which reads as follows:

> *Actions by Board of Appeals:*
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> (1) In a proceeding under this section, the Board of Appeals may:
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> (i) Remand the case to the Hearing Officer;
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> (ii) Affirm the decision of the Hearing Officer; or
>
> (iii) Reverse or modify the decision of the Hearing Officer if the decision:
>
> I. 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.

The Court in the case of *Monkton Preservation Ass'n v. Gaylor Brooks Realty Corp.*, 107 Md. App. 573, 581 (1996) explained that as to the Board's authority for reversing or modifying a decision of a Hearing Officer:

> The first three of these reasons involve errors of law, and, as to them, no deference is due to the hearing officer. The Board clearly must make its own independent evaluation. That is also true with respect to paragraph (e)-whether the hearing officer's decision is arbitrary or capricious. When it comes to reviewing the factual basis for the hearing officer's decision, however, the standard is the traditional one of looking only to whether there is substantial evidence to support the findings. In that examination, the Board does not make independent evaluations, for to do so would require the Board to make credibility decisions without having heard the testimony.

The Court in *Gaylor Brooks* explained the role of the Board of Appeals as:

> A county board of appeals is not intended to be that kind of policymaking body; at least with respect to reviewing development plans, it is not vested with broad visitatorial power over other county agencies, but acts rather as a review board, to assure that lower agency decisions are in conformance with law and are supported by substantial evidence.

The Board must examine the record as a whole to determine whether or not substantial evidence exists to support the findings of the Hearing Officer, and if so, the Board may affirm those findings. Toward that end, the Board takes note that "substantive evidence" has been defined to mean more than a "scintilla of evidence." *Prince George's County v. Meininger*, 264 Md. 148, 152 (1972).

Where either an incorrect legal standard is used or the conclusion is not sufficiently supported by the evidence, the decision is considered arbitrary and capricious and must be reversed. *Board of County Comm'rs for St. Mary's County v. Southern Res. Mgmt.*, 154 Md. App. 10, 26, 837 A.2d 1059, 1068 (2003). Furthermore, where the controversy concerns the proper interpretation of the zoning and development statutes regulations and ordinances the Board is considered the expert. *See People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 662, 682, 956, A.2d 899, 911 (2008).

BOARD'S ANALYSIS

Issue Raised By Petitioner

The Petitioner argues that although Appellants noted a timely appeal of the decision of the Opinion and Order of the Administrative Law Judge dated, January 29 2013, the appeal failed to satisfy the procedural and substantive requirements enumerated by Baltimore County Code 32-4-281(b)(2) and (3). Petitioner specifically states, "a person appealing shall file a petition setting forth, with reasonable particularity . . . the grounds for appeal, including the error committed by the Hearing Officer in taking final action; the relief sought and the reasons why the final action . . . should be reversed or remanded." Petitioner argues that the term "reasonable particularity" is included to assist both the tribunal and the responding party in being able to anticipate the issues of the case and prepare a meaningful response.

This Board finds that the material submitted by the Appellants with its notice of appeal is quite particularized and detailed and closely mirrors the brief submitted to this Board. The Appellants' notice of appeal made it extremely clear to this Board the nature of the Appellants' complaints and was also sufficient to put the Petitioner on notice as to these issues so that they could formulate a meaningful response, which they have. Consequently, the Board finds that the Appellants have complied with the spirit of the appeal procedures for this matter, thus the Board will consider the merits of the case at bar.

Issues Raised By Appellants

Appellant brings this appeal before the Board arguing that ALJ Beverungen erred in his decision not to address or admit evidence regarding the alleged "appearance" of impropriety and unfairness in the process which brought the PUD at bar to fruition. The Appellant argues that the alleged "appearance" of impropriety was demonstrated in the following ways:

1. The illegal campaign contribution from the developer to Councilman Quirk, who introduced the Resolution authorizing the PUD in question.
2. Illegal campaign contributions to Councilman Marks, allegedly to obtain support for Council Bill 38-12 which allegedly had an affect on the ultimate approval of the PUB in question.
3. The refusal of the County to permit the Appellant to review all County files which include not only the formal documents submitted to the Hearing Officer, but any letters, e-mails, notes and telephone calls which were available to assist Counsel in preparing his case before the Administrative Law Judge.

4. The refusal under oath during the Administrative Law Judge hearing of all the County witnesses called as hostile witnesses by Protestants', and their failure to answer questions in regard to the processing of PUD.
5. The connection between Bill 38-12, the amending of the compatibility rules and how those amendments allegedly favored the PUD proposal at issue.
6. Singling out this site for a T-5 Zone analysis, when it should have been a T-4, if the neighborhood was properly defined by the Planning Office. An artificial definition of "neighborhood" was created by permitting the area East of Maiden Choice Lane to be included in this neighborhood.
7. The State Prosecutor, subpoenaing the records of not just the campaign contribution aspect, but taking the step of extending those Subpoenas to all the County Departments mentioned above allegedly taints this process, plus the fact that the County Attorney allegedly refused to permit the Protestants' to review all of the files.
8. The appearance of alleged impropriety generated by County Reviewing Employees refusal to testify.
9. Mr. Whalen's testimony that he did not contribute campaign funds to members of the County Council that was later contradicted by the facts presented in his guilty plea.
10. The use by the Developer of Mr. Monk as an expert in the proceeding before the Administrative Law Judge, who had been a member of the County Architectural review Board.

A. "*Appearance of Impropriety*"

As it is the dominant issue on which the Appellants base their Appeal, the Board must first tackle the issue of the "appearance" of impropriety previously outlined above. Appellants'

Issues numbers 1, 2, 3, 4, 5, 7, 8, and 9 can be addressed by examining the "appearance" of impropriety topic. The Appellant cites Rathkopf, the Law of Zoning and Planning ,(2012) §32:14, which states that administrative tribunals must be unbiased and must avoid even the "appearance" of bias to be in accordance with the principles of due process. Appellants also cite Judge Sybert of the Maryland Court of Appeals who stated "anything which tends to weaken public confidence and to undermine the sense of security of the individual rights which a citizen is entitled to feel is against public policy." *Montgomery County Board of Appeals v. Albert W. Walker, et ux* 228 Md. 574 (1962). Appellant further quotes the Court which stated "even when conduct would not actually produce a mistrust in the minds of others, it might only create a suspicion of unfairness in the mind of the party to which the decision was adverse, it is far better that no room be given for suspicion or cavil." Appellants again cites Rathkopf, §32:21, stating that "where disqualifying prejudice or partiality is alleged, Courts in many cases have noted that the relationship in question need not be shown to have actually tainted or influenced the Decision, the question is one of a reasonable person reviewing the facts in the particular case which might weaken public confidence in the proper exercise of zoning power."

It is hard to argue based on the facts which were admitted to and subsequently proven during the State Prosecutor's investigation and prosecution of Mr. Whalen that some "appearance" of impropriety does not exist in the mind of the public in regards to Mr. Whalen's pursuit of the PUD for Southwest Physicians Pavilion. However, the unique procedural nature of the PUD process directly affects the power of both the Administrative Law Judge and this Board to weigh the influence of such alleged impropriety. Unlike any other County Development procedure, a PUD is initiated by a legislative act of the County Council which passes a Resolution which then initiates the PUD review process. The events uncovered by the State

Prosecutor's investigation which the Appellants argue outlines the *quid pro quo* for Councilman Quirk's introduction of County Resolution No.: 108-11 and for the introduction and passage of Bill 30-38 are not reviewable by the Administrative Law Judge or this Board as they are a function of the County Council, whose inter-workings are also beyond the review of the ALJ and this Board.

The allegations of impropriety brought by the Appellants were related directly to this alleged *qui pro quo* between Mr. Whalen and members of the County Counsel and was encompassed in Judge Beverungen's reasons for refusing to allow the Appellants to further elicit details from County employees during the hearing as to this alleged *quid pro quo* and the County refusal to share contents of their files involving information subpoenaed by the State Prosecutor.[1] While the Board does not agree that the fact that because others in County government were not included in any criminal prosecution, the Appellants should be precluded from presenting, or trying to illicit, further evidence of impropriety from witnesses, this Board does agree that due to context of the alleged impropriety, ALJ Beverungen was correct in barring further inquiry into the alleged *quid pro quo* between Mr. Whalen and members of the County Council. To allow such an inquiry, the ALJ and the Board would be questioning the validity of legislation already passed by the County Council, a power neither the ALJ nor this Board possesses. The Board of Appeals does not possess any supervisory power over actions of the County Council. Therefore, the Board may not substitute its judgment for that of the County

[1] ALJ Beverungen notes in his opinion that during the course of the hearing, he received correspondence from the Director of DOP, indicating that Counsel for the Appellants would be entitled to review that agency's entire file -- this occurred after Ms. Nugent of the DOP refused to share the contents of her file with Counsel for Appellants despite receiving a subpoena. Counsel, was however, free to recall this witness.

Council. *United Parcel v. People's Counsel*, 336 Md. 569 (1994); *Partnership v. Board of Supervisors*, 283 Md. 48 (1978).

B. ***T5 Zone or T4 Zone Analysis***

As outlined in Appellants' Issue 4, Appellants argue that the PUD site at issue was singled out for a T-5 Zone analysis, when it should have been a T-4 and that the neighborhood was not properly defined by the Planning Office. Appellants allege that an artificial definition of "neighborhood" was created by permitting the area East of Maiden Choice Lane to be included in this neighborhood. ALJ Beverungen noted the expert testimony of Bill Monk, a land planner with the firm of Morris Ritchie & Associates who presented testimony regarding the Master Plan of 2020, including the transect overlay districts that were used therein and located along major interstates and arterials. Mr. Monk described that the site at issue is in a T5 transect area, and is located in a community enhancement area. He further stated that the redlined Plan satisfies the T5 criteria. Mr. Monk testified that to determine the relevant "neighborhood" for the compatibility analysis, he used the Baltimore County Code's definition of the term and included the Wilkens Shopping Center because it was a "focal point" of the area. ALJ Beverungen noted that during cross-examination, Mr. Monk conceded that if the neighborhood was bounded by Maiden Choice Lane, as suggested by the community, the area would be designated as a T4 transect in Master Plan 2020. (Exhibit 4, ALJ, Opinion pp.7-8).

ALJ Beverungen noted the community also raised concerns about the "compatibility" of the development with the "neighborhood." ALJ Beverungen explained:

> Provided the "neighborhood" delineated by the DOP is reasonable, I am obliged to give "the greatest deference" to the "zoning authority's judgment regarding the scope of the neighborhood." Sedney v. Lloyd, 44 Md. App. 633, 639-40 (1980). Though the community disagreed with the delineation of the "neighborhood"

> provided by DOP and Mr. Monk, no expert testimony was presented on the point, and it was also not clear the community witnesses employed the Baltimore County Code's definition in determining its boundaries. In *Clayman v. Prince George's Co.*, 266 Md. 409, 418 (1971), the court held that the neighborhood surrounding the subject property "need not be precisely and rigidly defined," provided it is not "some area miles away."

(Exhibit 4, ALJ Opinion, pp. 17-18)

Under the applicable standard of review for the Board in PUD matters, the Board must defer to the ALJ on findings of fact based on his ability to judge the credibility of the witnesses and weigh the evidence. Consequently, this Board cannot reverse the decision of the ALJ on this issue.

C. ***Monk as Expert***

As outlined in Appellants' Issue 10, Appellants contend that it was improper for the Petitioners to use Bill Monk, a land planner with the firm of Morris Ritchie & Associates as an expert in the proceeding before the Administrative Law Judge, due to the fact he had been member of the County Design review Panel. ALJ Beverungen noted that during cross-examination, Counsel for Appellants questioned Mr. Monk regarding the propriety of seeking the input of the County's Design Review Panel (DRP) given that Mr. Monk serves as a member of that board. Mr. Monk explained that the DRP played no official role, but that their input was sought to comment on the unique design elements and he did not believe that doing so presented a conflict of interest. (Exhibit 4, ALJ Opinion pp. 8-9). Again, the Board is not aware of any *per se* prohibition of the use of Mr. Monk as an expert due to his role with the DRP. The ultimate decision as to whether Mr. Monk's testimony is allowed and what weight it is to be given is within the discretion of the Administrative Law Judge hearing the case and this Board

does not find that such discretion has been abused and cannot reverse the ALJ's finding on this matter.

"Community" Issues Raised By the Appellants

In addition to the issue relating to the alleged "appearance" of impropriety previously discussed, the Appellant's also argued in their notice of Appeal:

1. The site is too small to place such a large building.
2. The Modification Standards were self-inflicted.
3. The Developers traffic study was defective.
4. Elimination of Sate Highway Administration sound barrier still subjected residents to extra noise.
4. Sound study was defective.
5. County Council Bill 38-12 passage was designed to specifically address this PUD at bar and that the illegal campaign contributions relate to this PUD.

A. ***Modifications of Standards & Size of the Site***

Through witness, Berchier Manely, a Catonsville resident for 48 years, the Appellants presented testimony that the PUD for the proposed site was excessive development and was not compatible with the existing residential neighborhood within the Beltway. She further testified the compatibility requirement was critical for the stability of residential neighborhoods. She argued that the 19 Modifications of Standards were *prima facia* evidence that the PUD building was much too large and excessive.

Petitioner's expert witness, Frederick J. Thompson, a licensed professional engineer testified before the Administrative Law Judge describing the 2 acre PUD site in question. He testified that the subject property sits at a higher grade than I-695 and that the site has sufficient

infrastructure to support the project. He opined that the PUD proposal satisfied the B.C.Z.R. 502 standards and believes that the proposal constitutes a good design and use of a very unique site.

ALJ Beverungen further noted, as is permitted under law, the Petitioner originally sought 19 Modifications of Standards, 11 of which pertain to signage while 8 concern bulk and area regulations. In regards to these Modifications of Standards, ALJ Beverungen commented:

"I am obliged to find that these modifications (per §32-4-245(b)(3)(ii)) are necessary to achieve the intent and purpose of the regulations." (Exhibit 4, ALJ Opinion, p.15). He further stated that the DOP indicated in its final report that it supported the requested modifications. Both engineer Frederick Thompson and land planner Bill Monk also testified that they reviewed each of the proposed modifications and opined that they were reasonable and necessary to construct the building as designed. *See id.*

As ALJ Beverungen stated, the Administrative Law Judge is permitted to approve modifications of otherwise applicable zoning and development requirements upon finding that they are "necessary to achieve the intent and purpose" of the PUD regulations. In this case, ALJ Beverungen found that "the expert testimony indicated that both the PUD regulations and Master Plan attempt to achieve a quality design and promote compact commercial developments interspersed with residential uses." (Exhibit 4, ALJ Opinion, p.16) As this Board's review of the ALJ's decision is limited to the confines of BCC, §32-4-281(e), this Board finds that by approving these modifications, ALJ Beverungen did not exceeded his statutory authority or jurisdiction as a Hearing Officer; did not employ an unlawful procedure, did not make an error of law, did not base his decision on evidence unsupported by incompetent, material, or unsubstantial evidence in light of the entire record as submitted; nor was his decision arbitrary or capricious.

ALJ Beverungen did note, however, that the only exception to his findings regarding the modifications pertains to bulk regulations modification #5, regarding State licensed medical facilities. ALJ Beverungen stated:

> While the 750' zone line setback is one aspect of B.C.Z.R. Section 4C-102, that is but one facet of a comprehensive piece of legislation (Bill 39-02) designed to minimize conflicts and limit negative impacts of such facilities upon schools, churches and residential zones. Such State licensed medical facilities are permitted of right in industrial zones, but require special exception relief in business zones (including the OR-1 zone in this case). I do not believe that a modification of standards is the appropriate mechanism to permit such a facility at this property. State law defines and regulates the operation of such facilities, and without knowing the nature of the care or service offered, or the identification of the provider, it would be akin to granting a "blanket" special exception, which I do not believe is appropriate. I believe the more appropriate process would be for the tenant itself (assuming it is considered a "state licensed medical clinic") to file a petition for special exception and present its case at a public hearing, as envisioned by Bill 39-02. This will allow for public input and will help to minimize the impacts upon the adjacent school and neighborhood.

(Exhibit 4, ALJ Opinion, pp. 16-17)

B. ***Traffic Study***

Appellants' witness Linda Stroh, a resident at Catonsville Knolls community, testified that the traffic study at issue was defective in that it captured only one day in July, a day which surrounding high schools and colleges were not in session and whose resulting traffic was considered in the study.

ALJ Beverungen acknowledged that the community voiced concern about traffic, but lay witness testimony concerning anticipated traffic congestion cannot rebut a qualified expert's (in this case, Mr. Guckert) opinion that the road network is capable of handling the increased traffic

volume generated by the development. *Anderson v. Sawyer*, 23 Md. App, 612m 618-19 (1974), (Exhibit 4, ALJ Opinion, pp. 16-17). Expert Witness, Wes Guckert, testified for the Petitioner regarding the traffic study performed for the proposed site. He concluded that the roadway network in place could be easily accommodate the planned development, and indicated that the new traffic signal to be provided by the Developer at the Intersection of Wilkens and Kenwood Avenue would also improve the traffic pattern in the area. (Exhibit 4, ALJ Opinion, p.4). Appellants offered no expert opinions to rebut the conclusions of Mr. Guckert and ALJ Beverungen was within his discretion to accept Mr. Guekert's expert testimony as credible.

C. ***Noise Issues***

Appellants' witness, Gail Dawson, Vice President of Kenwood Gardens Condominium Association, testified that she objected to the proposal of the State Highway Administration and the Developer to remove three hundred fifty seven feet (357') of noise/sound barrier in that the proposed PUD building would not completely block the traffic noise level. Additionally, Appellants' expert telecommunications engineer, Julie Andrusenko, testified as to her concerns with the validity of the sound study performed by the Developer. She complained that the Developer's study was based on only one actual sound measurement and that one short sound measurement is not statistically valid in her professional opinion.

Petitioner's expert, Tracey Seymour, a professional engineer testified before the ALJ that she performed the traffic noise study at issue, which is 3-dimensional and considers terrain features, traffic volume, barriers to sound and similar features. She opined that the study showed that at all locations monitored there will be equal or less noise that at present with the barrier in place, and she stated that the State Highway Administration had approved her findings.

Additionally, Kristin Fusco Rowe, a licensed professional engineer provided expert testimony that she actually performed the study in question and commented that she believed that Ms. Andrusenko testimony did not address the focus of her study, which was measuring the potential difference in noise volumes with or without the sound barriers in place,. She further noted that the community's sound measurements were done with inferior equipment. Again, under the applicable standard of review for the Board in PUD matters, the Board must defer to the ALJ on findings of fact based on his ability to judge the credibility of the witnesses and weigh the evidence. Consequently, this Board cannot reverse the decision of the ALJ on this issue.

D. ***County Council Bill 38-12***

As has been previously outlined above, Appellants contend that a nexus exists between campaign donations made by Mr. Whalen and the passage of County Council Bill 38-12, which allegedly paved the way for the approval of the PUD at issue. As noted previously, such allegations cannot be considered by the ALJ or this Board in that the malfeasance alleged is a matter within the inner-workings of the County Council, whose ruling and procedures are not within the appellate jurisdiction of the ALJ or Board. Consequently, ALJ Beverungen was correct in his refusal to consider the motives or consequences of this Bill in fashioning his decision regarding the PUD at issue. (Exhibit 4, ALJ Opinion, p.14).

CONCLUSION

PUD REGULATIONS

The Hearing Officer can approve a PUD Development Plan only upon finding:

(1) The proposed development meets the intent, purpose, conditions, and standards of this section;

(2) The proposed development will conform with §502.1.A, B, C, D, E and F of the Baltimore County Zoning Regulations and will constitute a good design, use, and layout of the proposed site;

(3) There is a reasonable expectation that the proposed development, including development schedules contained in the PUD development plan, will be developed to the full extent of the plan;

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

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

B.C.C. §32-4-245(c)(1)-(5).

In the case at Bar ALJ Beverungen found that "the Developer presented evidence establishing each of these elements." ALJ Beverungen noted that Ms. Nugent of the Department of Planning and Mr. Monk testified the PUD Development Plan was in conformance with the Master Plan and the recommendations of DOP (*See,* Baltimore County Exhibit 2) and that it also satisfied the compatibility requirements of the Baltimore County Code. Messrs. Thompson and Monk testified that they were very familiar with the Petitioner's projects in the County, and believed the development would be completed to the full extent of the Plan, so B.C.C. § 32-4-245(c)(3) is satisfied. Finally, Mr. Thompson testified the project satisfied the B.C.Z.R. §502 special exception requirements, complied with B.C.Z.R. § 430 (governing PUDs) and met the intent and standards set forth in the B.C.C. and B.C.Z.R.

As stated by ALJ Beverungen, in determining whether to approve the Plan, the Hearing Officer can give "considerable weight" to the testimony and opinions expressed by County agency representatives, *Caldes v. Elm Street*, 415 Md. 122 (2010). In weighing the evidence presented before him, ALJ Beverungen found that the Appellants had not successfully rebutted the Petitioner's case. ALJ

Beverungen, as previously outlined above, was persuaded by the Petitioner's experts as to issues of traffic, noise, and compatibility. (Exhibit 4, ALJ Opinion, p.17).

As to compatibility, ALJ Beverungen further explains:

> . . . I believe that whether a development is compatible with the existing environs is a subjective determination, and I simply do not believe there is sufficient evidence in the record to rebut the recommendations of the DOP and the opinion of Mr. Monk. *See. e.g., Rectory Park v. City of DelRay Beach*, 208 F. Supp. 2d 1320, 1332 (S.D. Fla. 2002) (in land use case, "decision maker is permitted to exercise some discretion where the matter concerns a concept as inherently subjective as 'compatibility'"; *AT&T v. Orange County*, 23 F. Supp. 2d 1355, 1362 (M.D. Fla. 1998) (local government's evaluation of "neighborhood compatibility" necessarily includes subjective elements).

(Exhibit 4, ALJ Opinion, p.18).

In light of the reasons stated above, employing the standards of review for this Board found in BCC, §32-4-281(e), the Administrative Law Judges' Approval of the proposed PUD is **AFFRIMED**.

ORDER

THEREFORE, IT IS THIS 7th day of June, 2013, by the Board of Appeals of Baltimore County

ORDERED that the Petitioners' request for a Planned Unit Development (PUD), for Southwest Physicians' Pavilion on the subject property be and the same is hereby **GRANTED** , pursuant to Code § 32-4-281 (e)(1)(iii)(4).

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, Chairman

Wendell Grier

Wendy A. Zerwitz

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
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TOWSON, MARYLAND, 21204
410-887-3180
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June 7, 2013

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1 West Pennsylvania Avenue, Ste 300
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RE: *In the Matter of: Whalen Properties, LLC – Legal Owners*
Aka Southwest Physicians Pavilion PUD
Case No.: CBA-13-025

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 Shelton /kc

Theresa R. Shelton
Administrator

TRS/klc
Enclosure
Multiple Original Cover Letter

c: See attached Distribution List

Stephen W. Whalen, Jr./Whalen Properties, LLC
Fred Thompson/Gower Thompson, Inc.
Maureen Sweeney Smith and Richard Smith
Mark Flescher
Tracey Seymour
Thomas Whalen
Lindsay Banner
Jaime Fishman
Bill Monk
Joe Cronyn
Kristen Fusco-Rowe
Kenwood Gardens Condominiums, Inc
Paul Black
Gail Dawson
Barbara Haspert
Millie Yates
Larry Gratton
Linda Stroh
Emma McIntyre
Margaret M. Denoe
David Dressel
Patricia Grogan
Michael Burke
Paul Dongarra
William and Carol O'Brien
Jack and Berchie Manley
Pamela Fetsch
G. Carolyn Bisser
Joan Kelly
Julia Andrusenko
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
John E. Beverungen, Administrative Law Judge
Arnold Jablon, Director/PAI
Andrea Van Arsdale, Director/Department of Planning
Nancy West, Assistant County Attorney
Michael Field, County Attorney, Office of Law
Leonard Wasilewski, Zoning Review
David Lykens, DEPS
LaChelle Imwiko, Real Estate Compliance, PAI
Darryl Putty, PAI
Jenifer Nugent, Department of Planning
Bruce Gill, Development Plan Review, PAI
Dennis Kennedy, Development Plan Review, PAI