IN THE MATTER OF: CR GOLF CLUB, LLC – LEGAL OWNER (aka Castanea) W/s of Falls Road, S of Broadway Road (11700 Falls Road) 8th Election District 2nd Councilmanic District	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY
RE: Approval of Development Plan	*	Case No. CBA- 14-036

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OPINION

This matter comes to the Board of Appeals on appeal by Protestants Howard Schulman, Leslie C. Schulman, H. Thomas Goldbergh, Vickie L. Foster, Marie L. Laue, H. Harold Burns, and Joanne G. Capizzi (the "Protestants") of a development plan which was approved by the Hearing Officer on April 24, 2014 in accordance with the development review and approval process contained in Article 32, Title 4 of the Baltimore County Code ("B.C.C."). The property owner is CR Golf Club, LLC ("CR Golf").

HEARING OFFICER'S HEARING

At issue before the Hearing Officer was the approval of a development plan for property located at 11700 Falls Road, the former site of CR Golf Club (the "Property"). The development plan filed by CR Golf on August 27, 2012, proposed 85 single family dwelling lots on 229 acres+/-. At the time of that filing, the zoning for the land was R.C. 5. The day after the filing, August 28, 2012, the zoning was changed to R.C. 7 by the County Council during the 2012 Comprehensive Zoning Map Process ("CZMP"). Prior to the Hearing Officer's hearing, a redlined plan was filed proposing 10 lots (the "Plan"). (Dev. Ex. 1A and 1B).

On April 11, 2014, a hearing was held before the Hearing Officer (Beverungen, J.). Participating at the hearing were representatives of and counsel for CR Golf as well as the

Protestants. In addition, as with all development plan cases, representatives from the County agencies attended and commented on the Plan. These County agencies included Department of Permits, Approvals, and Inspections, Development Plans Review Section, Real Estate Compliance Section, Zoning Review Office, Department of Planning, and Department of Environmental Protection and Sustainability. Peter Max Zimmerman, Esquire of the Office of People's Counsel also participated in the hearing.

Each of the representatives from the County agencies recommended approval of the Plan. The representatives indicated to the Hearing Officer that the Plan addressed any and all comments by the agencies. Specifically, Lynn Lanham, of the Department of Planning, testified that the Plan satisfied the performance standards of the R.C.7 zone pursuant to Baltimore County Zoning Regulations §1A08.6.C ("B.C.Z.R.").

The evidence before the Hearing Officer was that the Property, totaling 229 acres+/-, consisted of two parcels: Parcel 5 (228.315 acres +/-) and Parcel 551 (1.5 acres +/-). The Plan further separated Parcel 5 into 195.1 acres+/- identified on the Plan as "Parcel 'A' – Reserved" and 30 acres+/- for 9 lots. With regard to Parcel A, the testimony before the Hearing Officer by David Thaler, P.E., CR Golf's engineer, was that the use of Parcel A had not been determined. The Plan also showed a 10th lot on Parcel 551 based on the premise that Parcels 5 and 551 could be segregated for the purpose of density calculation.

After hearing argument from People's Counsel and the Protestants that Parcel 551 should be considered part of the overall subdivision and not segregated for density calculations, the Hearing Officer agreed. He found that Parcel 551 was an integral part of the subdivision. To support his decision, the Hearing Officer noted that language on the original Plan (Dev. Ex. 1A) which described Parcel 551 as being "for illustrative purposes only" and "not part of this

Development Plan" were stricken on the redlined Plan (Dev. Ex. 1B). The Plan actually characterized Parcels 5 and 551 as the "tract."

Given that the BCZR uses the word 'tract' for the purpose of calculating density, the Hearing Officer reasoned that the entire "tract" should be aggregated to calculate density. He concluded that the entire 229+/- acre tract yielded 9 dwelling lots total, or 8 lots and potentially another permitted use.

The other concern raised at the hearing by People's Counsel and the Protestants was that Parcel A could, at a later time, be put to another permitted use (such as a church) without the opportunity for a public hearing. The Hearing Officer found this point to be a valid concern and provided in his Order that any new or different use specified for Parcel A would be subject to further review as a material amendment to the Plan such that a public hearing would be required.

The remaining issue raised by the Protestants at the hearing pertained to the grandfathering of the Plan from the County's Tier IV designation under the Sustainable Growth and Agricultural Protection Act ("SGA"). A Tier IV designation would limit the property to a minor subdivision (maximum 3 lots). The Hearing Officer found that he was not required or authorized to resolve this issue and that his authority was limited to determining whether the Plan complied with County development laws and regulations under BCC §32-4-229(b)(1) as well as with all other applicable laws or regulations of the County under BCC §32-4-114(a).

STANDARDS FOR HEARING OFFICER'S HEARING

Section 32-4-227 of the BCC sets out the general requirements for a Hearing Officer's hearing in evaluating a development plan. By taking testimony and receiving evidence, the Hearing Officer shall consider any unresolved comments or conditions that are relevant to the development plan under §32-4-228(a)(1).

In conducting the hearing, BCC, §32-4-228(b) provides that the Hearing Officer: (i) shall conduct the hearing in conformance with Rule IV of the Zoning Commissioner's rules (BCZR, Appendix B); (ii) shall regulate the course of the hearing as the Hearing Officer considers proper, including the scope and nature of the testimony and evidence presented; and (iii) may conduct the hearing in an informal manner.

Section 32-4-229(b)(1) of the BCC requires that the Hearing Officer grant approval of a development plan "that complies with these development regulations and applicable policies, rules and regulations adopted in accordance with Article 3, Title 7 of the Code, provided that the final approval of a plan shall be subject to all appropriate standards, rules, regulations, conditions, and safeguards set forth therein." Thus, the BCC mandates that the Hearing Officer determine whether the plan is in compliance with existing County standards and safeguards. The Hearing Officer is not affiliated with any Baltimore County agency. He or she acts independently in reviewing the development plan.

As noted by the Hearing Officer in his decision, the role of each reviewing County agency is to review the development plan and to determine whether or not the plan complies with all applicable Federal, State and/or County laws and regulations.

STANDARD OF REVIEW – BOARD OF APPEALS

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

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.

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 policy-making 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).

ISSUES

In this appeal, CR Golf contends that the appeal should be dismissed at the outset because the Protestants did not properly plead or preserve in their Petition for Appeal the alleged error made by the Hearing Officer (i.e. that he lacked jurisdiction to decide the grandfathering issue under the SGA). Second, CR Golf argued, in the alternative, that if this Board does not dismiss the Petition, then we should find that the Hearing Officer did have not have jurisdiction to decide whether or not the plan was grandfathered under the SGA. Third, CR Golf contends that if this Board decides that the Hearing Officer had jurisdiction to decide the grandfathering issue, then CR Golf timely filed a preliminary plan under the SGA, which was properly grandfathered, and the development plan for the 8 lots should be approved.

OPINION

By way of background, the Maryland General Assembly enacted the SGA in 2012. It became effective on July 1, 2012. The overarching goal of the SGA "is to limit the disproportionate impacts of large subdivisions on septic systems on farms, forest land, streams, rivers and Chesapeake and Coastal Bays." The SGA achieves this goal by requiring local

jurisdictions to map their respective territories by classifying them in one of four growth tiers. The growth tiers regulate the size of residential subdivisions and the sewerage systems that may be implemented. Tier IV is the most restrictive growth tier. Absent a special exemption, residential major subdivisions are prohibited within this tier; only minor residential subdivisions are permitted in Tier IV areas. The SGA is codified at MD Code Ann., EN, § 9-206.

Specifically, the grandfathering provision exempts a planned residential subdivision from the development limitations imposed by the SGA if a 'preliminary plan' was filed by October 1, 2012. Subdivisions which have not filed a plan by October 1, 2012 are subject to the strict requirements of the SGA. Specifically, the grandfathering provision of the SGA states that "an application for approval of a residential subdivision" is exempt from the growth-tier requirements 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.

The record in this case contains 3 documents which are pertinent to the grandfathering issue:

> 1) August 24, 2012 Preliminary Plan for 85 homes.
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> 2) August 27, 2012 Transmittal letter from DS Thaler, PE submitting the August 24, 2012 Preliminary Plan to the County.
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> 3) August 27, 2012 Letter from Arnold Jablon of Department of Permits and Development Management acknowledging receipt of the preliminary plan submission and grandfathering the plan.

1. Did the Petition for Appeal Properly Preserve Grandfathering Issue under the SGA?

CR Golf argues that the only decision made by the Hearing Officer in regard to whether the Plan was grandfathered under the SGA was that he lacked jurisdiction to decide. In the Petition for Appeal, CR Golf contends that there is no mention of the Hearing Officer's lack-of-jurisdiction ruling and therefore, the Petition should be dismissed on its face for failing to articulate the Hearing Officer's error with 'reasonable particularity' pursuant to BCC, §32-4-281(b)(2)(i).

While we note that the Petition for Appeal does not use the word "jurisdiction," we find that the Petition for Appeal reasonably describes the issue about which the Protestants complain. We find that the Protestants raised exactly the same issue before the Hearing Officer that they have raised before this Board. The Hearing Officer mentioned in his Opinion and Order that the grandfathering issue was one of 3 'discrete issues' raised by the Protestants. (Hearing Officer's Opinion and Order p. 3).

We interpret BCC, §32-4-281(b)(2)(i) as a notice provision, the purpose of which is to put CR Golf and this Board on notice of the issues on appeal. This Board had no difficulty determining the issues as they were the same issues which CR Golf encountered below. Thus, we find that the Protestants met this standard and the grandfathering issue was properly preserved for appeal.

2. Did the Hearing Officer lack jurisdiction to decide the Grandfathering Issue under SGA?

CR Golf's second argument before this Board was that the Hearing Officer was correct in finding that he did not have jurisdiction to decide whether or not the Plan was exempted under the SGA. CR Golf highlights that the authority of the Hearing Officer is limited to determining whether the Plan complies with all development regulations and all other laws of Baltimore County as required under BCC, §32-4-229(b)(1) and 32-4-114(a).

Protestants point out that the County Council enacted the 4-Tier system as required by the SGA and incorporated those Tiers into the County Master Plan. The 4-Tier system affects the number of lots which a property can have. In this case, the Hearing Officer was deciding the number of lots that this Property could have. Thus, as we see it, inherent in deciding whether a development plan meets all County laws and regulations is determining whether, in this case, the Plan met the County Growth Tier Maps and the County Master Plan.

Moreover, both the preliminary submission and grandfathering approval letter were referenced in Andrea Van Arsdale's comments at the Concept Plan Conference on September 24, 2013 in Project No. VIII-886 and in her Development Plan Conference comments of March 19, 2014, the latter of which specifically note that the subdivision is exempt from Tier IV status. Based on these documents, it is clear that the Department of Planning considered as part of its review of the Plan, the grandfathering approval. Thus, by default, this issue was part of the Hearing Officer's review of the Department of Planning's recommendation.

We hold that the Hearing Officer should have considered the grandfathering issue, as can this Board, because administrative agencies are authorized to consider all issues, even constitutional issues involving the relationship of state and local law. Holiday Point Marina v. Anne Arundel County 349 MD. 190, 199-200 (1998); Prince George's County v. Ray's Used Cars 398 Md. 632, 650-52(2007). See Trinity Assembly of God v. People's Counsel 407 Md. 53, 86-101 (2008), affirming the CBA's decision that Baltimore County sign standards, as applied, did not violate the federal Religious Land Use and Institutionalized Persons Act (RLUIPA).

Similarly, the Chesapeake Bay Critical Area legislation ("CBCA") is a state regulation imposed upon the counties. Hearing officers address CBCA issues in regard to development

plan cases. While the State authorized the County Council to enact grandfathering provisions for CBCA as found in BCZR §103.5, the fact that the grandfathering provisions of the SGA are contained in the Maryland Code does not limit the Hearing Officer's authority because the Baltimore County Growth Tier Maps were enacted as a result of the SGA. Indeed, §9-206(b)(2) directs the submission to the 'local jurisdiction.'

Thus, while we find that the Hearing Officer's decision that he was not required or authorized to decide the grandfathering issue was in error, we hold that it was harmless and a remand is not necessary or appropriate because the Hearing Officer made findings of fact in his Opinion in regard to the submission and we agree with the Hearing Officer's ultimate decision to approve the Plan.

3. Should the Plan be approved?

Protestants contend that the Plan should not be approved because, under their interpretation of the SGA, it failed to meet the grandfathering requirements. They claim that the Plan was not timely filed and that the Plan failed to include the information required of a Baltimore County Concept Plan under BCC §32-4-211 *et seq.* The Protestants further contend that the County, through Arnold Jablon, did not have the authority to "grandfather" or "exempt" the Plan.

There was no dispute here that the Property is located within the County's Tier IV growth area and the Hearing Officer made note of that fact in his Opinion. (Opinion, p.4). The Protestants believe that the preliminary plan under §9-206 is actually a Concept Plan under BCC §32-4-211. Protestants then conclude that the Plan was not filed by the October 1st deadline based on a receipt for a Concept Plan dated October 5, 2012 (Prot. Ex. 1).

The Hearing Officer made a factual finding in his Opinion that the Plan was submitted on August 27, 2012. (Opinion, p.4). That date is referenced in both the transmittal letter from DS Thaler to the County and the exemption letter from the County signed by Arnold Jablon. The Hearing Officer also found that the Concept Plan was not filed until August of 2013. (Opinion, p. 5). In review of the record as a whole, we find that there was competent evidence to support the Hearing Officer's factual finding as to the August 27, 2012 filing date based on the exhibits. (People's Council Ex. 1).

The SGA's grandfathering provision requires a developer to submit a "preliminary plan" to "*the local jurisdiction* that includes, at a minimum, the preliminary engineering, density, road network, lot layout, and existing features of the proposed site development." MD. Code Ann., EN § 9-206(b)(2)(i). In reviewing the evidence before the Hearing Officer, Mr. Jablon acknowledged in his letter that the Plan was submitted to the County before the October 1, 2012 deadline and that it included all of the State-mandated elements.

A concept plan requires additional information (landscaping, noise, floodplains) that a preliminary plan under MD. Code Ann., EN §9-206(b)(2)(i) does not. A preliminary plan provides information relevant to on-site sewage disposal systems. A concept plan depicts a general idea about an entire project. Additionally, the County was not authorized by the SGA to enact more stringent requirements. To do so would be in conflict with State law. In reviewing the plain meaning of the grandfathering language, we find that the Plan requirements contained therein are unambiguous and limited to the 5 listed elements. MD Code Ann., EN, §9-206(b)(2)(i).

The Protestants also contend that since the County did not assign the submission a 'project number' that the Plan was not properly submitted by the deadline. We disagree. Our

review of the SGA's grandfathering provision is much broader. The grandfathering provision was intended to provide relief for developers who had already acquired property. There is no requirement in the SGA for the county to implement a particular filing system for submissions.

With regard to whether the Hearing Officer's decision to approve the Plan for 8 lots should be approved, we find that a review of all of the evidence before the Hearing Officer supports the approval. There was no evidence presented by the Protestants below, other than the arguments set forth herein, as to the merits of the Plan. Accordingly, the Hearing Officer's decision that CR Golf met its burden of proof was supported by competent evidence in the record.

In the Hearing Officer's Opinion and Order dated April 24, 2014, the Plan approval was subject to the following conditions:

1. Any future use or development of Parcel A (195.1Acs. +/- shall be deemed a "material amendment" of the Development Plan pursuant to BCC, §32-4-262.

2. The Developer shall submit within fifteen (15) days of the date hereof a revised Development Plan clarifying that Parcel 551 is included within the overall Castanea subdivision for purposes of residential density calculation, and the density calculations shown on Note 6 of the Development Plan (Dev. Ex. 1B) shall be revised to reflect that Parcel 551 does not provide density for one dwelling unit.

In reviewing the Hearing Officer's decision, the evidence and argument presented to him, we agree that these conditions are important, were well-reasoned based on the evidence, and that these conditions should be incorporated into our Order approving the Plan.

ORDER

THEREFORE IT IS, it is this 24th day of September, 2014, by the County Board of Appeals of Baltimore County,

ORDERED, that CR Golf's Motion to Dismiss the Petition for Appeal for failure to articulate the Hearing Officer's error with reasonable particularity is hereby **DENIED**; and it is further,

ORDERED, that the Hearing Officer erred in ruling that he was not required or authorized by BCC 32-4-229(b)(1) and 32-4-114(a) to decide the grandfathering issue under the SGA but that such error was harmless and does not require a remand because the Hearing Officer made findings of fact in regard to the issue and this Board agrees with the Hearing Officer's decision that the Plan should be approved; and it is further,

ORDERED, that the decision of the Hearing Officer approving redlined development plan known as "Castanea FKA 11700 Falls Road" be, and it is hereby, **AFFIRMED** subject to the conditions set forth in the Hearing Officer's Order which read as follows:

1. Any future use or development of Parcel A (195.1Acs. +/- shall be deemed a "material amendment" of the Development Plan pursuant to BCC, §32-4-262.

2. The Developer shall submit within fifteen (15) days of the date hereof a revised Development Plan clarifying that Parcel 551 is included within the overall Castanea subdivision for purposes of residential density calculation, and the density calculations shown on Note 6 of the Development Plan (Dev. Ex. 1B) shall be revised to reflect that Parcel 551 does not provide density for one dwelling unit.

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 Chair

David L. Thurston

Richard A. Wisner