

IN THE MATTER OF
GGCV REAL ESATTE, LLC
AKA FOUNDRY ROW
HOH CASE NO.: 03-0496
10100 Reisterstown Road

3rd Election District
2nd Councilmanic District

RE: FINAL ACTION ON A DEVELOPMENT
PLAN

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CBA-14-018

* * * * *

OPINION

This matter comes before the Board as an appeal of the Administrative Law Judge's ("ALJ") Development Plan Opinion and Order dated October 16, 2013 and ALJ's Order on Motion for Reconsideration dated November 5, 2013 pursuant to BCC § 32-4-281. At issue is the Development Plan prepared on behalf of GGCV for the proposed mixed use retail/office development on Reisterstown Road in Owings Mills. The Project is known as Foundry Row. Foundry Row sits on 49.5 acres of land and the Developer has proposed a mixed use retail, office and restaurant project to be developed. The property was rezoned in 2012. The rezoning, from an industrial/manufacturing to a commercial zoning classification through the enactment of Bill No. 54-12, was approved by the Baltimore County Council on August 6, 2012, and effected the subject property as well as a number of other properties in the County's Second Councilmanic District. Opposed to the rezoning and contemplated development, the Appellants challenged the development. The Honorable John E.

Beverungen, Administrative Law Judge for Baltimore County held eight days of hearings from July 10, 2013 to September 24, 2013. During the eight days of hearings GGCV presented its Development Plan in accordance with the County procedures established in Article 32, Title 4 of the Baltimore County Code ("BCC"). During this process Painters Mill Executive Office Park Partnership, LLP and 100 Painters Mill, LLC by their attorneys Stuart Kaplow of Stuart Kaplow, P.A. and Garrison Realty Investors, LLC by its attorney G. Scott Barhight of Whiteford Taylor and Preston. L.L.P challenged the development. On October 16, 2013, the ALJ issued an opinion approving the development and on November 5, 2013, issued a subsequent opinion denying the motion for reconsideration.

Mr. Kaplow and Mr. Barhight filed a timely appeal of this matter to this Board. The Appellants asserted that the ALJ made sixteen errors in approving the Development Plan. Additionally, on December 11, 2013 the Appellants petitioned this Board to allow them the opportunity to produce additional evidence by requiring testimony from representatives of the State Highway Administration ("SHA") who had not appeared to testify in response to Appellants' subpoenas in the hearing before the ALJ. On January 2, 2014 the Board held a public deliberation on the Motion and on January 8, 2014, the Board refused this request, reasoning that if such additional testimony was later deemed warranted, it would be an issue to be remanded to the ALJ.

On January 8, 2014 the Board held a on the record hearing to adjudicate the

claims made by Appellants. At the hearing, Mr. Lawrence E. Schmidt and Mr. David Gildea of Smith, Gildea and Schmidt represented GGCV Real Estate, LLC.

STANDARD OF REVIEW FOR THE ALJ

Numerous representatives of the various Baltimore County agencies, who reviewed the Development Plan at issue, also attended the hearing before the ALJ, including the following individuals from the Department of Permits, Approvals and Inspections (PAI): Darryl Putty, Project Manager, Dennis Kennedy (Development Plans Review [DPR]), LaChelle Imwiko, Real Estate Compliance, and Joseph C. Merrey (Office of Zoning Review). Also appearing on behalf of the County were Glenn Shaffer from the Department of Environmental Protection and Sustainability (DEPS), and Jenifer Nugent, from the Department of Planning (DOP).

The role of the reviewing County agencies in the development review and approval process is to perform an independent and thorough review of the Development Plan as it pertains to their specific areas of concern and expertise. The agencies specifically comment on whether the plan complies with all applicable Federal, State, and/or County laws, policies, rules and regulations pertaining to development and related issues. In addition, these agencies carry out this role throughout the entire development plan review and approval process, which includes providing input to the ALJ in writing and/or in person at the hearing. Continued review of the plan occurs after the ALJ's Hearing during the Phase II review of the project. This continues until a

plat is recorded in the Land Records of Baltimore County and permits are issued for construction.

Pursuant to §§ 32-4-227 and 32-4-228 of the B.C.C., which regulate the conduct of the ALJ's Hearing, the ALJ is required first to identify any unresolved comments or issues as of the date of the hearing. At the hearing, each of the Baltimore County agency representatives identified above, indicated that the redlined Development Plan addressed any and all comments submitted by their agency, and they each recommended approval of the plan.

STANDARD OF REVIEW FOR THE BOARD OF APPEALS OF ALJ DECISION

The instant appeal is governed by BCC § 32-4-281. In part, BCC § 32-4-281 states:

BCC § 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.

DECISION

At the hearing on January 8, 2014 the Appellants argued that the Board must reverse the approval of the final Development Plan as it did not comply with Baltimore

County development regulations (32-4-201 et seq.) and asserted that the Developer failed to meet its burden of proof under 32-4-229. The Appellants organized their objections into sixteen separate arguments:

1. The "redlined" Development Plan was not sealed properly and does not comply with County Development Regulations.

The Appellants main argument for this issue is that the redline changes that were made during the hearings below were made after the proper seal was placed on the Development Plan. We disagree that the subsequent redline changes by Developers expert somehow voided the plan. The ALJ' s analysis was correct when he opined that "While it does not occur in every case, I would venture to say that similar amendments are made to plans in most development hearings, often in response to a community or County concern raised during the hearing. This is accepted practice in Baltimore County, and is reflective of the fact that the development process is ongoing and plans change as a project moves through the process and comes closer to actual construction. The Plan as modified is in fact sealed, and under State law Mr. Pieranunzi is responsible for the representations contained thereon. Md. Bus. Occ. & Prof. Code Ann, § 9-501. As such, this point cannot be the basis for Plan denial". (Page 23 of ALJ Opinion). We conclude that the Plan was properly sealed in accordance with BCC § 32-4-222(c), which reads:

...a Development Plan must be "signed and sealed by a surveyor, engineer, architect, or landscape architect, as appropriate, indicating that the plan is accurate and has been prepared in compliance with this title

and any regulations adopted under the authority in this title". The evidence is uncontroverted that the Development Plan was sealed by Michael Pieranunzi, a registered landscape architect and vice president with Century Engineering. Mr. Pieranunzi was in fact the same person who made the redline changes.

The point of the BCC § 32-4-222(c) requirement that the representations shown on the Development Plan have to be sealed is to make sure the person who sealed the plan has attested to the accuracy of the information contained therein. Redline changes made under oath at the hearing ensure similar accountability, particularly when they are made under oath by the same certified professional who sealed the plan.

- 2. The Developer has attempted to hide the existing 241,603 square foot warehouse on the Development Plan which makes the Plan not approvable.**

The Appellants contend that the Developer has attempted to hide the existing 241,603 square foot warehouse on the Development Plan. They further assert the analysis of the plan should include the warehouse which would significantly alter the traffic and parking analysis. We find this argument without merit. The Developer properly argued that there are no plans for alteration or utilization of the vacant warehouse at this time and that another public hearing would be required if there were any change in the vacant warehouse use that would generate additional vehicle trips and/or the need for off-street parking.

The ALJ carefully considered this issue and found no deception by the Developer. The ALJ was correct in concluding that a proper condition be placed on the

property so future development of the vacant warehouse be subject to all County Laws and Regulations. The ALJ's approval of the Plan imposed the following restriction:

"Any future improvements to, or change in use of, the 'vacant' warehouse shown on the Plan as 'Building J' shall be deemed a 'material amendment' of the development plan and must comply with the B.C.C. requirements concerning such amendments..."

We find this proper and sufficient.

3. The current Development Plan could not be approved when GGCV is a defendant in litigation pending in the U.S District Court for the District of Maryland.

Litigation pending in the U.S. District Court for the District of Maryland seeks to enjoin the demolition of the existing cogeneration energy plant, which currently sits on the proposed site. The Appellants contend that the Development Plan at issue cannot go forward with this litigation pending. The Appellants have asserted this claim in the incorrect forum. Neither this Board nor the ALJ is currently restricted in approving the Development Plan by a Court Order or Injunction of the U.S. District Court. If a judge of the U.S. District Court finds that the consideration of the Development Plan should be delayed or deferred, an order would be issued and the Developer would be mandated to comply with that Court's order. Without an order from that Court precluding Development Plan approval, neither the Hearing Officer nor the Board is enjoined from approving the plan. The Board's authority, like the Hearing Officer's, is statutorily created. Neither has the authority to stay the Development Plan approval

absent a judicial order to that effect.

4. The Development Plan should not have been approved because of an ingress and egress right of way that is not owned by the Developer.

The Appellants further assert that the Development Plan was improperly approved as key ingress and egress access was not legally obtained by the Developer. Another pending lawsuit is cited (Garrison Realty Investors, LLC v. St. Thomas Joint Venture Circuit Court Case No. 03-C-13-006356). Appellants argue that as long as this suit is pending and ingress and egress ownership rights are in question concerning a private drive which constitutes only one method of access to the property that the Development Plan is illegal or invalid. We disagree. The ALJ correctly found that the development complied with the applicable rules and regulations despite the Appellants' arguments regarding this access issue.

As shown on the Development Plan, there exists to the rear of the warehouse building a service road (on the subject property). This road provides a link from the subject property to a private access road which serves adjacent commercial properties. If left open, a link between commercial properties would be available and traffic could be dispersed and potentially reduced on the adjacent public streets. However, the Appellee's expert, Traffic Engineer, Mickey Cornelius' traffic studies did not utilize the service road nor the access road to which it leads in formulating his conclusions. As he testified, utilizing this means of access to the site was inappropriate given the pending litigation. In particular the record reflects the following relevant testimony:

A. Basically it was our understanding that there was this litigation, and the developers of Foundry Row may or may not have access and do not necessarily control that access. We basically identified that in this letter and said because of that, we are not going to assume that connection and did not assume access to that road.

Q. So in developing the conclusions as to the traffic patterns and how traffic would flow and whether traffic would get taken off of Reisterstown Road or Painters Mill Road because of the use of this road, you determined not to use that in any of your base assumptions. Is that a fair statement?

A. Yes, it is.

T. 8/2/13, p. 76

We conclude that, since access using this right of way was not considered, the pending litigation is irrelevant to the analysis as to whether the Development Plan complies with Baltimore County Laws and Regulations.

5. The Development Plan fails to comport with Front Yard Setback requirements of the Baltimore County Zoning Regulations (BCZR).

The Appellants argue that the Developer's engineer was shown a photograph of "the front" of an adjoining bank building and that the Development Plan does not comply with the front yard setback requirements and that the "redline" change to the Plan made during the hearing is a clear violation of the regulations. However, the Appellants cite no authority supporting this position. We have determined the ALJ's findings are supported by competent, material and substantial evidence. The relevant regulation is BCZR § 303.2. It provides:

the front yard depth of any building hereafter erected shall be the average of the front yard depths of the lots immediately adjoining on each side, provided such lots are improved with permanent commercial buildings constructed of fire-resisting materials situate within 100 feet of the joint side property line, but where said immediately adjoining lots are not both so improved, then the depth of the front yard of any building hereafter erected shall be not less than the average depth of the front yards of all lots within 100 feet on each side thereof which are improved as described above.

Developer's Counsel, Mr. Schmidt correctly argues that the pad site at issue here, Building L, was originally shown to face Reisterstown Road. The expert at the hearing, Mr. Pieranunzi's, uncontroverted testimony to the effect that the front yard for that building complied with all BCZR Regulations and in particular BCZR § 303.2.

6. The Development Plan does not comply with the applicable parking and loading regulations.

The Appellants assert there are numerous deficiencies with the parking as shown on the Plan. In particular they argue that the Plan does not property comply with COMAR 05.02.02 which mandates that a minimum of 20 handicap parking spaces be required and the Plan is illegal as it shows that reserved or restricted spaces are shared.

We conclude that the ALJ's decision on this issue was correct. As is customary with Development Plans the initial Development Plan is required to provide certain development information such as the "[p]roposed lot or building layout with parking and loading areas." BCC § 32-4-224(a)(1). Conspicuously absent from this provision is a requirement that handicapped parking or loading areas for uses which are not currently being proposed be noted on the Development Plan. This issue will be

properly adjudicated during Phase II of Plan review as contemplated by the COMAR regulations, BCC § 32-4-408(a) and BCZR § 409.9. Further, no use and occupancy permit can be issued without parking which complies with the both the County's parking regulations and the ADA regulations.

7. The Development Plan must be reversed because the street systems will not be safe or convenient.

The Appellants assert that the Plan fails to meet the requirements set forth in BCZR 32-4-405(a) which provides, "[a] street system shall provide safe and convenient vehicular circulation, both within the tract and between the tract and neighboring properties or particular traffic generators."

The ALJ carefully considered this issue and opined that provision is difficult to analyze because the terms "safe" and "convenient" are not defined in the BCC or BCZR. HOH decision dated 10/16/13, p. 18. However, the ALJ carefully considered testimony of Dennis Kennedy (Baltimore County) and Steve Foster (SHA) and concluded that "many of the particulars that will impact traffic safety -- such as design and placement of traffic signs, and the engineering for the roadways themselves -- will occur in a subsequent phase of the development process", Most importantly, the ALJ properly concluded that County and SHA witnesses did not express concerns that the proposal presents an unsafe condition. There was no evidence to the contrary presented. If the agencies give recommendations of approval of the Development Plan then it becomes the Appellants' burden to produce evidence rebutting the agencies' recommendations.

The Appellants produced no lay or expert testimony that the proposed traffic system is unsafe. Therefore, based upon the testimony of Mr. Kennedy and Mr. Foster, the ALJ correctly found that the Development Plan complied with all County Laws and Regulations with respect to this issue.

The ALJ also properly decided the issue of whether or not the street system is convenient. He concluded that the County's basic services mapping and level of service ("LOS") analysis for signalized intersections is an appropriate barometer in considering development. He further noted that construction should be halted only when an intersection functions at a LOS of "E" or "F" under BCZR § 4A02.4.D. None of the intersections in the vicinity is rated at LOS of "E" or "F. The Developer is also making substantial improvements to the intersection at Reisterstown Road and Painters Mill Road. Once these improvements are made this intersection will operate better than it does under current conditions. T. 9/16/13, p.161-162.

8. The Development Plan does not comply with the applicable regulations and a condition that compliance with ADA regulations that was required is not sufficient.

The Appellants also assert that the Development Plan contains flaws related to traffic that make the Development Plan not properly approvable, include the failure to provide for and to take into account the necessary pedestrian crossings at the intersection of Painters Mill Road and Reisterstown Road, as well as at the two other signalized intersections providing access to the development. The Appellants also

argues that the SHA made it clear that improvements must include pedestrian ADA compliant accommodations. The Appellant also asserts that mandated Synchro analysis performed as part of the Developer's Traffic Impact Study did not properly account for those pedestrian crossings. When proper pedestrian phasing is added to the analysis, the level of service is less than that which is required by the SHA and a bar to Development Plan approval.

We have determined that the ALJ's conclusions with respect to the pedestrian access issues and compliance with the Americans with Disabilities Act (ADA) regulations are supported by evidence and are proper. The Developer properly argues that there is no authority that supports the proposition that requires ADA compliant intersections to be shown on a Development Plan. BCC § 32-4-224(a)(2) provides that the Development Plan shall contain the "[p]roposed street layout with existing and future paving and right-of-way widths indicated, including pedestrian walkways." Conspicuously absent from this provision of the required Development Plan information is a requirement that ADA compliant walkways be shown.

The ALJ properly decided that compliance with ADA regulations will be mandated before use and occupancy permits will be issued. To remove any doubt the ALJ properly imposed as Condition 3: that the "Developer must comply with Title II of the ADA concerning all roadway, sidewalk and pedestrian access issues associated with the project". The ALJ also addressed this issue in the body of his decision. He found

that compliance with ADA regulations “will be determined in a subsequent phase of the development process, when additional details and plans will be evaluated by State and County officials.” HOH decision dated 10/16/13, p. 21.

The ALJ also diligently considered all issues pertaining to the pedestrian phasing analysis utilized in the traffic impact study. The ALJ decided these issues after listening to two expert witnesses. Mr. Cornelius’ testified on behalf of the Developer and Ann M. Randall, an expert transportation planner, testified on behalf of the Appellants. The ALJ found Mr. Cornelius testimony more credible and persuasive than Ms. Randall’s. HOH decision dated 10/16/13, p. 19. As a result, he concluded that when performing the traffic studies he did not need to incorporate the pedestrian crossing or pedestrian phasing analysis. The record reflects that Mr. Cornelius’ testimony was supported by the County and SHA representatives’ testimony that the plan complied with their requirements. This Board is unwilling to substitute its judgment for the ALJ’s when the ALJ’s decision is supported by competent, material and substantial evidence.

9. The Developer has not shown that the road system improvements required by the SHA approved Traffic Impact Study haven been completed before occupancy permits have been completed, thus the road system will not be safe and convenient.

The issue of the timely completion of roadway improvements in conjunction with the proposed development were obviously considered by the ALJ in Condition 1 of his Opinion, which states “all roadway improvements to be completed by Developer

and shown on the Development Plan must be completed prior to the issuance of a Use and Occupancy permit for the development or any portion thereof.”

The Appellants contend that despite this condition, the Developer is required to complete the SHA’s conceptual road improvements prior to occupancy. In the hearing before the ALJ, testimony was given by both Baltimore County and SHA representatives that the development plan could be approved without SHA improvements to the general area in place. As was noted by the ALJ in his opinion, no testimony to the contrary was given. As it is not the role of this Board to second guess the finder of fact in the hearing before the ALJ, we don’t not find that the ALJ decision in regards to allowing the Development to be approved without the roadway improvements in place to be unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or arbitrary or capricious.

10. **Steve Foster, Chief of the Maryland State Highway Administration Management Division, did not do any review of the Traffic Impact Studies and admitted on the witness stand that he does not know anything about the specific review and analysis performed for Foundry Row. Additionally, the Protestant never had an opportunity in the public quasi-judicial hearing to review the basis upon which Foster concluded the plan was approved.**

Appellants argue that they were denied the opportunity to challenge the SHA’s review of the Traffic Impact Study due to the ALJ’s refusal to allow them to extend the proceedings to subpoena additional witnesses and information from the SHA.

Appellants note that Steve Foster, chief of the Maryland State Highway

Administration Access Management Division, who testified on behalf of the SHA, did not personally review the Traffic Impact Studies at issue and did not have personal knowledge of the Foundry Row proposed development.

Appellants contend that the SHA failed to comply with a lawful subpoena, and after the adjudication of a Motion to Quash, SHA further refused to comply with the order of the ALJ denying that Motion. Appellants were then forced to file a Petition for Writ of Mandamus in the Circuit Court for Baltimore County. After a hearing on September 19, 2013, Judge John J. Nagle, III, granted the Appellants' Writ of Mandamus and ordered the SHA to produce the subpoenaed witnesses and documents.

On the final day of the hearing (September 24, 2013) two employees from the SHA (Kelly Kosino and Cedric Ward) provided testimony in response to a subpoena issued by Appellants' Counsel, which was upheld by Order of Circuit Court Judge John J. Nagle, III.

Ms. Kosino indicated that she worked in the Access Management Division of the SHA for most of the time during which she reviewed the Foundry Row project. Ms. Kosino stated that she is a licensed professional engineer, and that she reviewed all four of the traffic impact studies submitted by the Developer. The witness explained that the Critical Lane Volume ("CLV") methodology is a tool to measure how well an intersection works, and that Synchro is a modeling tool that would provide an idea of the efficiency and performance of a future roadway network. The witness stated that

she has conducted CLV analyses on many occasions, but has only worked with others in reviewing or conducting a Synchro analysis.

Ms. Kosino was shown a copy of the Development Plan, and indicated that she had not, prior to the hearing, seen or reviewed the document, nor could she state whether anyone at SHA had reviewed the Plan. The witness explained that the concept of "lost time" at signalized intersections involves the analysis of the brief period of time in which vehicles do not move after the traffic signal has changed. Ms. Kosino indicated that she reviewed in a general fashion the Synchro analysis in this case, but added that she could not answer any questions concerning a lost time element in that analysis.

Ms. Kosino was next shown several letters authored by the SHA expressing concern with the traffic study submitted by Mr. Cornelius and the Traffic Group. Ms. Kosino indicated that the Developer has been coordinating with the SHA, and she believed that each comment raised in the referenced correspondence had been resolved. In response to a question from Developer's Counsel, Ms. Kosino emphasized that Steven Foster was at all relevant times her supervisor, and that her job was to assist in providing him with the necessary background and comments which were incorporated into the SHA response letters bearing his signature.

The second SHA witness, who was also the final witness in the case, was Cedric Ward. Mr. Ward testified that he is the Director of the SHA Office of Traffic and Safety,

and by reference to an internet printout (Protestants' Exhibit 26) he described in general terms the functions of that office. Mr. Ward confirmed that he did not review any of the traffic impact studies in this case, and that he also could not provide any comment on the CLV or Synchro analysis that was performed.

The problems encountered by the Appellants with the SHA are somewhat attributable to the lack of a codified formal discovery process for matters before both the ALJ and the Board of Appeals. The inability of parties to request production of documents and take depositions prior to hearings often creates procedural difficulty. In this matter, the problem was further compounded by the SHA's unwillingness to cooperate with the ALJ's subpoena and the questionable compliance with the order of Judge Nagle in conjunction with the Writ of Mandamus. However, the issue before the Board regarding this matter is not whether the SHA complied with the Order of the Court, but rather if the ALJ was within his discretion to close the hearing after the eight days of testimony without allowing the Appellants to question a representative from SHA, who the Appellants deemed appropriate to answer their questions.

As noted by the Appellee, Rule L of the Rules of Practice and Procedure before the Zoning Commissioner/Hearing Officer of Baltimore County is entitled "Nature of Proceedings." It provides that:

[p]roceedings before the Zoning Commissioner¹ are quasi-judicial in nature. The Zoning Commissioner will not be bound by the technical rules

of evidence, and such proceedings before him will be guided, although not bound, by the Administrative Procedure Act, State Government Article, § 10-213 et seq., of the Annotated Code of Maryland.

The Administrative Procedure Act, which operates as a guide to the Hearing Officer, provides that he “may exclude evidence that is: (1) incompetent; (2) irrelevant; (3) immaterial; or (4) unduly repetitious.” Administrative Procedure Act (“APA”), State Government Article, § 10-213(d).

This rule is akin to Maryland Rule 2-403 **Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

The ALJ heard eight days of testimony in this matter from various experts and representatives from County and State agencies in order to make a determination as to whether the development complied with the applicable rules and regulations. In refusing to allow the Appellants the opportunity to seek additional witness from the SHA, the ALJ concluded that sufficient evidence had been elicited for him to make his decision.

At the conclusion of the hearing, the ALJ acknowledged the record was being closed despite the fact that “[t]he protestants wanted somebody to be able to speak to, for lack of a better word, the minutia or nuts and bolts of the Synchro and CLV

analysis.” T. 9/24/13, p. 93. The ALJ further commented, “I wrote in the order on the subpoena that I believed I would have sufficient information to make a decision. I still am of that opinion.” T. 9/24/13, p. 97.

While it is of course within the right of the Appellants to call witnesses, it is also within the right of the ALJ to determine the relevance of testimony and when enough testimony has been heard. At the root of the issue of whether further testimony was necessary from representatives of the SHA, was the dispute over the methodology used in performing the Traffic Impact Study. Without going into great scientific detail, Appellants’ expert, Ms. Randall testified as to the alleged shortcomings she found with the study completed by Developer’s expert, Mr. Cornelius. The Appellants sought to further explore these alleged shortcomings with relevant personnel from the SHA. It is clear from the ALJ’s opinion that he found Mr. Cornelius to be more credible. The ALJ found that Ms. Randall provided no reports or written data to support her conclusions and gave greater weight to Mr. Cornelius’s testimony which was corroborated by County and SHA representatives. With County agencies and the SHA recommending the approval of the Development Plan, it becomes the Appellants’ burden to produce evidence rebutting the agencies’ recommendations. People’s Counsel v. Elm Street Dev., Inc., 172 Md.App. 690, 703 (2007). Consequently, the Appellants were free to have their own expert complete a full Traffic Impact Study to controvert Mr. Cornelius’ findings and the SHA’s subsequent approval. Instead, Ms. Randall was called to challenge the

methodology of Mr. Cornelius' study, which the ALJ did not find to be persuasive.

Despite the less-than-full cooperation given by the SHA in regards to the ALJ's subpoena and Judge Nagle's Order, it was within the discretion of the ALJ to decide when he had heard enough testimony to make a proper determination regarding the proposed development. The ALJ has clearly articulated the rationale for his finding and has provided detailed reasoning on how he judged the credibility of the witnesses who testified regarding the issue of the Traffic Impact Study. Based on this, this Board will not substitute its judgment of the witness and weight of the evidence for that of the ALJ, and accordingly finds that the ALJ was within his discretion in closing the hearing and that the Appellants were not denied due process.

11. Baltimore County government witnesses at the hearing before the ALJ were clear that County government had not yet completed its review of the County required Traffic Impact Study.

Appellants contend that the County had not yet completed its review of the Traffic Impact Study. Citing the testimony of certain County employees, the Appellants contend that Baltimore County has not completed its review of the 4th revised traffic study, and that the Plan must therefore be disapproved. Kristoffer Nebre, an engineer employed by Baltimore County, stated that he only "skimmed" through the 4th study, and that he anticipated he will review and comment on same. Mr. Carski also confirmed that Mr. Nebre had not yet completed review of the 4th study, identified as Developer's Exhibit 20A.

However, as explained in the ALJ's Opinion, Mr. Carski also testified that during a meeting at the end of July 2013 with DPW Director Edward C. Adams, Jr., all in attendance agreed that the improvements to Painters Mill were sufficient and that the Department of Public Works continues to recommend approval of the Plan. The Appellants further contend that no evidence was presented establishing that Mr. Kennedy and/or Mr. Adams ever reviewed the traffic studies prior to making these recommendations. As reasoned by the ALJ in his opinion, the County agencies have no such evidentiary requirement. Under Maryland law, a government employee is presumed to have properly performed his duties, and while county agencies must review and comment on development proposals, they need not provide a detailed explanation or rationale for same. *People's Counsel v. Elm Street Dev., Inc.*, 172 Md. App. 690 (2007). It is the Appellants' burden to rebut this presumption, and Mr. Adams could have been called as a witness and cross-examined on this issue, but he was not. Mr. Kennedy testified he in fact did review the traffic studies in this case. The ALJ's decision that the review was properly completed was clearly supported by competent, material and substantial evidence.

12. The Traffic Impact Study is flawed, including that the 'Background conditions' analysis is not rationally based.

The Appellants, both during the hearing before the ALJ and in their argument before this Board have taken issue with the basis of the analysis used to perform the Traffic Impact Study. Specifically, as to this issue, the Appellants contend that the

Developer's expert, Mr. Cornelius did not consider the appropriate "background traffic" when performing his analysis.

As is clear from the record before the ALJ, a significant amount of lay and expert testimony was given regarding the issue of "background conditions" and when and how they were determined for use in Mr. Cornelius' study. The ALJ heard this testimony and concluded that the appropriate background traffic was considered. Again the Board will not substitute its own judgment for that of the Hearing Officer who was in the best position to evaluate the witnesses and evidence presented. While the Appellants argue that the "background conditions" were not considered prior to February 3, 2012 and therefore not properly factored into Mr. Cornelius's analysis, based on the testimony, the issue is at least fairly debatable and it was within the ALJ's discretion to decide whose argument was more credible.

The Hearing Officer found that there was an abundance of factual testimony which supported the finding that the appropriate background traffic was considered by Mr. Cornelius, State and local governments, and the Appellants' arguments to the contrary were not convincing to the ALJ. HOH decision dated 10/16/13, p. 24-25. Absent a finding that this factual matter was not even fairly debatable, the Board cannot substitute its own judgment for that of the Hearing Officer. *Communications Workers of Am.*, 424 Md. at 433.

13. The Traffic Impact Study is also flawed because if the Developer had used the proper lane utilization factor such would create a deficient

level of service.

The Appellants argue that the Developer's expert failed to employ the proper lane utilization factor further invalidating his Traffic Impact Study. Mr. Cornelius testified that southbound Reisterstown Road presently has three lanes north of the Painters Mill Road intersection and two lanes south of that intersection. Presently, at the intersection, the right hand lane becomes a turn only lane onto Painters Mill Road and the remaining two lanes are through lanes. As part of the Developer's improvements, a third southbound lane will be added to Reisterstown Road in front of its property. Mr. Cornelius testified, that given these road improvements, it was appropriate to permit the far right lane to be converted to both a through lane and a turn lane. Although this conversion would not materially address the function of the intersection, Mr. Cornelius and SHA agreed that it was a practical, pragmatic and appropriate design. T. 9/16/13, p. 154-156. The Hearing Officer agreed with these conclusions by SHA and Mr. Cornelius. HOH decision dated 10/16/13, p. 16.

While conflicting opinions on this issue were offered by the Developer's expert, Mr. Cornelius and the Appellants expert, Ms. Randall, the ALJ found Mr. Cornelius' testimony to be more credible and persuasive. HOH decision dated 10/16/13, p. 19. In support of this assessment, the ALJ stated that he found that Mr. Cornelius, a licensed professional engineer, completed 4 traffic studies which set documented his conclusions. Ms. Randall, who is not a licensed professional engineer, did not produce

a report of her findings and therefore could not document the validity of her opinions. As the ALJ has clearly enunciated the reasoning for placing more credence in the testimony of Mr. Cornelius, this Board will not substitute its own judgment on review of a fairly debatable factual matter.

14. The Traffic Impact Study is further flawed because there is no rational basis for construction timing design year.

Appellants argue that the proposed year of completion for the proposed development is irrational. As there is no statutory authority for calculating whether a proposed year of completion is rational or irrational, the decision is to be made by the finder of fact. In addressing this issue in his opinion, the ALJ stated that "the Protestants merely argue that the proposed year of completion is irrational, but they provide no admissible evidence (i.e. from shopping center operators and/or commercial construction professionals) to establish that the design year was improperly or over-optimistically chosen." HOH decision dated 10/16/13, p. 25.

The ALJ based his decision upon the testimony of the Developer's witnesses. Ultimately, the ALJ found that the testimony established that "[t]he design year of 2015 was selected, and neither the State nor Baltimore County expressed concern with the issue." HOH decision dated 10/16/13, p. 25. The ALJ found no relevant testimony to the contrary. Consequently, this Board finds that the ALJ's decision on this issue was clearly supported by competent, material and substantial evidence and will not substitute its judgment for that of the fact finder.

15. That the Development Plan could not and should not have been approved without the site being located within a zoning district that permits the uses provided.

Appellants contend that since Baltimore County Council Bill 54-12, the Comprehensive Zoning Map for the second district, has been petitioned to referendum, that the necessary zoning for this project is not yet certain due to the pending litigation regarding the status of the petition for referendum.

Charter § 309(a) specifies, in pertinent part, that “a law or ordinance declared to be effective on a date earlier or later than forty-five (45) days after enactment, shall remain in force from the date of its enactment notwithstanding the filing of such petition.” The Baltimore County Council voted to approve Bill No. 54-12 by a 6-1 vote on August 28, 2012. Shortly thereafter, the County Executive signed the Bill. As provided in Section 5 of same, Bill No. 54-12 took effect on September 10, 2012, approximately 10 days after its enactment. At this time the ordinance is still in force.

Neither the Circuit Court nor the Maryland Appellate courts have issued a stay of the Development Plan approval. The pendency of judicial review of the Board of Elections’ determination has no bearing on the zoning or the ability of the County to approve the Development Plan at this time.

16. The three conditions imposed by the ALJ’s Opinion were not sufficient to address the impact of the proposed development.

The Appellants contend that the three conditions noted in the ALJ’s Opinion are not sufficient to address the impact of the proposed development. Without specificity

as to why this is, or what additional conditions the Appellant's deem necessary, this Board will not substitute its judgment for that of the ALJ on this issue and find that this argument does not warrant a reversal of the ALJ decision.

CONCLUSION

The Baltimore County Code provides that the "Hearing Officer shall grant approval of a development plan that complies with these development regulations and applicable policies, rules and regulations." B.C.C. § 32-4-229. After consideration of the testimony and evidence presented by the Developer and Protestants, the exhibits offered at the hearing before the ALJ, and confirmation from the various agencies that the development plan satisfies Baltimore County requirements; the ALJ found that the Developer had satisfied its burden of proof and, therefore, was entitled to approval of the redlined Development Plan. Upon Appeal, this Board has reviewed the findings of the ALJ in conjunction with B.C.C. § 32-4-281 and find that the decision of the ALJ did not exceed the statutory authority or jurisdiction of the Hearing Officer, involve an unlawful procedure, result from any other error of law, is unsupported by competent, material, and substantial evidence in light of the entire record as submitted is arbitrary or capricious. Consequently, the ALJ's Order approving the Development Plan is **AFFRIMED**, including the condition previously included in the ALJ's Opinion.

ORDER


THEREFORE, IT IS THIS 24th day of February, 2014, by the Board of Appeals of Baltimore County,


ORDERED that the decision of Administrative Law Judge, John E. Beverungen, dated October 16, 2013 and subsequent opinion denying the Motion for Reconsideration dated, November 5, 2013 be and the same are hereby **AFFIRMED**, subject to the following restrictions:

1. All roadway improvements to be completed by Developer and shown on the Development Plan must be completed prior to the issuance of a Use and Occupancy permit for the development or any portion thereof.
2. Any future improvements to, or change in use of, the "vacant" warehouse shown on the Plan as "Building J" shall be deemed a "material amendment" of the development plan and must comply with the B.C.C. requirements concerning such amendments.
3. Developer must comply with Title II of the ADA concerning all roadway, sidewalk and pedestrian access issues associated with the project.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**


Andrew M. Belt, Panel Chairman


David L. Thurston


Richard A. Wisner



Board of Appeals of Baltimore County

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February 24, 2014

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RE: *In the Matter of: GGCV Real Estate, LLC – Owner/Developer*
Case No.: CBA-14-018

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,

A handwritten signature in cursive script that reads "Sunny Cannington".

Krysundra "Sunny" Cannington
Administrator

Enclosure
Multiple Original Cover Letter

Please see attached Distribution List

c: Counsel for Owner/Applicant : Lawrence E. Schmidt, Esquire
Owner/Applicants : GGCV Real Estate, LLC

Counsel for Appellants /Protestants : Stuart D. Kaplow, Esquire
: G. Scott Barhight, Esquire

Appellants /Protestants : Painters Mills Executive Office Park Partnership, LLP,
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