



Board of Appeals of Baltimore County

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

September 1, 2015

Lawrence E. Schmidt, Esquire
David K. Gildea, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Michael J. Moran, Esquire
The Law Offices of Michael J. Moran
3407 Eastern Boulevard, Suite A
Baltimore, Maryland 21220

RE: *In the Matter of: Baltimore County, Maryland – Legal Owner
Merritt Pavilion, LLC – Developer/Contract Purchaser
(a/k/a Merritt Pavilion PUD)*

Case No.: CBA-15-015

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 Han".

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: See Attached Distribution List

Baltimore County, Maryland -- Legal Owner
Merritt Pavilion, LLC -- Developer/Contract Purchaser
(a/k/a Merritt Pavilion PUD)
Distribution List
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Paul Van Riley, AIA/Merritt Pavilion, LLC
Bradley S. Glaser/Vanguard Commercial Development, Inc.
Karen Cruz
Charles Schedit
Robert Staab
Eastfield-Stanbrook Community Association
Greater Dundalk Alliance
Joseph J. Ucciferro, P.E./Bohler Engineering, Inc.
Mickey A. Cornelius, P.E., PTOE/The Traffic Group, Inc.
Henry A. Leskinen/Eco-Science Professionals, Inc.
Charles Beeler
Ron Schaeffer
Wayne Sloboda
Patricia Paul
C.O. "Buddy" Staigerwald, Jr.
Jake Mohorovic
Alfred Greiser
Scott Collier
Devin Crum
Kevin Marron
John Weber
Nancy Bradley
Pamela Wood/The Baltimore Sun
Office of People's Counsel
Vincent J. Gardina, Director/DEPS
Arnold Jablon, Director/PAI
Darryl D. Putty, Project Manager/PAI
Jan Cook, Acting Development Manager/PAI
Edward C. Adams, Jr., Director/Department of Public Works
Lawrence M. Stahl, Managing Admin. Law Judge
John E. Beverungen, Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Jennifer Nugent/Department of Planning
Nancy C. West, Assistant County Attorney/Office of Law
Michael Field, County Attorney/Office of Law

IN RE: PLANNED UNIT DEVELOPMENT	*	BEFORE THE
BALTIMORE COUNTY, MD – LEGAL OWNER		
MERRITT PAVILION, LLC – DEVELOPER/	*	BOARD OF APPEALS
CONTRACT PURCHASER/PETITIONER		
(aka Merritt Pavilion PUD)	*	OF
7701 Wise Avenue		
12 th Election District	*	BALTIMORE COUNTY
7 th Councilmanic District		
	*	Case No.: CBA-15-015

* * * * *

OPINION

This case comes to the Board as an appeal of the final decision of the Administrative Law Judge (Beverungen, J.E.) dated May 1, 2015 granting an application for a Planned Unit Development (“PUD”) as proposed by Applicant Merritt Pavilion, LLC, (herein Petitioner). The appeal was heard before this Board on the record. A hearing was held before the Board on July 23, 2015 and was publicly deliberated on August 17, 2015. Petitioner was represented by Lawrence E. Schmidt, Esquire of Smith, Gildea & Schmidt, LLC. Appellants were represented by Michael J. Moran, Esquire of the Law Offices of Michael J. Moran, P. C.

PROCEDURAL HISTORY & BACKGROUND

This matter was previously before the Office of Administrative Hearings (OAH) for a hearing pursuant to § 32-4-227 of the Baltimore County Code (B.C.C.). In accordance with the development regulations codified in B.C.C. Article 32, Title 4, the Developer seeks approval of a Development Plan (the "Plan") prepared by Bohler Engineering, Inc., for a proposed mixed-use planned unit development (PUD). The proposed development is more particularly described and depicted on the eight-sheet Development Plan.

A Development Plan Conference (DPC) was held between the Developer’s consultants and various Baltimore County agencies, to consider the project. In this case, the DPC was held on

March 4, 2015. At the DPC, the Baltimore County agencies responsible for the review of the Development Plan submit written comments regarding the compliance of the Development Plan with the various regulations governing land development in the County.

The property was posted with the Notice of Hearing on February 25, 2015 for 20 working days prior to the hearing and reposted on March 17, 2015, in order to inform all interested citizens of the date and location of the hearing. The ALJ found that sufficient notice has been provided pursuant to Largo Civic Ass'n. v. Prince George's Co., 21 Md. App. 76 (1974). The ALJ conducted hearings on March 26, March 27, and March 30, 2015.

As noted in the ALJ's Opinion, appearing at the public hearing on behalf of the Developer was Bradley S. Glaser, Principal, and Paul Van Riley, AIA, both with Vanguard Retail Property Development, Mickey Cornelius, the Traffic Group, and Joseph Ucciferro with Bohler Engineering, Inc., the engineering firm that prepared the Plan. Lawrence Schmidt, Esquire and David K. Gildea, Esquire, both with Smith, Gildea & Schmidt, LLC, appeared and represented the Developer. Several members of the community attended the hearing, and their names are reflected on the sign-in sheets. The community Protestants were represented by Michael Moran, Esquire.

Representatives of the various Baltimore County agencies who reviewed the Plan attended the hearing, including the following individuals from the Department of Permits, Approvals and Inspections (PAI): Darryl D. Putty, Project Manager; Jason Seidelman, Zoning Review, Dennis Kennedy, Development Plans Review (DPR); and LaChelle Imwiko, Real Estate Compliance. Also appearing on behalf of the County were Jenifer Nugent, Department of Planning (DOP); Jeff Livingston, Department of Environmental Protection and Sustainability (DEPS), and Jean Tansey, Department of Recreation and Parks (R&P)/Development Plans Review (DPR). All Baltimore

County representatives indicated that the redlined Development Plan satisfied all Baltimore County rules and regulations, and their agencies recommended approval of the Plan.

The property at issue in this case is situated at the intersection of Merritt Boulevard and Wise Avenue, both heavily traveled roadways. In 1981, the Board of Education conveyed to Baltimore County approximately 28 +/- acres of land at the site, which was previously used for a school. In 2013, Baltimore County determined the parcel was “no longer needed for public use” and it offered the property for sale through a public bidding process. As presently structured, Baltimore County has entered into a contract with the Developer to sell approximately 15.8 acres of land, on which now sits the North Point Government Center. The Developer will raze that building, and construct a commercial project with retail, restaurant and office uses. A community recreation and arts building will also be constructed on the land sold to Developer. Baltimore County will retain ownership of the balance of the original 28 acre parcel (approximately 12 +/- acres), which will continue to be used for athletic and recreational purposes.

Under the standards and regulations set forth in the B.C.C. and B.C.Z.R. 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 § 430 of the Baltimore County Zoning Regulations; and

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

B.C.C. § 32-4-245(c)(1)-(5).

In the case before the ALJ, it was found that the Developer presented evidence which, when coupled with the findings in the DOP's final report and Concept Plan Conference (CPC) comments dated August 5, 2014, establishes each of these elements. The DOP indicated the site is designated in Master Plan 2020 as T-5 (Urban Center Zone) which is an appropriate area for mixed-use developments. As such, the DOP opined that the PUD was "in conformance with the goals of the Baltimore County Master Plan 2020." The DOP also recommended approval of the plan which, as Developer notes in its post-hearing memorandum, is all that is required by B.C.C. § 32-4-245(c)(5). The DOP determined that the "Merritt Pavilion PUD meets the compatibility objectives found in § 32-4-402.1.B of the Baltimore County Code."

The Appellants' challenge to the ALJ's decision approving the PUD at issue can be characterized as more procedural than factual and includes the following points: (1) the Petitioner failed to secure the approval of the transfer of land on which the PUD will be developed. The Deed from Baltimore County Board of Education to Baltimore County, Maryland included a covenanted that states "...it will not convey, by deed, lease or other means, any portion or interest in the said property without first having received written consent...from the Board of Public Works of the State of Maryland..." (2) There is no community benefit. (3) The proposed development plan is inconsistent with the Master Plan. (4) The terms of the RFP changed over time. (5) The PUD process, in this case, is inconsistent with the concept of zoning generally and the comprehensive rezoning in particular, and (6) The County failed to make transparent and good faith efforts to involve the citizens in the review and approval process.

STANDARD OF REVIEW

In an appeal before this Board, a PUD 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

- (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 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.

BOARD'S ANALYSIS

Contract of Sale & RFP

The Appellants object to Baltimore County's Request for Proposal ("RFP") for the development at issue as well as the contract for sale between Baltimore County and Petitioner. The Appellants contend that the Petitioner failed to secure approval of the transfer of the land on which the PUD will be developed. The Deed from the Baltimore County Board of Education to Baltimore County, Maryland, dated October 22, 1981, liber 6408 folio 542 promised and covenanted that "... it will not convey by deed, lease or other means, any portion or interest in said property without first having received written consent . . . from the Board of Public Works of the State of Maryland . . ." Appellants contend that at the time of the hearing before the ALJ, the County had not obtained such approval nor had it been submitted for approval. The Appellants further contend that any conveyance of any interest in the land is restricted by the covenant in the Deed and since the County has not yet complied with the covenant, any conveyance, or proposed conveyance is *ultra vires* and therefore void.

As correctly stated by the Petitioner, the Office of Administrative Hearings and Board of Appeals are administrative agencies that are created by statute. They have no authority beyond what is granted unto them under law and the language of the enabling statute. (*Blakehurst v. Baltimore County*, 146 Md. App. 509 (2002)). Absent specific authority the ALJ and Board cannot void and/or interpret private contracts. Additionally, BCC § 32-4-101(e) defines "applicant" as "a

person who is an owner, contract purchaser, or the legally authorized representative of an owner or contract purchaser requesting approval of development under this title.” Consequently, this Board finds that the ALJ properly held that he could not rule upon the propriety of the RFP and/or contract of sale and could not enforce/interpret their provisions.

Similarly, the Board concurs with the ALJ’s finding that altering the terms of the Contract of Sale does not preclude approval of the proposed PUD Development Plan. While these issues may be deemed relevant for litigation in another venue, they are beyond the purview and jurisdiction of this Board and have no bearing on the Board’s review ALJ’s decision in this matter.

Community Benefit

The Appellants argue that there is no community benefit as required by statute. Appellants contend that although the ALJ found community benefit based on testimony of the proposed developer, the ALJ should have considered that the parcel at issue already provides a community benefit, in that it provides recreational facilities, and a location for community activities such as community theatre.

The community benefit is required to be included in the application for a PUD. BCC § 32-4-242(b)(6). As was found by the ALJ, the community benefit was included in the Petitioner’s application. BCC § 32-4-242(d)(2) provides that “[t]he Council shall also include in the resolution a statement of the community benefit provided by the proposed Planned Unit Development.” Resolution No. 52-14 provided that the community benefit consisted of a land use benefit, a capital improvement benefit, and a public policy benefit. Specifically, it stated:

The land use benefit is comprised of the demolition of the existing commercial recreational and arts facility building and construction of a commercial recreational and arts facility building at a cost of a minimum of \$2.2 million along with the construction of an amphitheater and the renovation of certain ball fields on the site. The capital improvement benefit

will consist of the renovation of ball fields and sports courts at Grange Elementary School and a monetary contribution of a minimum of twenty-five (25%) of the total cost, and sufficient when combined with other funding identified by the County, to fully fund all work required to construct a full-sized synthetic turf multi-purpose field and lights on County-owned property in the same recreation council district. The public policy benefit results from the promotion of economic development opportunities by locating the PUD in the North Point Commercial Revitalization District.

Pursuant to statute, the ALJ must also make certain findings as they pertain to the community benefit. BCC § 32-4-245(b)(4) provides that the ALJ cannot “alter the community benefit identified in the Council resolution” except as provided in BCC § 32-4-245(b)(3)(iii). BCC § 32-4-245(b)(3)(iii) provides that the Hearing Officer/ALJ may “[a]ccept any proposed benefit and further define its terms.” In this case the ALJ expressly found that “the project is located within the North Point Commercial Revitalization District which is a “public policy [community] benefit” as a matter of law pursuant to B.C.C. § 32-4-242(b)(6)(iv).” As this matter comes before the Board as a record appeal, we do not assume the role of fact finder in these proceedings. Further, we do not find that the ALJ’s finding of fact on this point are either unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or that they are arbitrary or capricious.

The Appellants take issue with the ALJ’s failure to consider the alleged impact on long term recreational and social programs that are conducted on the Property. As provided by the PUD plan, a new community building is proposed which will accommodate some of the existing programs. Improvements will be made to existing ballfields. At the ALJ’s hearing, Barry Williams, Director of the Department of Recreation and Parks opined that the renovation of the outdoor areas and the new community building will better accommodate existing programs. Although the Appellants’ argument noting that the property at issue already provides significant

community benefit unique from the proposed development is not without merit, such an argument is not contemplated by the applicable statutes. Consequently, this Board cannot find that the ALJ was charged with considering it, or erred in not doing so.

Master Plan

The Appellants further contend that the proposed development plan is inconsistent with the Master Plan. Appellants argue that the Master Plan calls for the conservation of open space. The Appellants argue that the plan at issue actually reduces open space.

BCC § 32-4-245(c)(5) states that “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.” In this case, the Department of Planning recommended approval of the plan. Thus, the other two criteria, i.e. compliance with the Master Plan and area plans, are not required. In prior cases before the Board such as *Galloway Creek, LLC* (CBA-08-136), the Board held that compliance with the Master Plan is required even if a favorable Department of Planning recommendation was received. Since the holding in *Galloway Creek, LLC*, the County Council enacted Bill 42-12 which added the italicized language to clarify their intent that only one prong of the three part test was required. As the Planning Office has recommended approval, it appears that compliance with the Master Plan is no longer required.

Assuming for the sake of argument that Master Plan compliance is required, this Board defers again to the ALJ’s finding of fact. The ALJ noted that the Department of Planning found conformance when it “indicated the site is designated in Master Plan 2020 as T-5 (Urban Center Zone) which is an appropriate area for mixed-use developments.” *5/1/15 Decision*, p. 8. The ALJ found that “[a]ll Baltimore County representatives indicated that the redlined Development Plan satisfied all Baltimore County rules and regulations, and their agencies recommended approval of

the Plan.” *Id.*, p. 3. The Protestants had the opportunity to present rebuttal evidence in the form of expert testimony to contradict these findings but did not avail themselves of this opportunity.

This Board finds that the ALJ’s finding that the proposed development is consistent with the Master Plan is supported by competent, material, and substantial evidence in light of the entire record as submitted; and is not arbitrary or capricious.

The PUD Process Itself

Lastly, the Appellants argue that the PUD process in this case is inconsistent with the concept of zoning generally and comprehensive zoning in particular. The Appellants challenge the legality of the PUD process in Baltimore County, including but not limited to the fact that uses can be amended or modified under it. Appellants contend that the County PUD law undermines the underlying purposes and intent of zoning/development law. In reviewing this argument, ALJ Beverungen found that the proposed uses were modified or amended in accordance with the law and that this law is proper.

BCC § 32-4-242(d)(2) provides that “[t]he Council may amend or modify the densities or uses in the proposed Planned Unit Development and shall include such amendments or modifications in the resolution adopted under this subsection.” Resolution No. 52-14 expressly provided that the County Council approved “a modification of the uses for the proposed PUD to permit nonresidential uses” other than those nonresidential uses that were expressly prohibited.

ALJ Beverungen found:

“The proposal in this case involves a PUD, which is a zoning/development process created by the County Council. The PUDs were designed to provide flexibility to address “changing patterns of land development and the demonstrated shortcomings of orthodox zoning regulations.” Rouse v. Prince George’s Co., 138 Md. App. 589, 624 (2001). Maryland’s highest court has described the PUD as a “floating zone,” in that it allows a specific parcel or

property to be developed in a manner that may not be permitted by the existing zoning classification. City of Rockville v. Rylyns Enter., Inc., Md. 514, 540 (2002). So, for example, the subject property is zoned D.R. 10.5, which would not permit commercial uses. But with the PUD, the property is in a sense rezoned (i.e., the “floating zone”) to permit commercial and retail uses as proposed in this project. Supporters claim the PUD process addresses the inflexibility and other shortcomings inherent in traditional zoning schemes. But critics, like Protestants here, argue that the PUD undermines the certainty provided by comprehensive (traditional) zoning. Regardless of one’s philosophical leanings on the subject, the PUD is permitted under existing County law, and I am obliged to consider the project under the standards and regulations set forth in the B.C.C and B.C.Z.R.”

The Board finds that its role in reviewing the ALJ decision is limited to reviewing the findings made pursuant to B.C.C. §32-4-245(c)(1)-(5). It is not the charge of this Board to decide the legitimacy or application of the PUD statute itself once a County Resolution has been made the process moves forward.

CONCLUSION

PUD REGULATIONS

As previously stated, the Hearing Officer can approve a PUD Development Plan only upon finding of factors delineated in 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 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 that B.C.C. § 32-4-245(c)(3) would be satisfied. Finally,

In the matter of: Baltimore County, MD – Legal Owner/Merritt Pavilion, LLC (aka Merritt Pavilion PUD)
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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.

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 AFFIRMED.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2015 by the Board
of Appeals of Baltimore County

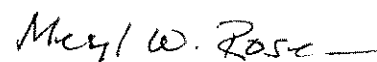
ORDERED that the final decision of the Administrative Law Judge, dated May 1, 2015, granting the Petitioners' request for a Planned Unit Development (PUD), for Merritt Pavilion on the subject property be and the same is hereby AFFIRMED, pursuant to Baltimore County Code § 32-4-281 (e)(1)(iii)(4).

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*.

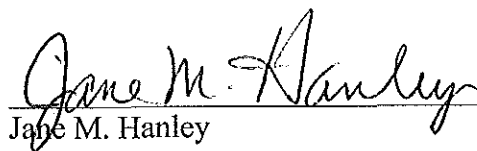
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Andrew M. Belt, Panel Chairman



Meryl W. Rosen



Jane M. Hanley