Board of Appeals of Baltimore County

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March 3, 2016

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RE: *In the Matter of: S.W. York Manor, LLC – Contract Purchaser/Developer*
Mount Saint Mary's University, Inc. – Legal Owner
Vernon Smith Property
Case No.: CBA-16-020

Dear Counsel:

Enclosed please find a copy of the final Majority Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter, as well as a copy of the Dissent.

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,

Sunny Cannington

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosures
Duplicate Original Cover Letter

c: See Distribution List Attached

c: S.W. York Manor, LLC
Mount Saint Mary's University, Inc.
Old York Manor—Pheasant Hill Estates Community Association, Inc.
Alfred D. Johnson, Jr.
Gregory and Susan Naylor
Paul Wajbel
Anne Bailey
Bruce Doak/Doak Consulting
G. Dwight Little, Jr., P.E./Little & Associates, Inc.
Sunnybrook Community Association, Inc.
Office of People's Counsel
Andrea Van Arsdale, Director/Department of Planning
Lawrence Stahl, Managing Administrative Law Judge
Vincent Gardina, Director/DEPS
Jan M. Cook, Development Manager/PAI
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF S.W. YORK MANOR, LLC - Contract Purchaser/Developer Mount Saint Mary's University, Inc. – Legal Owner for the property known as Vernon Smith Property Located at the end of York Manor Road HOH Case No.: 10-0466 10th Election District; 3rd Councilmanic District RE: Appeal of Denial of Development Plan	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY Case No. CBA-16-020

* * * * * * * * * * * *

OPINION

This matter comes to the Board of Appeals on appeal by Petitioner/Developer, S.W. York Manor, LLC (the "Petitioner") of a denial of a development plan by the Hearing Officer on October 20, 2015 in accordance with the development review and approval process contained in Article 32, Title 4 of the Baltimore County Code ("BCC"). The legal owner is Mount Saint Mary's University, Inc. The Petitioner was represented by Howard L. Alderman, Esquire. The Protestants were Old York Manor-Pheasant Hill Estates Community Association, Inc., Gregory and Susan Naylor, Alfred D. Johnson, Jr., Paul Wajbel and Anne Bailey (collectively the "Protestants"). The Protestants were represented by Michael R. McCann, Esquire.

A hearing on the record was held before this Board on January 5, 2016. A public deliberation was held before this Board on February 17, 2016.

STATEMENT OF FACTS

The property is located at the southern end of York Manor Road and Sagewood Road, north of Sunnybrook Road, in the Jacksonville area of Baltimore County (the "Property"). The Property is also known as the "Vernon Smith Property." The Property consists of 72.19 acres of land which is split zoned RC4 (71.71 acres) and RC6 (0.48 acres), with 50.70 acres of conservancy

area. (*ALJ Pet. Ex. 1*). The RC4 zone would permit 14.34 dwellings and the RC 6 zone would permit 0.20 dwellings. (*Id.*)

The Petitioner proposes to build a total of 14 single family homes within the RC4 portion of the Property as set forth on the Redlined Development Plan prepared by Little & Associates, Inc., professional engineers (the "Project"). (*Id.*). Access to the homes will be via York Manor Road and Sagewood Road, as each road extends into the Property. (*Id.*).

By way of background, the Property was inherited by the current owner, Mount Saint Mary's University, Inc., from Dr. Vernon Smith, through a provision in his Living Trust. (*ALJ. Pet. Ex. 3*). By deed dated April 24, 2013 and recorded in the Land Records of Baltimore County at Liber 34362, page 271, Mount Saint Mary's University, Inc. became the legal owner. (*Id.*) On January 2, 2014, Mount Saint Mary's University, Inc. entered into a Purchase Agreement to sell the Property to the Petitioner for $850,000.00, subject to the terms and conditions set forth in a Purchase Agreement. (*ALJ Prot. Ex. 29*).

Nearly 10 years earlier, on November 3, 2003, Little & Associates filed on behalf of Dr. Vernon Smith, an Application for Soil Percolation Tests with the Department of Permits and Development Management (now known as 'Permits, Approvals and Inspections' - hereinafter referred to as "PAI") along with a 'Well Area and Percolation Test Plat' (the "2003 Perc Plat") as well as the corresponding filing fee in the amount of $750.00. (*ALJ Pet. Ex. 2 without the 2003 Perc Plat*); (*ALJ Prot. Ex. 12 with 2003 Perc Plat*).

One day after Mount Saint Mary's University, Inc. became the legal owner, Little & Associates sent a letter dated April 25, 2013 to Adam Rosenblatt of PAI requesting confirmation that the Property had been 'grandfathered' from Senate Bill 236, known as the 'Sustainable Growth and Agricultural Preservation Act of 2012 ("SGAP"), as now codified in MD Code Ann., EN, §9-206 *et seq.* (*ALJ Prot. Ex. 12*). By letter dated May 9, 2013, Mr. Rosenblatt responded to Mr.

Little that PAI considered the 2003 Perc Plat as having met the requirements of MD Code Ann., EN, §9-206 and therefore concluded that the Property had been 'grandfathered.' (*ALJ Prot. Ex. 8*).

If the property is not grandfathered, a total of 3 lots is permitted.

Hearing Officer's Hearing

BCC §32-4-227 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).

As for 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 (Baltimore County Zoning Regulations, 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.

BCC §32-4-229(b)(1) 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." The Hearing Officer is not affiliated with any Baltimore County agency. He or she acts independently in reviewing the development plan.

As to imposing conditions on a development plan, the Hearing Officer has the authority under BCC §32-4-229(d) to impose a condition if the condition satisfies all of the following criteria:

> (i) Protects the surrounding and neighboring properties;
> (ii) Is based upon a comment that was raised or a condition that was proposed or requested by a participant;
> (iii) Is necessary to alleviate an adverse impact on the health, safety, or welfare of the community that would be present without the condition; and
> (iv) Does not reduce by more than 20 %:

1. The number of dwelling units proposed by a residential Development Plan in a DR 5.5., DR 10.5, or DR 16 zone; or
2. The square footage proposed by a non-residential Development Plan.

However, any condition imposed must be based on factual findings as supported by evidence. (*BCC §32-4-229(d)*)

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. In this case, the Hearing Officer, pursuant to his authority in BCC §§32-4-227 and 32-228, identified all unresolved or open comments and issues.

Representatives from several County agencies testified namely: Jan M. Cook, Project Manager (PAI); Dennis A. Kennedy and Jean M. Tansey (Development Plans Review); Brad Knatz (Real Estate Compliance); Jason Seidelman (Office of Zoning Review); Jeff Livingston (DEPS); and Brett M. Williams (Office of Planning). Each of the County agencies who were present at the hearing testified that the proposed Plan addressed all of the comments/issues submitted at the Development Plan Conference. Each agency recommended to the Hearing Officer that the Plan be approved.

The Hearing Officer then took testimony from G. Dwight Little, P.E., the principal of Little & Associates, Inc. Mr. Little presented a Redlined Development Plan for the proposed 14 lots. (*ALJ Pet. Ex. 1*). In Mr. Little's opinion, the Redlined Development Plan satisfied all Baltimore County rules and regulations.

In the Protestants' case, the ALJ heard from community members regarding their concerns that the Project would increase traffic, thereby causing safety issues for the community. Other witnesses expressed concern over loss of forests and trees and highlighted that DEPS had granted

a forest conversation plan for the Property on April 30, 2015 permitting the removal of 20 specimen trees. (*ALJ Prot. Exs. 27-31*).

In rebuttal, the Petitioner presented a traffic planning expert, J. Mark Keeley. (*ALJ Pet. Ex. 4*). It was Mr. Keeley's opinion that there was adequate sight distance at the ingress/egress point on Paper Mill Road. The Petitioner also called Amy Parrish, a registered sanitarian, in regard to the community's concerns about the proposed wells. It was her opinion that the proposed wells comply with the latest regulations and that, as a result, there would be fewer incidents of well failures.

Standard of Review

An appeal before this Board on 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):

> *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* further explained the role of the Board of Appeals as follows:

> 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.

Id. at 580.

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).

Decision

Addressing the issues raised on appeal by the Petitioner:

1. Was the ALJ Opinion Timely Issued under BCC §32-4-229(a)?

Before addressing the substance of the ALJ's opinion, Petitioner, in its Petition on Appeal, raises a procedural argument in regard to the timing of the ALJ Opinion. Petitioner argues that because the ALJ Opinion was issued more than 15 days after the close of the hearing, the Redlined

Development Plan was approved by operation of law under BCC §32-4-229(a)(2)(i). BCC §32-4-229(a)(2) reads as follows:

> § 32-4-229. SAME – DECISION OF THE HEARING OFFICER.
>
> (a) Final decision.
>
> (1) (i) The Hearing Officer shall issue the final decision within 15 days after the conclusion of the final hearing held on the Development Plan.
>
> (ii) The Hearing Officer shall file an opinion which includes the basis of the Hearing Officer's decision.
>
> (2) If a final decision is not rendered within 15 days:
>
> (i) The Development Plan shall be deemed approved as submitted by the applicant; and
>
> (ii) The Hearing Officer shall immediately notify the participants that:
>
> 1. The Development Plan is deemed approved; and
> 2. The appeal period began on the fifteenth day after the conclusion of the final hearing.

This issue turns on the date that the hearing was closed. Petitioner argues that October 2, 2015 is the closing date for the hearing because the Memorandums in lieu of closing argument were due on that date. Counting forward 15 days, the Petitioner claims that the ALJ Opinion was due on or before October 17, 2015, (Saturday), which would make the final due date October 19, 2015 (Monday). Since the Opinion was issued one day late, the Petitioner contends that the Development Plan is deemed approved.

The Board is divided on this issue; the Majority finds that the ALJ Opinion was timely issued and the Dissent finds that it was one day late. The Majority of this Board, in review of the transcript of the hearing and the pleadings before the ALJ, notes that a letter from counsel for the Petitioner dated October 6, 2015 was sent to the ALJ. The Petitioner's letter was date-stamped as having been received 3 days later in the Office of Administrative Hearings on October 9, 2015 (Friday). The

Petitioner's letter specifically requests that the ALJ '*strike*' a document which was attached to the Protestants' Post Hearing Memorandum entitled: '*Implementation Guidance for The Sustainable Growth and Agricultural Preservation Act of 2012*' (the "MDP Guidance Document"). The MDP Guidance Document was written and published by the Maryland Department of Planning and provided explanation on, and recommendations for, how the Counties should implement Senate Bill 236 or SGAP.

The Petitioner reasoned that the document should be stricken because it was evidence and was not submitted at the hearing. While acknowledging in its letter that the ALJ is not bound by the technical Rules of Evidence, the Petitioner's letter concluded with the following statement: "There is no cure for the action of the Protestants other than to strike the additional evidence submitted." (*Id.*). On October 13, 2015 (Tuesday), counsel for Protestants responded to Petitioner's letter via email to the ALJ in which he stated that he believed the MDP Guidance Document to be the type of document typically submitted along with memoranda.

The Majority of this Board finds that the Petitioner's letter was, for all practical purposes, a Motion to Strike evidence. The October 9, 2015 date-stamp from the Office of Administrative Hearings indicates that the Motion had been mailed to the ALJ because it was dated 3 days earlier. The letter does not indicate on its face that it was hand-delivered. Before the ALJ could properly consider the Petitioner's Motion, it was incumbent upon him to allow the Protestants to be heard on the issue. Here, the Protestants' response occurred via email on October 13, 2015. Consequently, the Majority of this Board holds that the earliest date for the close of the hearing was October 13, 2015. Using that date, the issuance of the Opinion on October 20, 2015 was timely.

The Majority finds authority for its holding in Rule 4(H) of the *Rules of Practice and Procedure before the Zoning Commissioner/Hearing Officer of Baltimore County* and BCC §32-4-228, which permits the ALJ to 'adjourn any hearing' for 'other acts as he may deem proper':

> may, either upon his own motion or upon application, **adjourn any hearing from time to time** and may grant such extensions of time for compliance with his orders **or other acts as he may deem proper**, provided that no requirement of law be violated thereby.

(Emphasis Added).

Rule 4 is referenced in BCC §32-4-228 which makes clear that, inherent in the ALJ's authority to conduct a hearing, is *his ability to make decisions on evidence* "regarding any … condition that is relevant to the proposed Development Plan" as set forth in BCC §32-4-228, which reads as follows:

> BCC § 32-4-228 SAME – CONDUCT OF THE HEARING.
>
> (a) Hearing conducted on unresolved comment or condition.
>
> (1) The Hearing Officer shall take testimony and receive evidence regarding any unresolved comment or condition that is relevant to the proposed Development Plan, including testimony or evidence regarding any potential impact of any approved development upon the proposed plan.
>
> (2) The Hearing Officer shall make findings for the record and shall render a decision in accordance with the requirements of this part.
>
> (b) Hearing conduct and operation. The Hearing Officer:
>
> (i) Shall conduct the hearing in conformance with Rule IV of the Zoning Commissioner's rules;
>
> (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

The Majority is persuaded that the ALJ properly considered the Motion and the Protestants' response because Footnote 2 of the ALJ Opinion states that he *denied* the Motion. Technically, because the Motion was not denied until October 20, 2015, that was the latest date upon which the ALJ ruled on all the evidence. Therefore, October 20, 2015 was the latest closing date of the hearing.

Using either October 13 or October 20 as the closing date, Footnote 2 confirms for the Majority that this is not a case where the ALJ ignored a motion and then simply fail to timely issue a decision. Rather, he spent time researching case law and cited *Haigley v. DHMH*, 128 Md. App. 194, 217 (1999) as support. The Majority finds that there was no need to issue a separate Order or other document confirming that the close of the hearing had extended as Footnote 2 makes that point obvious.

Finally on this issue, the Majority of the Board believes that it would also be inherently unfair for the Petitioner to benefit from the time period in which the ALJ considered Petitioner's own Motion, which period included, by necessity a response from the Protestants. Common sense dictates that the Petitioner wanted and expected the ALJ to rule on its Motion. Had the ALJ ignored the Motion, the Petitioner could have raised fairness arguments.

2. Was the ALJ's Consideration of the MDP Implementation Guidance for The Sustainable Growth and Agricultural Preservation Act of 2012 proper?

As to the Petitioner's argument that the ALJ should never have considered the MDP Guidance Document, we recognize that the ALJ referred to the MDP Guidance Document in support for his decision to deny the Development Plan. (*See ALJ Opinion, p.5*).

The transcript of the September 10, 2015 hearing reveals that the ALJ wanted to review this type of document. Toward that end, he questioned Protestants' expert witness, Richard Hall (the former Secretary of the Maryland Department of Planning) as to whether the Maryland Department of Planning had published any document - either before or after Senate Bill 236 was enacted - discussing the submission of a 'Preliminary Plan' under MD Code Ann., EN, §9-206. (*ALJ Hearing 9/10/15, T. p 137-138*). Mr. Hall confirmed that the Maryland Department of Planning had, in fact, published such documents. In response, the ALJ asked Mr. Hall whether he could direct him to "any written documents, guidelines, policies, Legislative history...as to [the] interpretation of what a

Preliminary Plan approval is in Baltimore County." (*ALJ Hearing 9/10/15, T. p 139*). Although Mr. Hall was not able to do so, he confirmed for the ALJ that such documents existed.

These excerpts demonstrate for this Board that the ALJ likened the MDP Guidance Document to legislative history. As the ALJ was charged with interpreting State law, it stands to reason that a document published by the MDP would assist him. In Footnote 2 of his Opinion, he also mentioned that the MDP Guidance Document is the type of document which a court would use in construing a statute. Thus, whether or not the Protestants provided a copy of the MDP Guidance document, or whether the ALJ discovered the document through his own research, this Board unanimously finds that the holding in *Haigley, supra,* permits the ALJ to consider the document in rendering this decision. (*Id.*) In addition, the Board is unanimous that the ALJ was not be bound by the technical rules of evidence and may conduct the hearing in an informal manner under BCC §32-4-228 and Rule 4(L), including consideration of this document.

3. Was the ALJ's Denial of the Development Plan for failure to comply with *The Sustainable Growth and Agricultural Preservation Act of 2012* correct under BCC §32-4-281(e)?

Finally, in considering whether the ALJ's decision to deny the proposed development plan was supported by competent, material and substantial evidence in light of the entire record as submitted, this Board unanimously finds that the decision was not in error.

A review of the record indicates that the proposed development plan failed to meet the grandfathering provisions contained with MD Code Ann. EN §9-206(b)(2)(i). In order to be grandfathered, a 'preliminary plan' must have been submitted to Baltimore County prior to October 1, 2012 and provided, at a minimum, 5 elements: (1) preliminary engineering, (2) density, (3) road network, (4) lot layout, and (5) existing features of the proposed site development:

> §9-206 (b) Applicability to residential subdivisions. –
>
> (1) Subsections (f) through (i) and subsection (l) of this section apply to residential subdivisions.

> (2) Subsections (f) through (i) do not apply to an application for approval of a residential subdivision under § 9-512(e) of this title if:
>
> (i) 1. 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;
>
> * * * *

In his Opinion, the ALJ construed MD Code Ann., EN §9-206(b)(2)(i) as separately identifying 2 distinct 'milestones' within the development process: 'preliminary plan'; and 'soil percolation test.' To understand that these are separate and distinct types of plans, one need only look at the express language in Section 9-206(b)(2)(i)2 and 9-206(b)(2)(i)3:

> (b) Applicability to residential subdivisions. –
>
> * * * *
>
> (2) Subsections (f) through (i) do not apply to an application for approval of a residential subdivision under § 9-512(e) of this title if:
>
> * * * *
>
> 2. By July 1, 2012, in a local jurisdiction that requires a soil percolation test before a submission for preliminary approval:
>
> A. An application for a soil percolation test approval for all lots that will be included in the submission for preliminary approval is made to the local health department; and
>
> B. Within 18 months after approval of the soil percolation tests for the lots that will be included in the submission for preliminary approval, a submission for preliminary 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; or
>
> 3. By July 1, 2012, in a local jurisdiction that requires a soil percolation test before a submission for preliminary approval and

> the local jurisdiction does not accept applications for soil percolation tests year round:
>
> A. Documentation that a Maryland professional engineer or surveyor has prepared and certified under seal a site plan in anticipation of an application for soil percolation tests;
>
> B. An application for a soil percolation test approval for all lots that will be included in the submission for preliminary approval is made to the local health department at the next available soil percolation test season; and
>
> C. Within 18 months after approval of the soil percolation tests for the lots that will be included in the submission for preliminary approval, a submission for preliminary 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; and

These Subsections make clear that a soil percolation test and a preliminary plan are submitted to the local jurisdiction at different times. As indicated in Subsection B, sometimes an application for soil percolation test approval will be included within the submission for preliminary approval. Other times, as indicated in Subsection C, within 18 months after the soil percolation tests are approved, the preliminary plan will then be submitted to the local jurisdiction. As also noted by the ALJ, in Baltimore County soil perc tests are addressed in a separate section of the BCC namely, §34-3-105.

As a result, we hold that, on its face, BCC §9-206(b)(2) spells out that a soil percolation plat is not the same as a 'Preliminary Plan.' Accordingly, we find that the ALJ's interpretation of §9-206 was not in error.

In support of its cause, Petitioner submitted into evidence the Application for Soil Percolation Test showing receipt by the County of a paid filing fee on November 7, 2003. (*ALJ*

Pet. Ex. 2). Ironically, the Petitioner did not submit into evidence the 2003 Perc Plat itself. It was the Protestants, through Subpoenas Duces Tecum, who obtained and submitted into evidence a copy of the 2003 Perc Plat. (*See ALJ Pleadings File*). (*ALJ Prot. Ex. 12*). The ALJ correctly noted that the purpose of the Soil Application was to obtain percolation test approval, not preliminary plan approval. The ALJ relied upon a Public Information Act request directed to PAI by the Protestants. This generated a response that the County had no record that the 2003 Perc Plat was ever submitted to the County. (*ALJ Prot. Ex: 6, Tabs 3 – 5*).

The ALJ also relied upon the evidence submitted including the list of properties maintained by PAI of preliminary plans filed before October 1, 2012. (*ALJ Prot. Ex. Tab 14*). The Property here was not included among 24 properties on that list. (*Id.*). Additionally, the ALJ considered persuasive the confirmation letters sent by PAI to each of those 24 property owners acknowledging receipt of the preliminary plans as filed and stating that the County considered each of those plans as grandfathered. (*ALJ Prot. Ex. 6, Tab 13*). The confirmatory letters sent by PAI was standard practice used by the County to implement SGAP. (*ALJ Prot. Ex. 6, Tab 13*). While we agree with the Petitioner that PAI's confirmatory letters do not, in themselves, "grandfather" a properties under 9-206, the letters are, however, another form of acknowledgment by the County that the filing date and 5 elements were met.

Along those lines, if Little & Associates believed that the 2003 Perc Plat met the 5 requirements for a preliminary plan under §9-206(b)(2)(i)1, there would have been evidence submitted to the ALJ that Little & Associates requested, prior to October 1, 2012, a confirmatory letter from PAI acknowledging the 2003 Perc Plat as the 'Preliminary Plan.' Indeed, our review of the exhibits shows that Little & Associates did receive a confirmation letter from PAI dated September 20, 2012 for one of those 24 properties. That Plan, which was labeled as "Preliminary Plan," was submitted by Little & Associates on September 16, 2012 on behalf of the Dorothy B.

Leidy Family Management, LLLP Property (the "Leidy Property"). (*ALJ Prot. Ex 6, Tab 13 and Ex. 25*). Receipt of that confirmation letter for the Leidy property is a strong indication that Little & Associates was aware of, and had used, the County's system for acceptance of preliminary plans.

Consequently, the evidence before the ALJ was substantial that, (a) Petitioner did not request a confirmatory letter from PAI prior to October 1, 2012 that the 2003 Perc Plat met the Preliminary Plan elements, (b) the 2003 Perc Plat not contained within the records of PAI as ever having been filed, and (c) Little & Associates were the recipients of a PAI confirmation letter for the Leidy plan and, thus, were well familiar with the County's standard procedures for grandfathering a property under SGAP.

In our view, the ALJ was correct in his assessment that the request by Little & Associates on April 25, 2013 that PAI considered the 2003 Perc Plat as grandfathering the Property, does not, in the ALJ's words, 'transmogrify' that filing into one seeking 'preliminary plan approval.' (*ALJ Opinion at p. 7*). This is true even if, as the ALJ wrote, the 2003 Perc Plan contains some of the elements for a 'Preliminary Plan.' (*Id.*). The timing of the April 25, 2013 request is telling given that it was one day after Mount Saint Mary's University, Inc. took title to the Property.

The ALJ found, and we unanimously agree, that the list of 24 properties maintained by PAI "was persuasive evidence concerning how the County interpreted and implemented the SGAP." (*Prot. Ex. 6. Tab 13*). The ALJ also correctly noted that the May 9, 2013 letter from Mr. Rosenblatt was not only after the October 1, 2012 deadline but was also the only confirmation letter not signed by the Director of PAI. (*Cf. ALJ Prot. Ex. 8 and Ex. 6, Tab 13*). As a result, the May 9, 2013 letter from Mr. Rosenblatt was an attempt to retroactively grandfather the Property which the ALJ correctly indicates is not authorized under SGAP. It conflicts entirely with the email thread between Mr. Rosenblatt and Thomas Bostwick on May 21, 2013 (11 days later),

wherein Mr. Rosenblatt confirmed that he kept the list of properties and that it was comprehensive. (*ALJ Prot. Ex. 6, Tab 6*).

Moreover, we agree with the ALJ's finding that the Application for the 2003 Perc Plat expired one year from the date of issue as stated on the Application. (*ALJ Prot. Ex. 12*). The Petitioner admitted that the perc tests were never conducted and therefore, the 2003 Application expired in November of 2004. (*ALJ Opinion p. 7*). That fact, combined with the previous mentioned facts contained herein, overwhelmingly support the ALJ's decision. Accordingly, we agree that the decision of the ALJ to deny the Redlined Development Plan for failure to comply with SGAP, was supported by competent, material and substantial evidence in light of the entire record as submitted.

ORDER

THEREFORE IT IS, it is this 3rd day of March, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the October 20, 2015 Administrative Law Judge's Development Plan Opinion & Order denying the Redlined Development Plan (ALJ Pet. Ex. 1), be and is hereby **AFFIRMED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules.*

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Chairman

Andrew M. Belt

IN THE MATTER OF S.W. YORK MANOR, LLC - Contract Purchaser/Developer Mount Saint Mary's Univ., Inc. – Legal Owner for the property known as Vernon Smith Property Located at the end of York Manor Road HOH Case No.: 10-0466 10th Election District; 3rd Councilmanic District RE: Appeal of Denial of Development Plan	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY Case No. CBA-16-020

* * * * * * * * * * * *

DISSENT

At the conclusion of the testimony in this case before the ALJ on September 11, 2015, and after a colloquy with counsel, the ALJ ordered the parties to submit post-trial memoranda in lieu of closing arguments on October 2, 2015. The parties complied with the ALJ's directive. With the submission of briefs by the parties on October 2, 2015, the hearing concluded.

The Baltimore County Code mandates that the ALJ "***shall*** issue the final decision [on a Development Plan] within 15 days after the conclusion of the final hearing held on the Development Plan." (*BCC § 32-4-229(a)(1)(i)*) (emphasis added). Because the fifteenth day following October 2, 2015 fell on Saturday, October 17, 2015, the ALJ was required to issue his final decision on the Development Plan by the conclusion of the next business day – Monday, October 19, 2015. (*See Baltimore County Code §1-2-203*) ("A period of time shall be calculated as described in Rule 1-203 of the Maryland Rules.") and (*Md. R. 1-203(a)(1)*) ("In computing any period of time prescribed by these rules, by rule or order of court, or by any applicable statute," when the last day of the period falls on a Saturday, Sunday, or holiday, the period of time "runs until the end of the next day that is not a Saturday, Sunday, or holiday.") The ALJ acknowledged on the record on September 11, 2015 that he was required by law to render his decision regarding the Development Plan in this case within

15 days of the submission of the parties' closing memoranda. The ALJ, however, did not issue his opinion in connection with the Development Plan until Tuesday, October 20, 2015, one day late.

Under the Code, a Development Plan "***shall*** be deemed approved as submitted by the applicant" if the ALJ fails to render a final decision within fifteen days of the conclusion of the hearing. (*BCC § 32-4-229(a)(2)(i)*) (emphasis added). Moreover, the Code makes clear that the use of the word "shall" has "a mandatory effect and establish[es] a requirement." (*Baltimore County Code §1-2-209.*)

Because I find that (1) the hearing on the Development Plan in this case concluded on October 2, 2015 and (2) the ALJ was required by law to render his decision on the Development Plan no later than October 19, 2015, the Development Plan must be approved as submitted under Section 32-4-229(a)(2)(i) of the Baltimore County Code. I disagree with the majority and the ALJ that the Petitioner's request that the ALJ strike the MDP Guidance Document attached to Protestants' closing memorandum subsequent to the submission of the parties' closing briefs had any effect on the timing required for the ALJ's final decision on the Development Plan under Section 32-4-229(a)(1)(i) of the Baltimore County Code. Once the hearing concluded on October 2, 2015 – the date established by the ALJ for the submission of closing briefs – the deadline for the ALJ's decision was established. The ALJ did not thereafter notify the parties that there would be any extension of the date concluding the hearing.

While it may seem harsh to reach such a result based on the fact that the ALJ's decision was only one day late, the time requirements established in the Code are mandatory, and the consequence for failing to meet those time requirements are unambiguous and leave no room to reach any other result. Although I agree with the holding of the majority of the Board on the underlying substantive

issues raised in this appeal, I dissent solely on my view that the Development Plan must be approved as submitted under Section 32-4-229(a)(2)(i) of the Baltimore County Code.

March 3, 2016
Date

James H. West | KC
James H. West