

IN THE MATTER OF
OWINGS MILLS INVESTMENT PROP., II, LLC - LO
ENTERPRISE HOUSING CORP. - Developer
(a/k/a Red Run Station - Lot 1 PUD)
10630 Red Run Blvd.
Owings Mills, Maryland 21117
4th Election District
4th Councilmanic District

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO.: CBA-17-009

In Re: Planned Unit Development – 72 apartments

* * * * *

OPINION

This case comes to the Board on appeal of the Administrative Law Judge’s Opinion and Order dated September 14, 2016 approving a Planned Unit Development (“PUD”) for property located at 10630 Red Run Blvd., Owings Mills, Maryland 21117, a/k/a Red Run Station.

A public hearing was held before this Board on November 22, 2016 during which oral arguments were heard. Owings Mills Investment Properties, II, LLC, the land owner, and Enterprise Housing Corporation, the developer, were represented by Jason T. Vettori, Esquire, and Smith, Gildea & Schmidt, LLC (collectively, “Developer”). Protestants, The Owings Mills Corporate Roundtable, Doug and Natalya Schroeder, Cindy Gies, Keerti Sunkara, Dennis and Georgette Burrin Campbell and Nick Mangione (collectively, the “Protestants”), were represented by J. Carroll Holzer, Esquire. A public deliberation was held by this Board on January 19, 2017.

PROCEDURAL HISTORY AND BACKGROUND

The property is a triangularly shaped parcel located at 10630 Red Run Blvd. in Owings Mills (Lot 1) (the “Property”). It is bounded on the east and south by an I-795 ramp; to the north by a State Highway Administration facility (the “SHA facility”); and to the west by Lot 2 which

borders Red Run Blvd. The Property is zoned ML-IM (manufacturing light – industrial, major) with a T-5 overlay (Transect Urban Center zone). The site is known as the “Red Run Station”.

The Developer requests approval for a general development PUD consisting of a 72-unit, multi-family apartment building. Ingress and egress to the PUD onto Red Run Blvd. is via a single entrance/exit through Lot 2. A redlined Plan prepared by engineers, Colbert Matz Rosenfelt, Inc., more particularly describes the PUD (the “Plan”). (ALJ Dev. Ex. 1).

On April 17, 2015, a PUD application was submitted to Councilman Julian E. Jones, Jr. A post submission community input meeting was held on May 13, 2015. The Baltimore County Council passed Resolution 56-15 on August 3, 2015 such that the PUD became eligible for review. On August 24, 2015, a pre-concept plan conference was held. On September 22, 2015, a Concept Plan Conference was held. A Community Input Meeting was held on November 5, 2015. On March 3, 2016, a development plan conference was held.

Subsequently, Administrative Law Judge Beverungen held hearings on April 22, 2016, June 9, 2016, June 10, 2016 and August 5, 2016. After 4 days of hearings, the ALJ issued an Opinion on September 14, 2016, approving the Red Run Station PUD.

STANDARD OF REVIEW

The law governing this Board’s review of a PUD is found within Baltimore County Code (“BCC”), §32-4-245(d) which requires that any appeal of a PUD to this Board to be reviewed in accordance with BCC §32-4-281(e). That Subsection reads as follows:

§ 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.

(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.

DECISION

In regard to the merits of the PUD, this Board is charged with reviewing the evidence presented to the ALJ and deciding whether each of the factors set forth in BCC, §32-4-245(c) have been met. The ALJ must independently find evidence on each factor. BCC §32-4-245(c)(1) - (5) states:

(c) *Basis for approval.* The Hearing Officer may approve a proposed PUD development plan only upon finding that:

- (1) The proposed development meets the intent, purpose, conditions, and standards of this section;
- (2) The proposed development will conform with Section 502.1.A, B, C, D, E and F of the Baltimore County Zoning Regulations and will constitute a good design, use, and layout of the proposed site;
- (3) There is a reasonable expectation that the proposed development, including development schedules contained in

the PUD development plan, will be developed to the full extent of the plan;

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

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

In our review of the record concerning these 5 factors, we find in some instances as a majority of this Board and in other instances, unanimously, as follows:

1. §32-4-245(c)(1) - Proposed development meets the intent, purpose, conditions and standards of this section.

In regard to Subsection (c)(1), the pertinent 'section' identified therein is Section 245. Subsection 245(a) directs that the ALJ shall conduct a PUD hearing in the same way the ALJ conducts a hearing on a development plan as required by BCC §32-4-227 and §32-4-228. In Subsection (b), the ALJ reviews the PUD for compliance with both zoning and development regulations and may impose conditions, if approved. Additionally, consistent with our prior PUD decision in *Galloway Creek, L.L.C., Case No., 08-136*, this Board has unanimously interpreted Subsection (c)(1) as a broad, catch-all provision which generally requires conformance with remaining Subsections of 245(c).

In reviewing the record and evidence before the ALJ, all of the appropriate County agencies appeared and testified. Each of the County representatives indicated that the Plan satisfied all of Baltimore County rules and regulations and each recommended approval. Additionally, the Developers' witnesses testified that the Plan met all the requirements in the BCC and BCZR. We unanimously agree that the ALJ's decision on this factor was correct.

2. §32-4-245(c)(2) - The proposed development will conform with Section 502.1 A, B, C, D, E and F of the B.C.Z.R. and will constitute a good design, use and layout of the proposed site.

Subsection (2) of BCC §32-4-245(c) has two parts. In the first part, the ALJ must review the PUD for conformity with 6 of the 9 special exception factors listed in BCZR, §502.1 (the “special exception” factors). In the second part, the ALJ must make specific findings about whether the proposal constitutes a good design, use and layout.

Specifically, the special exception factors in § 502.1(A)-(F) require evidence that the proposed PUD will not:

- A. Be detrimental to the health, safety or general welfare of the locality involved;
- B. Tend to create congestion in roads, streets or alleys therein;
- C. Create a potential hazard from fire, panic or other danger;
- D. Tend to overcrowd land and cause undue concentration of population;
- E. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements; and
- F. Interfere with adequate light and air.

The ALJ found that the Plan satisfied each of the special exception factors based on the testimony of Uri Avin, the Developer’s expert witness in urban and city planning. The ALJ is the fact finder and can judge the credibility of the witnesses and the opinions of experts. The weight of the evidence as to §502.1 was in favor of the Developer and we find, by a majority of this Board, that sufficient evidence was presented to find that the special exception factors were satisfied.

The second part of BCC §32-4-245(c)(2) requires the ALJ to decide whether the PUD constitutes a good design, use and layout. Submitted into evidence by the Developer was the

Architectural Pattern Book (Dev. Ex. 7) and the Revised Pattern Book (Dev. Ex. 27) which set forth in detail the design and layout for the project (collectively the “Pattern Book”). The Department of Planning, through the testimony of Jenifer Nugent, reviewed and approved the Pattern Book and determined that the PUD satisfied all Baltimore County requirements.

The ALJ highlighted the testimony of Michael Bainum, a senior development manager with Enterprise Homes, who added that the site’s convenient location near roadways and employment opportunities made the Property attractive for the proposed use. The ALJ also noted the testimony of Robert Rosenfelt, P.E., who described the layout of the development using the Plan and the Pattern Book.

There was no probative evidence provided by the Protestants that the Pattern Book did not provide a good design or layout. Consequently, the majority of this Board finds that ALJ’s decision regarding the fact that the Plan reflects a good use, design or layout, satisfied 32-4-245(c)(2) as supported by the evidence.

3. 32-4-245(c)(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.

As to the ALJ’s finding that there was a reasonable expectation that the proposed development will be developed to the full extent of the plan, the evidence was that this Developer has a ten-year history of completed projects in Baltimore County. Michael Bainum expressed confidence that the project would be developed to the full extent of the Plan.

In reviewing the ALJ’s decision, we find unanimously that his decision was based on the weight of the evidence presented. We note that the Protestants did not provide evidence showing the Developer had a history of nonperformance. If the evidence presented by the Protestants was that the developer had failed to complete other projects, the ALJ may have found that this project

did not have a great likelihood of success. That was not the case here. The Petitioner's experience and track record does impact the ultimate success of a project. Thus, we affirm the ALJ's decision under BCC §32-4-245(c)(3).

4. 32-4-245(c)(4) - Subject to the provisions of §32-4-242(c)(2), the development is in compliance with Section 430 of the Baltimore County Zoning Regulations.

Section 430 of the BCZR is entitled "Planned Unit Developments" and is divided into four (4) subsections which describe the concept of a PUD. This project was presented as a general development PUD, pursuant to §430.3, to be used for a residential purpose and is located inside the URDL. Under §430.3.B.1, the residential uses permitted for a general development PUD are those uses permitted in any residential zone or non-residential zone, subject to compatibility requirements under BCC §32-4-402. Here, the Property is zoned ML - IM.

Under BCZR §430.3.C.3, the density for an ML zone may not exceed that of a R.A.E. 1 zone of 40 density units/acre (BCZR §200.3.D.). Thus, in light of the acreage identified at the hearing, the density permitted by right here is 113 density units. The Plan proposes only 72 units. The ALJ found credible the testimony of Mr. Bainum and Mr. Rosenfelt, in describing that the Plan satisfied all the requirements of BCC and BCZR and specifically, BCZR, §430.

With regard to findings of compatibility under BCC, §32-4-402.1(a), the Director of Planning made compatibility recommendations in a report dated March 30, 2016 to the ALJ prior to the hearing pursuant to BCC §32-2-402.1(b). (See ALJ Opinion, p. 16). The Director of Planning stated in the report that: "the proposed PUD layout presents a quality housing development designed to meet the demand of an underserved market..." (Planning Report at p.3).

The Department of Planning indicated in their report that: "the design elements as shown in the submitted pattern book illustrate an architectural theme that is uniform to the internal design. Further, colors and materials proposed for the PUD building complement the commercial uses

within the immediate area. The PUD building materials and design exceeds the architectural pattern established by the non-residential structures to the east and west of the site.” (Planning Report, p. 3).

There was no cross-examination by the Protestants of Ms. Nugent at the ALJ hearing. Moreover, the Protestants did not offer expert testimony that any of the compatibility factors were not met. As a result, applying the holding in the *People’s Counsel v. Elm Street*, 172 Md. App. 690, 702-03 (2007) here, this Board unanimously finds that the ALJ was justified in accepting the recommendation of the Department of Planning that the compatibility factors were met.

5. 32-4-245 (c)(5) - The PUD development plan is in conformance with the goals, objectives and recommendations of the Master Plan or area plans or the Department of Planning.

As to Subsection (5), a majority of this Board agrees with the ALJ’s decision that Subsection (5) was satisfied based on the recommendation of the Department of Planning. We agree with the ALJ’s interpretation of Subsection (5) in that only one of three criteria must be met (i.e. the Master Plan, the area plan or the Department of Planning recommendation). As the ALJ wrote: “It is undisputed the DOP reviewed and approved the pattern book and recommended this project be approved. That is all that was required under the County Code.” (ALJ Opinion, pp. 12-13).

That fact notwithstanding, we also note that the Department of Planning, in its Report to the ALJ, found that the Plan was in conformance with the goals, objectives, and recommendations of the Master Plan 2020. (ALJ Opinion, p. 16). Toward this end, the Director of Planning explained in that Report that the Property is located within a T-5 Urban Center in the Owings Mills Growth Area and is also within the sub-area known as the Red Run Employment Corridor, each of which is identified in the Master Plan. As such, the Report clarified that the priorities of both T-5 zone and the Red Run Employment Corridor - as spelled out in the Master Plan - are satisfied

with this PUD; it brings the high design, high density factor of the T-5 zone (apartments) along with employment opportunities and job creation along Red Run Boulevard (workforce housing).

The majority of this Board, in reaching our decision in this case, applies the holding in *Monkton Preservation Ass'n v. Gaylor Brooks Realty Corp.*, 107 Md. App. 573, 581 (1996). In *Gaylor Brooks*, the Court of Special Appeals discussed the actions available to this Board on appeal under BCC, §32-4-281(e). The Court there explained that the Board's authority for reversing or modifying a decision of the ALJ is very limited:

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* added that the Board of Appeals is not a 'policy-making body' in regard to reviewing development plans:

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.

(Emphasis Added). (*Id.* at 580).

In applying the holding in *Gaylor Brooks* to the record here, we must examine the record as a whole to determine whether or not substantial evidence exists to support the findings of the ALJ under Subsection(c)(5), and if so, the Board must 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).

In *Anne Arundel County v. A-Pac Limited*, 67 Md. App. 122, 126-127 (1986) the Court of Special Appeals affirmed that the standard for review of a decision of a zoning board is clear:

it is not the function of the reviewing court to zone or rezone, or to substitute its judgment for that of the zoning authority if the action of the zoning authority[506 A.2d 673] is based on substantial evidence and the issue is thus fairly debatable. *Northampton v. Prince George's County*, 273 Md. 93, 101, 327 A.2d 774 (1974); *Floyd v. County Council of Prince George's County*, 55 Md. App. 246, 255, 461 A.2d 76 (1983).

Substantial evidence, we have noted, "means a little more than a 'scintilla of evidence.'" *Floyd*, 55 Md. App. at 258, 461 A.2d 76. Furthermore, the Court of Appeals has made it quite clear that,

[i]f the issue before the administrative body is 'fairly debatable,' that is, that its determination involved testimony from which a reasonable man could come to different conclusions, the courts will not substitute their judgment for that of the administrative body.... *Id.*, quoting from *Eger v. Stone*, 253 Md. 533, 542, 253 A.2d 372 (1969).

As stated by the Court of Appeals in *Snowden v. Mayor & City Council of Baltimore*, 224 Md. 443, 168 A.2d 390 (1961) citing *4 Davis, Administrative Law Treatise*, Sec. 29.05, p. 139 (1958):

The heart of the fact finding process often is the drawing of inferences from the facts. The administrative agency is the one to whom is committed the drawing of whatever inferences reasonably are to be drawn from the factual evidence. 'The Court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness.'

Thus, it is not the job of this Board to substitute our judgment for the ALJ, or to make credibility determinations of witnesses, or to decide how we would personally decide the proposed PUD, or to make policy decisions about whether or not the PUD law, as enacted by the County Council, is proper. We agree with the ALJ, citing *Maryland Overpak Corp. v. Balto. City*, 395 Md. 16, 22, n.4 (2006) that a PUD is, by definition, "an ad hoc procedure which when approved by the County Council 'grants a variety of uses within a development that would otherwise not be permitted under the pre-existing...zoning regulations.'" (ALJ Opinion. P. 17).

Accordingly, by a majority of this Board, we find that competent, material, and substantial evidence in light of the entire record was submitted by the Developer and reasonably accepted by the ALJ on each of the requirements in BCC, §32-4-245(c).

6. Constitutionality of 32-4-245(c)(5).

The Protestants argued that BCC, §32-4-245(c)(5) as derived from Bill 5-10, is unconstitutional as interpreted by the ALJ to authorize a PUD based upon the Department of Planning's approval alone because there are no standards to be applied by them. As a result, the Department of Planning has unlimited discretion, without regard to Master Plan consistency. (Protestants' Memorandum and Appendix, p. 2). The ALJ declined to decide this issue citing *VNA Hospice v. Dept. of Health and Mental Hygiene*, 406 Md. 584, 604-05 (2008).

We agree with the ALJ's reading of the holding in *VNA Hospice* and he need not decide the constitutional issue raised if he is deciding the case on other grounds. In our view of his Opinion and the record, he decided the case on other grounds.

In the alternative, if this constitutional issue should have been addressed, we unanimously find that BCC §32-4-245(c)(5) is not unconstitutional. The Court of Appeals in *Christ v. Md. Dep't of Natural Res.*, 335 Md. 427, 441-42 (1994), citing *Pressman v. Barnes*, 209 Md. 544, 555 (1956) repeated that the requirement of guidelines in cases of delegation of legislative power to executive branch agencies or officials is not absolute:

Where the discretion to be exercised relates to...regulations for the protection of public morals, health, safety or general welfare, and it is impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will, legislation delegating such discretion without such restrictions may be valid.

The discretion to be exercised in this case by the Department of Planning pertains to the protection of public morals, health, safety or general welfare.

Nevertheless, we unanimously find that there are guidelines for the Department of Planning to follow in reviewing a PUD Plan. The Compatibility objectives set forth in BCC, §32-4-402 (General Compatibility) and §32-4-402.1 (PUD Compatibility) are specifically employed by the Department of Planning in reviewing a proposed plan. In this case, the Department of Planning, in their Report to the ALJ, found that the Plan complied with all the factors in 32-4-402.1(b)(1)-(11).

We also note that the Court of Special Appeals in *Bowleys Quarters Comm. Ass'n v. Galloway Creek, LLC*, No. 0741, Sept. Term 2103, in an unreported opinion affirming this Board, found that Bill 5-10 was not unconstitutional as a 'special law'.

7. BCC, §32-4-245(a)(3) Modification of Standards.

In order for the proposed project to be built, the Developer has requested some modification of standards namely: 14 parking spaces in lieu of the maximum 12 spaces, without a landscaped island; a building height of 60 ft. in lieu of maximum 50 ft.; and a rear yard setback of 17 ft. in lieu of the required 40 ft. Subsection (a)(3) requires the ALJ to not only identify the requested modifications but to write a statement that the ALJ considered the impact of the modifications on the surrounding uses and why the modifications are in the public interest.

In reviewing the ALJ's Opinion, this Board unanimously agrees that the ALJ identified the requested modifications and made a statement that he considered both the impact and public interest. (ALJ Opinion, pp. 13-14). With regard to the parking modification, the ALJ found the requests to be *de minimis* which will only affect the internal site and not the surrounding uses. (*Id.* at 13). Similarly, he found the building height to be consistent with the height of hotels and offices

in the area. (*Id.* at 13-14). Finally, he found that the rear of the Property adjoins an SHA facility and as such, the reduction in rear yard setback will not impact surrounding uses. (*Id.* at 14).

With regard to public interest, the ALJ concluded that: “The modifications are necessary and in the public interest in that the modifications will facilitate the development of workforce housing on an underutilized site.” *Id.*

We find that this analysis not only satisfies the public interest requirement in Subsection (a)(3) but also the requirement under Subsection (b)(3)(ii) that the modifications are necessary to achieve the intent and purpose of that section.

Conclusion

Based on our review of the evidence presented, we find by a majority of this Board, that the decision of the ALJ to approve the PUD was supported by competent, material and substantial evidence in light of the entire record submitted and the ALJ did not act in any arbitrary or capricious manner.

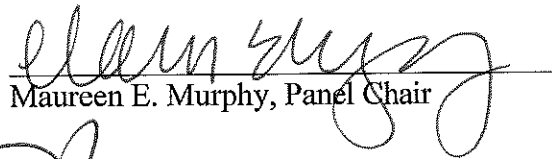
ORDER

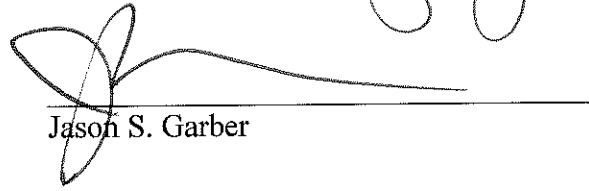
THEREFORE, IT IS THIS 3rd day of February, 2017, by the
Baltimore County Board of Appeals,

ORDERED that the Administrative Law Judge’s decision to approve the seven (7) sheet redlined Development Plan/PUD known as “Red Run Stations- Lot 1” (Developer’s Exhibit 1), be, and it 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, Panel Chair


Jason S. Garber

IN THE MATTER OF
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In Re: Planned Unit Development – 72 apartments

* * * * *

DISSENT

This matter concerns a Planned Unit Development (PUD) which has been approved for a seventy-two (72) unit apartment building on 2.85 acres in the middle of an area zoned M.L.-I.M, a business and manufacturing zone which does not permit residential units.¹ (*See e.g.* BCZR §§ 253 and 259(2)(e).) The PUD was introduced by the councilman for the Owings Mills area in the spring of 2015. Over the next 18 months, all of the procedural requirements were met, the county council approved it, and the County Department of Planning (DOP) recommended it.² The matter then came before Administrative Law Judge John E. Beverungen for review. The matter was opposed by the Owings Mills Corporate Roundtable and virtually all of the area commercial neighbors, including entities such as T. Rowe Price, The Baltimore Ravens, the Mangione hotel interests, and other substantial business concerns.³

¹ M.L refers to Manufacturing Light. I.M. stands for Industrial Major. While M.L. is the zoning classification, I.M. is a district overlay further defining the nature of development in certain industrial and manufacturing zones. BCZR § 259.2.E states in part: “In I.M. Districts, greater industrial use of prime industrial land is promoted by discouraging no auxiliary commercial usage.” In this context, “nonauxiliary commercial usage” refers to commercial activity that does **not** support the overall industrial use. In other words, it is intended to discourage residential commercial services.

² This PUD application process overlapped with the CZMP process. For some reason, the developer requested the PUD instead of seeking to re-zone the parcel during the county-wide process.

³ Interestingly, at times (though only at times), it was suggested that the target population for the apartments were “workforce” employees who would staff the neighboring businesses. The neighboring businesses were unimpressed.

The development site is an irregular triangle. On one side is the access road to, and site of, a significant State Highway Administration facility which includes maintenance garages, parking for a fleet of heavy equipment, and salt storage cones. The other two sides are each bound by significant roadways. One of these is Red Run Boulevard which is a major high speed artery with two lanes in each direction with a middle turn lane. There is no present way for pedestrians to cross Red Run, and even if there were, there are no residential services (restaurants, shopping, convenience stores, gas stations, pharmacies, etc.) readily available. The third side of the site triangle is Owings Mills Boulevard and the ramp from I-795 merging with it. Across Owings Mills Boulevard from the site is the I-795 cloverleaf.

Anything any resident would need or want is obtainable only by driving. Upon completion, the apartment building would be a lone, isolated, residential cell in the midst of an industrial area, not particularly close to the nearest other residential complexes, and hemmed in by two major road systems. There is little room for parks or associated outdoor accoutrements.

For years, the County has actively promoted the area for business development and has given its assurances to the established and incoming businesses and business developers that the County will continue to support this area as a non-residential area. As a direct result, and as the uncontradicted evidence before the ALJ demonstrated, the business and corporate community has invested approximately Three Billion Dollars (\$3,000,000,000) in the area.

The ALJ held hearings over a number of days, and ultimately approved the PUD. I dissent because I believe the ALJ misapprehended the extent of his authority to make an independent and objective ruling on the soundness and wisdom of the project. The ALJ simply approved the PUD because the DOP had. This the ALJ did notwithstanding articulated misgivings about the plan and recognition of the integrity of much of what the Protestants had to say.

BOARD OF APPEALS REVIEW

It goes without saying that the Board of Appeals review of a PUD matter is on the record. Even on the cold and sterile printed pages that the Board has before it, this PUD would appear to be a singularly poor idea. However, whether it is a good project or not is precisely the kind of assessment that each Board member is rightfully precluded by law from making. The Board's role is limited to determining whether the ALJ properly assessed the project given the PUD standards outlined in BCC § 32-4-245(c).

BCC § 32-4-245(c) provides that the ALJ "may" (not shall) approve a proposed PUD if five separate conditions are all met. For the purposes of this matter, subsection (2) requires two separate relevant inquiries. First, it requires the ALJ to examine the plan to insure that it conforms with the general criteria from BCZR § 502.1A-F. That section of the BCZR relates to standards regarding special exceptions. The reference to that regulation means, of course, that the PUD cannot be too discordant given the nature of the pre-existing site and, importantly, that it must support the general welfare. Subsections A and D are particularly relevant in this regard.

The ALJ's second mandated inquiry under § 32-4-245(c)(2) is to determine whether the PUD "will constitute a good design, use, and layout of the proposed site." This language can mean nothing less than a duty imposed on the ALJ to make his own independent evaluation of the project after hearing from any opponents in a fair adversary proceeding. While § 245(c)(5) also requires the ALJ to assure that the project is consistent with the Master Plan or an area plan or has been recommended by DOP, that provision is in addition to the requirement under (c)(2), not in lieu of it.

The Board of Appeals cannot and should not decide whether the project satisfies appropriate planning principles, but the ALJ, on the other hand, can and should. Unfortunately, while the ALJ's

opinion here is riddled with articulated doubts about the project, he ultimately concludes that because the Planning Department approved it, he is all but obliged to approve it. This approach leads to an abdication of the ALJ role and permits PUD approval without any independent review. It turns a judge into a foreman ticking off compliance categories on a punch list. This is an error of law, not fact, which should result in the reversal of the ALJ approval.

ARGUMENT

With subsection § 32-4-245(c)(2) in mind, it is useful to review the ALJ opinion. The Opinion is about 17 pages of text. The first two pages recount the procedural history. The next 9 pages represent a fairly straight forward account of the testimony of the County representatives and the various witnesses for the Developer and the Protestants. The actual analysis begins on page 12.

The first legal issue is the question of whether the plan conforms to the 2020 Master Plan. The Master Plan 2020, enacted in 2010, clearly and definitively designates this area, known as the Red Run Employment Corridor, for industrial, manufacturing and associated commercial purposes. There is no ambiguity in its language about maintaining a supply of commercially developable land, “maximizing” employment opportunities, and “[r]esist[ing] pressure for additional non-auxiliary retail and residential development. . .” Master Plan at p. 20. While it seems abundantly clear that the Master Plan does not support this residential development, the Developer presented an expert witness who indicated that by reason of the T-5 transect overlay, residential development was at least permitted, if not encouraged. *See* Master Plan at p. 27-29. This is a difficult conclusion to reach given the language of the T-5 provision:

T-5 (Urban Center Zone) includes higher density mixed-use buildings that accommodate retail, offices, townhouses, and apartments. It has a tight network of streets, with wide sidewalks, steady street tree planting and buildings set close to the sidewalks.

Master Plan at 29.

It would be peculiar to have the transect designations which are general in nature and applicable to a number of different and varying sites, override specific Master Plan directives about a particular area. But even if that were so, as is evident from the site plan and the witness testimony, this plan even after implementation is nowhere near the description or definition of the authentic mixed use sought to be accomplished by T-5 designation. It will have no “tight network of streets” with wide sidewalks and close set mixed use buildings. There will not be various types of residential buildings with related retail and commercial offices. As indicated above, it is a captive apartment complex trapped between two limited access thoroughfares and an SHA facility.

Ultimately, however, the view of any member of this Board regarding the supremacy of the Master Plan versus the transect overlay is not relevant **because the ALJ declined to address the issue**. Instead, he referred to BCC § 32-4-245(c)(5) which predicates approval on a finding that the PUD conforms with the Master Plan, an area plan, or the recommendation of the Department of Planning (DOP). The ALJ chose to set aside the Master Plan issue, and simply found that because DOP recommended the plan, the Master Plan -- no matter how modified by T-5 -- is irrelevant.⁴ (Opinion at p.12-13.)

For the purposes of this Dissent, the next significant issue concerns the Opinion’s treatment of the economic development issues.⁵ (Opinion at p.14.) In this section, the ALJ focused primarily

⁴ Because the ALJ – who heard the witnesses testify firsthand about the Master Plan -- made no finding, this Board cannot now decide for itself which interpretation is preferred in order to affirm or reverse the ALJ. If the meaning and applicability of the Master Plan is relevant, then the ALJ is the only one who can say how. This is because the issue requires the first level factfinder to make credibility assessments between the competing expert witnesses. Thus, for the very same reason that this Board is precluded from substituting its judgment on the soundness of the development plan, it is similarly precluded from saying that one expert as opposed to the other actually got it right.

⁵ There is no dissent from the issues associated with community benefit, modifications of standards or delegation of powers. That latter issue is potentially problematic, but it is certainly arguable that BCC § 32-4-402.1 provides legislative standards by which the DOP is to assess PUD applications. Whether DOP adheres to the standards is not the question; it is whether such guidelines and directives to DOP from the Council exist.

on the testimony of John Hentschel, an expert in real estate and development with international credentials. The ALJ found that Mr. Hentschel was “interesting and informative”, “provided convincing testimony”, and was “a credible and persuasive witness.” (Opinion at p. 14.) Mr. Hentschel’s testimony provided a strong basis to conclude that the development plan was bad from both an economic and policy perspective. In the end, however, he found Mr. Hentschel’s “convincing testimony” to be “not particularly germane.” He indicated that Mr. Hentschel’s testimony “dovetails” with the argument the ALJ did not reach regarding the import of the Master Plan. Even more, he dismissed Mr. Hentschel because the testimony “spoke to broader policy issues” rather than, according to the ALJ, the PUD standards under §32-4-245(c).

In the final portion of the Opinion, the ALJ quotes § 32-4-245(c) in its entirety because this is the Code provision which defines how an ALJ is to evaluate a PUD. The ALJ then indicated that he was approving the PUD because the Developer presented testimony that, colloquially speaking, covered every base. In other words, the developer filled in every box that needed to be filled in, and then, because DOP approved the plan, he approved it. (Opinion at p.16.) He provided no further analysis, no rationale, and no **independent** review regarding the merits of the project. He simply deferred to DOP. He did so even while noting with sympathy the active opposition of very substantial business and community leaders who for years had relied on the County’s representations that have induced those businesses to make multi-billion dollar investments in the Red Run area.

At the conclusion of the Opinion, the ALJ referred to Protestants evidence that sought to undermine the PUD as “an ad hoc process.” (Opinion at p. 17.) Again, the ALJ stated that the Protestants testimony on that point was “substantial and convincing.” In recognition of the clarity and force of the Protestants argument, the ALJ did indeed find that PUDs are ad hoc. He then stated, however, that it is acceptable for a PUD to be ad hoc. This is a misuse of the concept of “ad hoc”, and

that reveals the extent to which the ALJ felt compelled to merely ratify the DOP recommendation.⁶ PUDs are only ad hoc in that they can provide some much needed zoning relief in between quadrennial reviews. But they are not ad hoc in the sense that all pre-existing zoning and development standards are abandoned in favor of something akin to spot zoning. While it is true enough that PUDs enable uses that would otherwise not be permitted in the zone, those uses still have to be congruent and complementary to the existing zoning and have to satisfy the fairly rigorous special exception standards in BCZR 502.1A-F. The process is special, but the standards are not. If the County supported a special exception in some situation, the ALJ would feel no compunction to supersede that view if, after an adversary hearing, he was not convinced that the special exception should be granted. His authority in the PUD review is no different.

CONCLUSION

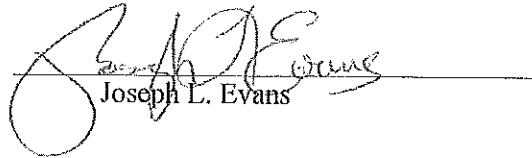
The ALJ in this case is extremely experienced and well-schooled in the intricacies of development plans and the processes by which they come to be. Not only does he understand the technical aspects of the process, he also appreciates the many issues that operate collectively to make development sane and sensible. He is an ALJ precisely because of these qualities. Yet in this case, while recognizing that the Protestants were essentially correct that this PUD is poorly conceived, he approved it without exercising his own independent judgment. It cannot be the case that once County planners approve it, and once the developer dots the i's and crosses the t's, the PUD has to be approved. The ALJ is the check to make the PUD process balanced.

⁶ The DOP report itself is a bit confounding. For example, it is based, at least in part, on the DOP conclusion that the PUD is consistent with the Master Plan, a conclusion that the ALJ was unwilling to accept. Moreover, while the report purports to rely on the compatibility standards in § 32-4-402.1, the report itself seems to have little to do with that provision. A fair reading reveals that it concentrates primarily on the difficulty a developer/investor has in presently disposing of the property. Some of its additional points also seem questionable: residents purchasing services from surrounding businesses cannot occur because there are no surrounding businesses; the building will be adjacent to a proposed extended stay hotel which the County lauds but which the hotel ownership decries; and the so-called economic development is simply the expenditure to construct the building (which is essentially true whether the building is residential or commercial), and not any long term ongoing generation of employment and business activity.

In the Matter of Owings Mills Investment Properties, II, LLC a/k/a Red Run Station PUD
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The error of law in this case was the simple failure of the ALJ to exercise the authority granted to him under 32-4-245(c) to make a thorough and independent assessment as to whether this PUD satisfies the mandatory criteria in subsection (2). For that reason, I believe he made an error of law that requires reversal.

February 3, 2017


Joseph L. Evans



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

February 3, 2017

David K. Gildea, Esquire
Jason T. Vettori, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

J. Carroll Holzer, Esquire
Holzer & Lee
508 Fairmount Avenue
Towson, Maryland 21286

RE: *In the Matter of: Owings Mills Investment Properties II, LLC – Legal Owner*
Enterprise Housing Corporation – Developer
(a/k/a Red Run Station – Lot 1 PUD)

Case No.: CBA-17-009

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 Mr. Evans' 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,

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

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosures
Duplicate Original Cover Letter

c: See Distribution List Attached

Owings Mills Investment Properties II, LLC – Legal Owner
Enterprise Housing Corporation – Developer
(a/k/a Red Run Station – Lot 1 PUD)
Distribution List
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Owings Mills Investment Properties II, LLC
Michael Bainum, Senior Development Manager/Enterprise Housing Corporation
Kenneth V. Moreland, Chairman/Owings Mills Corporate Roundtable
Doug and Natalya Schroeder
Cindy Gies
Keerti Sunkara
Dennis and Georgette Burrin Campbell
Nick Mangione
Robert S. Rosenfelt, P.E./Colbert, Matz & Rosenfelt, Inc.
Office of People's Counsel
Andrea Van Arsdale, Director/Department of Planning
Lawrence Stahl, Managing Administrative Law Judge
Vincent Gardina, Director/DEPS
Darryl Putty, Project Manager/PAI
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