IN RE: **DEVELOPMENT PLAN HEARING** 9th Election District 2nd Council District (6241 - 6247 Falls Road)	*	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
	*	FOR
CPC FALLS ROAD PROJECT **BLUESTEM** CPC Falls Road LLC, Owner Developer	*	BALTIMORE COUNTY **CASE NO. 09-0861**

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ADMINISTRATIVE LAW JUDGE'S ("ALJ")
DEVELOPMENT PLAN OPINION AND ORDER

This matter comes before the Office of Administrative Hearings ("OAH") for Baltimore County for a public hearing on a development proposal submitted in accordance with Article 32, Title 4, of the Baltimore County Code ("BCC"). CPC Falls Road LLC, *Owner/Developer*, (herein known as "Developer") submitted an eight (8) sheet redlined Development Plan ("Plan") prepared by Morris & Ritchie Associates, Inc., known as "CPC Falls Road Project / Bluestem."

The Developer proposes a mixed-use commercial and residential development with approximately 56,600 sq. ft. of restaurant/retail and office in several buildings and on the ground level of a multi-family residential building with 152 apartment units on 6.19 acres, more or less, of land zoned BM-CCC. The property is located in the Bare Hills section of Ruxton/Riderwood/Lake Roland area of Baltimore County, and is inside the Urban Rural Demarcation Line ("URDL"). A connection is proposed into the existing trail system of Lake Roland Park, and park visitors will be permitted to use the off-street parking provided for the project. In its current state, the site is developed with a mix of commercial uses along Falls Road and a large portion of the back half of the property is the mulch operation and storage yard for Hollins Organic Products.

This project is within the Ruxton-Riderwood-Lake Roland residential design area.

Pursuant to BCC § 32-4-204, projects within design review areas must be reviewed by the Design Review Panel ("DRP"). The DPR reviewed this project on August 8, 2018, and final DRP approval was granted on September 12, 2018.

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 November 21, 2018. At the DPC, the Baltimore County agencies responsible for the review of the Development Plan submit written comments regarding the proposed development. The Hearing Officer's Hearing ("HOH") was scheduled for Friday, January 25, 2019, at 10:00 AM, in Room 205 of the Jefferson Building, 105 West Chesapeake Avenue, Towson, Maryland. Additional hearings were held on several days spanning the next six months.

The property was posted with the Notice of Hearing on December 20, 2018 for 20 working days prior to the hearing, in order to inform all interested citizens of the date and location of the hearing. Appearing at the public hearings on behalf of the Developer was Len Weinberg and Joshua T. Sharon, professional engineer with Morris & Ritchie Associates, Inc., the engineering firm that prepared the Plan. Lawrence E. Schmidt, Esq. and David K. Gildea, Esq. with Smith, Gildea & Schmidt, LLC, appeared on behalf of the Developer. In attendance at the hearing and opposing the project were Michael R. McCann, Esq. representing several members of the community, Dino C. La Fiandra, Esq. representing Princeton Sports, Inc. and Lucile Real Estate LLC, and Robert Smith, Esq. representing the Rockland Ridge Homeowner's Assn.

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"): Jerry S. Chen, Project Manager; Jos Venturina and Jim Hermann, Department of Public Works ("DPW")/Development Plans Review ("DPR"); Gary Hucik, Office of Zoning

Review ("OZR"), and Brad Knatz, Real Estate Compliance. Also appearing on behalf of the County were Jenifer G. Nugent, Department of Planning ("DOP"), and Jeff Livingston with the Department of Environmental Protection and Sustainability ("DEPS").

Agency Witnesses

All agency witnesses indicated the redlined Development Plan satisfied all Baltimore County rules and regulations and each reviewer recommended approval of the Plan. DEPS approved a concept stormwater management plan on October 25, 2018. A schematic landscape plan was approved on December 6, 2018 and Mr. Hermann stated the Developer will provide amenity open space and private/public amenities which pursuant to the BCC are considered offsets to Local Open Space ("LOS") requirements. He testified the Developer will provide certain on and off-site amenities and improvements which will more than offset a fee in the approximate amount of $352,000 which would otherwise be payable to the County in lieu of providing the open space.

According to the School Impact Analysis (Baltimore County Exhibit 1) enrollment at the West Towson Elementary School and Towson High School is projected to exceed 115% of State Rated Capacity ("SRC"). Even so, Ms. Nugent testified there is sufficient capacity at Riderwood Elementary School and Loch Raven High School, and thus that agency opined the Adequate Public Facilities Ordinance ("APFO") is satisfied. On the third day of the hearing (April 5, 2019) Developer submitted a revised school analysis (Developer's Exhibit 17) which used enrollment numbers for the 2017-18 school year, as requested by the DOP. Developer's counsel indicated 2016 enrollment figures were used initially, which was erroneous.

Developer's Case

The first witness in Developer's case was Len Weinberg, a principal in the entity owner of the property. Mr. Weinberg explained he started in 1987 a real estate development company known as Vanguard. The witness testified his firm primarily focuses on retail projects, and that he has constructed approximately 40-50 such projects in this area. Mr. Weinberg described the site and current uses, and explained the project is best described as a mixed-use "village." He also described the process by which the Developer entered into a declaration and covenant agreement with Ruxton Riderwood Lake Roland Area Improvement Association ("RRLRAIA"). Developer's Exhibit 3.

In response to questions on cross examination, the witness indicated he was aware of community opposition to the project, which primarily focused upon the number of apartments proposed. Mr. Weinberg testified his firm attempted to purchase the adjacent property owned by Princeton Sports and was also aware the proposed stormwater management system outfall was located on property owned by Baltimore City.

The next witness in Developer's case was Lawrence Rief, a partner in Continental Realty. Mr. Rief testified his office is located across the street from the site and that he and his employer "wholeheartedly" support the project. He explained the proposed restaurants and retail/service establishments are sorely needed in the area.

Professional engineer Josh Sharon was the next witness. Mr. Sharon, who was accepted as an expert, described the site and existing features and uses thereon. He reviewed the development plan, and explained the significant features (including redline revisions) on each page of the 8-sheet plan. Mr. Sharon testified the site is not within a deficient service area as shown on the County's Basic Services Maps, and he explained the proposed access to the

project from Falls Road, which would involve aligning the proposed access road with Clarkview Road, which is controlled by a traffic signal.

On cross examination, the witness was questioned about (among other things) off-street parking and amenity open space/LOS. Mr. Sharon testified that other than the upper level(s) of the parking structure which would be reserved (with gated access) for residents, there will be no reserved parking at the project. He explained the public will be permitted to park on the property to access Lake Roland, and he stated he had not analyzed how many spaces would be used on a regular basis by the general public. Mr. Sharon advised the open space exhibit (Developer's Exhibit 2) had been approved by the OZR but not by the County's landscape architect.

Mr. Sharon responded to several questions concerning the LOS requirements, and he opined it was not feasible for the Developer to provide the requisite open space on the subject property given the various site and environmental constrains as shown on the Plan. The witness testified Developer will be constructing both public and private amenities (on-site and off-site), the "verified" cost of which can be deducted from the fee required under the LOS regulations. Mr. Sharon explained the costs shown on the Plan are industry estimates, and that in the construction phase (*i.e.*, Phase II) of the project Baltimore County would analyze and verify expenses submitted by Developer in connection with the construction of the proposed amenities.

James Hermann, the Baltimore County landscape architect, was again called as a witness on the third day of the hearing, to discuss a redline amendment (Developer's Exhibit 13) to the Open Space exhibit (Protestant's Exhibit 1) submitted previously. Mr. Hermann testified the revised open space calculations (submitted in response to comments from the OZR) shown on

the revised plan are in compliance with all Baltimore County requirements. In the revised exhibit Developer did not include as amenity open space the portion of land on the bottom of the stormwater management features and the security or fee in lieu (pending offsets for on-site and off-site improvements) amount was increased to $371,811.30. Mr. Hermann also explained additional detail was added to the plan (Developer's Exhibit 13) to categorize how the funds would be used by the Lake Roland Nature Council. In response to questions on cross-examination, the witness stated "verification" on the cost of improvements would come "down the road" after the amenities are constructed.

Dean Hoover, a land planner with over 30 years of experience, was the final witness in Developer's case in chief. Mr. Hoover, who was accepted as an expert, first noted the property's BM-CCC zoning classification is one of the most intense zones in the BCZR. He next described in detail the recent changes to the County's open space law, as found in Bill 73-16. Developer's Exhibit 16. He testified the new law provides an incentive for the Developer to provide amenities instead of unimproved "open space." Mr. Hoover explained the Developer wants to take advantage of its proximity to the 500 acre Lake Roland Park rather than providing open space on this small development site.

In response to questions on cross-examination, he conceded Developer has not obtained approval from Baltimore City to complete any of the off-site improvements shown on that plan. He was asked several questions concerning the feasibility of providing on-site open space and opined that such an analysis is not required in this case since Developer is not paying to Baltimore County a "fee-in-lieu."

Community Concerns

Several neighbors who reside in the community expressed concern with the size and scale of the project. In addition, community members are concerned the project would cause existing traffic conditions to become even more congested as well as the potential impact upon water and sewer resources.

Peter Wiedmann, a volunteer at Lake Roland, described a "balloon test" he performed which he believes shows the project will be visible from the serpentine meadow area of the park. Other residents described the "beautiful trail system" at Lake Roland and feared this project would have a detrimental impact upon the peaceful and bucolic setting. Several neighbors testified traffic along Falls Road in this area is a "disaster" and they feel this project will only exacerbate that problem. Members of the community allege the RRLRAIA is working "behind the scenes with the developer" to secure project approval. Others argue that while the proposal might satisfy some minimal standard, it is poorly designed and is in essence a "glorified parking lot."

Paul Davis is one of the owners of Princeton Sports ("Princeton"), a family-run sporting goods business that started in 1936. Mr. Davis testified that Princeton opened its Falls Road location 50 years ago, and that the Plan proposed by the Developer would "cut off their access to the store." Mr. Davis testified that his customers would need to use the intersection at Racquet Road for ingress and egress, which he believes is unsafe. The witness testified that the proposed means of access would have a detrimental impact upon the business, and that Princeton wants to have continued access to the traffic signal. In response to a question on cross-examination, Mr. Davis indicated that he did not believe Princeton had any specific authorization in its deed to access the Developer's property.

The next witness was Larry Green, a professional engineer accepted as an expert. Mr. Green testified that he is a traffic engineer, and has over 33 years of experience. He performed a traffic study for Princeton and determined that 58% of their customers use the northern driveway, while 42% use Racquet Road for ingress and egress. Mr. Green also testified that 75% of Princeton's customers traveling southbound on Falls Road turn left into the aforementioned driveway, while 25% use Racquet Road. In concluding his testimony, Mr. Green opined that the proposed Plan creates an adverse impact upon Princeton, since traffic would be diverted to Racquet Road which has substandard and unsafe sight distances.

In response to cross-examination questions, Mr. Green stated that he visited the site 4 or 5 times, and agrees that there is a grade differential between the Princeton store and the Bluestem property. The witness also conceded that the current alignment of the Princeton driveway does not comply with State Highway Administration ("SHA") standards. Finally, the witness stated that the Developer could provide access to Clarkview Road extended, but he noted that he had not performed any analysis or investigation of that issue in any detail.

Jane Huth was the next witness in the Protestants' case, and she explained that she lives off of Lake Avenue approximately 2 miles from the site. Ms. Huth stated that her children attend Towson High School, which she stated was presently at 129% of SRC, and has 10 or more portable classrooms to accommodate the overcrowding. The witness also presented documents obtained from the Baltimore County Public Schools which show that the enrollment at Towson High School is anticipated to rise steadily in the next few years to more than 150% of SRC.

Al Barry, a former Assistant Planning Director for Baltimore City with over 30 years of experience, was accepted as an expert in planning and zoning. Mr. Barry testified he in collaboration with community members and other stakeholders prepared the Ruxton-

Riderwood/Lake Roland Community Plan ("RRLRCP") adopted by the County Council in 2011. Mr. Barry explained that Lake Roland Park was a crucial aspect of the Plan, and that one of the important features the community desired was to connect the east and west side of Falls Road to the park.

Mr. Barry explained that the west side of Falls Road in this vicinity was earmarked for more intense development while the east side was specified in the community plan to have low (2 to 3 story) scale buildings, other historic structures, and access to Lake Roland Park. In this regard, the witness explained that the Hollins Organic Company located at the rear of the CPC Falls Road site had already moved the bulk of its operations to Cockeysville, and the community was concerned with the ultimate disposition of this parcel. Mr. Barry testified that he reviewed the development plan and believes that the density, height of structures, lack of open space and the lack of access to Lake Roland Park are all prominent features which are at odds with the RRLRCP. The witness stated that the site has no designated parking spaces for park users, and that the green space at the site should be adjacent to the park, rather than in small parcels spread throughout the entire site.

On cross-examination, the witness stated he is not familiar with Baltimore County Master Plan 2020 ("MP 2020"), and did not review or study that document prior to his testimony. Mr. Barry also conceded that he did not know the current zoning of the property, although he was aware that it was rezoned in or about 2016 after adoption of the RRLRCP.

Barbara Hopkins, the Director of Baltimore County NeighborSpace, was the next witness in the Protestants' case. Ms. Hopkins explained that NeighborSpace is designed to improve the livability of communities inside the URDL. She stated she was familiar with the open space regulations, and believes it is accurate to say there is an open space "crisis" in Baltimore County.

Ms. Hopkins explained she is intimately familiar with and was involved in the revision of BCC Section 32-6-108 concerning open space requirements.

In connection with this case, Ms. Hopkins believed the Developer simply disregarded the "feasibility" of providing open space before it focused upon the fee which would be required for a waiver. She advised that a developer must first demonstrate that it is unfeasible to provide open space on site or off site, pursuant to BCC § 32-6-108(f)(1), before being approved for a fee-in-lieu waiver.

In response to questions on cross-examination, Ms. Hopkins stated that under the new law open space for this project could be provided anywhere within the 2nd council district. She also testified that the new open space law does not focus on any given project; rather, she believes the law requires the Developer and Baltimore County to consider the needs of the entire council district in question. Ms. Hopkins also expressed frustration that even though the local open space law was revised substantially in 2016, the Local Open Space Manual has not been updated, which means neither developers nor the community have guidance concerning the interpretation and application of these regulations.

Mark Behrens is the President of the Rockland Ridge Homeowners Association, a community with 75 single family homes. Mr. Behrens testified he is an architect and civil engineer, and he expressed concern with the following issues: traffic, water pressure, adequacy of the sewer system and potential overcrowding of Lake Roland Park. He also advised that although his community is within its boundaries, he does not think that the RRLRAIA represented their interests in connection with the covenant agreement that association entered into with the Developer.

Robert Smith, an attorney, is also a board member of the Rockland Ridge Homeowners Association, and he also expressed significant concerns with the project. Mr. Smith criticized the traffic study presented by the Developer, which he stated does not consider the impact of I-83, which when congested, funnels traffic onto Falls Road in both directions. The witness also stated that parking at the proposed project is deficient, since the Developer cannot have adequate parking for Lake Roland Park users and also comply with the requirements of BCZR Section 409. Mr. Smith also expressed concern with the visibility of the project from the serpentine barrens, a unique environmental feature near the site which may also contain asbestos according to research papers presented by the witness.

Daniel O'Leary, a professional engineer accepted as an expert, was the next witness in the Protestants' case. Mr. O'Leary explained that he reviewed the stormwater management plan for the project, and determined that the proposed outfall (as shown on sheet 4 of the Plan), was located on property owned by Baltimore City ("City"). Mr. O'Leary opined that this was unacceptable, and that the project might need to be significantly revised if the City at a later date refuses to approve the proposed stormwater outfall. Mr. O'Leary testified that as an alternative the stormwater could be directed "uphill" to Falls Road, although in response to a question on cross-examination the witness conceded that this would be a difficult engineering task given the 25 ft. grade differential between the site and Falls Road. In conclusion, Mr. O'Leary opined that a stormwater outfall should be established early on at the conceptual phase of a development project, and that the Developer's Plan "hinges on getting approval from someone else" for the proposed outfall on City property.

The next witness in the Protestants' case was Randy Grachek, an environmental engineer employed by NewFields, Inc. Mr. Grachek described his extensive background as a civil engineer

and explained that his work focuses upon designing and evaluating large sewer projects. Mr. Grachek explained that he visited the Lake Roland site and reviewed certain documents, primarily the many reports prepared by Rummel, Klepper & Kahl, LLP ("RK&K"), the contractor engaged by Baltimore County to comply with the reporting mandates of the 2010 Consent Decree with the Environmental Protection Agency ("EPA").

Based on his review of those documents, the witness stated the property is in a "red zone," and that in his professional opinion it was not acceptable to add any more sewage to the system, since it is over capacity at the present time. Mr. Grachek testified that the Lake Roland interceptor was installed in the 1950's, and is antiquated and unique, especially since it runs completely under Lake Roland. The witness noted that records submitted to the EPA indicate there are 541 defects detected in the Lake Roland interceptor sewer line, which he explained was a far greater number than in sewers at other segments throughout the county.

In response to cross examination questions, Mr. Grachek conceded that he did not know if the subject property was connected to a public sewer at the present time, and does not know how much sewage is being produced by the current users on site. Mr. Grachek also stated that he has not prepared any calculations concerning the expected sewage demand to be created by the proposed project, but he stated that in his opinion it would generate more sewage than the current industrial activity. He also testified that in preparing for his testimony he relied significantly on the RK&K reports, and did not conduct any independent analysis of the present or proposed conditions of the sewer system. In addition, Mr. Grachek testified he does not believe the improvements recommended by RK&K have been completed.

Beth Miller, a registered architect, was the next witness in the Protestants' case. Ms. Miller is a volunteer with the Green Towson Alliance, and she explained that she monitors new

development proposals in Baltimore County and advocates for environmental issues. With respect to this case, Ms. Miller testified she compiled a list of projects which will drain to the Jones Falls sewer shed, and she prepared a chart (Protestants' Exhibit 66) showing the total number of units constructed since 2012.

Jeffrey Budnitz is a volunteer with Lake Roland Nature Council, and he described his significant involvement with the Lake Roland property, including the process by which Baltimore County assumed responsibility from Baltimore City for the maintenance and administration of the park. Mr. Budnitz testified that he repeatedly attempted to have Baltimore County acquire the Hollins Organic property, and also explained to neighbors opposing the project that they should endeavor to purchase the site so that it would not be developed. At the same time, Mr. Budnitz stressed that the subject property is not a "virgin site," and that impervious surface covers nearly the entire property. In addition, Mr. Budnitz testified that the views from the serpentine meadows are already blocked by cell towers and high voltage lines, and that a visitor can see many commercial and industrial structures from the orange trail in the park. Finally, Mr. Budnitz testified that in his opinion the traffic in the area is dependent upon the private schools in the area, which can generate a significant volume of traffic when school is in session.

Developer's Rebuttal Case

Joshua T. Sharon was again called as a witness in the Developer's rebuttal case, and at this stage of the proceedings he focused upon two issues raised by the Protestants. First, with respect to the Princeton access issue, the witness stated that at present the subject property has three curb cuts, and that if the Plan was implemented there would be only one curb cut on Falls Road for ingress and egress from the site. In addition, Mr. Sharon noted that there is a significant grade

change between the Princeton property and the subject site which would complicate any contemplated access between the properties.

Mr. Sharon also addressed the testimony of professional engineer Daniel O'Leary. He stressed that the stormwater management outfall would essentially be in the same location as at present, but that the water would be released at the bottom of the slope on a flat area. The witness stated that the notion of pumping stormwater, as advocated by Mr. O'Leary, is unwise and is almost never recommended by civil engineers. With regard to the outfall on the city property, Mr. Sharon noted that the stormwater has for many years drained onto city property, and the plan is to keep doing just that, although the outfall will be slightly farther into the park with an upgraded plunge pool to reduce the velocity of the water. Mr. Sharon opined that the proposed system would be far superior to the existing stormwater outfall. Finally, Mr. Sharon identified several regulations and codes (*See* Developer's Exhibit 22) which in his opinion dictate that Baltimore City approval for the outfall is not required until permits are sought for this project.

Christopher Jakubiak, a professional land planner accepted as an expert, was the next witness in the Developer's rebuttal case. Mr. Jakubiak testified at the outset that the planning expert presented by the Protestants (Al Barry) focused solely upon the RRLRCP in reaching his conclusion that the project was inconsistent with MP 2020. Mr. Jakubiak testified that determining consistency requires one to examine MP 2020, the relevant community plans, as well as the zoning maps for the property.

In this regard, Mr. Jakubiak testified that the subject property has three significant attributes under MP 2020: (1) the site is within a "community conservation" area; (2) the site is within a "community enhancement" area; and (3) the site is located in a T-5 transect, which Mr. Jakubiak stated was a signal identifying that the most intense mixed-use development should be directed

into such areas. Mr. Jakubiak described the T-5 transect as a classic urban center, and he opined that the proposed project would "fit nicely" in light of the three land use parameters from MP 2020 identified above. Mr. Jakubiak also noted the zoning was changed during the Comprehensive Zoning Map Process ("CZMP") in 2016 to BM-CCC. He noted that the CZMP is designed to implement the recommendations and goals of the master plan, and that the 2016 rezoning of this site was also consistent with the three master plan attributes identified above.

Mr. Jakubiak also opined that the project was consistent with the 2011 RRLRCP, which he said focuses mainly upon the Bare Hills Community and its connection to Lake Roland Park. Mr. Jakubiak also opined that it was not feasible, given the constraints of the situation and what the MP 2020 indicates, to provide three acres of open space on the subject property, which would be required under the LOS regulations. Mr. Jakubiak stated that in his opinion it would make no sense to demand that a significant amount of open space be provided for this project given that the park is "next door."

In response to questions on cross examination, the witness agreed the proposed structures would not be close to Falls Road, which MP 2020 identifies as an attribute of properties in the T-5 transect. Mr. Jakubiak also opined that MP 2020, not the RRLRCP, should govern the analysis in this case. In support of that conclusion, he noted the RRLRCP is not nearly as detailed as some community plans, which contain specific recommendations for future actions and projects. In addition, Mr. Jakubiak testified the RRLRCP expressly states that future plans were contemplated yet have not been completed, which in his opinion is another factor establishing that the 2011 RRLRCP should not be considered a definitive reference.

The final witness in Developer's rebuttal case was Mickey Cornelius, a professional engineer accepted as an expert. Mr. Cornelius is a traffic engineer, and he testified that his firm

prepared a traffic impact study for this project. Based on instructions he received from the SHA, the study analyzed two signalized intersections; Falls and Clarkview Roads and Falls at Old Pimlico. Mr. Cornelius described the methodology used in his study, and explained that existing traffic conditions at the intersections identified were at a level of service B/C during the morning/evening peak hour. Based upon the projected amount of traffic generated by the new project, which was determined by using trip report data provided by the Institute of Transportation Engineers, Mr. Cornelius indicated that the study determined those intersections would continue to function at a level of service B/C after completion of the project. Mr. Cornelius testified that the study was submitted to the SHA, which approved the analysis and findings therein. *See* Developer's Exhibit 27.

Mr. Cornelius also discussed Racquet Road, the county road to the south of the project which would be used for ingress/egress from the Princeton property. The witness conceded that there is inadequate sight distance using American Society of Highway and Transportation Officials ("ASHTO") standards for motorists attempting to make a left out of Racquet Road onto southbound Maryland Route 25. He stated that while newly constructed roads must comply with ASHTO standards, for existing roads traffic engineers examined crash data to determine whether a particular roadway is safe. In that regard, Mr. Cornelius testified he examined Maryland State Police records for the years of 2015 – 2018 and determined there was only one single vehicle accident reported during that period at the Racquet Road/Falls Road location. As such, Mr. Cornelius opined that a motorist, including customers exiting the Princeton property could safely use Racquet Road as a point of ingress/egress.

With regard to whether access could be provided to the Princeton property, the witness opined that it would not be safe to attempt a two-way in/out access point in front of the store.

Provided the existing parking at the front of the store was reconfigured, Mr. Cornelius stated it might be possible to design a point of inbound access only, provided the driveway was angled in such a fashion that would allow for a 20 to 30 mile per hour design speed for motorists entering the site from Falls Road. Even so, Mr. Cornelius opined that it would not be safe or prudent to construct an access point at the front of the Princeton property, although he conceded a connection point could be engineered which would provide ingress/egress at the rear of the existing commercial structure.

Master Plan

The law is clear that the Master Plan is a binding, regulatory mechanism in development cases in Baltimore County. This was the holding of *HNS Dev. v. People's Counsel*, 425 Md. 436 (2012), and is based on that court's interpretation of BCC § 32-4-102(a)(1). The aforementioned statute requires "all development of land [to] conform to the Master Plan."

Protestants contend the plan does not conform to MP 2020, and in support of that argument they presented testimony from Al Barry, a certified planner who prepared the RRLRCP. Mr. Barry, an impressive and articulate witness, described the major aspects of that plan and opined the project proposed by Developer would not be in conformity therewith. Among other reasons he stressed the community plan called for low-scale, village style buildings along Falls Road and a parking area for Lake Roland. He testified the proposed development would not adhere to either of these requirements.

In rebuttal Christopher Jakubiak testified the property's T-5 transect, community conservation and community enhancement area designations. He explained those designations emphasize the need for "sustainable redevelopments that are compact, mixed use and walkable." MP 2020, p.32. He also explained a major feature of the RRLRCP was connectivity to the park,

which was provided in the plan. In addition, the property's zoning classification permits a variety of intense uses, as explained by Mr. Hoover.

Moreover Mr. Barry's testimony focused almost exclusively upon the community plan without considering the impact of MP 2020 or the property's zoning and transect classifications. This is allowing the tail to wag the dog, since the master plan itself is the primary document recognized and required by state law. Indeed, Mr. Barry conceded he was not familiar with MP 2020 or the property's zoning designation, which in my opinion undercuts the validity of his testimony. While the RRLRCP has been incorporated into MP 2020, a property's zoning classification and transect designation are without a doubt the primary land use controls in Baltimore County. In conclusion, Mr. Jakubiak was a credible and persuasive witness and I find based on his testimony as detailed herein the project is in conformity with MP 2020, as required by BCC § 32-4-102(a)(1).

Princeton Sports

The Falls Road access to the store is somewhat problematic since it is located on property owned by the Developer, CPC Falls Road, LLC. Though Princeton has enjoyed this means of access (which is used by more than 50% of its customers) for nearly 50 years, the Developer now proposes to construct a new entrance road into its project (which would align with current Clarkview Road) which will result in the elimination of Princeton's Falls Road access.

Developer is correct the ALJ has no authority to resolve real property disputes. But the County Code expressly provides the ALJ with authority to impose conditions when necessary to "alleviate an adverse impact on the health, safety, or welfare of the community." BCC § 32-4-229(d). As an adjoining property owner Princeton Sports specifically would experience an adverse impact if patrons could no longer access the store from Falls Road, as they have done for more

than 50 years. And the community at large (or at least the subset thereof which patronizes Princeton Sports) would suffer an adverse impact since they would be required to use Racquet Road as the exclusive means of access to the store. Forcing patrons to use Racquet Road would not simply be inconvenient, it could also pose a serious traffic safety issue.

Both Messrs. Green and Cornelius agreed there is inadequate sight distance for motorists exiting Racquet Road. Closing the Falls Road access would mean 100% of the store's customers (instead of approximately 42% at present) would be subjected to this potentially dangerous condition. To mitigate or alleviate this adverse impact a condition must be included in any final order approving the project requiring Developer to provide at no cost a means of access to the Princeton Sports property from the proposed new road (*i.e.*, Clarkview Road extended).

Suitable Outfall

Protestants contend the plan should be disapproved since the Developer has not obtained approval and a franchise ordinance from Baltimore City permitting the discharge of storm water onto city-owned property. I do not believe this argument has merit.

Ownership or title issues are largely irrelevant in the context of a zoning or development case. *Richard Roeser, Inc. v. Anne Arundel Co.,* 368 Md. 294 (2002). Both development and zoning cases can be initiated by individuals or entities which do not own the property in question. In this case, whether or not the plan shows a "suitable outfall" is determined by examining engineering principles not a license or franchise agreement. *See* BCC §§ 32-4-224(a); 33-4-108(b); and COMAR 26.17.02.09 D.

At this stage of the proceedings the Developer is required only to show on a conceptual plan preliminary computations, the size, type and location of the facility proposed and a suitable outfall. BCC §32-4-224(a)(10). As described by Mr. Sharon, the Developer will be obligated to

provide additional and more detailed stormwater management plans in later phases of the development process, and before permits can be issued the Developer would certainly need to establish the legal right to discharge water onto property owned by Baltimore City. The reality is surface water from the site has for many years been directed onto city property; the current proposal would merely continue to do so, albeit with a modern and properly designed outfall. Based on this testimony and the approval of the conceptual plan by DEPS, I find Developer has satisfied this requirement.

Parking

The plan indicates 581 off-street parking spaces are required, while 584 spaces will be provided. But Protestants contend that since the Developer has not specifically allocated spaces for Lake Roland Park, the Plan should be disapproved. Protestants note the Developer pledged in the RRLRAIA covenant agreement to provide designated parking for park users. *See* Developer's Exhibit 4, p.3. I do not believe this argument has merit, for two reasons.

First, the BCZR does not require any specific number of off-street parking spaces for a public park or facility. BCZR § 409.6. Also, a property owner is not obligated to provide parking for public or off-site uses. While the Developer may be contractually obligated to provide parking for park users, Baltimore County is not a party to and is therefore not bound by that agreement. *Blakehurst Life Care Community v. Baltimore County*, 146 Md. App. 509 (2002). The OZR approved the parking calculation shown on the plan, and for that reason, as well as those articulated above, I believe Developer has satisfied BCZR Section 409.

Local Open Space

As noted above, the County's landscape architect and the OZR both testified Petitioner satisfied the LOS regulations. Similar testimony was presented by Messrs. Sharon and Hoover.

Protestants contend the Developer failed to prove it was not "feasible" to provide open space on the subject property. As such, they argue, a fee-in-lieu analysis is premature.

As an initial matter, I believe Section 32-6-108 of the BCC requires an applicant to establish it is not feasible to provide open space on or off site, before a fee-in-lieu analysis (including permitted reductions for certain amenities) is reached. In this regard I am persuaded by the testimony of Ms. Hopkins to the effect that the Developer disregarded the question of feasibility and proceeded instead to the fee and offset analysis. Indeed, that is the only way to logically interpret the cited Code provision since the cost of certain amenities may be deducted from the "fee" which would otherwise be payable, and the Code clearly states a fee shall be paid only when it is not "feasible" to provide the open space. BCC § 32-6-108(i)(2). The reality is this issue is not frequently litigated in development cases, and waiver fees are routinely approved without any consideration of whether it would be feasible to provide the open space in the first instance.

Having said that, I also believe it is not feasible for the Developer to provide the requisite open space on or off site. While it is true, as Protestants argue, the Developer could scale back the scope of the project which would enable it to comply with the LOS regulations, that is not an appropriate rejoinder to whether something is feasible. If that were the standard, a developer could never prove it would not be feasible to provide open space, since it could always scale back its project. At the very least it would not in many instances be economically feasible for a developer to do so.

While not defined in the BCC, the plain meaning of "feasible" incorporates some element of whether the contingency is logical or likely. In this case, the subject property is simply too small to provide the required amount of open space and the neighborhood (and Council District) in which the project is located is established and built out, which in my opinion would not make it feasible

to provide the open space off-site. Finally, one cannot ignore the fact the project is located next to a 500 acre park, and in my opinion it would be superfluous for Developer to provide on-site a small open space parcel next to such an expansive resource.

Protestants also challenge whether the Developer has established with the requisite degree of certainty the "verified cost" of the proposed amenities. I agree Developer has provided only rough estimates, but that is all that is required at this juncture. As Mr. Hermann testified, the costs will be "verified" at a later date and Baltimore County will ensure that an offset against the fee is granted only for the documented costs associated with the amenities and improvements. It certainly does seem incongruous that a Developer would be entitled to an offset against the LOS fee for a swimming pool provided for the exclusive use of its tenants. But Section 32-6-108 of the BCC expressly allows for such reductions, and I am obligated to enforce the law as written, not as I or the community would like it to read. I would note the County Council has introduced Bill 37-19, which proposes to repeal this aspect of the Code which was enacted in 2016 by Bill 73-16. Developer's Exhibit 16.

Sewer System

Protestants contend the plan should be denied due to insufficient capacity of the sewer which would serve this project. Protestants presented testimony from Randy Grachek, a professional engineer accepted as an expert. Mr. Grachek provided extensive testimony concerning the sewer system "interceptor" which serves the subject property, and he stated that the Jones Falls and Lake Roland Park interceptors were severely over-capacity. The witness prepared an exhibit (Prot. Ex.57) which shows that - - depending on the volume of rainfall which would be experienced in a 2, 10 or 20 year storm -- the sewer would be anywhere from 103% to 589% over capacity. This is sobering testimony, especially considering the County's own Sewer

Design Manual (Prot. Ex. 59) unequivocally states that "trunk and interceptor sewers shall not be designed to flow at depths exceeding 90%."

Baltimore County's sewer system - - like that of nearly all major east coast cities - - is antiquated and in dire need of repair. So serious is the problem that Baltimore County entered into a consent decree with the Environmental Protection Agency ("EPA") which requires the County to undertake a comprehensive evaluation of its sewer system and take corrective action to repair or replace defective portions of this infrastructure. The County hired RK&K (an engineering firm) to evaluate the sewer system as required by the consent decree and it determined in a study the interceptors serving the subject property are severely over capacity. RK&K also determined the Lake Roland interceptor had 541 defects, more than any other pipe segment in the Jones Falls watershed. Also, the County's own testing shows the levels of E coli in Lake Roland far exceed safe levels set forth in state regulations.

The consultant recommended Baltimore County install "relief sewers" for the Lake Roland Park & Jones Falls interceptors, which could help to address the overcapacity issues in this area. There is no evidence in the record to suggest Baltimore County has undertaken such measures, and Mr. Grachek opined "the systemic problems identified does not warrant additional sewage being added to the systemic problem, even if it were just a little bit." (T8, p. 105). Developer correctly notes the witness did not undertake any independent evaluation of the sewer serving the site. He did not need to; he relied upon the findings of the County's consultant, an accepted practice for expert testimony in litigation matters. *Williams v. Illinois*, 567 U.S. 50, 60 (2012)("commonly accepted" practice for one expert to rely on records of another expert). RK&K was not hired by Protestants, and its findings were submitted to the EPA in connection with the Consent Decree. In

these circumstances I believe these reports are especially trustworthy and I place a great deal of reliance upon them.

The Developer did not cause and is not responsible for the deficient sewer system near the subject property. As noted by Mr. Grachek it is a County-wide problem and Baltimore County is responsible for providing and maintaining infrastructure such as sewers, drains and roads. Such infrastructure is aging; the Lake Roland Park sewer was constructed in the early 1950's and was designed to serve a much smaller population than it is at present. But the obvious truth is the County, like local governments across the country, does not have sufficient funds to undertake the necessary repairs to its roads, bridges and sewers.

The Developer did not contradict any of the substantial evidence presented on this point by Protestants and it did not present testimony from an engineer or sanitarian to the effect that the existing sewer is sufficient to accommodate existing and proposed demand. Instead, the Developer cites the fact the subject property is not identified as deficient on the County's basic services map. I believe such reliance is misplaced.

Neither the Maps nor the Growth Management Act ("Act") in section 4A02 of the BCZR state they shall be the decisive factor in determining whether the ALJ approves any particular development plan in a contested case. Instead, the Act provides only that no building permits shall be issued for any project in an area identified as deficient on the sewer, water or transportation basic services maps. BCZR §4A02.3.G. Indeed, developers in similar cases have argued (successfully) that a development plan can be approved for a project within a failing traffic shed; the only prohibition in the law is upon issuance of permits. As recognized by the court of special appeals an HOH is not a proceeding in which a building permit is sought; that occurs later during

Phase II of the development process. *Monkton Preserv. Assn. v. Gaylord Brooks Realty*, 107 Md. App. 573, 584-85 (1996).

And it is certainly understandable why the County would be reticent to include a property on one of the basic services maps. The effect of such inclusion is a legislative moratorium, during which the county is expected to undertake the necessary repairs to the deficient infrastructure. Should this state of affairs persist for longer than 18 months, it is likely a court would find the owner's property had been "taken," which requires the payment of just compensation under the state and federal constitutions. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). This is yet another reason why I do not believe the maps are dispositive in any given case.

In this case I am persuaded by Mr. Grachek's testimony and the findings of the County's own consultant that the sewer system serving the subject property is woefully inadequate to handle existing demand, much less the additional inputs from recently approved development in the Towson area. As such, I believe the fact the property is not identified on the basic services map is plainly contradicted by the findings of the County's consultant.

Traffic

It is obvious, especially to residents, the traffic near the subject property during peak periods can be extremely congested. Of course the same can be said for many areas of the County. But the undisputed evidence in this case is that the signalized intersections near the project (which were selected by the SHA not the Developer) currently function at a level-of-service B/C during the A.M. and P.M. peak periods. The traffic study performed by Mr. Cornelius was approved by the SHA (Dev. Ex. 27) and indicated those intersections would continue to operate at a B/C level

after completion of the project. I believe this, along with the approval of DPR/DPW, is all the Developer was required to prove.

Schools

There is no dispute the elementary and high schools which would serve this project currently exceed SRC. And according to the Baltimore County Public Schools the situation is likely to get worse in coming years. But the plan cannot be disapproved on this basis.

Indeed, the BCC provides an exception which swallows the rule. If sufficient capacity exists at adjacent schools, the APFO is satisfied. BCC § 32-6-103(f)(3). Ms. Nugent testified sufficient capacity exists at adjacent schools, and that is all that is required by the cited BCC provision.

Forest Buffer

Mr. Sharon testified he prepared a plan delineating the forest buffers, which was approved by DEPS. Protestants did not present any evidence suggesting the buffers were not properly identified and mapped. Instead, Protestants contend Building F shown on the Plan intrudes upon the required setback. That building is residential in nature, but is set back only 25 feet, which would appear to be in violation of the 35 ft. setback for residential structures. I do not believe this is a basis upon which the plan should be disapproved, although if the project moves forward I believe the Developer would be required to obtain from DEPS a forest buffer variance.

CONCLUSION

The BCC provides that the "Hearing Officer shall grant approval of a development plan that complies with these development regulations and applicable policies, rules and regulations." BCC § 32-4-229. As discussed in detail above, I do not believe the plan is in compliance with the myriad state and county laws which require all residential projects to provide adequate and safe

sewage disposal systems. As such, the plan will be disapproved solely on this basis.

THEREFORE, IT IS ORDERED by this Hearing Officer/Administrative Law Judge this **30th** day of **August, 2019**, that the eight (8) sheet redlined Development Plan known as **"CPC FALLS ROAD PROJECT / BLUESTEM"** (Developer's Exhibit 1), be and is hereby **DISAPPROVED.**

Any appeal of this Order shall be taken in accordance with BCC §§ 32-3-401 and 32-4-281.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:dlw