

IN RE: DEVELOPMENT PLAN HEARING

S side of Old Court Road, E of
Springbriar Lane
(2801 Old Court Road)
3rd Election District
2nd Councilmanic District
(The Ridge at Old Court)

Five M, LLC
Applicant/Developer

* BEFORE THE
* OFFICE OF
* ADMINISTRATIVE HEARINGS
* FOR BALTIMORE COUNTY

* HOH Case No. 03-490

* * * * *

ADMINISTRATIVE LAW JUDGE'S OPINION AND DEVELOPMENT PLAN ORDER

This matter comes before the Office of Administrative Hearings for a hearing pursuant to Section 32-4-227 of the Baltimore County Code (B.C.C.). In accordance with the development regulations codified in B.C.C. Article 32, Title 4, the Owner/Developer seeks approval of a red-lined Development Plan (the "Plan") prepared by Advanced Engineering Consultants, PC for the proposed development of six (6) single family dwellings (the "subject property") on approximately 8 acres zoned DR 1. The subject property is located off of Old Court and east of Greenspring Avenue. The proposed subdivision is more particularly described on the Plan submitted into evidence and marked as Developer's Exhibit 1.

The file reveals that the subject property was timely posted with the notice of hearing as required by the Baltimore County Code, and thus the procedural prerequisites have been satisfied.

As to the history of this project through the development review process, a concept plan was prepared and a Concept Plan Conference (CPC) held on October 6, 2009, followed shortly thereafter by a Community Input Meeting (CIM) held on November 5, 2009. A Development Plan Conference (DPC) was held on November 17, 2010, and the Hearing Officer's Hearing (HOH) was opened (and immediately continued) on February 24, 2011, with three full days of public hearings on April 28, April 29, and May 26, 2011. At the conclusion of the hearing, Counsel for the parties

requested that post-hearing briefs be submitted in lieu of closing argument. Those memoranda were received by the Office of Administrative Hearings on June 10, 2011.

Prior to delving into the testimony and evidence, one preliminary matter needs to be addressed at the outset. Specifically, by letter dated June 13, 2011, Counsel for the Developer objected to the inclusion of two attachments appended to the Protestants' post-hearing memorandum. These exhibits were produced by Protestants' expert, James Patton, after the hearing concluded in the above matter on May 26, 2011. In these circumstances, I will not consider these documents (marked as Memo Attachment 1 and 2) which were both created and submitted to the undersigned after the conclusion of the quasi-judicial hearing. A similar scenario was addressed by the Court of Special Appeals in *Monkton Pres. Assoc. v. Gaylord Brooks*, 107 Md. App. 573, 582 (1996), wherein the Court held that the Baltimore County Board of Appeals did not err in refusing to consider evidence submitted for the first time after the hearing on the development plan. In light of the above, I will not consider Memo Attachment 1 or 2 submitted by Protestants.

Appearing at the public hearing on behalf of the Developer was Mostafa Izadi of Advanced Engineering Consultants, the professional engineer who prepared the Plan. Howard L. Alderman, Jr., Esquire, entered his appearance as counsel for the Developer.

Appearing in opposition to the proposal were J. Carroll Holzer, Esquire, representing the Pikesville-Greenspring Community Coalition, Inc., Old Court-Greenspring Community Association, Greenspring East Homeowner's Association and individuals Tom Skarzynski, Neville Jacobs, Dr. Ronald Diener, Mitch Barker, Ron Bondroff, Dr. Paul and Barbara Leand.

As is customary, this proceeding began with an "informal" session, wherein various County agency representatives appeared and indicated whether or not the Development Plan satisfied all agency requirements. In the present case, the following individuals appeared during this stage of

the hearing, and each indicated the red-lined Development Plan satisfied all agency requirements and that the agency therefore recommended approval of the Plan:

Jeffrey Perlow-Zoning Office;

Bruce Gill-Recreation and Parks;

Brad Natz-Real Estate;

Curtis Murray-Office of Planning;

Dennis Kennedy-Development Plans Review; and

Jeffrey Livingston and Robert Wood-Department of

Environmental Protection and Sustainability (DEPS).

Of course, Counsel for Protestants challenged the findings presented by several of these agencies, and that testimony will be discussed in the next portion of this Memorandum.

DEVELOPER'S CASE

In its case in chief, the Developer called just one witness, Mostafa Izadi with Advanced Engineering Consultants. Mr. Izadi is both a member of the developing entity, Five M, LLC, and is also a licensed engineer serving as an expert witness in this matter. Mr. Izadi testified that the Developer had originally proposed 8 lots, but through the course of the Concept Plan and development review process, that number was reduced to 6 single family dwellings, as proposed on the red-lined Development Plan. Mr. Izadi testified that he personally prepared the red-lined Plan, whereon he addressed all of the open comments from the Development Plan conference held on November 17, 2010. Mr. Izadi testified that in his opinion, the three sheet red-lined Development Plan (marked as Developer's Exhibits 1A, 1B, and 1C) meets all County codes and requirements.

In discussing the Plan, Mr. Izadi testified that the proposed stormwater management facility is designed to handle a 100 year flood, and that it will be owned by the homeowner's association,

not Baltimore County. In addition, Mr. Izadi pointed out that of the 8 +/- acre site, nearly 5.5 acres will be dedicated to Baltimore County for environmental and other open space purposes.

On cross examination, Mr. Izadi testified that he has been involved in only one other major subdivision in Baltimore County, which was constructed approximately 20 years ago. Mr. Izadi agreed that the subject property slopes significantly toward the rear of the property, and he estimated that there was approximately 60 feet of drop off from Lots 1 and 6 to the stormwater management area shown on the final development plan. Even so, Mr. Izadi said that "as an engineer, that is nothing." Mr. Izadi also conceded that there will be a retaining wall within the stormwater management facility, and he recognized that the County would not operate or own such a stormwater facility. Mr. Izadi also indicated that the pattern book for this project was submitted after the DPC, and that the houses are now smaller than originally proposed.

PROTESTANTS' CASE

The first "adverse" witness called by Protestants was Curtis Murray, from the Office of Planning. Mr. Murray stated that in his opinion the lot sizes proposed on the Plan were compatible with the neighborhood, and at the same time recognized that the Plan will certainly impact the scenic road (Old Court Road) more than is now the case. Mr. Murray testified that in his opinion the neighborhood would retain its "estate" character, and that there would still be a "park like" setting in this corridor. Mr. Murray conceded that Lots 1 and 6 as depicted on the Plan are proposed to be closer to Old Court Road than was the case at the concept plan phase.

The next County witness called by Protestants was Dennis Kennedy, from the Bureau of Development Plans Review. Mr. Kennedy testified that surface water is indeed being diverted in connection with the proposed development, and he advised that the Developer requested that the County Department of Public Works (DPW) approve the diversion after the Development Plan conference in this case. Mr. Kennedy advised that due to Mr. Patton's inquiries, he required the

Developer to satisfy the requirements for diversion approval set forth in the new DPW design manual even though this project was in fact grandfathered under the earlier regulations. Even so, Mr. Kennedy testified that Ed Adams, by letter dated April 28, 2011, approved the drainage diversion in this case. See County Exhibit 2.

The next witness was Dave Snook, an engineer from the Department of Public Works. Mr. Snook advised that his job entails reviewing plans for infrastructure (such as storm drains and floodplains) for compliance with County requirements. Mr. Snook testified that the Director of DPW, Ed Adams, issued a letter (marked as County Exhibit 2) approving the drainage diversion and that the "case" was therefore closed in his mind. The next County witness was Michael Viscarra from the Department of Permits, Approvals and Inspections. Mr. Viscarra testified that he first saw the drainage diversion analysis some time in March, 2011, well before the April 28 date on Mr. Adams' letter approving the diversion.

The final adverse County witness to testify was Robert Wood, from DEPS, who reviews stormwater management and grading plans for compliance with County requirements. Mr. Wood testified that the stormwater management facility proposed in this case was acceptable and met all Baltimore County requirements. Mr. Wood stated that the stormwater management pond could not be owned by Baltimore County, because it was designed with a retaining wall. Mr. Wood advised that he was initially concerned with the outfall of stormwater for this project, but believed that the issue had been addressed satisfactorily in the revised Plan. Mr. Wood testified that he walked the proposed stormwater management pipeline route on a few occasions, and was therefore familiar with what was being proposed in the final Plan. Mr. Wood next testified that the Developer's proposal would not comply with Maryland's new stormwater management regulations, but that this project was grandfathered given that the Developer had submitted sufficient information prior to May 4, 2010 so as to constitute "preliminary project approval." See B.C.C. § 33-4-112.1.

Upon questioning from Developer's counsel, Mr. Wood confirmed that residential developments frequently have privately owned and maintained stormwater management ponds, and he confirmed that if a privately owned facility is not maintained, Baltimore County will cause such work to be performed and charge the owners for the repairs. In response to a concern raised by neighboring owners (the Leands), Mr. Wood testified that the houses in the vicinity of the subject property are served by public water, and that the recharging of groundwater is a more important issue when a property is served by a well.

Thereafter, the Protestants presented a series of lay witnesses, most of whom are neighbors within the vicinity of the subject property. The first to testify was Tom Skarzynski, who owns Lot 7 as depicted on the Greenspring East plat. Mr. Skarzynski testified that he has had water and drainage problems for over 17 years, and he presented a photograph (marked as Protestants' Exhibit 2), which corresponded to Lots 2 and 5 at the end of the cul-de-sac as depicted on the final development plan. Mr. Skarzynski testified that these photos showed that the area has a lot of rock and fallen trees, along with steep slopes, and that he was therefore concerned with the suitability of the proposed development.

The next community witness was Neville Jacobs, who is the President of the Pikesville Greenspring Homeowners Association, an umbrella organization representing 16 community associations. Mr. Jacobs testified that the Developer's proposal "grabs the community in the gut," and that he feared the project would endanger the scenic aspect of Old Court Road. Mr. Jacobs advised that the area features homes on large lots, rather than multiple houses on small lots, as proposed in the final development plan. Mr. Jacobs lamented the fact that this matter has become so contentious, and as an example cited the Quarry Lake development, where the community worked for years with the developer, and the approval hearing took less than two hours. Mr. Jacobs

advised that he is dissatisfied with the present zoning of the subject property, and his organization was working with the Councilwoman to see if a solution existed.

The next community witness was Ronald Diener, who testified that he owns a home off of Old Court Road, and that there are seven houses on his street. Mr. Diener advised that all of the lots on his street are at least one acre in size, and that like Mr. Jacobs he too was "not happy with this development," especially since houses were being proposed on half acre lots.

Mitch Barker was the next community witness called, and he lives in the Greenspring East development, which adjoins the Developer's site. Mr. Barker indicated that he has lived at this location for approximately 17 years, and that his primary concerns relate to the extremely steep slopes at the rear of the subject property. Mr. Barker testified that there is approximately 100 feet of elevation change between his house and the stormwater management pond proposed for this development. The witness also advised that he has concerns with the proposed pipeline from the stormwater management pond, and the potential that it could destroy tree roots in the surrounding forest. Mr. Barker presented photographs (marked as Protestants' Exhibit 6) showing his backyard and the persistent wetness that he experiences. Mr. Barker testified that in his opinion it "doesn't seem like the stormwater management plans have been vetted in any detail, and that there was no push back from County engineers." On questioning from Developer's counsel, Mr. Barker advised that his home is situated on a .4 acre lot.

The next two community witnesses were Dr. Paul Leand and his wife, Barbara. The Leands purchased their home at 2731 Old Court Road in 1968, and the home is situated on 15.1 acres of land. Dr. Leand submitted several photos (marked as Protestants' Exhibit 7) which depict the wooded and park-like environment around his house that he does not want to see changed. Dr. Leand stated that County agencies originally had numerous objections to the Developer's proposal, and that he was surprised to see how those essentially disappeared and that as of the date of the

hearing the County has approved everything. Dr. Leand expressed further dissatisfaction with the County development process, and felt that the system should be more transparent. The witness also expressed concern that Mr. Izadi is both an investor and engineer for the project, which prevented independent expert corroboration of his opinions. Finally, Dr. Leand expressed strong disagreement with Curtis Murray's conclusions that the Developer's proposal was "compatible" with the neighborhood. Dr. Leand stated that Mr. Murray did not ever walk the site, and that in his opinion having 6 houses on just over 2 acres of land meant that this was an incompatible proposal. Barbara Leand echoed many of her husband's concerns, and also testified that Mr. Izadi's lack of experience with Baltimore County projects made her uncomfortable.

The final neighborhood witness presented by Protestants was Ron Bondroff, who lives on Quarry Heights Way, which is south of the subject property. Mr. Bondroff testified that there are 305 homes in the Greenspring East development. Mr. Bondroff advised that his homeowners association owns stormwater management pond #3 (as shown on Protestants' Exhibit 1), and that the pond was deeded to the homeowners association in 1999. Mr. Bondroff testified about the problems that his HOA has had maintaining pond #3, and he submitted documents demonstrating that approximately \$5,600 has been spent in the last year for cleaning and maintenance. (See Protestants' Exhibit 8). Mr. Bondroff advised that the homeowners association voted to not allow any additional water flow into pond #3, which he said has become a "nightmare." Finally, Mr. Bondroff testified that the area in question has rock and shale just beneath the surface, and that he does not understand how everyone in Baltimore County government approved this project.

JAMES PATTON - DEVELOPER'S ENGINEER

The next witness called by the Protestants was James Patton, a professional engineer. Mr. Patton's resume was submitted as Protestants' Exhibit 9, and he testified that he was intimately familiar with the Baltimore County development regulations and zoning code. Mr. Patton advised

that he has reviewed the zoning regulations, County Code, new DPW Design Manual and the Comprehensive Manual of Development Policies in connection with his review of this matter. Mr. Patton testified that he has been continually scrutinizing the Developer's submissions to Baltimore County, and also reviewed the Greenspring East plat and the deeds to the subject property and the neighboring Leand property.

At the outset, Mr. Patton testified that he disagreed with Curtis Murray, and did not feel that the proposal was "compatible" with the neighborhood. Mr. Patton advised that he has visited the subject property on at least six occasions, and he stated that Curtis Murray never visited the site and that his characterization of the neighborhood was "lacking." Mr. Patton described the area surrounding the subject property as a "rural pathway" through a residential area. In support of his opinions, Mr. Patton submitted photos (marked as Protestants' Exhibits 10 and 11), which he said depict the "long and low" character of the one story homes in the vicinity. He also advised that because of landscaping, these houses cannot be seen from Old Court Road. In summarizing his opinions concerning the lack of compatibility, Mr. Patton listed the following factors:

1. Public sewer (rather than septic systems) were proposed in the Plan;
2. Two story single family dwellings were proposed in the Plan, which are unlike the surrounding area which contains mainly one story structures; and
3. The proposed houses were incompatible with the scenic road and would not be sufficiently screened from the roadway.

Mr. Patton next opined that the Plan was defective in that it did not depict "private yard areas" (See Protestants' Exhibit 12). In this connection, Mr. Patton testified that many of the proposed dwellings had 3:1 slopes in the rear yard areas, and he opined that decks may be the only realistic way to meet the 500 square foot yard area.

Mr. Patton indicated that he did not review in any detail or run calculations concerning the proposed stormwater management facility. He advised that he did examine the system as concerns the drainage diversion aspect and whether a suitable outfall was proposed. Mr. Patton explained that a diversion was proposed, which he described as surface water runoff to another drainage area. Mr. Patton explained that Protestants' Exhibit 1, a stormwater management plan approved by Baltimore County/Mr. Wood, was merely a preliminary concept, and more was required in "Phase 2" of the development process. Mr. Patton also advised that Baltimore County officials were originally unaware of the need to approve a diversion in this case, and that County staff had to "scurry" to get a diversion approved between February and April, 2011. Significantly, Mr. Patton advised that he had no opinion as to whether or not the approval of the diversion in this case was proper.

Mr. Patton testified that to have a suitable outfall from the stormwater management facility, the Developer must demonstrate an ability to discharge appropriately the stormwater from the site. In this regard, Mr. Patton indicated that he reviewed the stormwater management plans for Greenspring East, which is where the Developer proposes to drain the stormwater from this project. Mr. Patton prepared a composite of several legal documents (marked and admitted as Protestants' Exhibit 14), which he said depicts the stormwater drainage from the site. Mr. Patton indicated there was a "questionable section" on the Developer's stormwater plans, given that there were no documents to show that an adjoining owner has granted approval for the Developer to cross its land to reach pond #3 in Greenspring East. As such, Mr. Patton opined that a suitable outfall was not depicted on the Plan, and that in his opinion, the Plan could not be approved.

Mr. Patton next described what he explained were very significant errors on the Developer's plans delineating the steep slopes on the site constraints map. Mr. Patton prepared his own steep slopes analysis (marked and admitted as Protestants' Exhibit 16), which he said reveals slopes of

greater than 25% in the area of Lots 2 and 5 which should have been delineated on the site constraints map. In his opinion, Mr. Patton believed this would have caused DEPS officials "great concern," since DEPS reviewed and approved the Plan based on there not being steep slopes in this vicinity.

Mr. Patton also advised that the Developer's site constraint plan failed to show that a "major cut" would be required near the Leand property line, and that this could cause trees to fall and water to be diverted from the Leand property to the Developer's stormwater management system. Mr. Patton presented a geological map (marked and admitted as Protestants' Exhibit 18) which shows that the soils depth on site may only be 0-5 feet, which caused him to become concerned with "how the site is going to be developed." Finally, Mr. Patton opined that more dense landscaping was required between the proposed houses and Old Court Road and the Leand's adjoining property.

On cross examination, Mr. Patton testified that the scale of the geologic map (Protestants' Exhibit 18) was one inch equals 24,000 square feet. At this scale, Mr. Patton advised that an inch on the map would represent approximately 5 miles.

In response to questioning from Developer's counsel, Mr. Patton conceded that the public storm drain, into which the Developer's proposed stormwater management facility will flow, is not over burdened. Mr. Patton agreed that the Developer's schematic landscape plan shows trees buffering the houses closest to Old Court Road, and he confirmed that there were no scenic easements in existence along this stretch of Old Court Road.

In connection with the compatibility issue and the performance standards set forth in B.C.Z.R. § 260, Mr. Patton conceded that the homes built in the last 10 to 20 years in the vicinity of the subject property have been two story single family dwellings. In reviewing the photographs he took from an adjoining subdivision (the Shapiro property) Mr. Patton advised that eight or nine homes had been approved for that subdivision, and that one of the homes could be located

approximately 50 feet from Old Court Road. (See Protestants' Exhibit 11B). Mr. Patton also stated that the small lots proposed in the final development plan were enabled by the provision of public sewerage, and that the surrounding homes were on larger lots and had septic waste systems.

With respect to his testimony concerning the private yard area, Mr. Patton conceded that there was no requirement in the County regulations concerning the active or passive nature of this yard area, unlike the Baltimore County Open Space Regulations, which contain such a delineation.

DEVELOPER'S REBUTTAL CASE

In its rebuttal case, the Developer first called John C. Canoles. Mr. Canoles was accepted as an expert natural resources consultant, and advised that he had visited the site approximately 12 times. Mr. Canoles advised that he prepared the site constraint map (marked as Developer's Exhibit 1A) as well as the forest buffer and forest conservation plans, all of which had been approved by DEPS. Mr. Canoles advised that the forest on this site is rated "high priority" and that "to the extent possible" the majority of this forest is protected and deeded to Baltimore County. Even so, Mr. Canoles conceded that roughly half of the forest (3.8 acres) would be cleared for the development. In that regard, Mr. Canoles stated that it was preferable to clear forest inside the URDL rather than in a rural area outside the URDL, such as northern Baltimore County.

With respect to the plans he prepared, Mr. Canoles testified that he takes slopes into consideration, and "scores" the slopes in ranges, as follows: 0-10%, 10-20%, and those slopes greater than 20%.

The Developer recalled Mustafa Izadi as the final witness in its rebuttal case. Mr. Izadi first presented a letter on Carrollton Bank letterhead (marked as Developer's Exhibit 6) wherein the bank approved an easement for the developer to cross its property with the piping from the stormwater management facility enroute to pond #3. Thereafter, Mr. Izadi turned his attention to the stormwater management facility and the drainage areas, and he testified that he prepared the

exhibits marked as Developer's Exhibits 7A and B to depict the portion of the subject property which would drain into pond #3, and that portion which would bypass pond #3 on its way to the Point of Interest and the public storm drain system. Mr. Izadi testified that the Greenspring East plat indicated that 60% of the subject site was designed to drain into pond #3. Mr. Izadi advised that at some point a swale was cut near the southern boundary of the subject property, which altered the stormwater flow and caused a portion of the drainage to bypass pond #3.

Mr. Izadi further explained that cutting and filling is always required in connection with land development projects, and in that regard he submitted a series of photographs (marked as Developer's Exhibits 10A-D) which depict a 40 foot retaining wall on a nearby housing project, as well as an area on the Shapiro property off of Old Court Road where 28 feet of fill was required to create the entrance roadway. With regard to the diversion of surface water that has historically flowed onto the Leand's property, Mr. Izadi testified that the Plan proposal includes four or five dry wells near the Leand's property line to collect and allow for absorption of rainwater.

LEGAL ANALYSIS

I. THE RIDGE AT OLD COURT PLAN IS "GRANDFATHERED" FROM COMPLIANCE WITH NEW MARYLAND STORMWATER REGULATIONS.

At the conclusion of the hearing, I asked the parties to address whether in fact there was any dispute concerning the grandfathered status of the Plan in this case. Under Maryland regulations, a development project which has "received a preliminary project approval prior to May 4, 2010" may be granted an administrative waiver from compliance with the State's newly-enacted stormwater management regulations. COMAR Section 26.17.02.01-2. The Baltimore County Council belatedly enacted Bill 25-10, which was codified at B.C.C. § 33-4-112.1, governing stormwater management waivers. In this case, both the comments at the Development Plan Conference as well as the Development Plan itself (See Exhibit 1, note 20) reflect that a "preliminary approval" of the

concept stormwater management plan was granted by the Department of Environmental Protection and Sustainability (DEPS), Stormwater Management Division on May 4, 2010. Thus, it is clear that the Plan in this case need not comply with the new Maryland stormwater management regulations.

II. STORMWATER MANAGEMENT PLAN ISSUES

Greenspring East Pond #3; "Suitable Outfall"

The Protestants and their expert, James Patton, both expressed serious concerns with the stormwater management plan as proposed by the Developer. As noted earlier, DEPS approved the Developer's stormwater management plan (See Protestants' Exhibit 1) and Mr. Patton correctly testified that this was simply a preliminary plan, and more analysis and investigation would be required in "phase 2" of the Development Plan process. The three phases of stormwater management plans are detailed in the County Code, and the "final stormwater management plan" has not yet been approved by DEPS. B.C.C. § 33-4-107.

One of the principle disputes concerning the stormwater management was whether or not the Developer was able to make use of the Greenspring East pond #3 (an in-stream stormwater management device) for the surface water drainage generated by the proposed development. Mr. Bondroff testified that the homeowner's association which owns the pond voted to prohibit the Developer from discharging any water into it or making any use thereof. But that is not the end of the analysis.

As an initial matter, the Developer correctly points out that when the stormwater management plan for Greenspring East was approved by Baltimore County on May 29, 1990, an easement for the stormwater drainage of upstream properties -- including most of the property owned by the Developer -- was noted thereon. See Protestants' Exhibit 14. In fact, the Developer of Greenspring East was obliged to construct that stormwater facility in such a fashion to accommodate the amount of runoff generated by "the entire upstream area" as if that area were

"fully developed in accordance with the Baltimore County Zoning Regulations." B.C.C. § 32-4-410(c).

In addition, Maryland common law also permits a landowner to discharge stormwater onto lower lying properties, and correspondingly, prevents owners of those lower lying properties from erecting barriers to prevent the flow of that water. *Baer vs. Board of County Commissioners of Washington County*, 255 Md. 163 (1969). Throughout the years Maryland has adhered to what is known as the "civil law" rule, and has engrafted onto that sometimes harsh rule a "reasonableness of use" requirement. *Mark Downs v. McCormick Properties*, 51 Md. App. 171 (1982). Without evidence of an unreasonable use by the dominant/upstream owner, or a material increase in the quantity or volume of water discharged onto the lower land, Maryland courts adhere to the "civil law" rule whereby there is a servitude created on the lower-lying land obligating that owner to receive (unimpeded) the stormwater runoff from higher elevations. In this case, the evidence indicates the volume of water discharged into pond #3 post-construction will be less than at present, and thus the "civil law" rule would apply.

The other significant issue which arose in connection with the stormwater management plan was whether or not the Developer had proposed a "suitable outfall." Both Developer's engineer (Mustafa Izadi) and Mr. Wood from DEPS opined that a suitable outfall was in fact demonstrated on the Plan, which received County approval. See Protestants' Exhibit 1. Protestants' engineer conceded that the public stormwater system into which the runoff would flow was not "overburdened" but he testified that there was a "questionable section" of private land between the Developer's property and pond #3, and that it was unclear whether the Developer had approval to cross that party's land. In fact, the land is now owned by the Carrollton Bank, and as revealed by Developer's Exhibit 6, the bank has granted the Developer an easement to make use of its property for the stormwater management conduits, upon a payment of \$20,000.

The community also raised certain concerns about the private ownership of the proposed stormwater management facility, and the ability of the six homeowners to keep up with maintenance costs and obligations. In this regard, Ron Bondroff testified that the Greenspring East homeowners association owns stormwater pond #3, and that just last year the HOA spent \$5,600 for cleaning and maintenance costs. See Protestants' Exhibit 8. As an initial matter, \$5,600 in yearly maintenance costs does not seem extreme, and with over 300 homes in the HOA the individual assessment for such an expense would be less than \$20. Another pertinent factor is that Baltimore County has recently enacted legislation whereby the County itself will perform any needed maintenance and repairs to a stormwater facility when an owner fails to do so, and the costs for such work will be applied as a lien to the homeowners' real property tax bill. See Bill No. 25-10, codified at B.C.C. § 33-4-111(b). Moreover, the Developer's engineer testified (and DEPS confirmed) that post-development, a smaller volume of stormwater will be drained into pond #3 than is presently the case.

Finally, the Protestants presented as Exhibit 15, an opinion of former Zoning Commissioner Lawrence Schmidt in the "Village Care" case, Zoning Case No. 96-284-SPHX and PDM Case No. III-377. In that case, Mr. Schmidt determined that a suitable outfall was not proposed by the Developer, and he therefore refused to approve the Development Plan. However, as the Developer demonstrates on the chart found at pages 24-25 of its post-hearing memorandum, there are significant factual differences between the Village Care case and the present matter. Simply put, the Developer in the present case has proposed and graphically demonstrated a "suitable outfall" for the stormwater. This was not the case in Village Care, where the Developer proposed four "alternatives" for handling the drainage, the success of each hinging on future contingencies, a scenario described by the Zoning Commissioner as a "trust us...we will later work out the details approach." Protestants' Exhibit 15, p. 17.

III. STEEP SLOPE ANALYSIS

The next issue raised by Protestants concerns alleged errors made in the Developer's plans where slopes of greater than 25% were not specifically identified. Mr. Patton testified that between Lots 2 and 5 on the Plan and the roadway adjacent thereto slopes of greater than 25% existed, yet were not indicated as such on the Plan.

It may be that the areas indicated by Mr. Patton (as reflected on the document he prepared which was marked and accepted as Protestants' Exhibits 16A and B) have slopes exceeding 25%, but that fact alone would not prevent approval of the Plan. Indeed, and as Developer's natural resources consultant, John P. Canoles, testified, he does take slopes into consideration when preparing forest buffer and forest conservation plans, and uses certain ranges which have scores associated therewith, as follows: 0-10%; 10-20%; and slopes greater than 20%. These are the very same scales set forth in the B.C.C. in connection with the preparation of forest buffer plans. B.C.C. § 33-3-111.

Although Mr. Canoles conceded on cross examination that he did not verify if slopes greater than 25% existed between proposed Lots 2 and 5, his plans (which were approved by DEPS) did reference and demarcate those areas where slopes were greater than 20%, which of necessity would encompass those slopes of greater than 25% which Mr. Patton contends exist on the subject property. Mr. Patton testified that DEPS would be "concerned" about this alleged discrepancy, but I was unable to find any provision in the development regulations which would suggest that the Plan could be denied on this basis.

IV. COMPATIBILITY OF THE PROPOSED SUBDIVISION

As noted on the Plan (See Developer's Exhibit 1B, note 38) the proposal is subject to the performance standards set forth in B.C.Z.R. § 260. Among other things, those regulations seek to ensure that "residential development in Baltimore County conforms with a higher quality of

design," and that the proposed buildings and site improvements "complement those in the surrounding neighborhood." B.C.Z.R. § 260.1.B.1; and § 260.2.A.5. Curtis Murray from the Office of Planning testified that in his opinion the Plan satisfied the performance standards set forth at B.C.Z.R. § 260, and his agency recommended approval. The Protestants faulted Mr. Murray's analysis and criticized him for never visiting the site. Even so, Mr. Murray confirmed that the community planner, Diane Itter, had significant input into this proposal and that she is intimately familiar with this area. Protestants also complained that two story homes are being proposed for the Ridge at Old Court subdivision, whereas the majority of surrounding homes are one story. While that may in fact be the case, Protestants' expert, James Patton, conceded that within the last 10 to 20 years only two story homes have been constructed in the vicinity of this project, reflecting a more modern trend in home construction. Mr. Patton also testified that extending public sewer to the subject property (which is now served by a septic system) would contribute to his finding of incompatibility. I am unable to credit such testimony since the State of Maryland has clearly articulate a public policy preference for eliminating residential septic systems, which are feared to have negative impacts on the environment.

The Protestants noted that the six homes planned for the subdivision would each have an approximately half-acre lot while those homes in the surrounding area have an acre or more. My review of the evidence reveals that while most of the homes along this portion of Old Court Road in fact have one acre or larger lots, that is certainly not the case for the adjoining Greenspring East subdivision, which contains over 300 homes. As an example, Mitch Barker's home is on a 0.4 acre lot, and according to tax records that is similar to those of his neighbors, which immediately adjoin the Developer's property. At bottom, whether or not a development is "compatible or incompatible" with the surrounding neighborhood, or would preserve the "estate like" character of the neighborhood, is a subjective judgment call. Mr. Murray conceded as such in his testimony,

and absent compelling testimony to the contrary, I am loathe to simply substitute my personal judgment for that of the Office of Planning which has particular expertise in these matters.

V. REMAINING ISSUES RAISED BY PROTESTANTS

The Protestants raised several additional issues at the hearing, and I will briefly discuss each. First, the Protestants cite Mr. Izadi's lack of experience on residential housing projects in Baltimore County, and contend that this should be a basis for the denial of the Plan. While this is a factor that may be considered important to potential investors and/or future purchasers (as well as neighbors living close to the project), the County Code and Zoning Regulations do not contain any requirements as to the experience or work history of those submitting plans for development approval, and I am not at liberty to engraft same. Mr. Izadi is a licensed professional engineer, as reflected by his seal on the Plan, and that renders him competent (as a matter of law) to prepare such drawings and documents and seek approval of same by Baltimore County authorities.

The Protestants complained that the Developer has not proposed sufficient landscaping and buffering to shield the development from Old Court Road and the property owned by the Leands. As an initial matter, Lot 1 is proposed to be situated 146 feet from Old Court Road, while the Leand's home is 184 feet from the road. This is not an appreciable difference, and the scenic road note on Developer's Exhibit 2 reflects that the area of scenic significance along Old Court Road shall remain to the extent possible in its natural state. The Plan reflects that there will also be plantings between Lots 2 and 3 and the Leand property, and the Developer will be required to demonstrate on the final landscape plan (See Baltimore County Landscape Manual, p. 78) that these homes are appropriately screened from neighboring property owners. B.C.C. § 32-4-229(g)(3). In addition, as can be seen on Protestants' Exhibit 11E, a recently constructed home in this vicinity sits approximately 50 feet off of Old Court Road and has almost no buffering, and I am persuaded the

proposed homes will be better screened from the scenic road. The Comprehensive Manual of Development Policies (CMDP) makes clear that "development can be accommodated in scenic areas" and I find that the proposed landscaping and the single access road to the homes shown on the Plan is in conformity with County requirements. See CMDP, pp. 175-83.

Finally, the Protestants allege they have submitted evidence of shallow surface soils and underground rock formations which may necessitate the use of blasting to construct the proposed development, which would negatively impact surrounding owners. The evidence and testimony on this point was somewhat scant and confusing, as evidenced by the dispute concerning the scale used on the geologic map, Protestants' Exhibit 18. Whether the scale is 1:24,000 (as Mr. Patton contends) or 1:2,000 (as Developer's counsel contends) is ultimately beside the point. What is clear is that Developer's Exhibit 18 is a very low scale map, and it would be hard to predict with any degree of certainty what type of rock formations may exist under the subject property. The other evidence on this point consisted of certain photos depicting fallen trees (Protestants' Exhibit 2) and lay witness testimony opining that such trees had fallen due to shallow surface soils. I do not believe this evidence had sufficient probative value to justify denying the Plan.

Even assuming the underlying rock formations are as alleged by Protestants, that is not an issue evaluated at this juncture of the bifurcated, "ongoing" approval process. Monkton Preservation, 107 Md. App. at 584-85 (holding that "hearing officer's affirmation of the plan is just the first step.") At present, no one has conducted soil test borings on the subject property, which is customarily done during phase 2 of the Baltimore County development process. Developer's engineer presented photographs of the existing home on the property (see Petitioner's Exhibit 19) which he says reveal that the home was constructed without a significant amount of excavation, judging by the lack of any rock piles which would customarily been seen in such a scenario. In the end, the best evidence on this point is perhaps anecdotal, and that is that the adjoining Greenspring


East subdivision was successfully constructed with more than 300 homes (and according to tax records the homes contain basements), and is contiguous to the subject property and no doubt shares the same geologic conditions and features.

CONCLUSION

The Baltimore County Code is clear regarding the standards that must be applied when the Administrative Law Judge considers a development plan. The Administrative Law Judge must approve a plan that satisfies the rules, regulations and policies adopted by Baltimore County regarding development. B.C.C. § 32-4-229. Based upon the testimony and evidence presented, considered at length above, I find that the red-lined Plan meets all County rules, regulations and standards for development in Baltimore County and, therefore, must be approved.

THEREFORE, IT IS ORDERED by this Hearing Officer/Administrative Law Judge this 27 day of June, 2011, that the redlined Development Plan for The Ridge at Old Court identified herein as Developer's Exhibit 1, be and is hereby APPROVED.

Any appeal of this Order shall be taken in accordance with Baltimore County Code, Section 32-4-281.


JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/pz