

IN THE MATTER OF:	*	IN THE
PIKESVILLE-GREENSPRING		
COMMUNITY COALITION, INC.,	*	CIRCUIT COURT
<i>ET AL.</i>		
	*	FOR
FOR JUDICIAL REVIEW OF		
THE DECISION OF THE	*	BALTIMORE COUNTY
BOARD OF APPEALS		
OF BALTIMORE COUNTY	*	Case No. 03-C-12-4191

* * * * *

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the Petition for Judicial Review filed by Pikesville-Greenspring Community Coalition, Inc., *et al.*, (“Petitioners”) on April 18, 2012. Petitioners¹ are seeking review of the March 22, 2012 decision of the Baltimore County Board of Appeals (“the Board”) which affirmed approval of the development plan of Five M, LLC (“Respondent”) for a residential development known as The Ridge at Old Court. A hearing on this matter was held in this Court on November 14, 2012. For the reasons set forth herein, the decision of the Board regarding the question presented on steep slopes shall be reversed and remanded for action consistent with this Opinion.

¹ In addition to the Coalition, Petitioners include Old Court Greenspring Improvement Association, Greenspring East Homeowners’ Association and individuals Dr. Paul and Barbara Leand, Ronald and Lois Diener, Neville Jacobs, Mitch Barker, Tom Skarzynski, Philip Weiner, David and Robbin Bord, and Noel Levy.

BACKGROUND

I. History and Process

On June 3, 2009, Advanced Engineering Consultants, P.C. ("AEC"), the engineer for Respondents, presented to the Baltimore County Department of Permits, Approvals and Inspections a Concept Plan for a residential development known as The Ridge at Old Court. By October 6, 2009, various County agencies had provided their input concerning the Concept Plan. A community input meeting was held on November 5, 2009. On October 12, 2010, the County received AEC's Development Plan for the site. On November 17, 2010, various County agencies commented on the Development Plan.

The Plan calls for six homes along a drive roughly running west from Old Court Road. A 2.91-acre Forest Conservation Easement ("Easement") Area south of the homes is designated by cross-hatching on the Plan. The Easement acts as a forest buffer between the development and a stream that runs part of the way along the outside of the eastern boundary of the Easement. The stream head is about 300 feet southeast of Lot 3. Shaded areas on the Plan, both within and outside of the Easement, indicate steep slopes. The only shaded areas shown outside of the Easement and within the Development is west of Lots 4, 5 and 6, as well as in between Lots 5 and 6.²

² Paved areas, such as the access road and driveways, are also shaded gray, making the Plan somewhat confusing and unclear as evidence regarding steep slopes. Respondent's counsel stated during the November 15, 2012 hearing that some of the shading indicated macadam.

On April 28 and 29, 2011 and May 26, 2011, an Administrative Law Judge (“ALJ”) from the Office of Administrative Hearings held a hearing on the Development Plan. The ALJ approved the Development Plan on June 27, 2011. Petitioners appealed. On March 22, 2012, the Board of Appeals (“Board”) affirmed the ALJ’s decision.

II. Petitioners’ and Respondent’s Contentions

Petitioners request the Court reverse the Board’s decision, alleging that the Board failed to consider steep slope requirements under Article 32 of the Baltimore County Code (Planning, Zoning and Subdivision Control) as it related to two parts of the proposed development: the area near Lots 2 and 5, and the access driveway leading to Lots 3 and 4 and to the Storm Water Management Facility. Petitioners contend that their expert, civil engineer James Patton, demonstrated the existence of steep slopes in these two areas. The slopes about which Patton testified are not within forest buffer areas and were not included in either the Respondent’s site constraints map or Respondent’s Development Plan. Petitioners argue that only Article 32 contains a definition of steep slopes, and that article forbids the county from approving a development unless the development includes measures to prevent erosion and preserve the natural features of the slopes.

Respondent argues that its natural resources expert, John Canoles, properly analyzed and demarcated all of the steep slopes in the proposed development area under Article 33 of the Baltimore County Code (Environmental Protection and Sustainability). Respondent argues that Article 33 contains more

stringent requirements and standards concerning steep slopes than Article 32, and that in any conflict between the two articles, Article 33 prevails. Respondent also attacks Patton's credibility as an expert witness for two reasons: first, that the Board has rejected his opinion before, in an unrelated case; and second, that his use of a map scale different from the developer's map scale makes his conclusions questionable.

The Board concluded that Canoles did reference and demarcate all areas where slope is greater than 20 percent, which of necessity would encompass slopes of greater than 25 percent. The Board stated that Patton acknowledged that an analysis by the Baltimore County Department of Environmental Protection and Sustainability included all slopes in excess of 20 percent; therefore, slopes of greater than 25 percent were included in the analysis.

ISSUE FOR REVIEW

Did the Board err by failing to make findings under Article 32 of the Baltimore County Code ("BCC") that the proposed development 1) includes protective measures adequate to prevent erosion or sloughing of any steep slope or unstable slope; and 2) promotes the preservation of the natural topographic features of the steep slope or unstable slope as required by BCC § 32-4-215?

STANDARD OF REVIEW

A court is "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel Service Inc. v. People's Counsel for Baltimore*

County, Md., 336 Md. 569 at 577 (1994); see also MD. ANN. CODE, STATE GOV'T ART. § 10-222(h).

In judicial review of zoning matters, including special exceptions and variances, the correct test to be applied is whether the issue before the administrative body is “fairly debatable,” that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions. *White v. North*, 356 Md. 31, 44 (1999). However, when an administrative agency’s conclusions are not supported by competent and substantial evidence, or where the agency draws impermissible or unreasonable inferences from undisputed evidence, such decisions are due no deference. *Chesley v. City of Annapolis*, 176 Md. App. 413, 431 (2007). Whether reasoning minds could reasonably reach a conclusion from facts in the record is the essential test. *Id.*

DISCUSSION

Both parties agree that the subject property contains “steep slopes” as defined by the BCC. Petitioners contend that any development plan must address slope protection under BCC Art. 32. Respondents contend that they have addressed the environmental impact or treatment of steep slopes under BCC Art. 33, which requires forest buffers on steep slopes that are adjacent to streams.

“Steep slope” means an area where the natural grade is 25 percent or greater. BCC § 32-4-101 (ww). The county may not approve a Development Plan or plat unless the county finds that the proposed development: (1) Includes

protective measures adequate to prevent erosion or sloughing of any steep slope or unstable slope; and (2) Promotes the preservation of the natural topographic features of the steep slope or unstable slope. BCC § 32-4-415(a).

“Forest buffer” means a wooded area that exists or is established to protect a stream system. BCC § 33-3-101(h). Multiple environmental protection and resource management values are provided by forest buffers. Forest buffers enhance and *protect the natural ecology of stream systems; water quality; wildlife habitat; the aesthetic and scenic qualities of natural features; environmentally sensitive areas, such as aquifer recharge areas; and flora and fauna preservation sites.* Forest buffers *adjacent to stream systems* restore and maintain the chemical, physical, and biological integrity of the water resources BCC § 33-3-103(b)(1) to (3) (emphasis added). A forest buffer for a stream system shall consist of a forested strip of land extending along both sides of a stream and its adjacent wetlands, riverine floodplain, and slopes. BCC § 33-3-111(a). Adjusted forest buffer standards and requirements for streams and wetlands with *adjacent steep slopes* and erodible soils are described in BCC § 33-3-111(c) (emphasis added). If the standards and management requirements *for forest buffers* are in conflict with other laws, regulations, and policies regarding streams, *steep slopes* ... the more restrictive standards and management requirements shall apply (emphasis added). BCC § 33-3-113(a).

Work under BCC Article 33, Title 3 is done with the express purpose of protecting water quality, streams, wetlands and floodplains. Forest buffers as defined are created and demarcated with the purpose of protecting adjacent

water; they are buffers between the water and development. Preparation of forest buffer plans are done with this purpose, not for the purpose of BCC § 32-4-415(a), which applies to any steep slope. Because sections under Art. 33-3 apply only to steep slopes as they concern water protection and forest buffers, § 33-3-113 does not mean that Article 33 supersedes Article 32 concerning steep slopes in *non-forest* buffer areas. Steep slopes *not* designated as being in forest buffer areas must necessarily be governed by BCC § 32-4-101(ww) and 32-4-415(a). A development plan, therefore, must address slope protection in non-buffer areas.

Petitioners' expert, Patton, testified that he had reviewed all of the pertinent documents concerning the land in this case. Transcript of May 26, 2011 hearing (hereinafter "T"), 9:18 to 11:08. Patton visited the Paul Leand property, adjacent to the proposed development site, six to eight times. T, 12:19-21. Patton testified to the following: Slopes greater than 25 percent that should have been delineated on the site constraints map were not, including areas going through Lots 2 and 5. T, 57:15 to 58:11. The site constraints map is incomplete in that it failed to show all areas of steep slope. T, 58:13-14. Steep slopes would impact the areas near Lots 5 and 2, as well as access to Lots 3 and 4 and the storm water management facility. T, 61:16 to 62:10. The Department of Environmental Protection and Resource Management (DEPRM, now DEPS) reviewed the development plan as if there were no steep slopes, according to its report and its approval of the development plan. T, 65:18-21. According to Patton, the impact of including these steep slopes in the development plan would be that the forest buffer, as delineated, would have to be revised. It might cause

DEPS to deny the project or require the developer to get a variance. T, 70:10-25.

Respondent's expert, Canoles, testified that his steep slope analysis was done in the context of determining forest buffers and preparing forest buffer plans. T, 96:07-25. When Canoles was asked whether he had any opinion, clarification or comment on the testimony he heard regarding his work on the development plan, in terms of whether it is shown properly, delineated properly and done in accordance with Baltimore County development regulation, Canoles replied that the forest buffer and forest conservation easement were shown in accordance with what was approved by DEPS. In addition, Canoles testified that developer's exhibits 1A through 1C comply with Baltimore County development regulations.³ T, 99:04 to 100:03.

When Canoles was asked whether he had made any determination that on developer's exhibit 1A that there were no steep slopes of 25 percent in the area of lots number two and five, he replied: "I did not." T, 100:16-24. When asked if he put anything on developer's exhibit 1A that reflected his analysis of steep slopes, Canoles replied: "No, because my, that does not include my steep slope analysis based on the forest buffer steep slope analysis and erodible soils analysis." T, 100:25 to 101:04. Canoles admitted that he never, while on the site, verified that between Lots 3 and 5 there were not slopes of 25 percent or more.⁴ T, 101:20-24.

³ Exhibits 1A, 1B and 1C are the Site Constraint Map, Development Plan, and Landscaping Plan & Panhandle Profile.

⁴ Although Patton testified about areas around and between Lots 2 and 5, the Transcript reflects Canoles saying Lots 3 and 5 here. This discrepancy is not explained.

Patton testified that areas around Lots 2 and 5, and the access road leading to Lots 3 and 4 and the Storm Water Management Facility, had slopes greater than 25 percent. Respondent's exhibits do not shade these areas as steep slopes.

This Court rejects Respondent's argument that Patton is not credible because the Board rejected his opinion in a previous, unrelated case. Respondent's argument that Patton is not credible because he used a different map scale also is not persuasive. As long as the topographical representations among the various maps are consistent, scale does not affect the depiction of steep slopes.

Neither the Board nor the ALJ made credibility findings regarding the testimony of Patton or Canoles; but, the record shows that Canoles did not contradict Patton's testimony. In fact, Canoles admitted he did not analyze the areas described as steep slopes by Patton; Canoles analyzed only the area which would be a forest buffer – areas needed to protect adjacent water. Canoles did not verify any slopes outside of the forest buffer area while visiting the site. He did not analyze the non-forested areas under § 32-4-415. Because Canoles did not consider them, he did not demarcate them on the Site Constraint Map that county officials considered and approved. County officials, therefore, did not determine whether the Development Plan Respondent created after the officials had approved the Site Constraint Map, included protective measures adequate to prevent erosion and promote the natural topography of any steep slope in non-forest buffer areas as required under § 32-4-215.

The Board states that Patton acknowledged that DEPS' analysis included all slopes in excess of 20 percent and therefore, slopes of greater than 25 percent were included in the analysis. See Opinion and Order, Case No. CBA-12-009, p. 11. It is unclear how the Board reached this conclusion, as it does not cite to the record. As noted above, Patton clearly states that the county did not consider the slopes in the areas on which he is focused. When asked if he agreed with Respondent's slope analysis with the major exception of "this area you previously defined," Patton responds that Respondent's analysis "was good as far as it went, but did not go far enough." T, 67:01-07. There is no substantial evidence for the Board's conclusion that Canoles' analysis included all slopes greater than 20 percent.

In any case, even if there was evidence that Canoles had analyzed all slopes at the site, the stricter standards and requirements mentioned in § 33-3-113(c) would have applied to slopes in forest buffer areas only, not to slopes outside of them. No measures have been stated which would prevent erosion and promote natural topography under § 32-4-415(a) regarding the steep slopes that have been identified just west of Lot 5.⁵

The Board erred as a matter of law because it did not apply Article 32 to areas outside of the forest buffer. Because the County never considered these areas, and because Patton's and Canoles' testimonies combine to show steep slopes in the non-forest buffer area have not been considered by the County, the Board lacked substantial evidence to conclude that Canoles' evaluation of slopes

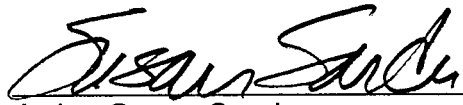
⁵ Respondent's counsel stated during the November 15, 2012 hearing that the measures would be to leave these areas in grass and to prohibit further development on them, but nothing to this effect is stated on the Development Plan.

of greater than 20 percent included all slopes within the proposed development. In sum, there is not substantial evidence in the record as a whole to support the agency's findings and conclusions, and the administrative decision was premised upon an erroneous conclusion of law. The County must determine all areas of steep slopes outside of non-forest buffer areas, and the Development Plan must affirmatively include what measures will be taken to prevent erosion and promote the natural topography of any steep slope in these non-forest buffer areas as required under BCC § 32-4-215.

CONCLUSION

For the reasons set forth herein, the decision of the Board of Appeals of Baltimore County shall be reversed and remanded for action consistent with this Opinion. It is so ORDERED.

1/16/13
Date



Judge Susan Souder

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