IN THE MATTER OF CURRAN PROPERTY David D. Smith – Legal Owner End of Ivy Reach Court W of Happy Hallow Road (Section Two) 8th Election District; 2nd Councilmatic District RE: Approval of Development Plan	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY Case No. CBA-10-034/PDM #VIII-831

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OPINION

This matter comes to the Baltimore County Board of Appeals on appeal by Protestants Falls Road Community Association (the "Community Association") and Terry and Sharon Musika (the "Musikas") (collectively "the Protestants") of a development plan which was approved by the Hearing Officer on March 31, 2010 in accordance with the development review and approval process contained in Article 32, Title 4 of the Baltimore County Code ("B.C.C."). The property owner is David D. Smith (the "Petitioner").

STATEMENT OF FACTS

The property, known as "Section Two – Curran Property," is located in Cockeysville, east of Falls Road and west of Happy Hollow Road at the terminus of Ivy Reach Court. It consists of a 103.3 acre parcel which is split zoned R.C.4 (Watershed Protection) and R.C.5 (Rural-Residential) (hereinafter the "Property"). The Petitioner proposes to subdivide the Property into nine (9) residential lots, a conservancy area to support the residential lots, and a parcel to be reserved for future development.

Hearing Officer's Hearing

Section 32-4-227 of the BCC sets out the general requirements for a Hearing Officer's hearing in evaluating a development plan. By taking testimony and receiving evidence, the Hearing Officer shall consider any unresolved comments or conditions that are relevant to the Development Plan under § 32-4-228(a)(1).

As to conducting the hearing, BCC, § 32-4-228(b) provides that the Hearing Officer: (i) shall conduct the hearing in conformance with Rule IV of the Zoning Commissioner's rules (Baltimore County Zoning Regulations, Appendix B); (ii) shall regulate the course of the hearing as the Hearing Officer considers proper, including the scope and nature of the testimony and evidence presented; and (iii) may conduct the hearing in an informal manner.

Section 32-4-229(b)(1) of the BCC requires that the Hearing Officer grant approval of a development plan "that complies with these development regulations and applicable policies, rules and regulations adopted in accordance with Article 3, Title 7 of the Code, provided that the final approval of a plan shall be subject to all appropriate standards, rules, regulations, conditions, and safeguards set forth therein." Thus, the BCC mandates that the Hearing Officer determine whether the plan is in compliance with existing County standards and safeguards. The Hearing Officer is not affiliated with any Baltimore County agency. He or she acts independently in reviewing the development plan.

As noted by the Hearing Officer in his decision, the role of each reviewing County agency is to review the development plan and to determine whether or not the plan complies with all applicable Federal, State and/or County laws and regulations. In this case, the Hearing Officer, pursuant to his authority in BCC §§32-4-227 and 32-228, identified all unresolved or open comments and issues. Each of the County agencies who were present at the hearing testified that there were no open issues except the Bureau of Land Acquisition which pointed out that there was a 10 foot wide strip of land between the Petitioner's property and the paved surface of Ivy Reach Court. This 10 foot strip was dedicated to the County by a 1999 plat (ZC Developer's Exh.4) for the adjacent six (6) lot subdivision but the strip was never conveyed to the County.

On the issue of the 10 foot strip, the Hearing Officer heard from Tom Goode of Permits and Development Management who referred the Hearing Officer to Note No. 1 on the plat which Note read that the Petitioner agrees to dedicate the 10 foot wide strip to the County, at no cost. The Petitioner has

legal access from his property all the way to Happy Hollow Road. (ZC – Dev. Exh. 5). In any event, the Protestants did not appeal this issue.

Representatives from several County agencies testified before the Hearing Officer namely: Darryl Putty (Project Manager) and Tom Goode of Department of Permits and Development Management ("PDM"); Dennis Kennedy from Bureau of Development Plans Review; Jeff Perlow (Zoning Review Office); Brad Knatz (Bureau of Land Acquisition); David Lykens (Department of Environmental Protection and Resource Management) ("DEPRM"); Curtis Murray (Office of Planning); Bruce Gill (Department of Recreation & Parks); and Lieutenant Roland Bosley, Jr. (Baltimore County Fire Department). In addition, the Maryland State Highway Administration (SHA) submitted written comments to the Hearing Officer which comments are contained within the Hearing Officer's file.

The Hearing Officer also took testimony from several witnesses testifying for the Petitioner including Geoffrey Schultz, the professional land surveyor with McKee & Associates, and Mickey Cornelius, a professional traffic operations engineer with The Traffic Group, Inc. Mr. Schultz provided the specifics of the proposed development. (ZC – Dev. Exh. 3 and 6). The Petitioner proposed a private roadway to be located off of Ivy Reach Court where the Musikas reside.

Mr. Schultz also addressed the performance standards of the RC4 and RC5 zones and represented that the proposed development met all applicable performance standards for both zones. He also opined that the conservancy area met all the RC4 performance standards. There was no expert testimony presented by the Protestants to contradict Mr. Schultz' testimony on either topic.

The Hearing Officer also heard from the Musikas who reside at 33 Ivy Reach Court and from John F. Graham, Jr. who resides at 24 Ivy Reach Court. Although it filed this appeal, the Community Association did not present any evidence before the Hearing Officer. Counsel who represents both the Community Association and the Musikas in this appeal, appeared only briefly before the Hearing Officer, but then left the hearing and did not participate.

The Musikas' concern was that their existing driveway and landscaping might be located on the Petitioner's property. On this issue, the Hearing Officer heard from Mr. Schultz, who presented an exhibit

confirming that no part of the Musikas property was on the Petitioner's property. The Musikas did not offer their own property line surveyor at the hearing to contradict this. Nevertheless, as to this issue, the Hearing Officer correctly pointed out that any property line dispute would have to be decided by the Circuit Court.

The Musikas other concerns were the condition and width of Happy Hollow Road and the distance between their home and the proposed private road. They complained that the private road would negatively impact their quiet enjoyment and privacy. It was noted by the Hearing Officer that the Musikas home was part of the six (6) lot subdivision recorded in the 1999 plat discussed *supra*.

Jurisdiction and Standard of Review

An appeal before this Board, a development plan is heard on the record of the Hearing Officer pursuant to BCC, §32-4-281(d). The standard of review of the Hearing Officer's decision is governed by BCC, §32-4-281(e) which reads as follows:

> *Actions by Board of Appeals.*
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> (1) In a proceeding under this section, the Board of Appeals may:
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> (i) Remand the case to the Hearing Officer;
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> (ii) Affirm the decision of the Hearing Officer; or
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> (iii) Reverse or modify the decision of the Hearing Officer if the decision:
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> 1. Exceeds the statutory authority or jurisdiction of the Hearing Officer;
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> 2. Results from an unlawful procedure;
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> 3. Is affected by any other error of law;
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> 4. Is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
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> 5. Is arbitrary or capricious.
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> (2) Notwithstanding any provisions to the contrary, if the Hearing Officer fails to comply with the requirements of § 32-4-229(a) of this subtitle and an appeal is filed under § 32-4-229(a) of this subtitle, the Board of Appeals may impose original conditions as are otherwise set out in § 32-4-229(c) and (d) of this subtitle.

The Court in the case of *Monkton Preservation Ass'n v. Gaylor Brooks Realty Corp.*, 107 Md. App. 573, 581 (1996) explained that as to the Board's authority for reversing or modifying a decision of a Hearing Officer:

> The first three of these reasons involve errors of law, and, as to them, no deference is due to the hearing officer. The Board clearly must make its own independent evaluation. That is also true with respect to paragraph (e)-whether the hearing officer's decision is arbitrary or capricious. When it comes to reviewing the factual basis for the hearing officer's decision, however, the standard is the traditional one of looking only to whether there is substantial evidence to support the findings. In that examination, the Board does *not* make independent evaluations, for to do so would require the Board to make credibility decisions without having heard the testimony.

The Court in *Gaylor Brooks* explained the role of the Board of Appeals as:

> A county board of appeals is not intended to be that kind of policy-making body; at least with respect to reviewing development plans, it is not vested with broad visitatorial power over other county agencies, but acts rather as a review board, to assure that lower agency decisions are in conformance with law and are supported by substantial evidence.

The Board must examine the record as a whole to determine whether or not substantial evidence exists to support the findings of the Hearing Officer, and if so, the Board may affirm those findings. Toward that end, the Board takes note that "substantive evidence" has been defined to mean more than a "scintilla of evidence." *Prince George's County v. Meininger*, 264 Md 148, 152 (1972).

Opinion

Protestants in this appeal argue that the Hearing Officer erred in several ways, namely that: (1) the Hearing Officer's file was missing documents under BCC, §§32-4-227; 32-3-106; 32-2-107; and 32-3-109 and the Board, in this appeal, should have accepted these documents in evidence at the Board hearing; (2) the review process for development plans was not followed in this case; (3) the development plan violates the conservancy area standards applicable to RC4 zones; (4) the proposed alternatives

analysis with regard to the forest buffer failed to meet the standard under BCC §33-3-112(c)(2)(i), specifically with regard to the storm water management outfall into the conservancy area.

As to the Protestants' first issue, at the hearing before the Board, the Protestants marked for identification and requested that a binder containing 20 documents be admitted into evidence. The 20 documents were collectively marked for identification as Protestants Ex.: 4 and were separated by numbered tabs. The Board accepted into evidence the document under Tab 19 because it was a copy of the BCC as well as the document under Tab 20 because it was a copy of the Baltimore County Development Management Policy Manual.

However, as to the remaining documents offered, the Board did not accept the remaining documents into evidence on the basis that the Board's review was *on the record* of the Hearing Officer, and not a *de novo* hearing. BCC, §32-4-281(d). The Board finds that offering these documents at the Board hearing but not at the Hearing Officer level, circumvents the creation of a record at the Hearing Officer level and frustrates the purpose of BCC §32-4-281(d). In other words, participation by the Protestants at the Hearing Officer's hearing should have included cross examination of representatives from the County agencies as to the very documents which Protestants now want to discuss for the first time on appeal. *In the Matter of Suburban Club Property/The Oxbridge Group*, Case No.: CBA-03-121.

If they had done so, the representatives from the County agencies could have authenticated the documents and explained their content. *Meadowridge Industrial Center Ltd. Part v. Howard County*, 109 Md. App. 410, 421 (1996). Those representatives would have had to explain why a prior disapproval (if any) of some aspect of the plan was later changed to a recommendation that the plan should be approved. Had this happened, the Hearing Officer would have had the opportunity to consider the documents and the testimony of the County representatives together in determining whether the plan really did meet the County requirements. The Board adds that this decision is not a "matter of form over substance" but rather a critical step in gathering the input of the County agencies that are charged with reviewing of these plans and providing the Hearing Officer with the information necessary to make an informed decision.

Those facts notwithstanding, this Board does not find that a remand hearing is warranted on what could have previously been addressed at the Hearing Officer level. Indeed, the Hearing Officer is charged with considering only unresolved issues that are either raised by a County agency or by a party in the case. BCC §32-4-227, 228. If an issue is not raised either by the County or by a party as being "unresolved" the plan is presumed to comply with the Development Regulations. *Id.*

The Protestants claim that they need not participate in the hearing to submit documents to the Hearing Officer because the Hearing Officer's file is required to contain "reports or comments from any ...county agency." BCC §32-3-107(2) (ii) 3. The Hearing Officer's file then becomes part of the Board's file on appeal. BCC, §32-3-108. In their Post-Hearing Memorandum, the Protestants now argue that, even though they requested that the documents be admitted into evidence at the Board hearing, it was not really necessary. Counsel for Protestants, on or about March 22, 2010 after the Hearing Officer's hearing, but before the Hearing Officer signed the Opinion and Development Plan Order on March 31, 2010, sent some of the same documents to the Hearing Officer and requested that they be made part of the Hearing Officer's file. (Protestants Post Hearing Memorandum – Tab 3). In reviewing the Hearing Officer's file, those documents were placed within the file but were not listed among, or included within, the Protestants' Exhibits.

This Board notes that the documents under Tabs 1 through 13 are dated before the Hearing Officer's hearing. Arguably, all of these documents would have been available to the Protestants to submit at the time of the hearing or the Protestants could have raised the point with the Hearing Officer that the Petitioner was submitting documents up until the hearing date and that, the Protestants find this was a violation of the Development Policy Manual. With regard to the documents under Tabs 14 through 18, those documents from DEPRM are dated after the Protestants' March 22, 2010 transmittal to the Hearing Officer, and therefore could not have been made part of the Hearing Officer's file.

Protestants, in their Post Hearing Memorandum, are unhappy with the Board's decision to exclude the documents, the effect of which, they argue, will allow a developer to simply wait until after the Hearing Officer's hearing to file its storm water management plan, forest conservation plan, and

environmental reports. While filing documents after the Hearing Officer's hearing is precisely what the Protestants did here, the Board is of the mind that, had the Protestants participated in the hearing, the Protestants could have crossed examined not only the Petitioner's witnesses but the County agencies as to the absence of these plans and reports.

The lack of participation before the Hearing Officer stems from the Community Association's contention that it did not know about the Hearing Officer's hearing until the day of the hearing. According to the statements of Michael McCann, Esquire at the hearing, the Community Association did not see the signs posted on the Property due to the snow. The Hearing Officer denied the request for postponement because the file indicated that letters were sent to the Community Association notifying them of the hearing. The appearance of the Protestants at the Hearing Officer's hearing showed their actual notice of the hearing and their waiver of due process rights. *Largo Civic Ass'n v. Prince George's Co.*, 21 Md. App. 76, 85-86 (1974); *McClay v. MD Assemblies, Inc.*, 269 Md. 465, 477 (1973).

The Protestants next argue that the development plan conference was not "scheduled at least 10 working days before" the Hearing Officer's hearing as required under BCC, §32-4-226(c)(2). The Hearing Officer rejected this argument noting that the only requirement is that the conference be *scheduled* at least 10 working days before the hearing. In this case, the conference was scheduled 11 working days prior to the hearing. Although the conference had to be rescheduled due to the blizzard that month, the Board finds that the Hearing Officer's decision in this regard was not arbitrary or capricious and that there was no unlawful procedure involved. The conference was scheduled in accordance with BCC. There is no requirement in the BCC that the conference be "held" at least 15 days before the hearing.

Protestants also rely on Permits and Development Manual with regard to time periods for submitting changes to a development plan. (BOA Protestants' Ex. 4 – Tab 20). The Policy Manual dictates that during the 15 days between the development plan conference and the Hearing Officer's hearing, redlined changes to the plan may only be made during the first 5 days and no new information may be submitted during the 5 days immediately preceding the hearing. The Protestants contend that the

Petitioner violated these standards by submitting information right before the hearing, Where the Policy Manual conflicts with the BCC, the BCC will control. *Christ v. MDE*, 335 Md. 427, 437 (1994). In any event, the Protestants failed to preserve this issue in the record below.

With regard to the remaining 2 issues (i.e. the conservancy area and the alternatives analysis for the forest buffer), the Protestants' position is that the Office of Planning and DEPRM should not have approved the plan with regard to these issues and/or that they failed to consider certain factors such as steep slopes in the conservancy area or whether water quality would be improved as required in the Baltimore County Zoning Regulations (the "BCZR").

Pursuant to BCZR §1A03.5A, the Director of Planning and the Director of DEPRM determine whether the conservancy area on the Plan meets the requirements of the BCZR applicable to RC4 zones as well as to the location of storm water management facility and outfall devices within the conservancy area. In the RC 5 Zone, the Office of Planning submits a finding to the Hearing Officer regarding whether the plan complies with the performance standards. BCZR, §1A-04.4.C. DEPRM is also charged with reviewing the Petitioner's alternatives analysis to determine whether the storm water management outfall device could be located within the conservancy area and forest buffer under the standards set forth in BCC, §33-3-112(c)(2)(i).

In this case, both the Office of Planning and DEPRM representatives testified before the Hearing Officer. Mr. Lykens of DEPRM testified that the conservancy area met the requirements of BCZR §1A03.5. In addition, Mr. Lykens testified that the location of the storm water management facility within the conservancy area and specifically the project's outfall device for the storm water management facility, had been reviewed and approved by DEPRM in accordance with §1A03.5.1 of the BCZR.

Likewise, Curtis Murray of the Office of Planning testified that his Office reviewed the plan with regard to the performance standards for both the RC4 and RC5 zones. The Office of Planning made a finding that the plan complied with all of the performance standards. The Protestants in this appeal complain that neither DEPRM nor the Office of Planning explain their facts and reasons in their recommendations as to how the plan met the performance standards for each zone.

On these issues, the Board relies on the holding of *People's Counsel v. Elm Street*, 172 Md. App. 690, 702-705 (2007). In *Elm* Street, the Court of Special Appeals held that:

> Hence, we conclude that, had the County wanted the Directors of the Office of Planning and DEPRM to state "facts and reasons" in their recommendations regarding the development plan's compliance with §§1A03.5(A) and (C), the BCZR would have said so.
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> And, contrary to appellants' argument, once the Directors had made their recommendations, it was not necessary for Elm Street or the agencies to produce evidence supporting those decisions. See Code §§32-4-227(e) and 32-4-228(a)(1); *Gough v. Board of Zoning Appeals*, 21 Md. App. 697, 704 (1974). Instead, it was then up to appellants to produce evidence rebutting the Director's recommendations. *See Id.*
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> Moreover, the Code requires the hearing officer to consider the development plan "to be in compliance with county regulations" if "no comments or conditions are received" by him. Code §32-4-227(e)(2). In other words, at this stage of the development plan review process, the development plan is deemed Code-compliant in the absence of evidence to the contrary.

On the issues of the conservancy area and the performance standards, the Protestants failed to make a record and therefore failed to preserve the issues which they now wish to discuss. They failed to produce evidence to rebut the findings and recommendations of DEPRM and the Office of Planning. All of the Protestants' points raised in their Post Closing Memorandum should have been addressed to DEPRM and the Office of Planning to point out any "failings, omissions or errors" in the plan and why it should be disapproved.

Applying the standard of review as set forth in BCC, §32-4-281(e) and the case law as to whether the decision of the Hearing Officer (1) exceeded statutory authority; (2) resulted from an unlawful procedure; (3) was affected by any other error of law; or (5) was arbitrary and capricious, and without giving any deference to the Hearing Officer, this Board has made an independent evaluation of the record and finds that the decision was not in error for the reasons set forth herein.

As referenced above, the Hearing Officer shall conduct the hearing in accordance to BCC, §32-4-228(b). In this case, the Hearing Officer heard from the County agencies on any "unresolved comments or issues." All County agencies recommended approval of the plan. After the informal part of the hearing, the Hearing Officer took extensive testimony of the witnesses. All parties had the right to exam and cross examine witnesses and to subpoena witnesses and produce documentary evidence. Thus, the Board finds that the hearing was conducted fairly and in accordance with Rule IV of the Zoning Commissioner's Rules of Practice and Procedure. (BCZR, Appendix G).

Finally, in considering whether the Hearing Officer's decision was supported by competent, material and substantial evidence in light of the entire record as submitted, this Board finds that there was substantial evidence from the record as a whole from which the Hearing Officer found, pursuant to BCC, §32-4-229(b)(1) that the development plan met all regulations and applicable policies, rules and regulations. The Hearing Officer had the opportunity to judge the credibility of the witnesses in this regard and in particular, the various County agency representatives, the Protestants witnesses, and the expert witnesses of the Petitioner.

In light of the standard imposed on the Hearing Officer that a development plan which meets all the regulations and polices must be approved and given the lack of any objection by any County agency to the Project as well as the failure by the Protestants' to produce evidence to the contrary, the Hearing Officer had a substantial basis for his conclusion that the Plan should be approved. There was more than a scintilla of evidence to support approval of the plan. (*Meininger, supra* at 152).

ORDER

THEREFORE IT IS, it is this 20th day of August, 2010, by the County Board of Appeals of Baltimore County,

ORDERED that the March 31, 2010 decision of the Hearing Officer approving redlined development plan known as "Section II- Curran Property", be and it is hereby **AFFIRMED;** and it is further,

ORDERED, that the Petition for Special Hearing requesting approval of the creation of undersized non-density R.C.4 portions of Lots Nos. 1, 2, 3, 4 and 9 and undersized non-density R.C.5 portions of Lots Nos. 5 and 7, be and the same is hereby **GRANTED**, subject to the conditions set forth in the Hearing Officer's Order.

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

Maureen E. Murphy, Panel Chair

Edward W. Crizer, Jr.

Robert W. Witt