



Board of Appeals of Baltimore County

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August 25, 2016

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RE: *In the Matter of: Hunt Valley Presbyterian Church, Inc.*
Case No.: CBA-16-050

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all **Petitions for Judicial Review** filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

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

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: Hunt Valley Presbyterian Church, Inc.
Century Engineering
Office of People's Counsel
Andrea Van Arsdale, Director/Department of Planning
Lawrence Stahl, Managing Administrative Law Judge
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

Deidre Bosley
Michael and Mary Kate Fitz-Patrick
Tony and Marsha Gaspari
Beaver Dam Community Association

IN THE MATTER OF	*	BEFORE THE
<u>HUNT VALLEY PRESBYTERIAN CHURCH, INC</u>	*	BOARD OF APPEALS
(aka Hunt Valley Church)	*	
13015 Beaver Dam Road	*	OF
HOH Case No: 08-0524	*	
8 th Election District, 3 rd Councilmanic District	*	BALTIMORE COUNTY
RE: Appeal of approval of Development Plan	*	Case No. CBA-16-050

* * * * *

OPINION

This matter comes before the Board of Appeals for Baltimore County (the “Board”) as a Record Appeal of the March 15, 2016 decision of the Administrative Law Judge, (“ALJ”) John E. Beverungen approving the Hunt Valley Presbyterian Church (“HVC”) Development Plan. Other issues were also reviewed in the hearing before the ALJ, however, the Development Plan was the sole issue considered before this Board. Oral arguments were heard on July 18, 2016. The Appellants, Deidre Bosley, Michael and Mary Beth Fitz-Patrick, Tony and Marsha Gaspari and the Beaver Dam Community Association were represented by Michael R. McCann, Esquire of Michael R. McCann, P.A. The Appellee, Hunt Valley Presbyterian Church was represented by Patricia A. Malone, Esquire and Adam M. Rosenblatt, Esquire of Venable LLP.

PROCEDURAL HISTORY

On January 28, 2016, ALJ Beverungen commenced what would total four days of hearing comprising of testimony from 13 witnesses, several of which were admitted as experts. On March 15, 2016, the ALJ issued a Combined Development Plan and Zoning Opinion and Order (“Hearing Officer’s Order”), approving the Development Plan with conditions. Protestants submitted a timely Motion for Reconsideration regarding issues with the ALJ’s findings involving the Petition for Special Hearing. No errors were alleged at that time regarding the Development Plan. The

Motion was denied and a timely appeal was filed with this Board. Due to the statutory time constraints for appeals to this Board involving Development Plans, the Special Hearing and Development Plan portions of this matter have been bifurcated, with the case at issue dealing only with the approved Development Plan.

DEVELOPMENT PLAN'S STANDARD OF REVIEW

The Board of Appeals' standard of review for the ALJ's approval of a Development Plan is enumerated in BCC Section 32-4-281. In reviewing the factual basis for the ALJ's decision, the Board of Appeals must limit its review to whether substantial evidence exists in the record as a whole to support the decision. *Monkton Preservation Assocs. v. Gaylord Brooks Realty Corp.*, 107 Md. App. 573, 580-81 (1996). "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." *Caucus Distributors, Inc. v. Maryland Securities Comm'r*, 320 Md. 313, 323-329 (1990).

When determining other issues such as whether the ALJ's decision resulted from unlawful procedure, was affected by other error of law, or was arbitrary and capricious, the Board of Appeals makes an independent evaluation.

BOARD'S ANALYSIS

Appellants' Arguments

Appellants' arguments on appeal can be summarized as the contention that the ALJ misapplied the burden of proof in this matter and the argument that the ALJ refused to consider certain traffic issues raised by the Protestant's traffic expert.

Development Plan Requirements Pursuant to the Baltimore County Code

Before addressing the issues brought before this Board on appeal, for guidance as to the parameters for approving a Development Plan we must look to BCC Section 32-4-201. Upon submission, the Code requires that the Development Plan be reviewed by agency representatives for compliance with the regulations within that agency's area of expertise. BCC, § 32-4-226(b). These agency representatives report their findings in the form of written "comments" at the Development Plan Conference ("DPC"), which are then submitted to the ALJ. BCC, § 32-4-226(d). If an agency "does not attend the conference, the agency is presumed to have no comment on the plan." BCC, § 32-4-226(c)(3). If the ALJ receives no comments at all, "the Development Plan shall be considered to be in compliance with the county regulations." BCC, § 32-4-226(e)(2).

Counsel for the Appellee contends that since the Code contains no provision that actually requires County agency representatives to appear at the ALJ's Hearing, that even if every agency failed to show up at the DPC, submitted no comment, and did not appear at the ALJ's Hearing, the ALJ would be required to consider the development plan to be "in compliance with the county regulations." BCC, § 32-4-226(e)(2). *See People's Counsel for Baltimore County v. Elm Street Development, Inc.*, 172 Md. App. 690, at 703 (2007). Alternatively, if, based on the comments submitted by the agency representatives, "unresolved comments" were identified, the Code would require the ALJ to take testimony and receive evidence on those issues. BCC, § 32-4-228(a). If, after taking testimony and receiving evidence on those "unresolved comments," the ALJ found that the plan "complies with the development regulations [Section 32, Title 4] and applicable policies, rules and regulations adopted in accordance with Article 3, Title 7 of the Code," the ALJ would be required to approve the development plan. BCC, § 32-4-229(b)(1). *See also Elm Street*, 172 Md. App. at 696

Review Required by County Agencies

A review of the evidence submitted before the ALJ reveals that at the DPC on January 6, 2016, the following agencies submitted comments on the HVC Development Plan: Department of Planning (“Planning”); Bureau of Development Plans Review (“DPR”); Department of Environmental Protection and Resource Management (“EPS”); Office of Zoning Review (“Zoning”); Real Estate Compliance; Fire Marshall’s Office; and State Highway Administration. Thereafter, Project Manager Darryl Putty, Department of Permits, Approvals and Inspections (“PAI”), submitted these comments to the Hearing Officer as required by BCC Section 32-4-226(d)(1).

At the Hearing before the ALJ, representatives of each of the County agencies responsible for reviewing and commenting on the Development Plan appeared and recommended approval of the Development Plan introduced as Developer’s Exhibit 1. These County representatives included: Darryl Putty, Project Manager with PAI; Brad Knatz with Real Estate Compliance; Jean Tansey and Vishnu Desai with DPR; Lloyd Moxley with Planning; Donald Muddiman with the Fire Marshall’s Office; Joseph Merrey with Zoning; and Jeffrey Livingston with EPS. No cross-examination of these witnesses by Appellant’s counsel was conducted regarding the agencies’ substantive review of the Development Plan or any perceived non-compliance with county regulations. *See* Transcript of Hearing Officer’s Hearing (“T.”), pp. 4-61.

As noted by the Appellee, with no “unresolved comments” having been identified by the county agencies and no challenge being made by way of cross-examination from Protestants, by the end of the Petitioner’s case, the ALJ was required by application of BCC Sections 32-4-226(e)(2), 32-4-228(a), and 32-4-229(b)(1) to find by way of presumption that the Petitioner’s Development Plan was “in compliance with county regulations.” *See Elm Street*, 172 Md. at 703

Further Evidence Considered by the ALJ

While the Appellee argues that the Appellants failed to rebut the presumption that the recommendations of the County agencies were correct in keeping with *Elm Street*, in this case, the Board is not required to examine the validity of such a presumption due to the fact that the Petitioner called six expert witnesses to bolster its case before ALJ and did not solely rely on the recommendations of County Agencies.

Before the ALJ the Petitioner presented testimony from: Michael Pieranunzi (expert land planner and registered landscape) on land planning and general compliance issues; Glenn Cook (expert traffic engineer) on assessment of traffic impacts, road conditions, and operational issues; Mark Eisner (expert in hydrogeology, geology, and hydrology) on sufficiency of groundwater supply, groundwater discharge, and any potential impacts on adjacent properties; Christa Kerrigan (architect) on building massing and siting, aesthetics, and zoning compliance; Mitch Kellman (land planner) on zoning compliance; and Randy Race (Director of Operations with Hunt Valley Church) on church operations and community outreach.

APPELLANTS' ARGUMENT THAT THE HEARING OFFICER APPLIED THE IMPROPER BURDEN OF PROOF.

Appellants argue that the ALJ erroneously applied the "burden of proof" in his approval of the Development Plan in this matter. Appellants allege that the ALJ erroneously placed the burden of proof on the Protestants. The Board is not persuaded by this argument and agrees with the Appellee in its argument that the ALJ was merely following the evidentiary standards and presumptions that are clearly enumerated by statute and relevant case law.

As outlined by the Appellee, the Baltimore County Code contains a clear framework to be utilized in determining whether a Development plan is approved:

BCC § 32-4-228(a): The HO "shall take testimony and receive evidence regarding any unresolved comment or condition..."

BCC § 32-4-227(e)(2): “if no comments [from agencies] are received by the HO, the development plan shall be considered to be in compliance with county regulations.....”

BCC § 32-4-229(b)(1): The HO “shall grant approval of a development plan that complies” with county regulations.

As previously noted, the Court of Special Appeals provided additional guidance on the application of these provisions in the *Elm Street* case:

Once the [agencies’] had made their recommendations [to the hearing officer], it was not necessary for the developer or the agencies to “produce evidence supporting those decisions...Instead, it was then up to [Protestants] to produce evidence rebutting the [agencies’] recommendations....

Under the County’s lengthy DP review process, [the developer’s] duty to demonstrate its plan’s compliance...ended when the [agencies] determined there was such compliance. Once that occurred, [the developer] could, according to Code § 32-4-227(e)(2), simply accept those recommendations and choose not to submit any comments or conditions to the hearing officer....

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.

172 Md. App. at 703.

In applying the *Elm Street* analysis to the case presented before the ALJ, with the agency representatives having confirmed plan compliance, and the Protestants being given an opportunity to cross examine these representatives, it is possible that the Petitioner may have already met its burden of proof. However, it is not necessary for this Board to make such a determination due to the fact that the Petitioner called its own expert witnesses to provide independent verification of compliance. The Board agrees with the Appellee and finds that it was within the ALJ’s discretion to find that the Petitioner satisfied its burden under the Baltimore County Code. The Board further agrees with the Appellee in its contention that satisfying its burden can be equated to the

requirement that a plaintiff in a civil proceeding make a “prima facie” case. *See Baltimore Am. Underwriters of Balt. Am. Ins. Co. of New York v. Beckley*, 173 Md. 202, 208 (1937) (holding that when a plaintiff “has established a prima facie case the defendant is bound to controvert it by evidence, otherwise he will be cast in judgment”).

The Board finds that the ALJ’s explanation of the burden of the Protestants to disprove the findings of compliance by the county agencies and Petitioner’s witnesses is correct:

The B.C.C. and its interpretation by the courts is such that when agency reviewers confirm the plan satisfies all requirements, it “shall” be approved by the Administrative Law Judge (ALJ) unless the protestants can undermine those findings or otherwise present evidence the plan does not satisfy the development regulations. Here, the Protestants have not done so, and I believe the Development Plan must be approved. B.C.C. 32-4-229; *People’s Counsel v. Elm Street Dev.*, 172 Md. App. 690, 703 (2007).

See Hearing Officer’s Order, p. 10.

THE ALJ’S DECISION REGARDING TRAFFIC ISSUES

Additionally, Appellants take issue with the following from the ALJ’s opinion regarding traffic:

The testimony of Chris Tielser was the only evidence presented by the Protestants, which could as a matter of law potentially rebut the findings of agency reviewers and Developer’s experts. Mr. Tielser (and Developer’s traffic expert) testified traffic volume would increase significantly if the project is approved. He also testified there would be significant delays exiting the site after the church services, and he opined the unsignalized intersection of the shared driveway and Beaver Dam Road would function at a level of service “F”. While all this may be true, Baltimore does not evaluate the efficiency, vel non, of unsignalized intersections in reviewing development proposals, and Protestants cite no authority or regulation for the proposition that such adverse effects could justify plan denial. Indeed, all development and permitted land uses will have at least some adverse effect upon the locality. *Shultz v. Pritts*, 291 Md. 1, 20-21 (1981). In addition, Mr. Cook testified that a “surge” in traffic volume is inherent in the operation of a large church or sports venue where parishioners/patrons enter/exit at the same time. Thus, I do not believe the Development Plan can be rejected based on a significant increase of traffic.

In the Board's reading of the ALJ's comments above, we interpret that the ALJ was presented with the competing expert testimony of Protestant's expert Chris Tielser, and Petitioner's expert, Glen Cook. The Board interprets the ALJ's comments to mean that in applying his discretion as a fact finder and in weighing the credibility of witness testimony, he found Mr. Cook to be the more compelling witness. The ALJ agreed with Mr. Cook in his assertion that a "surge of traffic volume is inherent in the operation of a large church and that the increase in traffic requires the rejection of a Development Plan. It is clear from the ALJ comments that he considered the traffic issues at hand and did not find an allegation of failing intersection to be a *per se* bar of Development Plan approval.

In reaching his decision, the ALJ heard the testimony of Mr. Cook who introduced his Traffic Impact Analysis. In preparing the traffic impact analysis, Mr. Cook explained that he first evaluated the road system that serves the project and conducted traffic counts and turning movement counts to assess existing volumes and utilization of the road system. Then, based on the anticipated use of the expanded facility as described by the Petitioner, he prepared projections of future traffic, and added those additional volumes to existing road conditions. He then used recognized methodologies to determine projected (or future) levels of service at area intersections. *See Developer's Exhibits 14 and 15; T., pp. 212-218.*

Based on the results of his analysis, Mr. Cook offered certain suggestions, which he described as a "transportation management plan." *See Developer's Exhibit 14, Results, Recommendations, and Conclusions, p. 30; T., pp. 218-223.* This "transportation management plan" was in addition to changes to the circulation pattern onsite (angling entrance to parking lot and parking spaces, creating a "stop" controlled exit from parking lot, etc.) reflected on the Development Plan. *See also Testimony of Michael Pieranunzi, T., pp. 77-79.* With respect to the "transportation management plan," Mr. Cook made three recommendations to the ALJ:

1. It is recommended that the access for the church be widened to provide two outbound lanes, an exclusive left turn lane, and an exclusive right turn lane along the entire length of the drive aisle.
2. It is recommended that a police officer be available at the Beaver Dam Road access for a 25 to 30 minute period after a service is over to help direct traffic out of the subject site.
3. It is recommended that 45 minutes to an hour be provided between services to prevent the overlap of the incoming vehicles and the outbound vehicles from the church at the same time.

Developer's Exhibit 14, Results, Recommendations, and Conclusions, pp. 30-31.

Mr. Cook further testified that in his professional opinion, making the improvements to the access point, reconfiguring the circulation pattern into and out of the church parking lot, implementing the transportation management plan, and adding signage to Beaver Dam Road would adequately address any safety concerns and minimize impacts to motorists on the surrounding road network and, in particular, to those sharing the private road. T., pp. 218-232, 824-835.

Protestants expert, Chris Tiesler, in summary, testified that there would be an unacceptable amount of delay that would result for vehicles exiting the site during peak times; and that the resulting queue on westbound Beaver Dam Road for vehicles waiting to turn left into the church would reduce the "stopping sight distance" to an unacceptable level.

Further evidencing that the ALJ considered traffic issue in his analysis of the Development Plan at issue, he included the following conditions in his Opinion:

1. HVC must widen the point of egress from the church to provide two outbound lanes: an exclusive left turn lane, and an exclusive right turn lane along the entire length of the drive aisle;
2. HVC must provide police officer(s) (on-duty or uniformed secondary employment to direct traffic at the church access on Sundays before and after services and during any event in which unusual traffic volume is expected;

3. On Sundays, HVC must allow 45 minutes to one hour between services to prevent the overlap of incoming and outbound vehicles from the HVC property;
4. HVC shall advocate for a sign to be installed on westbound Beaver Dam Road east of the I-83 overpass to alert travelers to the potential for vehicles turning into the HVC property.

As the Board reviews this Development matter as a Record Appeal, we must defer to the discretion of the ALJ in his determination of which expert he found to be more compelling. Consequently, we find no error in the ALJ's finding on the issue of traffic, in that it is obvious from the record that he had a substantial factual basis to come to his ultimate conclusion.

CONCLUSION

In conclusion this Board does not find that the ALJ deviated from the proper burden of proof in adjudicating this matter, and we are satisfied that the ALJ was presented with a substantial basis of evidence to make his decision regarding traffic issues. Additionally, we find that the ALJ's decision to accept the testimony of Mr. Cook was within his discretion as the fact finder and not for this Board to second guess. Consequently, the ALJ's decision approving the Development Plan with conditions shall be AFFIRMED.

ORDER

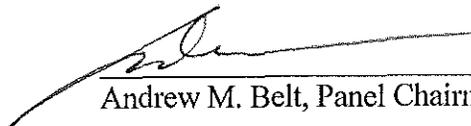
THEREFORE, IT IS THIS 25th day of August, 2016 by the Board
of Appeals of Baltimore County

ORDERED that the decision of the Administrative Law Judge dated March 15, 2016 insofar as it applies to the Development Plan portion of this matter, be and the same is hereby **AFFIRMED.**

In the matter of: Hunt Valley Presbyterian Church, Inc.
Case number: CBA-16-050

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

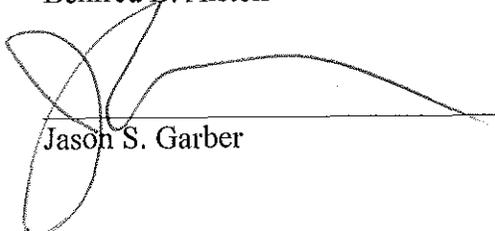
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Andrew M. Belt, Panel Chairman



Benfred B. Alston



Jason S. Garber