

IN RE: DEVELOPMENT PLAN HEARING & PETITION FOR SPECIAL HEARING	*	BEFORE THE OFFICE OF
(12710 Falls Road)	*	ADMINISTRATIVE HEARINGS
8 th Election District		
2 nd Council District	*	FOR
(BECKER PROPERTY – 1st Material Amendment to the 2nd Refined Dev. Plan)*		BALTIMORE COUNTY
Arthur H. Becker, Jr., Trustee & Nancy D. Miller, Trustee, <i>Legal Owners</i>	*	
Gaylord Brooks Realty Co., Inc., <i>Developer/Applicant</i>	*	HOH Case No. 08-791 & Zoning Case 2019-0143-SPH

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ADMINISTRATIVE LAW JUDGE’S COMBINED DEVELOPMENT PLAN AND ZONING OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (“OAH”) for Baltimore County for a public hearing on a development proposal submitted in accordance with Article 32, Title 4, of the Baltimore County Code (“BCC”). Timothy Kotroco, Esquire, on behalf of Arthur H. Becker, Jr., Trustee and Nancy D. Miller, Trustee, *Legal Owners*, and Gaylord Brooks Realty Co., Inc., *Developer/Applicant* (hereinafter “the Developer”), submitted for approval a four-sheet redlined Development Plan (“Plan”) prepared by Morris & Ritchie Associates, Inc., known as “Becker Property, 1st Material Amendment to the 2nd Refined Development Plan”.

The Developer proposes five (5) additional lots on the property, in an area referred to by the parties as the “northern pod.” Ten lots (all improved) have been approved in previous zoning and development cases. *See* Developer’s Exhibits 4 and 5. The property is split-zoned RC 4 and RC 5, a fact which necessitated zoning relief. The Petition for Special Hearing pursuant to Section 500.7 of the Baltimore County Zoning Regulations (“BCZR”) seeks: (1) To permit a lot (Lot 11) with a total acreage of 1.41 acres to have 1.10 acres in the RC 5 zone in lieu of the require 1.5 acres; (2) To permit a lot (Lot 12) with a total acreage of 2.90 acres to have 1.18 acres in the RC 5 zone in lieu of the required 1.5 acres; (3) To permit a principal dwelling to be split between RC

4 and RC 5 for Lot 11 and Lot 12 where sufficient density exists for the lot in each of the respective zones; (4) To permit well and septic reserve areas for Lots 10, 11, 12, 13, and 14 in a different zone than the proposed principal dwelling; (5) To permit non-density parcels in the RC 5 zone for Lots 10, 11, and 12; (6) To permit a non-density parcel in the RC 4 zone for Lots 13 and 14; and (7) To amend the previously approved Final Development Plan (“FDP”).

The development and zoning cases were considered at a combined hearing as permitted by Baltimore County Code (“BCC”) § 32-4-230. Details of the proposed development are more fully depicted on the redlined four-sheet Development Plan that was marked and accepted into evidence as Developer’s Exhibit 2. The property was posted with the Notice of Hearing Officer’s Hearing (“HOH”) and Zoning Notice, both on December 17, 2018 in compliance with the regulations. The undersigned conducted a public hearing on January 18, 2019, in Room 205 of the Jefferson Building, 105 West Chesapeake Avenue, Towson, Maryland.

In attendance at the HOH in support of the Plan on behalf of the Developer was Steve Smith. Also in attendance was Joshua T. Sharon, a professional engineer with Morris & Ritchie Associates, Inc., the firm that prepared the site plan. Timothy Kotroco, Esquire represented the Developer. Several neighbors attended the hearing and expressed concerns about various aspects of the project. The neighbors and the Falls Road Community Association (“FRCA”) were represented by Michael McCann, Esquire.

Numerous representatives of the various Baltimore County agencies who reviewed the Plan also attended the hearing, including the following individuals from the Department of Permits, Approvals and Inspections (“PAI”): Patrick Williams, Project Manager, Michael Viscarra and Jim Hermann (Development Plans Review [“DPR”]), Brad Knatz, Real Estate Compliance, and Aaron Tsui (Office of Zoning Review). Also appearing on behalf of the County were Steve Ford from

the Department of Environmental Protection and Sustainability (“DEPS”), and Jenifer G. Nugent from the Department of Planning (“DOP”).

Each County agency representative indicated the Plan addressed all comments submitted by their agency, and they each recommended approval of the Plan. Ms. Nugent indicated none of the schools in the district are overcrowded, as shown in the school impact analysis admitted as Baltimore County Exhibit 3. Mr. Hermann confirmed his agency approved a schematic landscape plan (Baltimore County Exhibit 1) and that in lieu of providing the required 5,000 sq. ft. of open space, the Developer will pay a fee in the amount of \$2,250.00. Baltimore County Exhibit 2.

DEVELOPER’S CASE

In the “formal” portion of the case, the Developer presented one witness: Joshua T. Sharon, professional engineer with Morris & Ritchie Associates, Inc. Mr. Sharon was accepted as an expert and explained in detail the development proposal. He described the layout of the site and also explained and identified which of the proposed lots were included within the special hearing requests. Mr. Sharon described what he opined were “significant” changes between the current plan and the one approved in 2004. He also described and showed on the Plan the “meandering” zoning boundary line which bisects the proposed lots.

In concluding his testimony, Mr. Sharon opined that the redlined Development Plan (Developer’s Exhibit 2) satisfied all requirements set forth in the development and zoning regulations. In addition, with respect to the zoning requests Mr. Sharon testified granting the petition would not have a detrimental impact upon the health, safety and welfare of the community. The witness noted similar zoning relief was granted in earlier zoning/development cases involving the subject property.

PROTESTANTS' CASE

As noted above, several members of the community opposed this project. Community members provided testimony highlighting their concerns, which generally speaking focused upon the unsafe conditions along this stretch of Falls Road. Residents have particular concern with children getting on/off school buses which stop at this location. In addition, neighbors testified there are simply too many points of ingress/egress at this location, which in their opinion raises significant safety concerns.

LEGAL ISSUES

A. *Res Judicata* – Collateral Estoppel

It is clear these doctrines involving prior adjudications are applicable in administrative hearings. *Seminary Galleria, LLC v. Dulaney Valley Improve. Ass'n*, 192 Md. App. 719 (2010). In fact, the 2016 iteration of this project was dismissed/disapproved based on collateral estoppel/*res judicata*. Developer's Exhibit 6. Those doctrines do not apply however if the applicant can show there has been a "substantial change in fact and circumstances." *Woodlawn Assn. v. Board of County Comm'rs.*, 241 Md. 187 (1965).

Mr. Sharon opined the changes shown on the current plan are significant, and no evidence was presented to rebut this testimony. The current plan proposes five (5) new homes, while the 2004 plan proposed ten (10) lots. A 50% reduction in density is in my opinion--based upon the plain meaning of that term--a "substantial" change. In addition, the access roadway is now proposed to be an existing private driveway, as opposed to the public road shown on the earlier plans.

Former Deputy Zoning Commissioner Murphy referenced both of these issues in his 2004 order when discussing the circumstances under which the "northern pod" might be approved, and

thus he obviously considered these to be material or substantial issues. Dev. Ex. 4, at p.32. Finally, the 50% reduction in lots has allowed the Developer to provide stormwater management (“SWM”) devices on each individual lot, which in my opinion also constitutes a material change from the previous plan which proposed a large SWM facility. These changes are more numerous and substantial than the sole change proposed in the 2016 case; *i.e.*, eight (8) rather than ten (10) lots. As such I do not believe the current plan is barred by *res judicata* and/or collateral estoppel.

The Protestants, citing the Rathkopf treatise, contend that to avoid the application of *res judicata* the “change in circumstances must be a change in the particular circumstances that induced the prior denial.” I believe the Developer satisfies this standard. Mr. Murphy’s denial of the northern pod in 2004 was based upon his belief the intersection with Falls Road was unsafe. While he did not expressly state what changes needed to be made, he noted that: (1) the number of lots should be reduced; and (2) the access road should be private, so drivers are not misled. Dev. Ex. 4, at p. 32. Mr. Murphy expressly stated that “a large part of the problem (*i.e.*, an unsafe intersection) arises with the fact that Rose Court is to be a public road.” *Id.* at p.30. He also held in 2004 the northern pod was denied (in part) based on the proposed stormwater management system, which he ordered must be “revised” on any future plan submission. *Id.* at p.33. The current plan addresses and proposes changes in all of these areas, which “induced the prior denial.”

B. Sustainable Growth Act

The Sustainable Growth Act (“SGA”) of 2012 is a state law that greatly restricts the ability of an owner to construct a major development which relies upon on-site septic waste disposal systems. See Md. Environ. Art. Code Ann. § 9-206. In its development plan comments contained in the case file, the DOP indicated that Lot 10 of the Becker Plan (which encompasses the property at issue in this case) was designated Tier IV in December 2012. That agency also noted the 2016

development plan for this property (Developer's Exhibit 7) was deemed by Baltimore County to be an "exempted plan." The Developer asserts the property is mapped as Tier III, which in light of the foregoing is incorrect.

In either event, the SGA contains an exemption for properties for which a "preliminary site plan" has been filed prior to the effective date of that act. SGA §9-206(b)(2). Baltimore County previously made a determination the 2016 plan qualified for the exemption, and the (current) 2018 plan involves essentially the same tract of land covered by the earlier plan. As such, I believe the 2018 plan is also exempt from the SGA. See *Goldbergh v. CR Golf Club, LLC*, 2016 WL 5906979 (10-11-2016, unreported).

C. Amendment of Final Development Plan

The final request in the zoning petition seeks to "amend the previously approved final development plan." The Protestants contend the prior FDPs were not submitted as exhibits by Developer and that in any event no testimony was presented addressing the FDP amendment issue and standards as set forth in the BCZR. To the contrary, Mr. Sharon opined that granting the special hearing requests (including the amendment of the FDP) would not have a detrimental impact upon the health, safety or welfare of the community. This of course is the special exception standard set forth at BCZR §502.1, which is expressly referenced in BCZR §1B01.3.A.7.

In addition, the 2004 development plan for the Becker property identified the northern pod as an area for future development, and Mr. Murphy's prior orders certainly contemplated the subject property would be subdivided at a later date. As such, I also find that the current five lot plan is "consistent with the spirit and intent of the original [2004] plan." BCZR §1B01.3.A.7.b.(3). Finally, as noted in the Developer's post-hearing memorandum, none of the proposed lots are located within 300 feet of any lot shown on the original plan, and thus it is arguable the FDP does

not need to be amended. *Id.*

D. Safety of Intersection

Protestants contend the County's Plans Review Policy Manual requires public or private intersections to be separated by at least 100 feet. In fact, the Manual states that the distance should be 100 feet "where possible." *See* Manual, p.22. Here, as recognized by Mr. Murphy, the 100 ft. separation is not possible since the Developer does not own sufficient frontage on Falls Road. Dev. Ex. 4, at p. 27. Even so, as recognized by Protestants the centerline of proposed Peachwood Road is approximately 50 feet from the centerline of Hickory Hill Road, which is an increase from the 38 feet of separation shown on the earlier plans. In addition, the State Highway Administration ("SHA") determined (with regard to the 2016 plan) that the "minimum required sight distance can be achieved at the entrance location MD 25 [sic]" Dev. Ex. 13. It is the SHA, not the ALJ or Baltimore County, which determines whether the proposed access is safe and satisfies State requirements, and thus I do not believe the plan can be denied on this basis.

The BCC provides that the "Hearing Officer shall grant approval of a development plan that complies with these development regulations and applicable policies, rules and regulations." BCC § 32-4-229. After considering the testimony and evidence presented by the Developer, the exhibits offered at the hearing, and confirmation from the various County agencies that the Plan satisfies those agencies' requirements, I find that the Developer has satisfied its burden of proof and, therefore, is entitled to approval of the Development Plan.

Pursuant to the advertisement, posting of the property, and public hearing held thereon, the requirements of which are contained in Article 32, Title 4, of the BCC, the "Becker Property – 1st Material Amendment to the 2nd Refined Development Plan" shall be approved.

THEREFORE, IT IS ORDERED by this Administrative Law Judge/Hearing Officer for

Baltimore County, this 6th day of **February, 2019**, that the **“BECKER PROPERTY – 1st Material Amendment to the 2nd Refined Development Plan”** marked and accepted into evidence as Developer’s Exhibit 2, be and is hereby **APPROVED**.

IT IS FURTHER ORDERED that the Petition for Special Hearing pursuant to Section 500.7 of the Baltimore County Zoning Regulations (“BCZR”): (1) To permit a lot (Lot 11) with a total acreage of 1.41 acres to have 1.10 acres in the RC 5 zone in lieu of the require 1.5 acres; (2) To permit a lot (Lot 12) with a total acreage of 2.90 acres to have 1.18 acres in the RC 5 zone in lieu of the required 1.5 acres; (3) To permit a principal dwelling to be split between RC 4 and RC 5 for Lot 11 and Lot 12 where sufficient density exists for the lot in each of the respective zones; (4) To permit well and septic reserve areas for Lots 10, 11, 12, 13, and 14 in a different zone than the proposed principal dwelling; (5) To permit non-density parcels in the RC 5 zone for Lots 10, 11, and 12; (6) To permit a non-density parcel in the RC 4 zone for Lots 13 and 14; and (7) To amend the previously approved Final Development Plan (“FDP”), be and is hereby **GRANTED**.

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

Signed
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:dlw