[redacted]

– BC 758-07 Galloway Creek Marina –
~~Concept Plan~~ Site Plan

51829-6454

JMC 1/15/08
5/9/08
JMC 8/12/08

STATE OF MARYLAND
CRITICAL AREA COMMISSION
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338
www.dnr.state.md.us/criticalarea/

August 12, 2008

Ms. Regina Esslinger
Baltimore County DEPRM
401 Bosley Ave, Suite 416
Towson, MD 21204

RE: Galloway Creek Marina, Variation of Standards

Dear Ms. Esslinger:

Thank you for arranging a site visit to the above referenced property. It was helpful to see the current conditions in assessing the plans for redevelopment. Commission staff has reviewed the information provided, including the mitigation table prepared by DEPRM staff.

As indicated in previous comments, we recommend that the County refer to the Commission's guidance policy for multi-family residential development within a Buffer Exemption Area since the County's Program does not directly address such projects. In reviewing the plans and the mitigation table, Commission staff compared the proposal to what would be required under the Commission's policy if it were applied.

1. First, a densely planted 25-foot "bufferyard" would be required and, if more variety is added to the plantings currently proposed within the 25-foot setback, it appears that this aspect of the Commission's guidance would be met. The Commission's policy calls for 5 trees, 10 understory trees/large shrubs, 30 small shrubs, and 40 herbaceous plants or grasses for every 100 linear feet of bufferyard. The proposal is made up of primarily large and small shrubs along with herbaceous materials. We recommend that trees be added wherever possible to increase the diversity and improve the water quality and habitat benefits. Species such as red cedar, shadbush, redbud, dogwood, river birch, and red maple should be considered.

2. Second, natural forest vegetation of an area twice the extent of the footprint of the development activity within the 100-foot Buffer should be provided on site in the Buffer or at another location, as may be determined by the local jurisdiction. The policy also allows other offsets such as removal of impervious surface within the Buffer to count towards the mitigation required. Without addressing the issue of

mitigation credit, staff reviewed the proposal purely from a square footage basis. Based on the information provided, it appears likely that this requirement is met through the plantings on Parcel 162, and the plantings and impervious surface removal outside of the setback on Parcel 4.

3. We recommend that native grass or herbaceous materials be used wherever possible in lieu of a turf grass lawn. While a lawn is pervious, added fertilizer, pesticides and herbicides (along with chronic maintenance) can negate any benefit of removing impervious cover.

4. The applicant should provide a clear plan of all existing impervious surface proposed for removal and distinguishing between that removed as Buffer mitigation and that removed for stormwater management credit. If removal of impervious does not fully address stormwater management for this site, there appear to be ample opportunity to provide small raingardens, perimeter sandfilters or bioretention areas around the site.

Thank you for the opportunity to provide further comments on this plan. If you have any questions or if you would like to discuss these comments further, please contact me at (410) 260-3477.

Sincerely,

LeeAnne Chandler
Science Advisor

cc: BC758-07

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May 9, 2008

Ms. Regina Esslinger
Baltimore County DEPRM
401 Bosley Avenue, Suite 416
Towson, Maryland 21204

Re: Galloway Creek Marina

Dear Ms. Esslinger:

Thank you for forwarding revised plans, Variations of Standards, and Alternatives Analysis for the above referenced project. The project proposes the redevelopment of an existing marina to a condominium complex. It appears that the majority of my comments from my later dated January 15, 2008 have been satisfied. Based on this additional information provided, I have these comments:

Revised Plans

1. While this site is designated a Buffer Exempt Area (BEA) and fully impervious in the 100-foot Buffer, impacts should be minimized to the extent possible. This office recommends further reduction of impervious surface on this site, particularly in the 100-foot Buffer.
2. Although it appears that the applicant has revised their Buffer Management Plan to be comprised entirely of native species, we continue to recommend that County follow the Commission's BEA guidance policy for multi-family residential development which includes the Buffer Planting Plan for the 25-foot setback. The submitted plan currently proposes a combination of shrubs. The 25-foot setback should be densely planted with a combination of canopy trees, understory trees, and shrubs, the density of which is described in our Policy. Any plantings in the Buffer Exemption Area should be equivalent or exceed the Commission's standards for this area. Please have the applicant demonstrate how they are meeting this requirement.
3. It appears that portions of the marina will be redeveloped and the net number of slips will be reduced to 36 as part of the condominium regime. The applicant has shown the path to the one pier which will remain in service.

Variations of Standards

4. The purpose of the variations of standards application is to address the reduction of the 100-foot Buffer to a 25-foot setback. The applicant is requesting relief to reduce the

Buffer by 34,500 square feet. Currently, this area is entirely paved. It is my understanding that there will be no reduction of impervious surface area in the 100-foot Buffer, except the area of the 25-foot setback which is proposed to be planted. Given this site is being redeveloped, the applicant could further reduce the impervious surface beyond the 25-foot setback, within the 100-foot Buffer.

5. The applicant has offered several types of mitigation for the proposed disturbance to the 100-foot Buffer at different mitigation ratios (2:1 and 3:1). As proposed, it does not appear that the applicant has produced a sufficient mitigation package. Based on our conversations, it is my understanding that the County will be working with the applicant to devise a suitable mitigation package for the proposed development.
6. In order to provide sufficient mitigation, the applicant should increase the proposed planting area beyond the 25-foot setback. Additionally, the applicant should not receive two times the credit for increasing the planting density, as it is not clear the plants will survive, nor does the Commission generally accept this practice.
7. The applicant proposes to remove 87,010 square feet of impervious surface from this site, primarily in the RCA. It is my understanding that the County will not require an impervious surface variance because there is a net decrease of impervious surface on this redevelopment site.

Alternatives Analysis

8. It appears from the applicant's submittal that the majority of the benefits on this site are to the RCA portion and that only limited water and habitat improvements are being made to the LDA portion of the site. The alternatives analysis requires applicants provide greater water quality and habitat benefits onsite. Although the RCA site is providing these benefits, these benefits should also be provided in the LDA. We recommend the applicant considered removing additional impervious surface in the 100-foot Buffer.
9. As previously indicated, this office will be reviewing the stormwater management plans when they become available for associated improvements and BMPs in the LDA.

Please forward any new or revised materials for this project as they become available. Thank you for the opportunity to provide comments. If you have any questions, please call me at (410) 260-3476.

Sincerely,

Julie Roberts
Natural Resources Planner

Cc: BC 758-07

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January 15, 2008

Ms. Regina Esslinger
Baltimore County DEPRM
401 Bosley Avenue, Suite 416
Towson, Maryland 21204

Re: Galloway Creek Marina

Dear Ms. Esslinger:

Thank you for forwarding the above referenced project. The project proposes the redevelopment of an existing marina to a condominium complex. The total area of the site 14.7 acres, 2.7 acres of which are located in the Limited Development Area (LDA); 12.0 acres are located in the Resource Conservation Area (RCA). This site is also designated as a Buffer Management Area (BMA). Based on the information provided, I have these comments:

1. Absent clear standards in the County Code, we recommend mitigation be required for all impervious surface located in the 100-foot Buffer at a ratio of 2:1 in the form of native plantings. This is consistent with the current Critical Area Commission policy for redevelopment of multifamily and commercial sites.
2. The 25-foot BMA setback must also be planted according to the Critical Area Commission guidance policy. All plantings must be native species; it appears from the landscaping plan that several of the species are not natives. Please have the applicant provide a plantings plan which includes the species, size, spacing and schedule for review.
3. Although the applicants show an overall net reduction of impervious surface (66% overall reduction) for the site, approximately 20.82% of the overall property is proposed as an impervious surface. Will the County require an impervious surface variance for this subdivision? If not, what standards does the County use when evaluating sites that are being redeveloped and do not meet the impervious surface limits?
4. The site plan provided does not show any details regarding stormwater management. Please have the applicant provide this information.
5. It appears that portions of the marina will be redeveloped and the net number of slips will be reduced to 36. Will the slips still be associated with a commercial marina operation or will the slips be part of the condominium regime?
6. There do not appear to be visible access points to this redeveloped marina on the plans submitted. Please have the applicant clarify.

Thank you for the opportunity to provide comments. If you have any questions, please call me at (410) 260-3476.

Sincerely,

Julie Roberts
Natural Resources Planner

Cc: BC 758-07

758-07

KEVIN KAMENETZ
County Executive

LAWRENCE M. STAHL
Managing Administrative Law Judge
JOHN E. BEVERUNGEN
TIMOTHY M. KOTROCO
Administrative Law Judges

November 25, 2011

JOHN GONTRUM, ESQUIRE
WHITEFORD, TAYLOR & PRESTON, LLP
TOWSON COMMONS, SUITE 300
ONE WEST PENNSYLVANIA AVENUE
TOWSON, MD 21204-5025
jgontrum@wtplaw.com

Re: Case No.: 15-925 -- Galloway Creek PUD
Location: 1414 Burke Road

Dear Mr. Gontrum:

Enclosed please find the decision rendered in the above-captioned case.

In the event the decision rendered is unfavorable to any party, please be advised that any party may file with the Department of Permits, Approvals and Inspections an appeal within thirty (30) days from the date of this Order. If you require additional information concerning filing an appeal, please feel free to contact the appeals clerk at 410-887-3391.

Sincerely,

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/pz

Enclosure

c: J. Carroll Holzer, Esquire, Holzer & Lee, 508 Fairmount Avenue, Towson, MD 21286
jcholzer@cavtel.net
Milton Raybine, President, Bowleys Quarters Improvement Association, P.O. Box 18051 Baltimore, MD 21220
Janet Walper, President, Bowleys Quarters Community Association, PO Box 484, Chase, MD 21027;
janet@bqca.org
Darryl Putty, Project Manager, Permits, Approvals and Inspections
File, People's Council

IN RE: PLANNED UNIT DEVELOPMENT W and E sides of Burke Road, NE corner of Bowleys Quarters Road (1414 Burke Road) 15th Election District 6th Councilmanic District Galloway Creek, LLC *Developer*	*	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS FOR BALTIMORE COUNTY **Case No. XV-925**

* *

ADMINISTRATIVE LAW JUDGE'S OPINION:

PLANNED UNIT DEVELOPMENT

This general development Planned Unit Development (PUD) is for a multi-story, waterfront condominium with 36 two bedroom units. The project proposes a parking and storage level, elevators, and a pier and 36 boat slips for the residents of the condominium. The proposed condominium is located in the Bowleys Quarters area of Baltimore County. The property is approximately 14.5 acres in size, consisting of 3.9 acres zoned BMB, .463 acres zoned RC 5, and 10.9 acres of RC 20 property. Currently, the subject property is improved by a marina and boat yard, which has operated at the location for over 20+ years. The surrounding neighborhood consists of primarily single-family detached homes, although there are agricultural uses and park areas in the environs.

The hearing in this case was unusual and unique in many respects. Not the least of which is that the PUD here is proposed for outside the Urban Rural Demarcation Line (URDL), while current County law prohibits PUDs outside of the URDL. B.C.Z.R. § 430.3.A. The "ground rules" for this PUD are those set forth in the consent Order entered by Judge Jakobowski in the Circuit Court, and the evidentiary hearing conducted in the Office of Administrative Hearings (OAH) was pursuant to that Order. The Developer began by presenting its case in chief, at which

time the undersigned requested that County representatives from the various reviewing agencies appear and testify as to whether there were any open issues or concerns with respect to the County review process. This, of course, is the procedure normally followed in hearings on development plans, and hearings on PUDs are supposed to be conducted in a similar fashion. B.C.C. § 32-4-245(a)(1). Thereafter, the Protestants presented their case, including both lay witnesses and experts.

What follows will be a summary of the witnesses testimony, followed by an application of applicable law and regulations to that testimony. Each day of the proceedings was transcribed by a court reporter, and the witness testimony summary that follows is not intended to be an exhaustive and verbatim recitation of each witness' testimony. Rather, the salient portions of each witness' testimony is repeated, so that it can be considered within the appropriate legal framework governing PUD approvals.

DEVELOPER'S CASE

The Developer's first witness was James Mattis, a licensed professional engineer with 20 years of experience. Mr. Mattis, who was accepted as an expert, testified that he has been involved in approximately 9 Baltimore County PUDs.

Mr. Mattis testified that the boat yard operation presently occupying the west side of Burke Road contains nearly all impervious surfaces, while the east side of Burke Road contains approximately 1 acre of impervious surfaces. The witness stated that the 1972 special exception permitting the boat yard operation contained no restrictions as to hours or similar matters. Mr. Mattis indicated that all "development" associated with the PUD will be located in the BMB zone, and he conceded that a four story structure is a "big building," and as such the plan is to locate the structure 97 feet off of Burke Road. Mr. Mattis testified that the garages are proposed to be

oriented toward the street, because the focus of the PUD is the waterfront vista. Mr. Mattis indicated that each of the condominiums would be two bedroom units, and he stated that that the Developer's proposal would reduce the impervious surfaces at the site by 66%, and he also noted that the use of the proposed boat slips was restricted to condominium residents, pursuant to a note found on the red-lined plan marked as Developer's Exhibit 8.

Mr. Mattis confirmed that certain modifications of standards were being sought in connection with the PUD, including a floor area ratio of .59 (the Comprehensive Manual of Development Policies provides for an FAR of .213). A variation is also being sought with respect to parking, and the Developer proposes 79 spaces instead of the 81 spaces required under the regulations. Mr. Mattis indicated that the Developer could add the additional 2 spaces, but he felt that the plan provided for more than enough parking and the Developer wanted to avoid adding any unnecessary impervious surfaces to the site. The only modification concerning local open space concerned the configuration of such space, not the amount, and Mr. Mattis testified that the Department of Recreation and Parks approved such modification.

In summary, Mr. Mattis opined that the PUD plan meets all the requirements set forth in B.C.Z.R. § 502, and he indicated that the proposal would in fact reduce traffic and congestion in the surrounding area compared to the current boat yard operation. Mr. Mattis further opined that the requested modifications are within the spirit of the zoning regulations, and he testified that the PUD proposal also complies with the specific requirements set forth in B.C.Z.R. § 430. Mr. Mattis opined that the PUD proposal is in harmony with the surrounding neighborhood, especially post Hurricane Isabel, and the witness opined that the proposal was in concert with the County Council resolution (Resolution 82-07) authorizing a further review of the PUD.

On cross examination, Mr. Mattis stated that the footprint of the condominium structure would be 25,496 square feet, and that the building would be approximately 330 feet long and 88 feet wide. Mr. Mattis stated that he did not know where on the Bowleys Quarters peninsula a similarly sized building was located. Mr. Mattis conceded that the "pattern" of the neighborhood was single family detached homes although he believed that there may be one other multi-family dwelling in the immediate vicinity. Mr. Mattis further opined that the current boat yard operation was a "mess," and he said that such active boat yards represented a much more intense use than would a residential condominium development.

In response to a question by Mr. Holzer, Mr. Mattis stated that the height and size of the proposed condominium had nothing to do with whether or not the development would be "compatible" with the surrounding neighborhood. Mr. Mattis opined that B.C.Z.R. § 4A03.2 was inapplicable to this proposal, given that the PUD development was taking place wholly in the BMB zoned portion of the subject property. In response to a question concerning page 48 of the pattern book, Mr. Mattis explained that that the proposed condominium need not be proportionate to the houses immediately surrounding it, given that the site in question is a very large lot, meaning that it was acceptable to have a much larger structure that was proportionate to the size of the lot in question, rather than the size of the neighboring homes. Mr. Mattis indicated that the density of immediately surrounding dwellings ranged from four to six lots per acre, while the present proposal is for 36 units on 2.55 acres, which equated to approximately to 15 houses per acre, or three times the density of surrounding sites.

The next witness in Developer's case was Jerry Lynch, a neighbor who has lived on Bowleys Quarters Road since 2002. Mr. Lynch, whose letter of support is found at page 77 of the

pattern book; testified that he thinks the proposed condominium would be the "crown jewel" of the Bowleys Quarters peninsula.

The next witness was William Scheler, who has resided at 1444 Burke Road since 1979. Mr. Scheler indicated that he was not troubled by the size of the proposed condominium, and felt that it would benefit his property. Mr. Scheler stated that in his mind the proposed condominium was compatible with the neighborhood because he would rather look at a well designed condominium building than the old and derelict boats found at the boat yard presently operating at the site. Mr. Scheler further testified that he had no concerns with traffic congestion as a result of the condominium proposal, and he advised that he has certainly noticed "modernization" of the Bowleys Quarters peninsula in the recent years.

The next witness in Developer's case was Mickey Cornelius, an engineer with The Traffic Group, Inc. Mr. Cornelius was accepted as an expect witness in transportation planning, and he indicated he is very familiar with the area given that his wife grew up in the vicinity and he once had a boat in a marina in the area. Mr. Cornelius stated that he prepared the transportation chart and figures found at page 35 of the pattern book.

In terms of the traffic study he conducted, Mr. Cornelius testified that the primary intersection in question was Bowleys Quarters Road and Carol Island Road, and Eastern Avenue and Carroll Island Road. The witness testified that these intersections receive a rating of A in the morning hours, and a B rating in the evening commuting hours. Mr. Cornelius opined that the proposed automobile trips associated with the condominium would have no impact on the current traffic scores, and would not cause or effect traffic congestion on Bowleys Quarters Road. The witness further testified that the condominium use would generate much less traffic than the marina which is presently operated the site. Mr. Cornelius opined that the PUD proposal will not

create congestion in the area, and that the existing roads could handle the traffic which would be generated. Finally, the witness testified that in his opinion "far more" parking spaces were being provided than would actually be needed for the condominium proposal. In response to questions on cross examination, Mr. Cornelius conceded that he did not take any traffic counts in the area, and instead used national (ITE) standards in performing his calculations. Mr. Cornelius also agreed that the area in question was "rural," and he added that he was not aware of any similarly sized building in the immediate vicinity.

The next witness was Charles Marek, an obstetrician who has resided in the area since 1929. Dr. Marek testified that he lives near Bay Drive and Miami Beach, and said most owners have been improving their properties and residences since Hurricane Isabel. Dr. Marek stated that in his opinion the condominium would be a huge improvement to the area, and that he was not concerned with the proposed height or length of the building. On cross examination, Dr. Marek confirmed that he could not see the subject property from his house.

David Hash, who has resided at 3804 Chestnut Road for 23 years, was the next witness called in Developer's case. Mr. Hash testified he works at the Bayview Hopkins facility, and advised that he was involved with the creation of the Bowleys Quarters Action Plans. Mr. Hash testified he has no concerns with the project proposal, and expressed frustration that the process had taken so long. Mr. Hash testified he thinks the community is presently on an "up swing," and thinks the proposed condominium is compatible with the surrounding environs. In response to questions on cross examination, Mr. Hash conceded that he lived approximately one mile from the subject premises and could not see the marina from his house. In addition, Mr. Hash conceded that it would be a "fair question" as to whether he would be in favor of this project if he lived right next door.

The next witness in Developer's case was Lawrence Wiley, Jr., who has resided at 1432 Burke Road since 1993. Mr. Wiley testified he lives four houses away from the project, and is in support of the Developer's proposal. Mr. Wiley stated he had no concerns with the proposed height or size of the project, and felt that the condominium would be a big improvement to the community.

Thereafter, the Developer called several additional community residents (Edward Miller, Michael Hepner, Carl Corinith, Robert Sersen and John Michel) all of whom were supportive of the Developer's proposal, and each felt the condominium project would be a big improvement for the area.

The next witness presented in Developer's case was Henry Leskenien from Echo Science Professionals, Inc. Mr. Leskenien was accepted as an expert in natural resources assessments and inventory, and he indicated he prepared a habitat assessment and wetland delineation for this project. Mr. Leskenien testified that DEPS wanted the entire property analyzed including both sides of Burke Avenue. The witness stated that the 300 foot buffer otherwise required could be reduced if certain factors were met, and he indicated that "an alternative analysis" was performed to reduce the buffer to 100 feet from 300 feet. In addition, the witness advised that a variation of standards was sought to reduce the 100 feet buffer to 25 feet. The witness testified that at present there is absolutely no buffer, while the Developer's proposal will remove impervious surface and create a 25 foot natural buffer. In summary, the witness opined that the proposed development will be of a higher environmental quality than that presently existing at the site.

In response to cross examination questions, the witness advised he looked at the entire 14± acre site, and confirmed that improvements planned for the site span all of the zones. When questioned about Developer's Exhibit 19, the witness advised that DEPS has the final say

regarding any variation of critical area standards, but he added that the critical area commission could veto the County's ruling. The witness agreed that a 100 foot buffer at this site could be maintained that would still allow room for the construction of single family homes.

Robert Palmer was the next witness called in Developer's case, and he has operated the Trade Winds Marina for 28 years. Mr. Palmer advised that he was on a committee that prepared the Bowleys Quarters Community Plan, and he also advised he was supportive of the Developer's proposal. Mr. Palmer explained that he thinks multi-family dwellings are a good variation to include among single family dwellings. With respect to whether or not the proposal was compatible with the surrounding area, Mr. Palmer stated that it is hard to discern any particular "pattern" of development in the Bowleys Quarters area, and he conceded that condominium proposal is obviously different from the houses immediately surrounding the subject site. Even so, the witness stated that the subject site is much larger than the surrounding residential sites, and as such, a larger structure was suitable. The witness also explained that following Hurricane Isabel the community changed greatly, and the houses got taller to accommodate construction out of the floodplain. In response to cross examination questions, the witness advised that he lived approximately two miles from the site, and that he also participated in the study comparing the redevelopment of marinas under traditional development procedures versus the PUD regulations, and agreed that a developer could get much more density with a PUD proposal.

The next witness was Milton Raybine, who is the owner and operator of the marina on the subject property. Mr. Raybine testified that he has lived in the Bowleys Quarters area for 52 years and that he is active in the Improvement Association. Mr. Raybine explained that the bulk of his current business is the storage of boats and watercraft, but that he also does boat hauling, and that there were no restrictions in the special exception Order permitting his operation. Mr. Raybine

explained that when he originally conceived of the condominium project, he went door to door talking with his neighbors and showed them the plans of the prospective development. Mr. Raybine believes the project is consistent with the community plans, and thinks the project will fit within the current landscape and environment because there is no set pattern of development in the neighborhood, which has a mix of housing types. Mr. Raybine added that the walking path depicted on the site plan would be open to the general public, and that it was the number one amenity requested by the community. The witness stated that in his opinion the PUD would not overcrowd schools or overcrowd the surrounding land, and that the design will in fact open up a wide vista to the waterfront. Mr. Raybine advised he was seeking a modification of the height standards because the proposed condominium has a beautiful roofline, and that the size and height proposed are important to insure the economic feasibility of the project. He was also advised that the nearby Chesapeake Yachting Center "may" be as long (approximately 400 feet) as the proposed condominium project.

In response to questions on cross examination, Mr. Raybine advised that he was unsure of the range of prices for the proposed condominiums, but he advised that the numbers would not "work" using single family homes on the site. Mr. Raybine stated that after Hurricane Isabel he started to think of improving his boat yard, and he confirmed that he loves the boat business. However, the witness advised that he wanted to make his "mark" with the beautiful condominium proposal, and felt that the property was ideally suited for this project. The witness also advised that if the PUD is approved, he will donate $220,000 to the local volunteer fire department for its purchase of certain rescue equipment.

Albert Barry, a land planner, was the next witness to testify in Developer's case. Mr. Barry has a B.S. from Johns Hopkins University, and has worked on 100 or more PUD proposals

in Baltimore City. Mr. Barry was accepted as an expert witness in planning, and he indicated that he was proficient with the Baltimore County zoning and development regulations. Mr. Barry stated that he visited the site, and was surprised with the pattern of development nearby. Specifically, the witness noted the narrow 50 or 60 foot lots with little or no public access to the water. Mr. Barry opined that for compatibility purposes, the relevant "neighborhood" is the entire Bowleys Quarters peninsula. At the same time, the witness cautioned that a compatibility analysis does not mean that everything has to be the same or identical to the surrounding uses.

In terms of his expert opinions, the witness testified that the proposal was "compatible" with the surrounding neighborhood because a residential use was proposed. The building setbacks exceed what is normal in the area, a generous view of the waterfront was provided, and the houses north of the site are in fact more dense (on a per bedroom basis) than the proposed condominium project. With respect to the factors set forth at B.C.Z.R. § 32-4-402, the witness reviewed each of the eight factors and opined that all were met with the possible exception of No. 8, which concerned the scale and massing of the proposed condominium. The witness conceded that there was room for debate as to whether any building over a certain size would be "compatible" with the neighborhood. At the same time, the witness stated that the subject property is large, and that the Baltimore County plans advocate diverse housing types and redevelopment of larger waterfront sites. Mr. Barry also opined that the condominium proposal was an "efficient" use of the land, much more so than in the case of single family dwellings. Mr. Barry was also supportive of the requested FAR modification because the Developer has set aside approximately 12 acres of land on the east side of Burke Avenue, and the witness advised that you "have to look at the entire package" when making such assessments. Finally, Mr. Barry opined that the Developer's proposal was consistent with pages 200 through 208 of the Master Plan 2010, and that the

proposal was also harmonious with the Bowleys Quarters Plan, marked and accepted into evidence as Developer's Exhibit 30.

In response to Mr. Zimmerman's questions on cross examination, Mr. Barry advised that he looked at the "entire" property owned by the Developer, but did not know if the subject property was located within the Bowleys Quarters Growth Management Area pursuant to Bill 64-99. The witness also agreed that the "immediate" neighborhood could be considered the 30 or so houses to the south of the subject site to the cove.

BALTIMORE COUNTY AGENCY WITNESSES

The first Baltimore County witness to testify was Lloyd Moxley, who works in the Office of Planning. Mr. Moxley testified he has been employed with Baltimore County for 12 years, and he was responsible for reviewing the Galloway Development Plan in December, 2010. The witness testified that he created the detailed findings found in Protestants' Exhibit 11 because the Planning Board indicated it needed additional details, and that Lynn Lanham assigned the project to him. The witness stated that it never "crossed his mind" that this PUD project should be denied. Mr. Moxley explained that in his mind the "PUD area" is limited to the 3.8 acres of BMB zoned land. At the same time, the witness agreed that "development" (as that term is used in B.C.C. § 32-4-101(p)) was occurring on all areas of the 14 acres owned by Developer including the BMB, RC 5 and RC 20 zoned portions. Mr. Moxley advised he had never before seen Developer's Exhibit 20, and felt that the "neighborhood" in question could include almost all of the Bowleys Quarters peninsula. Mr. Moxley advised the subject property was within the Bowleys Quarters Growth Management Area, a fact he said was discussed within the Office of Planning even though it was not mentioned in the staff report. Mr. Moxley indicated that in his opinion the Master Plan was an advisory document, while the zoning regulations are the primary

land use control. The witness stated that the proposed condominium would be the biggest building within one mile of the site.

In response to questioning from Developer's counsel, Mr. Moxley opined that the PUD was compatible with the master plan, because it clustered the density into a single structure. He also believed that the PUD proposal was in conformity with action item #7 on page 205 of the Master Plan, since the structure was attractive and could become a "landmark" for area boaters and sailors. Mr. Moxley stated that the PUD proposal was in conformity with Bill 16-07, admitted as People's Counsel Exhibit 7. The witness indicated that he did a Photoshop® study to evaluate how the proposed condominium would affect the lighting patterns in the vicinity, and conceded he never conducted a site visit to the property. The witness stated that the PUD was located within a "rural residential area" as identified at page 233 of the Master Plan, while the land east of Burke Road was designed as a resource preservation area in the Master Plan.

The next witness was Dennis Kennedy from Building Plans Review, who indicated that his agency had no unaddressed comments concerning the PUD proposal. Lloyd Moxley was then recalled as a "court" witness and he confirmed that there were at this time no open and/or unaddressed issues from the perspective of the Office of Planning. David Lykens, from DEPS, was the next witness to testify, and he confirmed that his agency had no open and/or unaddressed issues or comments concerning the PUD proposal.

The next witness to testify was Bruno Rudaitis, from the Zoning Review Office of PAI. Mr. Rudaitis advised that his agency had no outstanding issues or comments, and he advised that the PUD proposal in question includes only the BMB zoned portion of the Developer's property. Mr. Rudaitis testified that the RC 20 and RC 5 zoned portion of the property had "nothing to do with the PUD proposal." Mr. Rudaitis also advised that the Developer's PUD did not have to

comply with the Bowleys Quarters Growth Management Plan and that in his mind a PUD proposal is reviewed in a fashion similar to that for a special exception under B.C.Z.R. § 502. In conclusion, the witness clarified that as far as the Zoning Office was concerned, the only "development" on this project was occurring in the BMB zone.

Bruce Gill, from the Department of Recreation and Parks, confirmed that his agency had no unaddressed or open comments or concerns regarding the PUD, and he also advised that all of the local open space for the project was located within the BMB zone.

Patricia Farr, from DEPS, was the next witness called, and she indicated she has more than 20 years of experience in the Critical Area regulations. The PUD hearing reconvened on July 11, 2011, and Ms. Farr resumed her testimony from the last session on March 30, 2011. Ms. Farr confirmed that she is Baltimore County's most knowledgeable employee regarding the Critical Area Regulations. In response to a question from Mr. Zimmerman, Ms. Farr indicated she does refer to the Master Plan in her work, but she added that the Master Plan and zoning are totally distinct avenues of inquiry from the Critical Area Rules and Regulations. Ms. Farr testified that the Developer's proposal was consistent with Baltimore County's Critical Area program, given that redevelopment projects are preferable in buffer management areas such as that occupied by the Galloway Marina.

Ms. Farr stated that COMAR § 27.01.02.04B(3)(b) has been applied consistently by her department (since at least 1988) on a macroscopic or County-wide basis, rather than as being applicable to individual development sites. Ms. Farr explained she had many years ago a telephone conversation with attorney Sarah Taylor, former Director of the Critical Areas Commission, and that Ms. Taylor confirmed her interpretation of this regulation. Ms. Farr added that Section C of the above regulation is applied and used by her agency on a daily basis, for site

specific projects, while Section B, the section identified by Mr. Zimmerman, was more general and applied globally to LDA areas throughout the County. Ms. Farr also stated that in her opinion there was no development taking place on the west side of Burke Road, where the RC zoned portion of the subject site is located.

PROTESTANTS' CASE

The Protestants called a series of community/neighborhood witnesses, all of whom live in the Bowleys Quarters area. Those witnesses were: Malcolm Wood, Joseph Hession, Roy Walper, Steven Moody, Michelle Prettyman, Norma Bankard, Kenneth Nowakowski, Janet Walter, Mildred Reiner, and Allen Robertson. With the exception of Mr. Robertson, whose testimony will be discussed below, the community witnesses all provided brief testimony and all indicated that they were strongly opposed to the condominium project. The recurring themes in each of the witnesses' testimony was that the condominium building was much too large for the surrounding area and would not be compatible with the existing neighborhood, which consists of single family homes and several marinas. Almost every community witness also articulated concerns with traffic, and felt that the condominium project would generate much more traffic than the marina operation. The neighborhood witnesses indicated that less than half of the boat slips at the marina are occupied, and they stress that the marina is a seasonal operation, while the condominium would of course have year round traffic generated. In describing the proposed condo project, Joseph Hession testified that the building would be as large as "a football field and an end zone," and would bring a different element into the area, which he described as a "hotel effect."

Ron Walper, along with several other community witnesses, described in some detail the events that led to the formation of the new community association (known as the Bowleys Quarters Community Association) and the events that led to their defection from the Bowleys

Quarters Improvement Association. Mr. Walper explained that he and many citizens felt that Milton Raybine, the President of the BQIA, carefully orchestrated the meeting at which the vote was taken on the condominium project, and that Mr. Raybine misrepresented certain information that caused the membership to at that time vote in favor of the project. Mr. Walper also presented a three dimensional model which he prepared to demonstrate the juxtaposition of the proposed condominium with the existing single family dwellings in the area. Mr. Walper explained that he has a drafting and engineering background, and that the model was to scale, and admitted as Protestants' Exhibits 6A and 6B were photographs of the model.

Another common thread throughout the community witnesses' testimony was the discussion of what constituted their "neighborhood." Although there were perhaps subtle variations in phrasing, nearly every community witness explained that their "neighborhood" was that area south of Susquehanna Avenue and Bowleys Quarters Road (near the volunteer fire company) southward to the tip of the peninsula. The witnesses explained that the roadway intersection at this area formed a natural demarcation point, and also the fact that gravity sewer systems existed north of this location, while the homes south of that intersection used grinder pumps. In addition, the neighborhood witnesses explained that north of that V shaped intersection was more intensely developed with apartments and retail stores, while south of that location were only single family home and large portions of RC zoned land, which also did not exist north of Susquehanna Avenue and Bowleys Quarters Road.

Norma Bankard testified that she and Janet Walper conducted a traffic count on June 6, 2008, and positioned themselves at the intersection of Susquehanna Avenue and Bowley's Quarters Roads. Ms. Bankard explained that she and Ms. Walper counted all cars and trucks for a three hour period in the morning, and a three hour period during the evening on the day in

question. Ms. Bankard further explained that the total number of vehicles counted in this 6 hour period was 3,023, and that this volume of traffic exceeded the average daily traffic (ADT) allowable by Baltimore County for a 20 feet wide roadway. *See* Protestants' Exhibit 13.

Janet Walper next testified that she, along with a few other members of the community, obtained 300 signatures on a petition (*See* Protestants' Exhibit 11) in April, 2006, opposing the Developer's condominium project. Ms. Walper explained that the signatures were obtained within about a period of one month, and that after approximately 100 signatures had been obtained, she and members of her community met with then-Councilman Bartenfelder to express their dissatisfaction with the condominium proposal. Ms. Walper also testified concerning certain events that took place at BQIA meetings, and she opined that the Board of the BQIA appeared to manipulate the process during the meeting at which the vote on the condominium project was taken, and Ms. Walper stated that "it smelled, and was just not right."

The final community witness to testify was Allen Robertson, and as noted above his testimony was much more lengthy and detailed than the other members of the community. Mr. Robertson indicated he has lived in the Bowleys Quarters area for most of his life, and like the other members of the neighborhood who testified, he strongly opposes the condominium project. Mr. Robertson testified that he was instrumental in forming the BQCA, which has over 100 active members presently. The witness explained that a community is made up of several neighborhoods, and in his opinion the neighborhood in this case extends southward from Susquehanna Road to the end of the Bowleys Quarters peninsula. The witness conceded that the Office of Planning describes the neighborhood differently, and added that he disagreed with that agency's interpretation of the issue.

Mr. Robertson presented a packet of materials (*See* Protestants' Exhibit 14) which served as an outline of sorts for his testimony. The witness first discussed certain conceptual issues related to his opposition to the project. In this regard, Mr. Robertson testified that there has never been a PUD approved in Baltimore County outside of the URDL, and that the Galloway Creek PUD proposed certain variations of standards, which in his opinion was inappropriate. In addition, the witness stated that any development should be located at least 100 feet from Galloway Creek, and that the condominium was proposed to be much closer than that which would lead to runoff and other environmental issues.

Next, the witness identified certain specific concerns he had with the PUD proposal, and the first such concern was that the PUD violated the law because it was located outside of the URDL and was also being developed in an RC zone, not just the BMB zoned portion of the subject property. In addition, Mr. Robertson stated that there are discrepancies (shown on Protestants' Exhibit 14, p.I-17) in the exact amount of land owned by the Developer. The witness added that in his opinion, the project in question was a conversion of a commercial use to a residential one, and was not a redevelopment project as County agencies had believed.

The witness next stated that the condominium proposal violated certain critical area regulations, in that the density of the project was much too great for a limited development area (LDA) zone. Mr. Robertson testified that the County Code also imposed an additional 35 foot setback from Chesapeake Bay Critical Area easements, and that the Developer's proposal also ran afoul of this provision. Mr. Robertson also discussed a 2003 letter from the County's environmental department, which the witness interpreted as a disapproval of an earlier request by the same Developer for a more modest condominium development on the subject property. The witness testified that the unsigned letter from the County's environmental department was

preceded by a written request by Mr. Karski (*See* Protestants' Exhibit 14, IV, p.9) which, in the witness' opinion, resulted in the disapproval letter from the County approximately six months later.

Mr. Robertson's testimony continued on August 31, 2011, at which time he began addressing certain height issues associated with the condominium proposal, as set forth in V of his outline. The witness stated that the height limit in the adjacent RC zone is 35 feet, that even without the cupola the condominium is 58 feet. Mr. Robertson testified that the community did not want see a variation of standards granted with respect to the height issue, since the community wanted to preserve the rural feel of the area.

The next issue concerned the length of the building, which is proposed to be 331 feet. Mr. Robertson stated that the maximum length of the multi-family building is 240 feet, and that statutory exception only allows for an increase of that length to 300 feet. Again, the witness stated that the neighborhood is in the Chesapeake Bay Critical Area, and the proposed length would disrupt the rural feel of the area. Thereafter, the witness addressed what in his opinion was a deficiency with respect to the proposed boat slips at the project, referencing B.C.C. § 33-6-604, Mr. Robertson stated that the slips would be limited to one for each 300 feet of shoreline, and that the Developer's proposal had ran afoul at this provision.

Next, Section VIII of his outline, Mr. Robertson identified in his opinion an unresolved issue concerning the floor area ratio (FAR) of the condominium project. The witness stated that if the Developer is using the BMB zoning for purposes of this calculation, it proposes 36 boat slips, B.C.Z.R. § 218 would require an FAR of .33 or less. The witness created a chart (found at VIII-4 of his outline) showing comparable FAR's of adjoining properties, and in his opinion the witness

stated that the Developer's proposal has an FAR of .76 if they are using just the BMB zone, which is in violation of the above provision.

Mr. Robertson next addressed traffic concerns, in doing so referenced Protestants' Exhibit 18, a letter from the State Highway Administration, which erroneously refers to a Chapel Road. Mr. Robertson was quick to point out that there is no Chapel Road in this vicinity, and that the witness indicated this was indicative of the cursory and sloppy governmental review that had taken place with respect to traffic concerns. Thereafter, Mr. Robertson contended that the Developer's proposal was in violation of the Residential Transition Area (RTA) regulations, given that the proposed condominium was located only 45 feet from the adjoining residential property line, not 50 feet as required under the RTA regulations.

The next issued addressed by Mr. Robertson concerned the components which each PUD is required to embody under County regulations, which in the witnesses opinion are lacking in the condominium proposal. As an example, Mr. Robertson stated that the proposal would destroy the "community image", bringing a "Fells Point feel" to what is now a rural area, and that no new services would be provided by the PUD. The witness added that there is simply no "mixed use" area in this proposal, and that the project is a PUD in name only, given that it does not meet any of the principles set forth in the CMPD.

In summarizing his conclusions, which came at the end of several hours of testimony, the witness stated that the community did not believe the PUD should be approved for the following reasons:

1. The project is on RC-zoned land outside of the URDL;
2. The number of variations of standards requested by the Developer demonstrated that the project is not compatible with the community;

3. The approval of such a project would set a dangerous precedent for other marina and boat yard redevelopment projects in the area; and

4. The purported environmental benefits are in fact delusory, given that it was the owner of the property himself that caused the problems in the first instance.

Prior to the cross examination of Helen Robertson, the Protestants called Michael Kulis as a witness, who appeared pursuant to a subpoena issued by Mr. Zimmerman. Mr. Kulis indicated that he began employment with the County in 1987, and is a Natural Resource Specialist. Mr. Kulis' testimony primarily centered on Protestants' Exhibit 3, which was a draft correspondence from Mr. Kulis to Thomas Karski. The witness confirmed that the letter was never sent, and upon further questioning Mr. Kulis indicated that he simply had no recollection concerning the circumstances surrounding the creation of the letter, or what events may have taken place before or thereafter.

Mr. Robertson's testimony then resumed, and he was questioned by the Developer's attorney, John Gontrum. At the outset, Mr. Robertson conceded that Protestants' Exhibit 1 was not an accurate depiction of the proposed condominium, because it showed the building as four stories tall, rather than three. Thereafter, the witness indicated he first learned of the condominium project in August 2005, and he detailed in a chronological timeline his interactions with former Councilman Bartenfelder and members of the County Office of Planning. Most significantly, Mr. Robertson testified that Mr. Bartenfelder, unbeknownst to the community and allegedly in violation of a promise he had earlier made, introduced legislation to allow PUDs outside of the URDL in the Bowleys Quarters Growth Management area, and also introduced Resolution (82-07) allowing for a review of the project as a PUD.

Next, Mr. Robertson conceded that the zoning maps reveal that since at least 1976 the property surrounding the Galloway marina was already zoned RC 5 and RC 20. Even so, the witness agreed that the waterfront lots are not designed around an RC 5 template, but in reality the density is akin to a DR 3.5 zone. Thereafter, in responding to questions from Messrs. Holzer and Zimmerman, the witness advised that in April 2011 he filed with the Department of PAI his second complaint against the marina, for allegedly violating the boundary set forth in the 1976 special exception. Mr. Robertson advised that the Department of PAI postponed the code enforcement matter on several occasions, and officially dismissed the case on August 31, 2011, the day before this hearing resumed. *See* Protestants' Exhibit 21. In response to a final question from Mr. Gontrum, the witness conceded that the installation of public sewer and post-Isabel regulations resulted in "pretty big changes" for his community in the last ten years.

The Protestants called as their next witness James Patton, a licensed professional engineer with over 40 years of experience. During voir dire, the witness discussed his educational background and experience, and conceded that he is not an environmental expert or a surveyor, and in his profession he would subcontract such issues to the appropriate professionals and relied on their work. Mr. Patton was accepted as an expert in the areas of land planning, zoning, land development consulting, and site engineering with an emphasis on waterfront development.

The first area of testimony discussed by Mr. Patton concerned an alleged title defect on the Galloway property. Specifically, and referring to Protestants' Exhibit 27, the witness indicated that the cross hatched area is – based on his review of prior plats and title documents – an easement or strip of land "used with others," and that it provided access several adjoining waterfront lots.

Mr. Patton next testified that he defined the PUD area as 14 acres, and in doing so referenced People's Counsel Exhibit 22, which is a fiscal note which accompanied County Council Bill 16-07. The witness further opined that this PUD proposal included areas outside of the BMB zone, and that compliance with the Master Plan was mandatory (per B.C.C. § 32-4-245), and that this proposal was in fact in conflict with the Master Plan. The witness further testified that, in determining the boundaries of the "neighborhood," he believes that the neighbors themselves and their perceptions should be the most important consideration.

In addressing whether or not the condominium proposal was compatible with the neighborhood, Mr. Patton opined that it was not. The witness testified that the physical orientation of the proposed building would result in the condominium residents looking into adjoining neighbors' side yards, rather than Burke Road or the waterfront as is the case with the physical orientation and layout of the adjoining single family dwellings. In addition, the witness stated that multi-family residential dwellings are not permitted in the rural areas of Master Plan 2010, and cited this as further evidence that the proposal was not compatible with the Master Plan.

Mr. Patton agreed that the special exception factors set forth in B.C.Z.R. § 502 are employed in reviewing a PUD, and he advised that such factors were not met in the present case. The witness stated that the present boat yard is not in compliance with the original special exception granted, and he opined that it would therefore be wrong to grant a new special exception in such an instance. In addition, the witness stated that the size of the structure would change the character of the community, and set a dangerous precedent for other multi-family housing in rural waterfront communities.

In response to questions from Mr. Zimmerman, the witness indicated that in his opinion the condominium proposal violated Bill 16-07, given that there was "interdependency" between

the BMB and RC zoned portions of the 14-acre property. Mr. Patton testified that under the Developer's proposal, the RC-zoned properties would contain drains, culverts, storm water devices, a marina and other dockage facilities, which are all defined as 'improvements" under the Baltimore County Code. The witness next stated that the "mix of zoning" provision found at B.C.Z.R. § 430.3 was not applicable in this setting, given that under the legislation this PUD was only permitted in a BMB zone only. The witness stated this "mix of zoning" provision was applicable to properties inside of the URDL where you have a mix of zoning in a given project. In terms of "compatibility," Mr. Patton opined that this condominium would "fit" in a higher density neighborhood, perhaps closer to Eastern Avenue.

The next issue Mr. Patton discussed concerned the three critical area land use designations set forth in State law: IDA, LDA and RCA. The witness stated that the boat yard is located on an LDA area, while the 10-acre RC zoned land falls within an RCA zone. The witness stated that Baltimore County agencies never addressed what he believed was an inconsistency between the PUD density on this project and the Maryland regulations concerning permissible density in the Chesapeake Bay Critical Area. *See* People's Counsel Exhibit Nos. 20, 21 and 27. In response to Mr. Zimmerman's final question, Mr. Patton testified that the Galloway condominium project would be the only PUD to ever be approved outside of the URDL in Baltimore County.

Mr. Gontrum's cross examination of Mr. Patton was extremely brief. The most significant feature was that the witness conceded he "did not hold himself to the Code [B.C.C.] a definition of 'neighborhood'."

DEVELOPER'S REBUTTAL CASE

In its rebuttal case, which began on September 7, 2011, Attorney Gontrum recalled his engineer, James Matis. In addressing the alleged inconsistency in acreage found at various places

on the plans, Mr. Matis testified that the "PUD authorization" area found on Developer's Exhibit 8 is a metes and bounds measurement, and given that Baltimore County allows an owner to include in its calculation adjoining areas to the centerline of a roadway, the 3.887 acres figure was accurate. In addressing a question concerning the density of the project, Mr. Matis clarified that the Developer was using only 60% of the available density permitted in the BMB-zoned area.

Mr. Holzer posed a series of questions to the witness concerning the size of the PUD area on this project. Mr. Matis agreed that the RC 5 zoned property will have a beach or bird feeding area, which he agreed is an amenity provided to the condominium owners. At the same time, Mr. Matis testified that you could eliminate the RC 5 and RC 20 zoned portions of this property, and the project would still be viable because the Developer could perform off-site plantings and mitigation and/or make a fee in lieu payment. In response to Mr. Zimmerman's questions on this topic, Mr. Matis confirmed that the PUD area is simply a part of the overall 14-acre tract. With regard to whether or not development was taking place on the RC-zoned portions, Mr. Matis testified that the Developer's dedication of a right-of-way area along both sides of Burke Road is not an "improvement" related to a "street."

The Developer next recalled Mickey Cornelius, its traffic engineering expert. Mr. Cornelius opined that the condominium project would not cause traffic trips to exceed the 5,000 limit on a 20 foot wide roadway, as alleged by Protestants in connection with their traffic count. The witness opined that the PUD project would not increase the number of average daily trips beyond that which the marina now generates.

In response to questions from Messrs. Holzer and Zimmerman, Mr. Cornelius conceded that he did not perform a traffic count in connection with his review of this project, and that he also considered the 188 slips at the Galloway marina to be occupied in performing his

calculations. In addition, Mr. Cornelius testified that his opinion had not changed since the preparation of the Pattern Book in 2007, and he acknowledged that as a general matter marinas receive less use and generate less traffic during the winter.

The Developer next recalled its natural resources expert, Henry Leskenien. Mr. Leskenien testified that he disagreed with Mr. Robertson's testimony, and advised that Baltimore County had not ignored the applicable CBCA setbacks or the additional 35 foot residential setback which are applicable in this setting. The witness stated that he prepared an Alternatives Analysis (which was approved by DEPS) which reduced the 300 foot setback to 100 feet, and he then requested a variation of standards (also approved by DEPS) which granted the Developer variance relief from the 100 foot buffer and 35 foot residential setback which would otherwise be applicable.

The final witness in Developer's rebuttal case was Albert Barry, its planning expert. Mr. Barry first referenced Protestants' Exhibit 14 (VII-4) concerning the FAR calculations performed by Mr. Robertson. Mr. Barry conceded that the discrepancies in FAR was an issue, but was not the "whole story" in terms of determining compatibility. Mr. Barry next opined that this PUD proposal satisfied all of the conceptual principles set forth in the CMPD, including walkability, connectivity and mixed use, which was satisfied here given that the marina would be an accessory use to the residential condominium. Finally, Mr. Barry testified that the County Code's definition of "neighborhood," which Mr. Patton admitted he did not follow, was applicable to this case.

LEGAL ANALYSIS

Provisions concerning the review of PUDs are found in the B.C.C. and B.C.Z.R., and copied below are the sections pertinent to this case.

B.C.C. § 32-4-245. HEARING OFFICER REVIEW

(a) *Action by Hearing Officer.*

(1) The Hearing Officer shall conduct a hearing on the PUD development plan in accordance with the provisions of §§ 32-4-227 and 32-4-228.

(2) The Hearing Officer shall issue a written decision that approves or denies the PUD development plan and may condition approval on comments contained in the Director's report or otherwise.

(3) The decision shall identify any development or zoning requirements modified under subsection (b)(3) and a statement indicating that the Hearing Officer considered the impact of such modifications upon surrounding uses and why such modifications are in the public interest.

(b) *Standards for review.*

(1) The Hearing Officer shall review the proposed Planned Unit Development for compliance with the requirements of the Baltimore County Zoning Regulations and the development regulations.

(2) The height, area, setback, parking, open space, sign and other development and zoning requirements of the underlying zone or district that apply in that portion of the proposed Planned Unit Development shall provide the base for the Hearing Officer's review. Unless otherwise modified, the base development and zoning requirements shall apply.

(3) The Hearing Officer may:

(i) Condition approval of a PUD development plan on higher design standards;

(ii) Approve modifications of the applicable requirements of the underlying zone upon a finding that they are necessary to achieve the intent and purpose of this section; and

(iii) Accept any proposed community benefit and further define its terms.

(4) The Hearing Officer may not alter the amendments or modifications imposed by the County Council under § 32-4-242(c) or, except as provided in item (3)(iii), alter the community benefit identified in the Council resolution.

(5) The Hearing Officer may require compliance of the plan with § 32-4-203 and with any of the general design standards of Article 32, Title 4, Subtitle 4 of the Baltimore County Code.

(c) *Basis for approval.* The Hearing Officer may approve a proposed PUD development plan only upon finding that:

(1) The proposed development meets the intent, purpose, conditions, and standards of this section;

(2) The proposed development will conform with Section 502.1.A, B, C, D, E and F of the Baltimore County Zoning Regulations and will constitute a good design, use, and layout of the proposed site;

(3) There is a reasonable expectation that the proposed development, including development schedules contained in the PUD development plan, will be developed to the full extent of the plan;

(4) Subject to the provisions of § 32-4-242(c)(2), the development is in compliance with Section 430 of the Baltimore County Zoning Regulations; and

(5) The PUD development plan is in conformance with the goals, objectives, and recommendations of the Master Plan, area plans, or the Office of Planning.

(d) *Appeals.* The decision of the Hearing Officer is subject to the appeal provisions of § 32-4-281.

B.C.C. § 32-4-227. HEARING OFFICER'S HEARING – GENERAL REQUIREMENTS

(a) *In general.* Except as provided in § 32-4-106 of this title, final action on a Development Plan may not be taken until after a public quasi-judicial hearing before a Hearing Officer.

(b) *Notice.*

(1) At the direction of the county, notice of the date, time, and place of the Hearing Officer's hearing shall be conspicuously posted on the lot, parcel, or tract that is the subject of the Development Plan at least 20 working days before the hearing.

(2) The posting of the notice of the date, time, and place of the Hearing Officer's hearing shall remain posted on the lot, parcel, or tract for at least 15 days before the hearing.

(3) The Hearing Officer may not consider the Development Plan unless the property subject to the plan has been posted in accordance with this section.

(c) *Hearing files.*

(1) The Department of Permits, Approvals and Inspections shall have responsibility for compiling and maintaining complete files with respect to all hearing proceedings over which the Hearing Officer presides.

(2) The files shall include at least the following documents:

(i) The Development Plan;

(ii) Reports or comments or proposed or requested conditions relating to the plan from county agencies, the community input meeting, community groups, or any person;

(iii) Exhibits introduced in evidence at the hearing;

(iv) The final decision rendered by the Hearing Officer; and

(v) Papers, records, and dockets required under §§ 32-3-106 and 32-3-109 of this article.

(3) The Department of Permits, Approvals and Inspections shall make available to any person copies of any portion of the Development Plan file upon request and payment of any necessary fees.

(d) *Recording of hearing proceedings.*

(1) The proceedings of any hearing shall be recorded.

(2) A person may have access to the recorded proceedings upon request and payment of any fees or costs involved.

(e) *Comments and conditions.*

(1) The Hearing Officer shall consider any comments and conditions submitted by a county agency under § 32-4-226 of this subtitle and make the comments and conditions part of the permanent Development Plan file.

(2) If no comments or conditions are received by the Hearing Officer, the Development Plan shall be considered to be in compliance with county regulations.

B.C.C. § 32-4-228. SAME – CONDUCT OF THE HEARING.

(a) *Hearing conducted on unresolved comment or condition.*

(1) The Hearing Officer shall take testimony and receive evidence regarding any unresolved comment or condition that is relevant to the proposed Development Plan, including testimony or evidence regarding any potential impact of any approved development upon the proposed plan.

(2) The Hearing Officer shall make findings for the record and shall render a decision in accordance with the requirements of this part.

(b) *Hearing conduct and operation.* The Hearing Officer:

(i) Shall conduct the hearing in conformance with Rule IV of the Zoning Commissioner's rules;

(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.

(c) *Oaths.* The Hearing Officer may:

(1) Administer oaths; and

(2) Require witnesses to testify under oath.

B.C.Z.R. § 502.1

§ 502.1. Conditions determining granting of special exception.

Before any special exception may be granted, it must appear that the use for which the special exception is requested will not:

A. Be detrimental to the health, safety or general welfare of the locality involved;

B. Tend to create congestion in roads, streets or alleys therein;

C. Create a potential hazard from fire, panic or other danger;

D. Tend to overcrowd land and cause undue concentration of population;

E. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements;

F. Interfere with adequate light and air;

B.C.Z.R. § 430. Planned Unit Developments

§ 430.1. Definition; review; rezoning.

A. Definition. A "planned unit development" (PUD) is a development in which residential and/or commercial uses are approved subject to restrictions calculated to achieve the compatible and efficient use of land, including the consideration of any detrimental impact upon adjacent residential communities.

B. Review. A PUD shall be submitted and reviewed in accordance with the procedures of Article 32, Title 4, Subtitle 2, Part IV of the Baltimore County Code.

C. Rezoning. The use of property for a PUD may not be considered as evidence of substantial change in the character of the neighborhood for the purpose of interim zoning classifications of other property in the neighborhood.

§ 430.2. Application of process.

A. The PUD process may be utilized for:

1. A general development PUD, as provided in Section 430.3; or

2. A bed-and-breakfast PUD, as provided in Section 430.4.

§ 430.3. General development PUD.

A. Location. A general development PUD shall be located inside the urban rural demarcation line (URDL).

B. Permitted uses.

1. Residential uses. Residential uses are permitted in any residential or nonresidential zone subject to the compatibility requirements of § 32-4-402 of the Baltimore County Code.

2. Nonresidential uses. Uses permitted, as a matter of right or by special exception, in a B.L., B.M., B.R., B.M.M., B.M.B., OR 1, OR 2, O-3, OT or S.E. Zone are permitted in any nonresidential zone. In a C.B. or B.L.R. Zone, only those listed uses are permitted.

3. Mix of zoning. If the underlying zoning consists of nonresidential and residential zones, the residential and nonresidential uses may be reallocated on acreage anywhere within the designated PUD boundaries, but the building area of nonresidential uses in the residential zones may not exceed the building area otherwise permitted in the underlying nonresidential zones. Additionally, the density of the residential uses may not exceed the corresponding density allowed in the underlying residential zone. A residential and nonresidential use may overlap vertically to occupy the same acreage. Subject to the provisions of § 32-4-245 of the County Code. Section 102.2 of the Zoning Regulations does not apply to a mixed-use PUD.

C. Density.

1. If the underlying zone is classified residential, calculation of residential density may not exceed that of the underlying zone, and such density may be used anywhere within the PUD boundaries.

2. If the underlying zone is classified as a business zone or an office zone or S.E. Zone, calculation of residential density may not exceed the density permitted in a D.R.16 Zone, except that in a mixed-use PUD in an O.T. Zone, the calculation of residential density may not exceed 32 units per acre.

3. If the underlying zone is classified as a manufacturing zone, calculation of residential density may not exceed the density permitted in a R.A.E.1 Zone.

4. If the underlying zone is classified as an R.O. or R.O.A. Zone, calculation of residential density may not exceed the density permitted in a D.R.5.5 Zone.

5. This subsection is subject to the provisions of § 32-4-242(c) of the Baltimore County Code.

D. Dwelling type. Subject to the provisions of § 32-4-242(c) of the Baltimore County Code, any type of dwelling is permitted.

B.C.C. § 32-4-402. COMPATIBILITY.

(a) *"Neighborhood" defined.* In this section, "neighborhood" means the existing buildings and land uses adjacent to and extending from the proposed development to:

(1) A definable boundary such as a primary collector street or arterial street;

(2) An area with a significant change in character or land use; or

(3) A major natural feature.

(b) *Exception.* This section does not apply to a research park.

(c) *Recommendations by Director of Planning.* The Director of Planning shall make compatibility recommendations to the Hearing Officer for:

(1) A cluster subdivision;

(2) A development in the RCC, R-0, OR-1, OR-2, O-3, SE, OT zones, the CR districts, or a Planned Unit Development; or

(3) Alternative site design dwellings as provided in the comprehensive manual of development policies.

(d) *Compatibility objectives.* Subject to subsection (c) of this section, development of property shall be designed to achieve the following compatibility objectives in accordance with the guidelines in the comprehensive manual of development policies:

(1) The arrangement and orientation of the proposed buildings and site improvements are patterned in a similar manner to those in the neighborhood;

(2) The building and parking lot layouts reinforce existing building and streetscape patterns and assure that the placement of buildings and parking lots have no adverse impact on the neighborhood;

(3) The proposed streets are connected with the existing neighborhood road network wherever possible and the proposed sidewalks are located to support the functional patterns of the neighborhood;

(4) The open spaces of the proposed development reinforce the open space patterns of the neighborhood in form and siting and complement existing open space systems;

(5) Locally significant features of the site such as distinctive buildings or vistas are integrated into the site design;

(6) The proposed landscape design complements the neighborhood's landscape patterns and reinforces its functional qualities;

(7) The exterior signs, site lighting and accessory structures support a uniform architectural theme and present a harmonious visual relationship with the surrounding neighborhood; and

(8) The scale, proportions, massing, and detailing of the proposed buildings are in proportion to those existing in the neighborhood.

Special Exception Standards

Under the Baltimore County Code, the Hearing Officer must find that the proposed PUD will satisfy the special exception factors set forth in B.C.Z.R. § 502. The first such factor is that the proposed development not be detrimental to the health and general welfare of the locality involved. There was considerable testimony in this matter concerning the community's objections to the project, and whether or not the project was compatible with the surrounding environment. Even so, there was no evidence presented which suggested that the construction of the condominium would impact the health or general welfare of the community. Aesthetics and compatibility are important issues, but they do not rise to the level of health or safety concerns, and I therefore believe that B.C.Z.R. § 502.1 A has been satisfied.

The next factor concerns whether the development would cause congestion in the nearby roads. On this topic, the Developer presented the testimony and report of Mickey Cornelius, from The Traffic Group, Inc. Ultimately, Mr. Cornelius opined that the condominium development would have no discernable impact on the presently existing traffic situation in the area, and that the condominium and marina proposal would generate less traffic on the Bowleys Quarters

peninsula than the current boatyard use. Of course, the Protestants adduced testimony of Norma Bankert and Janet Walper, both of whom assisted in the preparation of a traffic count study they prepared after consultation with Richard Klein, a consultant who advises community groups. According to the study submitted by Protestants, the average number of daily trips at present exceeds the limit set by Baltimore County for a 20-foot wide roadway, although it is undisputed that there are no intersections with a level of service "D" or "F" in this vicinity.

Although Ms. Bankert and Ms. Walper were honest and believable, and deserve credit for their significant investment of time conducting the traffic count, I find the testimony of Mr. Cornelius more convincing on this issue. Although he admittedly did not conduct a traffic count, Mr. Cornelius has a wealth of experience and is familiar with local, state and federal traffic guidelines, and his opinion was that the proposal would not create congestion in roads, streets, or alleys in this vicinity, and B.C.Z.R. § 502.1.B is therefore satisfied. As noted by the Court of Special Appeals, lay witness testimony about "traffic congestion" was not sufficient to rebut a qualified traffic expert's opinion that the roadways could handle any additional traffic generated by the project. *Anderson v. Sawyer*, 23 Md. App. 612, 618-19 (1974).

The next special exception condition concerns whether or not the development would create a hazard from fire, panic or other danger. There is no specific testimony and/or evidence of any sort in the record tending to indicate that the condominium development would create a fire or panic hazard, thus those provisions are not germane. As concerns "other dangers," there was testimony to the effect that it would be imprudent to construct a 36-unit condominium this close to the Chesapeake Bay, in consideration of the violent hurricanes and storms of recent years. While such storms are of course a matter of record, it is equally true that Baltimore County revised its building code after Hurricane Isabel and now requires that the first 10 feet of any dwelling be

unoccupied, to allow for flood and drainage protection. The condominium proposal incorporates these new building regulations. As such, I do not believe the condominium development would pose a danger to the surrounding community, and B.C.Z.R. § 502.1.C is satisfied.

The next factor examines whether the development would "overcrowd land" or cause an "undue concentration of population." Several of the Protestants testified that the proposed condominium was simply much too large for the community, but I do not believe the testimony in this regard spoke to the issue of whether the development would cause an "undue concentration of population." I find that the condominium proposal will not overcrowd the land, given that the proposed structure is situated on a 2.55 +/- acre lot, and is in proportion (in terms of lot coverage) to the adjacent homes situated on smaller ½ acre residential lots. This sentiment was expressed convincingly by Mr. Barry, who testified that the houses north of the subject site are in fact more dense on a per bedroom basis than is the present condominium project, and thus I believe B.C.Z.R. § 502.1.D has been satisfied.

The next special exception provision concerns whether or not the proposed development would interfere with adequate public schools, parks and other infrastructure. According to the Office of Planning, none of the schools in the area are overcapacity. *See* County Exhibit 1. In addition, no evidence was presented to suggest that the sewerage or transportation system was at overcapacity or deficient in any level of service, and thus I find that this factor is satisfied in the present case.

The final special exception factor concerns whether or not the proposed development would interfere with adequate light and air. Malcolm Wood, who resides at 1402 Burke Road, testified that he believes his house will be negatively impacted, given the height of the proposed condominium building. Mr. Wood fears that the building is too tall and long, and will block

sunlight from reaching his property. On cross examination, Mr. Wood conceded that his view at present to the south of the peninsula is blocked by the stockade fence at the marina, and by the boats and other materials stored at the boatyard.

Given his proximity to the development, it is patently obvious that Mr. Wood will be impacted in a unique and more substantial way than other residents of the peninsula. Just the same, Mr. Wood's home is situated on the waterfront, and based on the photographs and other evidence, it seems clear that his home would, for the great portion of the daylight hours, be exposed to fresh air and sunlight, and it is only when the sun reached a certain point in the sky that the light would be blocked from reaching his property. While it is not my intent to trivialize Mr. Wood's concerns, I do not believe that his testimony on this issue is sufficient to establish that the proposed condominium would interfere with adequate light and air.

Having evaluated the specific special exception criteria set forth in B.C.C. § 32-4-245(c)(2), I find that the condominium project would "constitute a good design, use, and layout of the proposed site." Id. As the many architectural elevations show, the condominium project has a striking and attractive design, and would, in my estimation, be a much better use for the site than the relatively moribund boat yard operation.

Although they are not included as part of the PUD review pursuant to B.C.C. § 32-4-245(c), the zoning regulations contain three additional factors under § 502.1 that are applicable in run-of-the-mill special exception cases. Indeed, conditions G, H, and I concern whether or not a project is inconsistent with a property's zoning classification, would violate impervious surface provisions, or would be detrimental to environmental and natural resources in an R.C. zone. There is no legislative history to suggest why the County Council omitted consideration of factors G, H,

and I in PUD matters, although it seems particularly noteworthy and problematic in this case, given that a large portion of the testimony concerned just these issues.

Reasonable Expectation of Development Completion

The next factor to be considered under B.C.C. § 32-4-245 is whether there is a "reasonable expectation" that the proposed development "will be developed to the full extent of the plan." This issue requires little discussion, given that the Developer is a well-known and experienced builder with many projects throughout Baltimore County. Indeed, Shelter Development, led by Mr. Karski, has constructed numerous projects throughout Baltimore County, and they have been popular and well received, and there is no reason to believe that the Galloway condominium project would not likewise be of high quality and built to the specifications provided in the Development Plan. While it is true, as pointed out in the brief filed by People's Counsel, that the general malaise in the economy has had a significant impact on residential development, this cannot be construed to mean that such development projects cannot at this time be approved in Baltimore County, and I would imagine the Developer is in a better position than most to weather the current downturn. As such, I find that the factor set forth in B.C.C. § 32-4-245(c)(3) is satisfied.

B.C.Z.R. Section 430

The next factor is whether the proposed development is in compliance with Section 430 of the B.C.Z.R., concerning PUDs. B.C.Z.R. § 430.1 contains only definitions and a cross reference to the aforementioned provisions of the Baltimore County Code, and thus requires no analysis. It is B.C.Z.R. §§ 430.2 and 430.3 which contain substantive provisions, and are analyzed below.

Under B.C.Z.R. § 430.2, the PUD process may be utilized for a "general development PUD." The project proposes residential uses, which are permitted in a general development PUD

pursuant to B.C.Z.R. § 430.3.B.1. This section also contains provisions related to the Urban Rural Demarcation Line (URDL) and the permissible density for a general development PUD, and both of these issues were hotly contested at the hearing.

As noted at the outset, current law provides that general development PUDs shall be located inside the URDL, although the parties here stipulated that the Developer could avail itself of the former version of this ordinance, which permitted general development PUDs in the Bowleys Quarters Growth Management Area outside of the URDL when located in a BMB zone. *See* Bill No. 16-07. People's Counsel Exhibit 7. Protestants and People's Counsel contend that the Developer has run afoul of this provision, given that its PUD application presented to the County Council specified that the project was comprised of approximately fourteen (14) acres, over eleven (11) of which are zoned RC 20. In addition, Protestants' expert, James Patton, testified that in his opinion there is an "interdependency" between the BMB zone on the west side of Burke Road and the RC 20 zone on the east side of Burke Road, and that the project must be denied on that basis.

The Developer, on the other hand, contends that although the site in total is over 14 acres, the "PUD authorization area" essentially mimics the BMB zoning located within the overall property. In this regard, the Developer contends that on Parcel 4, west of Burke Road, the PUD authorization area includes roughly 2.1 acres, while Parcel 162 on the east side of the road contains roughly 1.45 acres zoned BMB.

The Protestants and People's Counsel appear to have the better of this argument. As an initial matter, the concept of the "PUD authorization area" is not found in the B.C.Z.R. or development regulations, and I therefore do not believe it can be used to bifurcate the site. If the Developer believed that it was only the BMB acreage that should be subjected to and scrutinized

according to the development regulations, it should have so specified in its application or secured an amended Council Resolution to that effect. Here, the Resolution authorizing further review of the PUD (See People's Counsel Exhibit 5) specifies that the Developer submitted an "application for approval of an approximately 14 acre site." That Resolution does not "carve out" a "PUD authorization area," and speaks only of the 14 acre site being eligible for County review.

In an analogous setting, courts have repeatedly noted that the plaintiff is the "master of his complaint." *Custer v. Sweeney*, 89 F.3d 1156, 1165 (4th Cir. 1996). So it is here, and the Developer, in seeking a resolution from the County Council to authorize further review of the PUD, elected to include the entire 14 acres in the application. In addition, although there will be no physical improvements on the east side of Burke Road, the Developer is proposing to remove impervious surfaces from the area, undertake a forest restoration project, and dedicate certain easements to the County, which were conditions upon DEPS' approval of the project. See County Exhibit 2. All of these activities, as well as imposing a condominium regime on the property and combining two "parcels of property for any purpose" (See Developer's Exhibit 7, pp. 13 and 28), constitute "development" and "improvements" under the Code. See People's Counsel Exhibit 25. As such, I find that there is in fact an interdependency and/or interrelationship between the BMB and RC zoned parcels, and as such, the PUD proposal is in violation of Bill No. 16-07.

The final concept under B.C.Z.R. § 430.3 concerns the permissible density of the project. According to the Developer, the residential density calculation considered approximately 3.88 acres of BMB zoned land. Under B.C.Z.R. § 430.3.C.2, the Developer contends that since the BMB is a business zone, the residential density equals that permitted in a DR 16 zone, such that 62 dwelling units would be permissible on the 3.88 acres +/- of BMB zoned land.

The Protestants and People's Counsel contend the "mix of zoning" provision in B.C.Z.R. § 430.3 is applicable, such that the 3.88 acres of BMB zoned land would be subject to a DR 5.5 density, yielding slightly over 21 units, while the RC 5 and RC 20 zones would provide just one additional dwelling unit.

Given that the BMB zone is in fact a "business" zone, the density is properly calculated under B.C.Z.R. § 430.3.C.2. Under that regulation the density may not exceed that permitted in the DR 16 zone, and the Developer is proposing 36 dwelling units on 3.88 acres of BMB zoned land, and I therefore find that the proposed density is less than that permitted under this provision of the B.C.Z.R. In both B.C.Z.R. § 430.3.B.3 and C, the operative language is "underlying zone." That, in my opinion, refers to the actual land underneath the dwellings upon which the density is to be evaluated. As noted earlier, there will be no dwellings constructed on the RC zoned land, and thus I do not believe that the "mix of zoning" provision is applicable. Nor do I view this finding as conflicting with the determination that the PUD occupies the entire 14+/- acres, since determining the features that comprise the PUD (i.e., waterfront and environmental amenities, tree planting) is a very different analysis than one looking at zoning density.

Master Plan Conformity

The fifth and final factor set forth in the B.C.C. is whether the "PUD Development Plan is in conformance with the goals, objectives, and recommendations of the Master Plan, Area Plans, or the Office of Planning." B.C.C. § 32-4-245(c)(5). The forgoing provision, by its use of the disjunctive "or," could literally be read to mean that as long as a PUD development plan was approved by the Office of Planning, it would pass muster under this provision. Of course, it certainly does not seem as if this was the County Council's intent, given that such an interpretation could lead to absurd results, whereby the Office of Planning could make recommendations or

approvals that flatly contradicted the Master Plan or an Area Plan. That did not occur in this case, although the Office of Planning, in its December 29, 2010 report, somewhat skirted the issue by concluding (erroneously, in light of an appellate opinion issued after the date of that report) that the Master Plan was merely a "guide," as had long been thought.

The applicable Plan in this case is Master Plan 2010, enacted by the County Council in 2000. Under that plan, the land use map found on Page 259 designates the subject property as lying within the Resource Preservation and Rural Residential zones. In these areas, the Master Plan recommends limiting "residential densities to one dwelling unit per 25-50 acres." *See* Master Plan 2010, p. 243. With respect to the Rural Residential Areas, the Plan prescribes "a mix of single family residential development and woodlands, farm fields, stream valleys and areas of significant historic and cultural value." Id. at 243. In addition, the relevant community plan (which by operation of law is incorporated into the Master Plan) specifies the community supports the development of "single family detached" homes. See Developer's Exhibit 30, p. 12. Quite obviously, a multi-family project like that proposed in the Galloway Plan would not be compatible with either the Resource Preservation or Rural Residential Areas described in Master Plan 2010, or the community plan, and the next question is thus whether conformity is mandated in this scenario.

As noted above, the long-standing rule, relied upon by the Office of Planning, is that Master Plans and similar documents are advisory guides only, and are not considered mandatory in zoning cases. *Trail v. Terrapin Run, LLC*, 403 Md. 523, 535 (2008). Whatever doubt there was on this issue in the context of a development plan was eliminated by the Court of Special Appeals in a recent decision. Indeed, in *HNS Development, LLC v. People's Counsel for Baltimore County*, 200 Md. App. 1 (2011), the court held that "the Master Plan is binding as to development

and subdivision plans in Baltimore County." Id. at 35. As such, case law provides that the Master Plan is binding when in fact a development law or regulation states as much, and that is the case with B.C.C. § 32-4-245(c)(5), which provides that a PUD plan must be "in conformance" with the goals and recommendations of the Master Plan. Here, the PUD Development Plan proposes construction of a multi-family housing project, which is antithetical to the goals set forth in Master Plan 2010 and the Bowley's Quarters community plan. In light of the above, I believe a Master Plan conflict exists which stands as an obstacle to approval of the PUD Plan.

Chesapeake Bay Critical Area (CBCA) Issues

The parties here dispute whether the PUD proposal violates CBCA law and regulations concerning density standards. I do not believe that issue should be resolved in this proceeding.

As all parties acknowledge, State law – for the most part – provides that a local jurisdiction shall have "primary responsibility" for "implementing" its critical area program. Md. Nat. Res. Code Ann. § 8-1808. In this case, Ms. Farr testified that the density provisions cited by the Protestants and People's Counsel apply on a macroscopic basis (as when the County was first developing its program and mapping land into the various area designations) rather than a site-specific basis. Though Ms. Farr was cross-examined on the point, no evidence was presented to directly contradict her testimony. In addition, the CBCA Commission conducted a site visit and evaluated the Developer's proposal, and did not interpose any objections or indicate that the project exceeded the permissible density for a Limited Development Area (LDA). See Developer's Exhibit 19. As such, I do not believe that the CBCA issue must be resolved in this case, especially since the Master Plan and Community Plan (both of which are expressly applicable in a PUD case) contain land area designations and density standards which are binding.

Compatibility with the Neighborhood

The parties spent a great deal of time in this case offering their arguments and interpretations concerning whether or not the condominium project was compatible with the neighborhood. An equal amount of time was spent concerning the proper definition and parameters of "neighborhood." As noted in the brief of People's Counsel, the compatibility review process is set forth in Sections 32-4-242 and 32-4-402 of the County Code. Upon review of those Sections, and the specific provisions concerning planned unit developments found in Article 32, Title 4, subtitle 2, part IV of the Code, I do not believe that I am required or authorized to make such a compatibility finding, and therefore decline to do so.

Upon making application to the County Council for a PUD, the applicant is obliged to include a "statement of how the Planned Unit Development will comply with the compatibility requirements" of the Code. B.C.C. § 32-4-242. Thereafter, assuming the Council issues a Resolution authorizing further review, the Developer would then be required to submit a concept plan/pattern book providing written documentation describing "how the Planned Unit Development will comply with the compatibility requirements" of the Code. B.C.C. § 32-4-243(b). In Section 32-4-245(c), the Code sets forth the five findings that must be made by the Hearing Officer before approving a PUD plan. Nowhere does it state the Hearing Officer must find the project satisfies the compatibility standards set forth in Section 32-4-402, nor does it specify that the Hearing Officer is obliged to make or review the Office of Planning's compatibility finding.

Aside from the statutory text, there is also a common sense reason why the compatibility finding should not be left to the Hearing Officer. The determination of compatibility under the Code encompasses eight criteria, and at bottom this is a subjective determination without any

black-letter legal principles that can guide a Hearing Officer's decision. As such, the determination of compatibility is best left to the Office of Planning which has a wealth of experience on the topic.

Alternatively, the Design Review Panel is ideally situated to make such a finding. The Panel is composed of architects and other licensed design professionals, and the Code (§ 32-4-203(c)) provides that the Panel shall follow the policies of the CMDP and evaluate proposals with certain enumerated criteria. As it happens, this is virtually the same process and criteria used by the Office of Planning in making "compatibility" determinations. B.C.C. § 32-4-402(d).

Section 32-4-245(b)(5) of the Code indicates the Hearing Officer may "require compliance of the [PUD] plan with § 32-4-203" [Baltimore County Design Review Panel]. Though this provision is poorly drafted and it is not entirely clear what it means, my surmise is that a Hearing Officer could condition approval of the plan upon the panel's recommendation, which is binding on the Hearing Officer per B.C.C. § 32-4-203(i). I am convinced that would ensure a more competent and informed evaluation of the project, and I would impose such a condition if the Plan were to be approved.

Remaining Legal Issues

The Protestants and People's Counsel argued at the conclusion of the hearing that the development of the Galloway condominium project constitutes illegal spot zoning. I do not believe this argument has merit. In *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 539 (2002), the Court of Appeals noted that planned unit development zones are in effect the same thing as a "floating" zone. Much earlier, Maryland's highest court upheld the concept of a floating zone against a challenge that it constituted illegal spot zoning. *Huff v. Board of Zoning Appeals*, 214 Md. 48 (1957). I believe that precedent is applicable in this case. In a sense, all

PUDs constitute a sort of "spot zoning" approved by the Council, and the issue became much more pronounced through the years as the Council reduced, and eventually eliminated, acreage requirements for a PUD, as noted in the opening memorandum filed by People's Counsel.

People's Counsel and Protestants have also argued that the "grandfather clause" contained in Bill 5-10, when applied to Bill 16-07, renders Bill 5-10 a "special law" prohibited by Article III, Section 33 of the Maryland Constitution. The brief of People's Counsel, at pages 27-32, contains a thorough discussion of the topic, and the argument appears to have merit.

Ultimately, I am not going to rule on this issue, given the disposition of the many other issues discussed above. See Breslin v. Powell, 421 Md. 266, 299 n. 26 (2011) ("avoid, where possible, reaching a constitutional question"). But it does appear as if the "grandfather clause" in Bill 5-10 limited the application of Bill 16-07 to only one entity, since as a factual matter no one else could have secured a Council Resolution other than the Developer, which is the sine qua non of a "special law." In other words, unlike the possibility in Reyes v. Prince George's County, 281 Md. 279 (1977), that another stadium could be built in the future which could avail itself of the challenged law, here it is a matter of certainty that the law can and will apply only to this entity.

Conclusion

As noted earlier, B.C.C. § 32-4-245(c) sets forth the standards which must be satisfied for approval of a PUD Development Plan. The Developer has satisfied (c)(1), (2) and (3) of that Section. But I believe the Development Plan must be denied based on (c)(4) and (5). The Plan does not satisfy B.C.Z.R. § 430, given that the PUD development is not restricted to the BMB zone. In addition, the Plan is not "in conformance" with the Master Plan or the Bowley's Quarters Community Plan, neither of which recommend the construction of multi-family buildings in the area.

THEREFORE, IT IS ORDERED by this Hearing Officer/Administrative Law Judge this 25 day of November, 2011, that the redlined PUD Development Plan for **GALLOWAY CREEK** identified herein as Developer's Exhibit 8, be and is hereby DENIED.

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/dlw

#758-07

BALTIMORE COUNTY
MARYLAND

PLANNING BOARD

September 26, 2008

William J. Wiseman, III
Baltimore County Hearing Officer
The Jefferson Building
105 W. Chesapeake Ave.
Towson, MD 21204

Re: Variation of Standards – Galloway Creek

Dear Mr. Wiseman:

Section 32-4-231(a) of the Baltimore County Code gives the Baltimore County Planning Board the authority to grant a variation of standards to the Chesapeake Bay Critical Area regulations for certain types of development projects, in accordance with State-mandated regulations adopted by the Critical Area Commission concerning variances. Specifically, there are several criteria listed in Section 32-4-232(d) that must be used to evaluate the applicant's request. All of the criteria must be met in order to approve the variation of standards.

The applicant's proposal requires variation of standards approval from buffer protection management provisions in Section 33-2-401 (Tidal Buffer Establishment) of the Code. Specifically, the applicant is proposing impacts to 35,500 square feet of 100-foot buffer in order to accommodate a four-level multi-family condominium building with 36 units, road and parking areas, and continued use of existing water access uses. The applicant is also proposing a 295 square-foot reduction of the primary structure setback from the buffer to a minimum 25 feet.

At its September 18, 2008 meeting, the Planning Board of Baltimore County found the Galloway Creek Application for Variation of Standards in compliance with State-mandated criteria for granting variances in the Chesapeake Bay Critical Area and recommends approval with the DEPRM conditions as listed below:

1. All buffer impacts associated with this variation of standards request shall be mitigated either on the development site, off-site, or through fees-in-lieu. A Critical Area Management Plan must be approved for any mitigation on site.
2. All mitigation shall be completed within a timeframe established by DEPRM, but no later than two years from grading permit issuance for the development. A final Critical Area

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planning@baltimorecountymd.gov www.baltimorecountymd.gov

Area Management Plan shall be submitted to DEPRM for review and approval prior to grading plan approval for the site. Any changes to this plan will require prior written permission from DEPRM. Additionally, a cost estimate shall be provided to DEPRM for review along with the Critical Area Management Plan, detailing the cost of installing and maintaining the mitigation plantings.

3. Once the final Critical Area Management Plan has been approved, and prior to grading permit issuance, the applicant shall sign an Environmental Agreement, and shall post a Critical Area Management security with DEPRM equal to 110% of the cost of implementing the Plan. At a minimum, the security amount for the planting portion of the Plan shall equal at least $0.25 per square foot of planting.
4. Release of the Critical Area Management security shall generally be in accordance with DEPRM's established Environmental Agreement policy. As required by the policy, the applicant is responsible for submitting inspection reports to DEPRM for approval in accordance with the plan requirements. The reports shall include information regarding the number, health, size, form and vigor of the plant material; control of insects, disease, and competing vegetation; watering; mechanical injury; and the name of the company or individual responsible for plant care.
5. All retained onsite wetlands, buffers and forests and planting mitigation areas shall be protected via a perpetual Critical Area Easement. This easement shall be shown on the record plat for the project, and recorded in the Land Records of Baltimore County along with an associated Declaration of Protective Covenants. Any proposed uses within the easement shall require prior written permission from DEPRM. The mitigation areas shall be protected in perpetuity as determined by DEPRM.
6. Surveyed limits of the Critical Area Easement shall be clearly marked in the field at predetermined intervals with permanent below grade markers to facilitate identification of easement limits by both homeowners and County staff. Critical Area Easement "Do Not Disturb" signs shall be installed as "witness" posts near each rebar location. Additionally, the locations of the rebar and the Critical Area Easement limits shall be submitted digitally to DEPRM in a format that could be incorporated into a GIS layer for future County use. The locations of these signs and markers shall be shown on the final Galloway Creek Critical Area Management Plan.

7. Any proposed changes to the site layout or proposed site uses may require an amended variation of standards request as determined by DEPRM.

Please let me know if you have any questions.

Sincerely,

Jeffrey W. Long for

Arnold F. 'Pat' Keller, III
Secretary to the Board

AFK:bjw

c: Members, Baltimore County Council
Thomas Peddicord, Legislative Counsel/Secretary
Mary P. Allen, County Auditor
Fred Homan, Administrative Officer
John Beverungen, Baltimore County Attorney
Peter M. Zimmerman, Peoples Counsel
Pat Farr, Manager, DEPRM
Jonas Jacobson, Director, DEPRM
Tim Kotroco, Director, PDM
Edward C. Adams, Jr., Director, DPW
Bob Barrett, Director, Recreation. & Parks
David Iannucci, Director, Economic Development
Lynn Lanham, Planning
Galloway Creek, LLC
John Gontrum, Esq.
James E. Matis, P.E.
Edward J. Gilliss, Chair, Planning Board

CHESAPEAKE BAY CRITICAL AREA
VARIATION OF STANDARDS STAFF REPORT
September 4, 2008

Property Information

Project Name: Galloway Creek
Property Address/Location: 1414 Burke Road, Bowleys Quarters

General Variation of Standards Information

Section 32-4-231(a) of the Baltimore County Code (hereafter "Code") gives the Baltimore County Planning Board the authority to grant a variation of standards to the Chesapeake Bay Critical Area regulations for certain types of development projects, in accordance with State-mandated regulations adopted by the Critical Area Commission concerning variances. Specifically, there are several criteria listed in Section 32-4-232(d) that must be used to evaluate the applicant's request. All of these criteria must be met in order to approve the variation of standards.

Existing Site Conditions

The property is two parcels, which together total approximately 14.5 acres in size, and is located entirely within the Critical Area in Bowleys Quarters. Parcel 4 is waterfront, facing Galloway Creek and fronting Burke Road. It is designated a Limited Development Area. Parcel 162 fronts Burke Road, across the road from Parcel 4. Single-family residential properties surround Parcel 4 and the west side of Parcel 162. Parcel 162 is surrounded by forest on the remaining three sides. It is designated a Resource Conservation Area.

Parcel 4 contains an existing marina, with two buildings, boat storage, and parking. It has 88% impervious surface. Parcel 162 contains a boat storage area, wetlands, and forest. It has 6.5% impervious surface. Overall, the site contains 20.8% impervious surfaces.

The shoreline buffer area has both bulkhead and riprap in front of the marina and a small area of natural shoreline to the north of the bulkhead. There are three existing piers and a travel lift with the marina. There is minimal vegetation on Parcel 4 and the 100-foot buffer is entirely impervious.

Variation of Standards Proposal

The applicant's proposal requires variation of standards approval from buffer protection and management provisions in Section 33-2-401 (Tidal Buffer Establishment) and Section 33-2-204 (building setbacks) of the Code. Specifically, the applicant is proposing impacts to 34,500 square feet of 100-foot buffer in order to accommodate a four-level, multi-family condominium building with 36 units, road and parking areas, and continued use of existing water access uses. The applicant is also proposing a 295 square foot reduction of the primary structure setback from the buffer to a minimum of 25 feet.

Evaluation of Variance Criteria in Section 32-4-232(d)

The first criterion requires that special conditions or circumstances exist that are peculiar to the land or structure within the Critical Area of the County. The applicant is proposing to develop areas of the buffer that have been historically developed and covered in impervious surfaces. Due to the previous uses and configuration of the site, the required buffer and setbacks, and the

wetlands and forest on Parcel 162, the site is highly constrained. As such, special conditions and circumstances exist that are peculiar to the land, and this criterion has been met.

The second criterion requires that strict compliance with the regulations would result in unwarranted hardship. Strict compliance with the regulations would prevent the applicant from utilizing areas along the waterfront that have been historically disturbed for development and water access uses. Therefore, the hardship in this case is unwarranted, and this criterion has been met.

The third criterion requires that strict compliance with the Critical Area regulations would deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area of the County. Other waterfront properties in the Chesapeake Bay Critical Area with similar historical buffer disturbances, parcel configurations, and environmental features like wetlands and forest would be granted similar variations of standards. Thus, strict compliance with the regulations would deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area, and this criterion has been met.

The fourth criterion requires that the granting of a variation will not confer upon an applicant any special privilege that would be denied by the Critical Area regulations to other lands or structures within the Critical Area of the County. Another variation of standards applicant in the Chesapeake Bay Critical Area with similar existing property conditions and proposing similar impacts, water quality protection, and enhancement measures would be given the same consideration as the current applicant. Therefore, this criterion has been met.

The fifth criterion requires that the variation request is not based upon conditions or circumstances which are the result of actions by the applicant. The variation of standards is a result of historical property uses and site constraints rather than actions by the applicant. As such, this criterion has been met.

The sixth criterion requires that the request does not arise from any condition relating to land or building use, either permitted or non-conforming, on any neighboring property. The areas of the property associated with the variation of standards request are located adjacent to an existing residential community. The proposal for the condominium development is based on the existing site constraints and existing conditions on the site to be developed. Therefore, the request does not arise from any condition relating to land or building use on any neighboring property.

The seventh criterion requires that the granting of a variation will be in harmony with the general spirit and intent of the Critical Area regulations of the County. As previously noted, the applicant is proposing to impact buffer and setback areas in the Limited Development Area that have been historically developed with commercial uses and water access. Furthermore, the applicant proposes to enhance water quality and habitat functions by removing impervious surfaces from both parcels, establishing a planted 25-foot buffer along the waterfront, and planting forest in the newly pervious Resource Conservation Area adjacent to the existing forest and wetlands. These mitigation efforts will provide better filtering of sediment and nutrient runoff than the existing disturbed buffer areas. Therefore, the applicant's proposal is in harmony with the general spirit and intent of the Critical Area regulations of the County, and this criterion has been met.

The eighth criterion requires that the variation conforms to the requirements as stated in Section 32-4-226(d) of the Code; that is, that the variation conforms to the following goals of the Chesapeake Bay Critical Area law:

Goal 1: The proposal must minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have runoff from surrounding lands.

The applicant's proposal will minimize water quality impacts by reducing impervious surfaces from the buffer on the site, and by planting new pervious areas to increase the filtering capacity of the buffer and forest. Therefore, this goal has been met.

Goal 2: The proposal must conserve fish, wildlife, and plant habitat.

The applicant's proposal to remove impervious surfaces and to plant all open areas on Parcel 162 and then to protect it via recordation of a permanent Critical Area Easement will increase habitat on site. Thus, this goal has been met.

Goal 3: The proposal must be consistent with established land use policies for development in the Chesapeake Bay Critical Area, which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts.

The applicant's development project must meet all other Chesapeake Bay Critical Area requirements and will, therefore, be consistent with established land use policies for development in this portion of the County. Planting a portion of the buffer will help reduce the number, movement, and activities of persons that can potentially create adverse environmental impacts. Conversion of a formerly commercial site to residential use will also reduce the number, movement, and activities of people on the property.

Chesapeake Bay Critical Area Findings

Based upon our review, the Department of Environmental Protection and Resource Management (DEPRM) finds that the first six of the variation of standards criteria have been met, and that the seventh and eighth criterion can be met by implementing water quality protection and enhancement measures outlined below. We further find that all of the goals of the Chesapeake Bay Critical Area regulations have been met. Therefore, we hereby recommend that the requested variation of standards be granted, with the following conditions:

1. All buffer impacts associated with this variation of standards request shall be mitigated either on the development site, off-site, or through fees-in-lieu. A Critical Area Management Plan must be approved for any mitigation on site.

2. All mitigation shall be completed within a timeframe established by DEPRM, but no later than two years from grading permit issuance for the development. A final Critical Area Management Plan shall be submitted to DEPRM for review and approval prior to grading plan approval for the site. Any changes to this plan will require prior written permission from DEPRM. Additionally, a cost estimate shall be provided to DEPRM for review along with the Critical Area Management Plan, detailing the cost of installing and maintaining the mitigation plantings.

3. Once the final Critical Area Management Plan has been approved, and prior to grading permit issuance, the applicant shall sign an Environmental Agreement, and shall post a

Critical Area Management security with DEPRM equal to 110% of the cost of implementing the Plan. At a minimum, the security amount for the planting portion of the Plan shall equal at least $0.25 per square foot of planting.

4. Release of the Critical Area Management security shall generally be in accordance with DEPRM's established Environmental Agreement policy. As required by the policy, the applicant is responsible for submitting inspection reports to DEPRM for approval in accordance with the plan requirements. The reports shall include information regarding the number, health, size, form and vigor of the plant material; control of insects, disease, and competing vegetation; watering; mechanical injury; and the name of the company or individual responsible for plant care.

5. All retained onsite wetlands, buffers and forests and planting mitigation areas shall be protected via a perpetual Critical Area Easement. This easement shall be shown on the record plat for the project, and recorded in the Land Records of Baltimore County along with an associated Declaration of Protective Covenants. Any proposed uses within the easement shall require prior written permission from DEPRM. The mitigation areas shall be protected in perpetuity as determined by DEPRM.

6. Surveyed limits of the Critical Area Easement shall be clearly marked in the field at predetermined intervals with permanent below grade markers to facilitate identification of easement limits by both homeowners and County staff. Critical Area Easement "Do Not Disturb" signs shall be installed as "witness" posts near each rebar location. Additionally, the locations of the rebar and the Critical Area Easement limits shall be submitted digitally to DEPRM in a format that could be incorporated into a GIS layer for future County use. The locations of these signs and markers shall be shown on the final Galloway Creek Critical Area Management Plan.

7. Any proposed changes to the site layout or proposed site uses may require an amended variation of standards request as determined by DEPRM.

Jonas A. Jacobson
Director

9/21/08
Date

JAJ/rae