

IN THE MATTER OF	*	BEFORE THE
GREENSPRING JOPPA FALLS, LLC	*	BOARD OF APPEALS
Legal Owner and Developer of the property located	*	OF
at 2310 West Joppa Road	*	BALTIMORE COUNTY
(Greenspring Manor)	*	Case No.: CBA-24-030
8 <sup>th</sup> Election District	*	
3 <sup>rd</sup> Council District	*	
RE: Appeal of Granting of Development Plan	*	
PAI # 08-0922	*	

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**OPINION**

This matter comes to the Board of Appeals of Baltimore County (the “Board”) on appeal of the Amended Combined Development Plan and Zoning Opinion and Order After Motion for Reconsideration Hearing (“the Amended Order”) dated April 17, 2024, by Administrative Law Judge (“ALJ”) Maureen E. Murphy wherein the Blue-lined Development Plan known as Greenspring Manor was approved subject to conditions.

Owner and Developer of Greenspring Manor development, Greenspring Joppa Falls, LLC, is represented by Adam M. Rosenblatt, Esquire and Christopher D. Mudd, Esquire of Venable LLP. Appellants and Protestants Valleys Planning Council, Inc., Falls Road Community Association, Inc., Heatherfield Community Association, Seminary Ridge Owners Association, Boxwood Homeowners Association, Jim Gary and Dan Radebaugh and the Meadows of Greenspring Homeowners Association, Inc., are all represented by Michael R. McCann, Esquire. Michael T. Wyatt, Esquire appeared *pro se* on behalf of himself and Courtney C. Wyatt. People’s Counsel for Baltimore County, Peter M. Zimmerman also participated.<sup>1</sup>

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<sup>1</sup> Mr. Zimmerman, who died on July 15, 2024, submitted memoranda of law before the ALJ and this Board, but did not appear at the hearing before the Board. The Board considered the legal arguments in those documents in reaching its decision.

The Board heard argument on this matter on June 11, 2024, at which time the parties agreed that the Board could bifurcate the case, and rule on the Development Plan and related issues, then separately consider the zoning petition for special variance.

All parties submitted memoranda to the Board. A virtual public deliberation was held on Tuesday, July 30, 2024.

### STANDARD OF REVIEW

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

*Actions by Board of Appeals.*

(1) In a proceeding under this section, the Board of Appeals may:

- (i) Remand the case to the Hearing Officer;
- (ii) Affirm the decision of the Hearing Officer; or
- (iii) Reverse or modify the decision of the Hearing Officer if the decision:

1. Exceeds the statutory authority or jurisdiction of the Hearing Officer;
2. Results from an unlawful procedure;
3. Is affected by any other error of law;
4. Is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
5. Is arbitrary or capricious.

(2) Notwithstanding any provisions to the contrary, if the Hearing Officer fails to comply with the requirements of § 32-4-229(a) of this subtitle and an appeal is filed under § 32-4-229(a) of this subtitle, the Board of Appeals may impose original conditions as are otherwise set out in § 32-4-229(c) and (d) of this subtitle.

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

The first three of these reasons involve errors of law, and, as to them, no deference is due to the hearing officer. The Board clearly must make its own independent evaluation. That is also true with respect to paragraph (e) -- whether the hearing officer's decision is arbitrary or capricious.

Citing *Brandywine Senior Living at Potomac LLC v. Paul*, 184 Md.App 195 (2018), conclusions of law are reviewed *de novo*. No deference is owed to an erroneous conclusion of law. The court stated: "Where an administrative agency renders a decision based on an error of law, we owe the agency's decision no deference.

The Court in *Gaylord Brooks* further explained the role of the Board of Appeals as follows:

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

*Id.* at 580.

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

### **BACKGROUND**

This matter has a lengthy history. The property known as Greenspring Manor is a 39.4± Acre tract of land on the north side of Joppa Road (2310 Joppa Road) (the "Property"), split zoned in Density Residential categories, D.R. 1 and D.R. 2. Developer proposes 61 single family homes (including one existing house). Developer filed a Petition for Special Variance pursuant to Baltimore County Zoning Regulations ("BCZR") §4A02.4.G to allow the development within

a failing traffic shed. Developer also submitted for approval a one sheet Red-lined Development Plan and a one sheet Green-lined Development Plan depicting the proposed development.

The Development Plan and Zoning cases were filed for a combined hearing before the ALJ as permitted by Baltimore County Code (“BCC”) §32-4-230. Following the requisite procedures under BCC §32-4-401, et seq. and BCZR, the Property was posted and a virtual combined public hearing was held over 13 days beginning September 1, 2022 and concluding May 31, 2023.

On July 31, 2023, the ALJ issued a 132-page Combined Development Plan and Zoning Opinion and Order, denying the Green-lined Development Plan and the Petition for Special Variance. In this lengthy and detailed order, the ALJ based her decision on, among other things inadequate sewer capacity and traffic safety. The ALJ concluded that:

Each of these [several county] regulations and policies requires sewage facilities to safely, adequately and efficiently function. Here the overwhelming evidence shows that, for this particular sewage path, it will not. As a result, I cannot accept the argument that just adding sewage from 61 new homes to the sewer system is “inconsequential when compared to the amount of sewage which flows through the system.” It is clear to me that the sewage path from this Property cannot handle the existing sewage which flows along the path, much less the additional sewage which will come from adding 61 homes to the sewer system. (ALJ Opinion at 129)

With respect to the usual presumption in favor of plan approval, the ALJ found that “the presumption of development plan compliance in *Elm Street*... is not found here, as there was substantial evidence by DPWT to the contrary.” (*Id.* At 120)

On August 30, 2023, Developer filed a timely Motion for Reconsideration, contending the ALJ’s findings on sewer capacity were based on “misunderstandings” and requesting that the ALJ convene an additional hearing.

On September 25, 2023, the ALJ issued an Order on Motion for Reconsideration, granting the motion and ordering a hearing to be conducted to consider testimony and/or documents from

the Department of Public Works and Transportation (“DPWT”) representative in regard to the “sewer path” from the Property, and further, permitting Developer at that hearing to offer a revised plan eliminating the proposed Emergency Access Gate, stating “but no additional testimony or evidence will be provided in regard to that issue.”

A Motion for Reconsideration hearing was held on February 26, 2024 and was limited as stated in the ALJ’s Order on Motion for Reconsideration.

On April 17, 2024, the ALJ issued her Amended Combined Development Plan and Zoning Opinion and Order After Motion for Reconsideration Hearing in which she approved the Amended Blue-lined Development Plan for Greenspring Manor, subject to two conditions: that the Blue-lined Plan be incorporated in the Order; and, that “prior to issuance of Use and Occupancy Permits, all improvements/repairs and/or replacements to the eight (8) sewer segments identified in the DPR/DPWT dated August 10, 2021 (County Exhibit 12A) shall be completed.”<sup>2</sup>

Timely appeals were filed by Developer on April 18, 2024, People’s Counsel on May 2, 2024 and all Protestants on May 16, 2024.

A hearing was held before the Board on June 11, 2024, at which time the parties presented argument on both procedural and substantive issues relating to the Amended Order.

### **DISCUSSION**

The Board first considered whether the Administrative Law Judge properly granted the Motion for Reconsideration.

Rule 4K of the Rules of Practice and Procedure before the Zoning Commissioner provides, in pertinent part:

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<sup>2</sup> This refers to the Development Plan Review Comments completed by DPWT.

K. Motion for Reconsideration.

A party may file a motion for reconsideration of an order issued by the Zoning Commissioner. ...The motion must state, with specificity, the grounds and reasons for the request... The Zoning Commissioner shall rule on the motion within 30 days from the date which the motion is accepted for filing. A ruling by the Zoning Commissioner on the motion for reconsideration shall be considered the final decision in accordance with Section 26-209 or 26-132 of the Baltimore County Code. At his discretion, the Zoning Commissioner may convene a hearing to receive testimony and/or argument on the motion. Each party shall be limited to that which is the subject matter of the motion.

The Board held that granting the motion is within the broad discretion of the ALJ, despite argument that the common law rule, or that stated in the Maryland Rules 2-535, which requires a showing of fraud, mistake or irregularity, should control. No such showing is required under Rule 4K. We believe granting the motion is within the discretion of the ALJ and consistent with the body of Maryland administrative law.

The Board then considered the proceedings at the Hearing on Reconsideration and evidence permitted and considered by the ALJ.

At the Hearing on Reconsideration, the ALJ herself moved and admitted into evidence as County Exhibit 14, a letter dated February 23, 2024 from County Attorney James R. Benjamin, Jr. (the "County Attorney Letter") to her, providing "new facts" about the sewer path and purporting to clarify inaccuracies in the record, over the objections of the Protestants.<sup>3</sup> The Board held that the ALJ has the discretion to admit such a letter. Having done so, the ALJ justified accepting and admitting the County Attorney Letter as a county authorized government document, and as such, one having an indicia of trustworthiness.

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<sup>3</sup> The letter primarily explained away the non-performance of sewer improvements by Johns Hopkins and added that although the Memorandum of Understanding requiring Johns Hopkins to improve the sewer segments has expired, the County is continuing to negotiate those improvements with Johns Hopkins. No enforceable agreement exists requiring Johns Hopkins to upgrade the sewer segments. No supporting documentation accompanied the letter.



The Board finds that the County Attorney Letter does not rise to the level of an adjudicative fact meriting judicial recognition, as distinguished from a statute, adopted master plan or other generally available and widely accepted public document. Nor, as People's Counsel Zimmerman points out, is the letter a county record kept in the ordinary course of business.

There are, however, instances where a decision maker may recognize certain documents without requiring proof. The Maryland Administrative Procedure Act, State Government Article ("APA"), §10-213(h) is instructive both as to what facts an agency may take notice of and the appropriate procedure to follow when doing so. Were the letter deemed to be an adjudicative fact, the APA requires that each party be given notice and opportunity to contest the facts therein.

The Board of Appeals finds that the County Attorney Letter has no probative value to the issues before the ALJ. Reliance on its contents as new evidence offering assurances regarding "future completion" of the necessary sewer improvements is unsupported, unproven and erroneous.<sup>4</sup>

At the hearing before the Board, Protestants argued that the ALJ erred by permitting Developer to call David Bayer as a DPWT witness when Mr. Bayer could have testified at the Developer's case in chief or as a rebuttal witness. While it is true that Developer could have called Mr. Bayer earlier in the proceedings<sup>5</sup>, the Board found that the broad discretion bestowed on the ALJ allowed her to hear from this witness.

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<sup>4</sup> The Administrative Procedures Act also requires that before taking official notice of a fact, all parties have to receive notice, and *shall be given an opportunity to contest the fact*. The ALJ believed that all parties received copies of the letter prior to the Reconsideration Hearing, but this was not the case. No party was given opportunity to contest the information in the letter.

<sup>5</sup> In fact, People's Counsel strenuously urged the Developer to call either Mr. Bayer or another DPWT employee in its case in chief as being necessary to make its case, but the Developer chose not to. Mr. Bayer was called in the Reconsideration Hearing, at least in part, to refute statements he has made in emails that would not have been produced but for PIA requests made by Protestants' Counsel and admitted in their rebuttal case.

Mr. Bayer testified at length, over continuing objections by Protestants' counsel. His testimony was sometimes vague and inconsistent with prior documentary evidence that he authored or approved. Mr. Bayer's testimony regarding modeling of sanitary sewer overflows was based on a computer simulation model that was still in development, which he said showed that replacement of the eight (8) sewer segments with 12-inch segments would relieve the concern of sanitary sewer overflows, thereby allowing the 61 new homes to be connected to the system without issue. Mr. Bayer did not produce any documentary evidence from the simulation in support of his opinion and testified based on his memory of the data.

Even so, Mr. Bayer did not refute the need for sewer line improvements to remedy existing capacity inadequacies.

The ALJ limited Protestants to cross-examining Mr. Bayer, while not allowing any rebuttal witnesses or evidence. In fact, during cross-examination, Protestants' attorney attempted to question Mr. Bayer about the Draft of the County's Triennial Sewerage and Water Supply Plan, (a public document legally required of the County in the ordinary course of business), available on the Baltimore County Website. Upon objection by Developer's attorney, the document and line of questioning were not permitted. Taking our direction from the APA, this document could be deemed to contain judicially noticeable information or general, technical or scientific information with the specialized knowledge of the agency. To prohibit the introduction of this document and the relevant nature of its subject matter seems to us as error.

The Board finds that denying Protestants the ability to present witnesses or evidence in rebuttal violates the language of Rule 4K which states, "Each party shall be limited to that which is the subject matter of the motion." (Emphasis added). The rule anticipates that both parties be able to address the issues on reconsideration. Prohibiting Protestants ability to do so denied the



fundamental fairness required by due process. *Mehrling v. Nationwide Ins. Co*, 371 Md. 40 (2002); *Md. State Police v. Zeigler*, 330 Md. 540 (1993).

The Administrative Law Judge has broad discretion to consider evidence but must comply with due process. *Eastern Outdoor Advertising Co. v. Mayor and City Council of Baltimore*, 146 Md.App. 283 (2002). The *Zeigler* case goes further: "... if the evidence is at all disputed or controversial, fair opportunity must be afforded for cross-examination and rebuttal." *Zeigler*, p. 556. Even the case cited by Developer, *Brandywine Senior Living* emphasizes the authority of agencies to rely on post-hearing evidence (like here, the submission of an amended plan), so long as there exists an opportunity for cross-examination and rebuttal. *Brandywine*, 237 Md.App, at p. 214.

Accordingly, we find that as a matter of law, the ALJ erred by denying Protestants the opportunity to present rebuttal witnesses and evidence.

The issue of the adequacy of the sewer line and available capacity were not resolved by Mr. Bayer's testimony. Nowhere in his testimony was it asserted that he was authorized to present an amendment to the county departmental comments in the underlying record, which required that certain improvements be made prior to the issuance of use and occupancy permits for the proposed houses. Nor was the issue addressed of how the improvement of the sewer segments at issue, which run through private property of the Benedictine Sisters, would ever actually be accomplish, when the Sisters have strongly expressed their unwillingness to grant an easement to do so. People's Counsel raised the issue that under BCZR §4A02.3. a reserve capacity use certificate was required because of the lack of sewerage capacity. Though Developer pursued this procedure with regard to traffic, it chose not to do so with regard to sewer deficiency. No building permit can be issued without such relief. Designating the area as one of

“concern” on the Basic Services Maps, it is clear that the County recognizes that the sewer system serving the site as inadequate and adherence to BCZR §4A02.3.G would prohibit the issuance of building permits for the proposed development. Based on the entirety of the record, the weight of the evidence from multiple expert witnesses and studies conducted for Baltimore County demonstrates overwhelmingly that the sewer system is deficient.

Protestants’ counsel also objected to the ALJ seemingly shifting the burden of proof from Developer to Protestants to refute Mr. Bayer’s testimony. We note that to be able to do so, Protestants must first have been afforded the opportunity to present rebuttal witnesses and evidence, which they were not.

In considering all the issues before it, this Board concluded that the decision of the ALJ resulted from an unlawful procedure by the denial of due process, and further, in light of the entire record as submitted, was unsupported by the evidence.

### **ORDER**

**THEREFORE, IT IS THIS** 14th day of August, 2024, by the Board of Appeals of Baltimore County,

**ORDERED** that the April 17, 2024 Administrative Law Judge’s Amended Combined Development Plan and Zoning Opinion and Order After Motion for Reconsideration Hearing be and is hereby **REVERSED**; and it is further

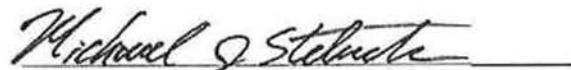
**ORDERED** that the July 31, 2023, Administrative Law Judge’s Combined Development Plan and Zoning Opinion and Order be and is hereby **REINSTATED**.

**In the matter of: Greenspring Joppa Falls, LLC**  
**Case No.: CBA-24-030**

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

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
Deborah Dopkin, Panel Chair

  
Michael J. Stelmack

  
William H. Paulshock, Sr.



## Board of Appeals of Baltimore County

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August 14, 2024

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RE: In the Matter of: *Greenspring Joppa Falls, LLC – Legal Owner/Developer*  
(*Greenspring Manor*)  
Case No.: CBA-24-030

Dear Counsel:

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

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

Very truly yours,

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

Krysundra "Sunny" Cannington  
Executive Secretary

KLC/taz  
Enclosure  
Multiple Original Cover Letters

c: See Distribution List following

In the matter of: Greenspring Joppa Falls, LLC – Legal Owner/Developer  
(Greenspring Manor)

Case No.: CBA-24-030

Distribution List

August 14, 2024

Russell Powell/Greenspring Joppa Falls, LLC  
Courtney C. Wyatt and Michael T. Wyatt  
Renee Hamidi, Executive Director/Valleys Planning Council, Inc.  
Harold Burns/Falls Road Community Association, Inc.  
Karen McGraw/The Meadows of Greenspring HOA  
Dean Merritt/Heatherfield Community Association  
Scott Andrzejewski/Seminary Ridge Owners Association  
Jay Weiss/Boxwood Homeowners Association  
Jim Gary  
Dan Radabaugh  
Doug Sachse, Esquire  
Michael Tanczyn, Esquire  
Fred Hallahan  
James and Susan Weiss  
Matthew Bishop, PLA/Kimley-Horn & Associates  
Maureen E. Murphy, Chief Administrative Law Judge  
Stephen Lafferty, Director/Department of Planning  
Horacio Tablada, Director/DEPS  
Lloyd Moxley, Development Manager/PAI  
C. Pete Gutwald, Director/PAI  
James R. Benjamin, Jr., County Attorney/Office of Law