

IN RE: DEVELOPMENT PLAN HEARING AND	*	BEFORE THE
PETITIONS FOR SPECIAL HEARING AND		
VARIANCE ON THE PROPERTY LOCATED	*	BOARD OF APPEALS
AT 1400 W. SEMINARY AVENUE		
8 TH ELECTION DISTRICT	*	OF
3 RD COUNCIL DISTRICT		
(TORCH HILL)	*	BALTIMORE COUNTY
	*	Case No: 21-274-SPHA
		and CBA-23-009

* * * * *

BOARD OF APPEALS' COMBINED OPINION
ON APPEAL OF DEVELOPMENT PLAN APPROVAL & *DE NOVO* HEARING ON
REQUESTED VARIANCE RELIEF

The first matter in this combined appeal comes before the Baltimore County Board of Appeals (“Board”) as a record appeal of the Administrative Law Judge’s (“ALJ”) October 13, 2022 Opinion & Order (“ALJ Opinion”) approving a development proposal submitted in accordance with Article 32, Title 4, of the Baltimore County Code (“BCC”) by Alvin B. Krongard, Owner/Applicant (herein known as “Developer”) submitted for approval a two-sheet redlined Development Plan (the "Redlined Development Plan") and a two-sheet greenlined Development Plan (the “Greenlined Development Plan”) prepared by Stacy A. McArthur of D.S. Thaler & Associates, Inc., known as the “Torch Hill Project” (the “Property”). The Developer proposed to develop ± 42.44 acres of land with 31 new single family detached dwellings, as well as retaining the existing dwelling which fronts on Seminary Avenue. Oral arguments were heard before the Board on July 1, 2023.

Second, companion to first matter outlined above, the Developer has filed a Petition for Special Variance from Baltimore County Zoning Regulations (“BCZR”), §4A02.4.G, to allow the Torch Hill Project within the Falls Rd. and Seminary Rd. traffic shed. Developer has also requested Variance relief from the BCZR, §1B01.2.C.b, to permit a front yard setback of zero

feet in lieu of the required 25 feet for the existing home. A *de novo* hearing was held before this Board as to these variances on July 11 and July 13, 2023.

Christopher Mudd, Esquire, Patsy Malone, Esquire and Venable LLP represented the Developer. Michael McCann, Esquire represented the Protestant, Falls Road Community Association, Inc. ("FRCA"). One day prior to the Board's hearing, FRCA's counsel entered his appearance on behalf of four individual Protestants, Doug Carroll, Deidre Smith, Doug Sachse, and Peter George. A public deliberation was held by the Board on both of these matters on August 24, 2023.

INTRODUCTION

Developer owns 89± acres of land on the north side of Seminary Avenue in the Lutherville-Timonium area of Baltimore County. The land is divided into two parcels. The northern parcel ("Krongard Parcel") is zoned RC-5 and is improved with a single-family residence and several outbuildings. The southern parcel ("Development Parcel" or "the Property") is zoned DR-1 and is improved with a single-family residence (the "Existing House") situated directly adjacent to Seminary Avenue. Under the DR-1 zoning, the Development Parcel could yield 42 dwelling units/lots.

Developer proposes the building 32 single-family lots, 31 of which will be improved with new homes. The Existing House is proposed to remain on the last lot.

In September of 2021, Developer submitted the development plan that is the subject of this appeal. Additionally, Developer filed an Application for Special Variance, pursuant to Baltimore County Code ("BCC") § 33-6-116, for removal of or impacts to certain trees ("specimen trees") located on the Property (the "Specimen Tree Variance"). The development also required relief from the Baltimore County Zoning Regulations ("BCZR"). Developer

requested: a Petition for Special Variance, pursuant to § 4A02.4.G of the Baltimore County Zoning Regulations (“BCZR”), to allow development to proceed in the failing traffic shed associated with the Falls Road and Seminary Avenue intersection; and a Petition for Variance, pursuant to BCZR § 1B01.2.C.b, to allow a zero-foot front yard setback for the Existing House.

A combined evidentiary hearing on the development plan and the associated Zoning Relief was held before Administrative Law Judge Maureen Murphy (the “ALJ”) on July 7, July 8, and August 22, 2022. During these hearings, the ALJ heard from several County agency representatives, each of whom recommended approval of the redlined/greenlined development plan, which was accepted into evidence as Developer’s Exhibit (“Dev. Ex. 2”) The ALJ also heard testimony from three expert witnesses: Stacey McArthur, Registered Landscape Architect with D.S. Thaler & Associates; John Motsco, a Professional Engineer also with D.S. Thaler & Associates, and Mickey Cornelius, a Professional Engineer and Traffic Engineer with the Traffic Group, Inc.

Protestant, Falls Road Community Association, Inc. (“Protestant”) presented two witnesses, Randall Grachek, Professional Engineer with New Fields, LLC, and Beth Miller, a Licensed Architect and member of Green Towson Alliance’s Executive Committee with testimony focusing primarily on Baltimore County’s public sewer system.

DEVELOPMENT PLAN

STANDARD OF REVIEW

The Baltimore County Code provides for an appeal of an ALJ’s approval/denial of a development plan to the Board of Appeals. Section § 3-6-303 provides the standard for the hearing before the Board, namely that it be a hearing on the record.

Upon review of the evidence in the record before the ALJ, under BCC §3-6-304 this Board has the following Disposition options:

1. Remand the case to the Hearing Officer;
2. Affirm the final order of the Hearing Officer; or
3. Reverse or modify the final order if a finding, conclusion, or decision of the Code Official, the Director, or the Hearing Officer:
 - (i) Exceeds the statutory authority or jurisdiction of the Code Official, the Director, or the Hearing Officer;
 - (ii) Results from an unlawful procedure;
 - (iii) Is affected by any other error of law;
 - (iv) Is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
 - (v) Is arbitrary or capricious.

When assessing a factual finding of an agency, the appropriate standard of review is whether there is substantial evidence from the record as a whole. *Eller Media Co. v. Mayor of Baltimore*, 141 Md. App. 76, 84 (2001). If reasoning minds could reasonably reach the conclusion reached by the agency from the facts in the record, then the agency's findings are based on substantial evidence and the reviewing court has no power to reject that conclusion. *Columbia Road Citizens' Ass'n v. Montgomery Cnty.*, 98 Md. App. 695, 698 (1994). Judicial review of an agency decision does not involve an independent decision on the evidence; instead, a court is limited to determining whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. *United Parcel Serv., Inc. v. People's Counsel for Baltimore Cnty.*, 336 Md. 569 577 (1994).

When considering whether an agency erred as a matter of law, the reviewing court decides the correctness of the agency's conclusions and may substitute the court's judgment for that of the agency. *People's Counsel for Baltimore Cnty. v. Prosser Co.*, 119 Md. App. 150, 168 (1998). The "substantial evidence test" also applies when there is a mixed question of law and fact. In

other words, the agency has correctly stated the law and the fact finding is supported by the record, but the question is whether the agency has applied the law to the facts correctly. *Cowles v. Montgomery Cnty.*, 123 Md. App. 426, 433 (1998). Therefore, the order of an administrative agency must be upheld on review if it is not premised upon an error of law and if the agency's conclusions on questions of fact or on mixed questions of law and fact are supported by substantial evidence. *Kohli v. LOCC, Inc.* 103 Md. App. 694, 711.

While not substituting our judgment for that of the ALJ as to factual findings in this matter, it is necessary for the Board to review the facts presented during the ALJ hearing to assess whether ALJ's decision approving the development plan was supported by competent, material, and substantial evidence in light of the entire record as submitted and not arbitrary or capricious. Below, is an overview of the evidence presented in the hearing before the ALJ regarding the development plan and the factual findings made by the ALJ in support of the plan's approval.

COUNTY AGENCY WITNESSES

As outlined in the ALJ's Opinion, representatives of the various Baltimore County agencies who reviewed the Plan and attended the hearing before the ALJ, included the following individuals from the Department of Permits, Approvals and Inspections ("PAI"): Jerry Chen, the Project Manager; James Hermann on behalf of Development Plans Review ("DPR") and Department of Recreation and Parks ("R&P"); Eugene Cauley from Development Plans Review ("DPR"); LaChelle Imwiko from Real Estate Compliance ("REC"); and Shawn Crawford from the Office of Zoning Review ("OZR"). Also appearing on behalf of the County was Jeff Livingston from the Department of Environmental Protection and Sustainability ("DEPS"), and Brett Williams from the Department of Planning ("DOP").

On day three of the hearing before the ALJ, Kristopher Nebre, P.E., Engineer III of the

Bureau of Traffic Engineering and Traffic and his supervisor, Angelica Daniels, Bureau Chief of Traffic Engineering and Transportation Planning testified. As an Engineer III in Traffic Engineering and Traffic Planning Section of DPWT, Mr. Nebre's duties include handling traffic control inquiries from citizens, reviewing traffic signal construction plans and reviewing traffic impact studies.

Ms. Daniels testified that Transportation Planning at times, provides technical assistance to the DOP and to evaluate and recommend specific projects in anticipation of future transportation, land use and economic development needs. Except for the eastbound private road coming out of St. Paul's Schools, Ms. Daniels testified that Falls Rd. and Seminary Avenue are State roads, and the signal at the Falls/Seminary intersection is also owned by the State. As a result, the State, not the County, has jurisdiction to improve those roadways and/or to make changes to the signal timing. The State can also approve plans by a developer to improve the roadways.

As outlined in the ALJ's Opinion, Mr. Nebre explained that the County uses the 'Loaded Cycle Methodology' ("LCM") as described in the Highway Capacity Manual (1965). He stated that the County is the only jurisdiction in the United States which still uses that method to rate intersections. Under the LCM, the Traffic Engineering/Planning section employs a team to perform traffic counts at intersections during a two-hour period to evaluate each approach during both morning and afternoon peak hours. As also explained in the ALJ's Opinion, a traffic cycle becomes "loaded" if, on a green light, the last vehicle in line at the light does not get through the intersection. Stated in percentages, an intersection is "F" rated when 86 to 100% of the time, the last vehicle at the light does not get through the intersection. For intersections rated D, E and F, Mr. Nebre explained that DPWT conducts annual traffic counts to reevaluate the ratings each

year. For intersections rated A, B and C, the counts are conducted every three years. Although Mr. Nebre does not determine the boundaries for traffic sheds, he confirmed that the Property is only included in the traffic shed for Falls/Seminary intersection, and not the traffic sheds for Falls/Greenspring Valley or Falls/Joppa Rd., both of which are also failing intersections.

Based on the actual traffic counts conducted by the County under the LCM, the Falls/Seminary intersection has an “F” rating. He noted that the approaches causing the “F” rating was westbound in the peak morning hours (86%), and eastbound in the afternoon (90%) coming from St. Paul’s Schools.

Mr. Nebre further testified before the ALJ that he reviewed the Traffic Impact Analysis (“TIA”) prepared by Mr. Cornelius. Mr. Nebre explained his email dated December 22, 2021 requesting more information from Mr. Cornelius as to how the level of service at the intersection would be improved from a loaded cycle standpoint. Mr. Nebre also requested that Mr. Cornelius clarify his comment about the proposed condition for removing green light time for eastbound traffic. The ALJ notes that Mr. Nebre explained that he wanted to understand what the traffic impact from the Torch Hill Project would be on the intersection and that if the proposed improvement would make the intersection better, that would be positive.

Mr. Nebre further explained that the “district standard” under BCZR §4A02.4.G.1.a is to determine whether the traffic generated by a proposed development will have a negative impact on the intersection. He testified that if improvements to the roadway are proposed, the issue is whether the proposed improvement would accommodate the additional traffic generated by the development such that it would have a net zero impact on the intersection.

Mr. Nebre testified that, for the westbound approach, the Developer has proposed to lengthen the left turn lane 190 ft. Mr. Nebre agreed that 190 ft. would accommodate eight

additional vehicles. He noted that SHA approved the proposed left turn lane extension on October 19, 2021. On behalf of DPWT, Mr. Nebre concurred that the proposed left turn lane extension will not make the Falls/Seminary intersection any worse. He testified that the net impact from traffic generated by the Torch Hill development at that intersection would be zero. He also testified that, even with the proposed left turn lane extension, the intersection may still be rated a level of service of “F”.

DEVELOPER’S WITNESSES

Stacy McArthur was admitted before the ALJ as an expert in landscape architecture, in BCZR, and in BCC Titles 32 and 33 including issues involving specimen trees. She outlined the development proposal as shown on both the Redlined Development Plan and the Greenlined Development Plan. (Dev. Exs. 1, 2). She also created the Pattern Book. (Dev. Ex. 3).

Using an aerial geographic information system, (“GIS”) photograph, Ms. McArthur stated that the Property is inside the Urban Rural Demarcation Line (“URDL”) and will connect to public water and sewer. The aerial photograph shows that the Property is an irregularly shaped, mostly unimproved, parcel located on the corner of Seminary Ave. and Mays Chapel Rd. There is an existing residential structure which is proposed to remain, fronting on Seminary Ave., accessed by a driveway. The existing driveway is proposed to be removed, grass planted, and a new public road constructed on the western side of the existing structure to provide access to the development.

Ms. McArthur described the Property as 42.44 acres. It is zoned Density Residential (“DR-1”), allowing for 42 units. She noted that a covenant was entered into with Meadows at Greenspring community wherein it was agreed that the maximum number of units would be 32. The Redlined Development Plan shows the changes/additions/corrections requested by the

County agencies during the review process. (Dev. Ex. 1). The Greenlined Development Plan includes the Redlined Development Plan in its entirety, and corrects, at the request of DEPS, that the Forest Buffer and Forest Conservation areas will be owned by a private homeowner's association and that Lot 22 extends into the Forest Buffer and Forest Conservation Easements.

Developer offered a colored rendering of the Torch Hill Project into evidence. Ms. McArthur testified that it was consistent with the Greenlined Development Plan. (Dev. Ex. 7). It shows 16 acres of the Forest Buffer and Forest Conservation areas will be preserved by recorded easements. Two stormwater management ("SWM") devices will be installed to control both water quality and water quantity. Parking for the homes will be provided via garages, driveways and on-street parking. On the western side, between the Property and Mays Chapel Rd. is a strip of land which will be protected by a Land Preservation Trust Easement. (Dev. Exs. 1, 2). Between Lots 4 and 5, there is a wetland area which will remain.

As noted in the ALJ's Opinion, Ms. McArthur opined that the Torch Hill Project meets all of the Residential Performance standards in BCZR §260 *et seq.* including: retaining existing quality vegetation; integrating the existing home into the development; coordinating building design and layout with existing topography; retaining the existing landscape buffer and adding trees, shrubs and vegetation; and providing for a smooth transition between neighborhoods. She further opined that the Torch Hill Project meets all development regulations in the BCC.

Ms. McArthur prepared an initial Forest Conservation Variance Application dated August of 2021 stating that 90 specimen trees were on-site and requesting that 11 of those specimen trees be removed. (Dev. Ex. 9). After review by DEPS, the site layout was modified in order to retain additional forest and/or specimen trees. Ms. McArthur testified that in order to retain the forested area north of Lot 22, specimen trees would need to be removed. Additionally, a retaining wall

near Lot 1 was proposed to be constructed but will require the removal of specimen trees. In order to use and incorporate the existing stream crossing into the design layout, specimen trees would need to be removed. On Lot 5, retention of the wetland area permitted the retention of a specimen tree. As a result of the changes to the site layout, an Amended Forest Conservation Variance Application was filed in February 2022 requesting that 16 of the 90 specimen trees be removed.

In consideration of the factors required under BBC, §33-6-116(d) and (e), Ms. McArthur opined that while BCC, §33-6-116(d)(1) is not applicable, the variance request satisfies both (d)(2) and (3) because the 90 specimen trees are scattered throughout the Property which provides a unique circumstance not attributable to the general condition of the neighborhood, and the specimen trees are not consolidated in any particular forest area. She further opined that the removal of 16 specimen trees will not alter the essential character of the existing neighborhood as the neighborhood is already developed.

In regard to BCC §33-6-116(e)(1), Ms. McArthur asserted that the Forest Buffer and Forest Conservation areas that are to remain will provide better water quality than the 16 scattered specimen trees; the request to remove the specimen trees is due to limited developable areas and modification of original site layout, neither of which arose from a condition or circumstance caused by the Developer. Finally, within the spirit and intent of Article 33, only 12 of the 16 trees are in fair condition or better and 4.1 acres of reforestation and specimen tree mitigation plantings will be provided on-site.

The ALJ notes that on cross examination, Ms. McArthur acknowledged that floodplains and wetlands exist in the middle of the Property. A floodplain study was accepted for filing by the County. An Alternatives Analysis was approved by DEPS in January 2022.

Also appearing before the ALJ, was Mickey Cornelius, P.E., who was accepted as an expert in traffic engineering and in the BCZR. Mr. Cornelius testified that he had researched the traffic shed for this Property as depicted by County Basic Services Map and confirmed that it is within the failing traffic shed for Falls Rd./Seminary, but not within the traffic shed for Greenspring Valley/Falls Rd. or Joppa Rd./Falls Rd. He explained that the Property falls within that County-determined traffic shed because 50% of the trips generated by the 32 homes will proceed through that failing intersection. He also acknowledged that Falls/Seminary intersection has been rated as an “F” intersection on the Basic Services Map since at least 2000. He further testified that at the request of the County and SHA, he prepared a TIA. The TIA was approved by SHA by letter dated October 19, 2021. (County Ex. 5B).

As part of the TIA, the County required that seven intersections be studied, not just Falls/Seminary. (Dev. Ex. 16). Mr. Cornelius explained that in rating intersections, the County uses the “loaded cycle methodology” and is purportedly the only jurisdiction in the country to do so. He explained that this method requires observing and counting the number of vehicles which are able to proceed through an intersection on a green light. He explained that this method has limitations because it cannot predict future traffic conditions such as traffic generated by a proposed development. (Dev. Ex. 14, p. 7). The SHA applies the Critical Lane Volume (“CLV”) and Highway Capacity Manual (“HCM”) methodologies. Under both CLV and HCM analysis, the Falls/Seminary intersection is rated as a “D” intersection during the peak morning hours, and “C” during evening peak hours. (Dev. Ex. 14, pp. 14-15).

Mr. Cornelius explained that the trip generation rates from the Institute of Transportation Engineers (“ITE”), Trip Generation Manual (10th Edition), during projected peak hour trips for 32 single family detached homes, is 28 trips in the morning peak hour, and 34 trips in the evening

peak hour. (Dev. Ex. 14, p. 9). Background traffic conditions were calculated to allow for 1.5% annual traffic growth along Falls Rd. He indicated that Seminary Ave. has not experienced a traffic growth over the past 10 years. (*Id.*). Mr. Cornelius testified that 40% of the projected trips from Torch Hill Project would travel east on Seminary Ave., with 60% traveling west. He stated that this results in less than one vehicle per signal cycle being added to the Falls/Seminary intersection.

As noted in the ALJ's Opinion, Mr. Cornelius opined that based on the TIA, the failing traffic movement was westbound on Seminary Ave. approaching the intersection. The eastbound road at that intersection comes from St. Paul's Schools and is privately owned. To accommodate the additional vehicles from the Torch Hill Project headed westbound, the Developer proposes to extend the left turn lane 190 ft. He explained that 190 ft. is the length needed to accommodate eight additional vehicles. (Dev. Ex. 15). Mr. Cornelius stated that there is sufficient right-of-way to meet the proposed improvement. He added that the queues will be reduced by 500 ft. (Dev. Ex. 14, p. 18).

Next, John Motsco, P.E. was accepted by the ALJ as an expert professional engineer, in the BCZR, and in the BCC. He explained that the Torch Hill Project would be served by connecting to the public gravity-fed sewer system at manhole 59915 which is located between proposed Lots 27 and 28. He testified that DPWT confirmed via email dated September 2, 2021 that capacity existed for the 32 proposed homes. (Dev. Ex. 19).

PROTESTANTS' WITNESSES

As noted in the Protestants' oral arguments before the Board and in their closing memorandum, Protestants' main point of contention with the ALJ's approval of the development plan other than traffic involves the issue of sewer capacity. As to this issue, Protestants presented

the testimony of Randall Grachek, P.E. an environmental engineer employed by NewFields, Inc. As noted by the ALJ, Mr. Grachek was previously accepted as an expert in Case No.: CBA-20-006, *In the Matter of CPC Falls Road, LLC (CPC Falls Road Project/Bluestem)* (“*Bluestem*”). Accordingly, he was admitted as a professional engineer, in wastewater engineering, in the evaluation of sewer systems and their capacity in this matter.

In his testimony before the ALJ, Mr. Grachek explained that Baltimore County has a gravity-fed sewer system with three main trunk lines (Jones Falls; Roland-Run; Towson Run) which flow into the interceptor line under Lake Roland and then out to Baltimore City waste water treatment plants. As noted by the ALJ in her Opinion, while Mr. Grachek has not visited the Property since the *Bluestem* case, upon his review of the sewer maps provided by the County, the sewage from the proposed project will end up in the Lake Roland interceptor. (Prot. Exs. 4, 5). The County data obtained by Protestant’s counsel for the Roland Run interceptor was for 2019 and designates each service area by number, provides the acreage, as well as both the numbers for the upstream and downstream manholes and the coefficient for each pipe. (Prot. Ex. 6).

The ALJ also notes in her Opinion, that as in the *Bluestem* case, Mr. Grachek referred to a complaint filed on July 26, 2005 by the Environmental Protection Agency (“EPA”) against Baltimore County in the United States District Court of the District of Maryland, Northern Division, Case No.: 1:05-cv-02028-AMD, regarding the discharge of tens of millions of gallons of untreated wastewater containing raw sewage into navigable waters and waters of the State beginning in 1997. (Prot. Ex. 8). Those waters included Towson Run, Lake Roland and the Jones Falls. This lawsuit resulted in a Consent Decree dated September 21, 2005 in which the County was provided a legal framework to eliminate sanitary sewer overflows (“SSOs”) (when

a sewer pipe reaches overcapacity causing sewage to flow into waterways.) (Prot. Ex. 7). Mr. Grachek explained that pursuant to the Consent Decree, the County was charged with conducting an evaluation of the system, inspecting it to determine its condition, and modeling it with different weather events to determine whether the pipes were at overcapacity. To achieve this, the County hired consulting engineering firm Rummel, Klepper & Kahl, LLP (“RKK”) to perform the study. RKK evaluated, inspected, and modeled the system using software to input data showing where the pipes were at capacity during both dry and wet weather events. (Prot. Ex. 9, 10). The results of this evaluation showed 541 defects in a single trunk line (Sewer ID 6888-6887). (Prot. Ex. 18). Specifically, RKK studied five different storm events: (1) 2-Year, 6-hour storm; (2) 2-year, 24-hour storm; (3) 10-year, 6-hour storm; (4) 10-year, 24-hour storm; and (5) 20-year, 24-hour storm. (Prot. Ex. 10). RKK prepared a Long-Term Capacity Report dated November 2012 (“RKK-LTC 2012 Report”).

The ALJ made note that Mr. Grachek clarified that he did not review the RKK modeling but assumed it was correct. She also noted in her Opinion that Mr. Grachek did not personally investigate or perform his own evaluation of the sewer system but relied upon the results in the RKK-LTC 2012 Report. Mr. Grachek emphasized that the RKK-LTC 2012 Report recommended that the County take corrective action, depending on the storm event. These actions included installing *relief sewers* as shown by the red lines on the site plans placed into evidence before the ALJ. For the 10-year, 6-hour event, the 10-year, 24-hour event, and the 20-year, 24-hour event, he stated that the RKK-LTC 2012 Report specifically *required* that a relief sewer be installed between manholes (“MH”) 6950 and 22009 of various lengths in linear feet, depending on the storm. (Prot. Ex. 10, p. 14). He explained that a relief sewer pipe is a storage unit which may include an underground vault or additional parallel piping designed to

temporarily manage water during these storm events. The relief sewer recommended to be installed between MH 6950-22009 is in Essex Farm Park (the “Essex Farm Relief Sewer”). (Prot. Ex. 11).

Mr. Grachek further testified before the ALJ that the RKK-LTC 2012 Report also recommended upsizing a 10-inch pipe to an 18-inch pipe as shown by a pink line on the maps attached thereto. (Prot. Ex. 10, p. 14). Finally, the RKK-LTC 2012 Report at Table 6.1 recommended that, in conjunction with installation of the relief sewer, certain manholes be sealed. (Prot. Ex. 10, p. 14). The ALJ’s Opinion noted that Mr. Grachek also showed a 2019 photograph of manhole 6888 with its lid ajar which he opined is due to the surcharge pushing out the manhole cover. (Prot. Ex. 17).

Mr. Grachek researched on My Neighborhood GIS to determine whether the Essex Farm Relief Sewer proposed in the RKK-LTC 2012 Report had been installed and he concluded that it had not. He reviewed an email dated April 29, 2022 from the Chief, Sewer Design Section of DPWT, which also confirmed that the Essex Farm Relief Sewer had not been installed by the County. (Prot. Ex. 16). As also mentioned in the ALJ’s Opinion, Mr. Grachek acknowledged that he only investigated whether the Essex Farm Relief Sewer had been installed. He was unaware as to whether the County had performed any other improvements pursuant to the Consent Decree. The ALJ further notes that Mr. Gracheck did not request, nor did he review any Certificates of Completion for work performed by the County.

Additionally, after reviewing a 2019 evaluation by the County of the sewer pipes, Mr. Gracheck opined that the County failed to consider the degradation of each pipe in evaluating their capacity, as shown by the fact that the manning coefficient on the chart remained at 0.013 for each pipe. (Prot. Ex. 6). He explained that the manning coefficient relates to how rough or

smooth the inside of each pipe is. Accordingly, he opined that the County did not evaluate the pipes for wet weather events. He further asserted that this data shows that the Lake Roland interceptor pipe is not well-designed and is at overcapacity. He opined that this pipe will always leak, and must be replaced. The ALJ, again noted that Mr. Grachek did not conduct any investigation or evaluation of the sewer system himself, nor did he do any modeling.

Mr. Grachek reviewed the County's water sampling results from Lake Roland and noted that the sampling from May 23, 2022 indicated that E. coli levels were greater than 2,420. (Prot. Ex. 20). He explained that the Code of Maryland Regulations ("COMAR") sets the geometric mean standard at 126. (Prot. Ex. 19). While acknowledging that E. coli levels were only 43 on June 1, 2022, and 13.8 on June 15, 2022, he opined that the 2,420 result on May 23, 2012, could only have been the direct result of sewage leaking into Lake Roland from the interceptor.

For the Torch Hill Project, Mr. Grachek stated that for the 32 proposed units, the sewage system could be designed using one of two methods: (1) 90 gal/per day per resident; or (2) 150 gal per bedroom per day. He calculated a normal flow from the Torch Hill Project would be 12,000-14,000 gal per day. He explained if the sewage flow from this Project was the only additional flow into the existing system, it would not have a negative impact. However, he clarified that if there were many more developments in the future, with no improvements being made, it would overburden the system. Consequently, in his opinion, based on industry standards, flow should not be added to this system. As noted in the ALJ's Opinion, Mr. Grachek acknowledged that his opinion is based on the 2012 results in the RKK-LTC 2012 Report.

As noted by the ALJ, Beth Miller, a member of the executive committee for Green Towson Alliance, a group created in 2015 to monitor development in the County also testified. Ms. Miller investigated development applications within the Jones Falls sewer shed since 2012

and created a chart listing the developments which were proposed to be developed, were under construction, and were existing. (Prot. Ex. 24). The ALJ notes that this chart was last updated on September 14, 2020. This chart lists the estimated sewage for each development based on square footage of the particular project.

DEVELOPER'S REBUTTAL CASE

John Motsco, testified again in rebuttal to Mr. Grachek's testimony concerning the capacity of the County sewer system in the Jones Falls sewer shed. Mr. Motsco stated that Mr. Grachek relied heavily on the RKK-LTC 2012 Report as the basis for his opinion that each one of sewer repairs recommended therein was required to be performed by the County. (Prot. Ex. 10). Mr. Motsco explained that the RKK-LTC 2012 Report contains a list of suggested repairs and was only step two of the Consent Decree process. Mr. Motsco stated that those suggested repairs constituted a non-binding guide and were not required to be performed under the Consent Decree for the Jones Falls sewer shed. (Prot. Ex. 7). He explained that the repairs that were actually required were approved by both EPA and Maryland Department of Environment ("MDE"), and are contained in the sewer shed Repair, Replacement and Rehabilitation ("SRRR") Plan dated December, 2012 (the "2012 SRRR Plan"). (Prot. Ex. 9). In addition, a Performance Assessment Report dated May 26, 2021 was prepared by RJN Group, Inc. and lays out the 2012 SRRR Plan work performed by the County ("the 2021 Performance Assessment Report"). (Pet. Ex. 25).

Referring to Map 6-1 entitled *Sewer, Manhole and Hydraulic Corrective Action Recommendations* which was attached to the 2012 SRRR Plan, Mr. Motsco outlined how Map 6-1 depicts the required sewer repairs for the Jones Falls sewer shed, and shows the direction of sewage flow from Manhole 59915 to which the Torch Hill Project would connect, as it travels

south through the sewer system. (Pet. Ex. 22). The yellow-shaded area on Map 6-1 contains sub-sewer sheds which were determined by the RKK-LTC 2012 Report to exhibit excessive inflow and infiltration (“I&I”) as a result of storm water entering the sewer system. He further testified that a valve at Texas Station was found to be leaking 100,000 gallons per day of raw sewage into the Jones Falls Watershed. The repairs for that sub-sewer shed area included relining sewer pipes and reconstructing/relining manholes. He explained that the sewage from Torch Hill Project will not go through the yellow sub-sewer sheds which is upstream from the Property and that all of the required improvements within the yellow sub-sewer sheds have been performed as confirmed by the Certificates of Substantial Completion. (Pet. Ex. 23). As noted in the ALJ’s Opinion, Mr. Motsco opined that those improvements, as well as the repair of the Texas Station valve, would result in increased sewer system capacity downstream during wet weather events, ultimately reducing the potential for SSOs.

Mr. Motsco further explained that the area of Essex Farms Park on Map 6-1 is located at the junction of meter basins BC11, BC07, and BC06. Under the 2012 SRRR Plan, the required repair only involves a lining for that sewer pipe (not a relief sewer). He acknowledged that lining has not been installed. He explained that within the Torch Hill sewage path (blue line on Map 6-1 of the 2012 SRRR Plan), the improvements proposed were only linings and reconstructions under SRRR Plan. No relief sewers or upsizing of pipe sizes were required to be performed in the sewage path. Based on the County Quarterly Reports and Performance Assessment Report, he stated “almost all” sewer work within the Torch Hill sewage path (blue line) has been performed. (Dev. Ex. 22).

As referred to in the ALJ’s Opinion, Mr. Motsco testified that the maximum sewage peak flow for the Torch Hill Project would be 10,000-15,000 gallons per day. Taking into account

the Texas Station valve repair alone, he opined that the sewer system sufficient capacity to accommodate the sewage flow from this Project. The ALJ further noted that the basis for his opinion was the County's confirmation via email from David Bayer of DPWT dated September 2, 2021, that the connection to Manhole 59915 has adequate capacity to service the 32 proposed homes. (Pet. Ex. 19).

Mr. Motsco also explained the Performance Assessment Report for the Jones Falls sewer shed prepared by RJN Group, Inc. dated May 26, 2021 was step four of the Consent Decree process (the "2021 Performance Assessment Report"). (Dev. Ex. 25). The 2021 Performance Assessment Report monitored and analyzed the performance of the 2012 SRRR Plan required improvements to determine if they were successful. A determination was made that the work was performed and that the overall system capacity has been improved.

The ALJ made specific note in regarding the photograph of manhole 6888 which Mr. Grachek opined needed repair, using My Neighborhood Maps, Mr. Motsco located manhole 6888, went into the field to take a photograph of it, along with a photograph showing that it was cast in February of 2020. (Dev. Ex. 24). Using his more-recent photographs, Mr. Motsco testified that the Protestant's photograph from 2019 did not reflect the current condition of the manhole as it had been repaired.

In regard to E. coli readings in Lake Roland, Mr. Motsco testified that E. coli comes from many sources, including animals, and that a determination cannot be made that the results came from the sewer system.

As noted in the ALJ's Opinion, it is Mr. Motsco's contention that the source of contamination for E. coli cannot be directly attributed to the sewer system. E. coli comes from both human and animal sources. He explained that the sampling results do not differentiate

between those sources because the purpose of the sampling is to warn people if any E. coli exists. He described Lake Roland as an area of high community use which also has a dog park in the area where sampling occurs.

Mr. Motsco testified that the Jones Falls sewer shed comprises 40 square miles, with 67,000 people living within its boundaries, but only one third of that area was served by public sewer. (Dev. Ex. 28). That leaves two thirds of the Jones Falls sewer shed area (45,000 people) who are served by private septic systems as shown by the hatching on the map of the private septic systems outside of the URDL. (Dev. Ex. 28). With regard to the sewage issues, he opined that the Torch Hill Project complies with all rules, laws, and regulations. Consequently, he did not see any non-compliance warranting disapproval of the Greenlined Development Plan.

In cross-examination before the ALJ, Mr. Motsco conceded that he had not reviewed the County's sewer capacity analysis for any individual developments. (Prot. Ex. 6). While he acknowledged that the County evaluates sewer capacity for each development based on dry weather conditions, this analysis is not inconsistent with the Consent Decree. (*Id.*). The Consent Decree directed the County to analyze the sewer system in both dry and wet weather, but did not require upgrading or improving the system based on a particular wet weather model (storm event). Mr. Motsco agreed that the goal of Consent Decree was to eliminate SSOs through the repair and maintenance of the existing sewer system. He reiterated that, under the Consent Decree, the County was given the freedom to use their judgment in deciding what repairs or replacements would be performed. In his view, the County has met all requirements of the Consent Decree for Jones Falls sewer shed not just the four-meter basins/sub-sewer sheds upstream from Essex Farm Park. He added that there is one active SSO at Marnat Rd. caused by an undersized main. This defect must be corrected by Baltimore City. The ALJ noted that

regardless, the Torch Hill Project does not drain through Marnat Rd.

Mr. Motsco agreed that the Essex Farm relief sewer recommended in the RKK-LTC 2012 Report has not been installed because it was not required under the 2012 SRRR Plan. The maps attached to the 2021 Performance Assessment Report confirm all necessary repairs and rehabilitation for the Jones Falls sewer shed. The Certificates of Substantial Completion were not provided for all sewer sheds in Jones Falls but only for four-meter basins (BC02, BC03, BC04, BC09) which were available on County website. However, as noted by the ALJ, Mr. Motsco opined that because 100,000 ft of sewer relining and rehabilitation within those four sub-sewer sheds/meter basins has been completed, and the repair of the Texas Station valve where previously 250,000 gallons of sewage was passing through that valve had been corrected, those improvements would offset any increase in flow from Torch Hill Project. In his view, there would be capacity within the sewer system for this Project. He added that the active SSOs below the Property have “not been active as of late,” which, he believes, is an indication that the repairs upstream have been successful.

ALJ’S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The BCC provides that the “Hearing Officer *shall* grant approval of a development plan that complies with these development regulations and applicable policies, rules and regulations.” BCC § 32-4-229 (emphasis added). In *People’s Counsel v. Elm Street Development, Inc.*, 172 Md. App. 690 (2007), (“*Elm Street*”) the Appellate Court of Maryland (formerly known as the Court of Special Appeals) held that if the county agencies recommend approval of a development plan, it is “then up to [protestants] to provide evidence rebutting the Director’s recommendations.” (*Id.* at 703.) It should also be noted that in Baltimore County “the development process is indeed an ongoing process, and the hearing officer’s affirmation of the

plan is just the first step.” *Monkton Preservation Association, et al. v. Gaylord Brooks Realty Corp.*, 107 Md. App. 573, 585 (1996).

In this matter Protestants did not offer testimony contradicting the approval of County agencies except for the issue of sewer capacity. As to this issue, the ALJ was presented with the competing expert testimony of Mr. Motsco and Mr. Gracheck as outlined previously. The Board gives great deference to the ALJ in its determination of the credibility of experts. Consequently, it is not our charge to second guess this determination, but rather to ensure that a sufficient factual basis exists for ALJ’s finding that one expert was more persuasive than the other.

In providing the factual support and reasoning for her decision, the ALJ provided a substantial review and evaluation of the sewer issues raised by Protestants. In doing so, she addressed the relevance and application of the *Bluestem* case; the Consent Decree and the determination of the required Jones Falls sewer shed improvements; an explanation of the SRRR Plan; her analysis of the RJN Performance Assessment; and the evidence presented regarding *E. coli* readings in Lake Roland.

In her analysis of the *Bluestem* case, she noted how the ALJ’s Opinion in *Bluestem* focused upon the LTC Report, while not making reference to the SRRR Plan, when examining the extent of the sewer shed improvements that were recommended at that time. She further noted that, in 2019, the ALJ in the *Bluestem* could not have been aware of the 2021 RJN Performance Assessment. In distinguishing this case from *Bluestem*, the ALJ explained that based on the 2012 SRRR Plan and the 2021 RJN Performance Assessment Report we now know that some work required to be performed had been performed prior to the *Bluestem* Opinion.

The ALJ also discussed the Consent Decree and the requirements imposed upon Baltimore County for work to be performed within the Jones Falls sewer shed. She assessed

whether the SRRR Plan or the LTC Report dictated the plan of repair and determined that, based on her analysis of the Consent Decree, that the SRRR Plan controls (*See* Map. 6.1 of that Plan Dev. Ex. 22). She noted how the requirement for the County to prepare the 2012 SRRR Plan is set forth in Section 10.A of the Consent Decree and how MDE and the EPA were required to approve the 2012 SRRR Plan for the Jones Falls sewer shed. She further noted how the Consent Decree required each SRRR Plan to “*tak[e] into consideration the [LTC Report] analysis performed for each sewer shed,*” but that the SRRR Plan itself “would propose a plan and schedule for implementing rehabilitation and other corrective action determined necessary to correct deficiencies.” (*Id.*, p. 27-28).

Ultimately, the ALJ concluded that the County, through the SRRR Plan, had properly chosen certain storm events for which it would implement recommended improvements within the Jones Falls sewer shed. She confirmed how the Consent Decree “unequivocally states that each approved SRRR Plan shall be incorporated into, and become enforceable under, the [Consent Decree].” (*Id.*). Finally, she found that the LTC Report was an “evaluation” and was produced within one month of the SRRR Plan, she found that it would not be logical that both the SRRR Plan and the LTC Report provided the approved plan of repair for the Jones Falls sewer shed. (*Id.*, p. 29.)

THE REQUIREMENTS OF THE SRRR PLAN

The ALJ addressed what the SRRR Plan required regarding improvements to the Jones Falls sewer shed and confirmed that the SRRR Plan was controlling. She explained that the SRRR Plan “acknowledged that model-predicted corrective actions suggested in the [LTC Report] were ‘recommendations,’” and how it further expressly “superseded” some of the recommendations in the LTC Report. (*Id.*, p. 29-30 emphasis in original). She further recognized

that Map 6-1 of the SRRR Plan identified both the capacity improvements and the structural condition improvement that are shown on that Map. She noted that the Essex Farm relief sewer that was recommended in the LTC Report was not required under the SRRR Plan which was approved by MDE and EPA. She found that the improvements proposed, including a concentration of improvements within meter basins upstream of Essex Farm Park were targeted to reduce water inflow and infiltration (“I&I”) into the system, which would alleviate the need for a relief sewer at all. She made the extrapolation that reducing I&I of water that is not designed to flow through the sewer system would increase capacity within the system for sewage. She made the determination that the County found that the specific improvements listed in the SRRR Plan for the sewers and manholes were the capacity improvements needed upstream from the Essex Farm sewer pipes to comprehensively reduce I&I.

The ALJ further explained that the RJN Performance Assessment also supported her conclusion that the SRRR Plan governed the improvements required within the Jones Falls sewer shed, and also addressed the effect of those improvements on the functionality of the sewer system. She noted the RJN Performance Assessment’s stated that two relief sewers were constructed within the Jones Falls sewer shed, and were “shown to be effective in eliminating capacity deficiencies and would prevent future SSOs.” (*Id.*, p. 33.) She further noted that the RJN Performance Assessment’s language stating “that the completed rehabilitation projects which occurred between 2015 and 2019, were effective in reducing groundwater infiltration” and that “rehabilitation on public manholes, laterals and sewers within areas that exhibited excessive I&I reduced model-predicted SSOs.” (*Id.*, p. 33-34.)

The ALJ also made note that RJN’s conclusion was that I&I had been reduced in the meter basins where the rehabilitation work was focused (upstream of Essex Farm Park). (*Id.*)

Further, she noted that the RJN Performance Assessment concluded “that the rehabilitation work decreased both the occurrence and volume of SSOs” within the Jones Falls sewer shed, including a reduction of SSOs “from 8 to zero” under the 2 year, 6-hour storm event, and a reduction “from 23 to 4” under the 10-year, 6-hour storm event. (*Id.*, p. 35.)

The ALJ acknowledged that the RJN Performance Assessment also notes some of the improvements required under the SRRR Plan may not have been completed. She found that Map 2 of the RJN Performance Assessment indicates that at least some of the improvements shown on Map 6-1 of the SRRR Plan were not part of the improvements completed as of the date that RJN performed its analyses. (*See* Prot. Ex. 29.) The ALJ found “that this particular unfinished work is necessary to correct any defects which still exist in the sewage path” and made completion of all improvements depicted on Map 6-1 of the SRRR Plan as being required along the sewerage path for the Torch Hill project as a condition of approval of the Development Plan.

The ALJ also considered the evidence submitted by the Protestants’ regarding E. coli readings within Lake Roland and whether such evidence indicated active SSOs within the Jones Falls sewer shed. As to this issue she concluded that there was not definitive evidence that the Lake Roland interceptor was leaking. She commented that the contention that these E. coli results are solely from human waste was speculative.

After a review of the evidence presented and the factual findings outlined above, the ALJ ultimately concluded that the sewer system has the capacity to accommodate 32 homes from the Torch Hill Project (subject to ALJ’s conditions) and meets requirements, rules, regulations and County policies set forth in BCZR §4A02.3.G; BCC §32-4-102(b); DPW Design Manual Sanitary Sewer; and PAI, Development Plans Review Manual.

SPECIMEN TREE VARIANCE

In addition to adjudicating the Development Plan application, the ALJ was also charged with reviewing the DEPS Director's approval of the Specimen Tree Variance to permit impacts to 16 of the 90 specimen trees on the Property. The ALJ found that, while 16 specimen trees would be removed/impacted, the approval of the development would result in 16 of the 42 acres of the Property (38%) being preserved by environmental easements."

The ALJ also determined that "[o]f the 16 [specimen trees] to be removed, four (4) are in poor or very poor condition. Of the twelve (12) remaining, mitigation will be provided on-site with tree planting." (*Id.*) In her Opinion the ALJ adopted all of the reasons set forth in the approval letter issued by the DEPS Director, in support of her decision to approve the variance. (*See Id.*; *see also* Dev. Ex. 11.) The Protestants provided no evidence refuting the DEP Director's approval letter.

ADDITIONAL FINDINGS

The ALJ's Opinion addressed three other issues in the Development Plan portion of her Opinion. She found that the Development Plan complied with the Residential Performance Standards contained in BCZR § 260, in that the Developer proposed no modifications or waivers of those standards, and Planning found that the Plan complied with all of the standards. The Protestants offered no evidence to the contrary.

Next, the ALJ discussed the school impact analysis filed by the Developer and approved by Planning. As outlined in the ALJ's Opinion, County Code allows developments to be approved when the number new students generated by them will not cause an elementary, middle, or high school to exceed 115% of the state-rated capacity of each school. (*See* BCC §32-6-103(e)(1)(2) and (f)(3).) Evidence was presented demonstrating that, when adding the new pupils

projected from the Torch Hill development, Riderwood Elementary School's capacity would be 98.09%, Ridgely Middle School's capacity would be 103.36%, and Dulaney High School's capacity would be 97.83%. Consequently, the ALJ found that the Development Plan complied with the BCC as to this issue.

Regarding local open space, the ALJ noted that BCC §32-6-108 requires 32,000 square feet of local open space to be provided on the Property as part of the development. Evidence was presented that the Development Plan proposed 32,006 square feet (or 0.735 acres) of local open space to be preserved on the Property, thus the ALJ found that the Plan complied with this requirement.

Counsel for the Protestants raised the issue alleging that the ALJ misinterpreted Map 3 of the RJN Performance Assessment. This Map, which represented a modeled analysis performed by RJN, identified potential issues within the Jones Falls sewer shed, following the completion of some of the improvements required under the SRRR Plan. Protestants argue that the Map demonstrates that there are capacity issues indicated, and that the ALJ misread it. Assuming, the ALJ was mistaken in her interpretation, her discussion of this issue is minimal in light of the extensive analysis and rationale that she was provided for arriving at her decision. Consequently, the Board does not find that the ALJ's decision is invalidated by this alleged misinterpretation of Map 3 of the RJN Performance Assessment.

BOARD'S REVIEW OF THE ALJ'S APPROVAL OF THE DEVELOPMENT PLAN

In reviewing the ALJ's approval of the Development Plan pursuant to BCC §3-6-304, the Board does not substitute its own fact finding for that of the ALJ. It does not matter if the Board, in reviewing all of the same evidence considered by the ALJ, disagrees with the ALJ's findings.

The Board must review the evidence presented and determine whether a reasoning mind reasonably could have reached the same conclusions that that the ALJ reached in this decision.

As outlined in detail above, the ALJ in her Opinion, outlined the evidence presented and her reasoning for her decision. In addition to the testimony of the County agencies reviewed in keeping with the *Elm Street* analysis, the ALJ was presented with the competing expert testimony of Mr. Grachek and Mr. Motsco, ultimately deciding that Mr. Motsco's opinions carried the day. It is not within the purview of this Board to second guess the ALJ's assessment as to persuasiveness of witnesses. Consequently, the Board finds that the ALJ's approval of the development plan was supported by competent, material, and substantial evidence in light of the entire record as submitted and not arbitrary or capricious, and affirms the ALJ's decision and adopts its conditions.

ZONING VARIANCES

PETITION FOR SPECIAL HEARING TO OBTAIN "SPECIAL VARIANCE"

The Petitioner filed a Petition for Special Hearing to obtain "special variance" approval under the Baltimore County Zoning Regulations ("BCZR") Section 4A02.4.G to permit the eventual construction of 32 homes within the traffic shed associated with the F-rated intersection at Falls Road and Seminary Avenue. A *de novo* hearing was held before this Board as to these variances on July 11 and July 13, 2023. A public deliberation was held by this Board on August 24, 2023.

The Petitioner called Mickey Cornelius, PE to testify regarding the special variance. Mr. Cornelius was accepted as an expert in Traffic Engineering and in the BCZR. Mr. Cornelius discussed the Baltimore County Basic Services Maps and, as it relates to transportation, how the County grades the intersections. The methodology utilized is by calculating current vehicle

counts in what is known as the Loaded Cycle Methodology (“LCM”). An intersection with an “F” grade is considered as failing, and these intersections are governed by the Basic Services Map legislation. Development is strictly controlled in these areas.

Mr. Cornelius researched the traffic shed for this property and determined that the property is located within the failing traffic shed of Falls Road and Seminary Avenue. Falls Road and Seminary Avenue intersection is an “F” rated traffic shed by Baltimore County. Mr. Cornelius reviewed the history of the intersection and determined that the intersection has been level of service “F” since at least the year 2000. Nothing has been done to address the failing condition. Both Falls Road and Seminary Avenue are owned by the MDOT State Highway Administration, not Baltimore County.

At the request of Baltimore County and the Maryland State Highway Administration, Mr. Cornelius prepared a traffic study. Normally a traffic study is not required for a 32-house development, but Petitioner performed one in this case because the subject property is located within the failing traffic shed. (Pet. Ex. 9). The study consisted of reviewing seven intersections in the surrounding area, which included the Falls Road and Seminary Road intersection.

Regarding the Loaded Cycle Methodology, Mr. Cornelius stated that it is derived from the 1965 highway capacity manual. It is an observational study based on present traffic. He opined that there is no way to use the LCM to study future conditions because the methodology counts only current traffic. To study future conditions, the methods used by State Highway Administration are used. These are the Critical Lane Volume Methodology (“CLV”) and the Highway Capacity Manual Methodology (“HCM”).

The CLV methodology is a planning methodology which does not take into consideration signal timing and phasing. Using the CLV methodology, the intersection is rated a “D” (not

failing). The HCM methodology is more detailed and does take into consideration things such as signal timing and phasing and whether the intersection is signalized or not. Using the HCM Methodology the intersection is also rated as a “D” (not failing). Regardless of what the studies show using the CLV and HCM methodologies, the County still utilizes the LCM and shows the intersection on the Basic Services Map, as failing.

The next part of the study was to determine the future traffic conditions. In order to study the future traffic conditions, some background traffic conditions were utilized.

With 32 single-family dwelling units, it is expected that the site would be developed within 2-3 years. To provide for additional traffic growth, a review was conducted of historical traffic volumes along Falls Road and Seminary Avenue. As previously noted, Seminary Avenue has not experienced traffic growth over the past 10 years. Information obtained from MDOT SHA shows Falls Road experienced an approximate 1.2% annual growth rate over the past 10 years. Therefore, we have provided an allowance of 1.5% of annual traffic growth along the Falls Road corridor for a period of 3 years. (Pet. Ex. 9).

For the traffic generated by the development, the Institute of Transportation Engineers (ITE) Trip Generation Manual (10th. Edition) was utilized. It was determined that the trip rate for the 32 homes would be 28 trips in the peak morning hours and 34 trips in the peak afternoon hours. (Pet. Ex. 9).

The next step was to determine the direction where the traffic from the new development would be headed. Based on the study, it was found that 40% of the traffic leaving the development would turn right on Seminary and then left on to Falls Road. (Pet. Ex. 9, fig. 5).

When adding these trips to the study, the following was determined that the addition of 32 homes would have an extremely small impact on the total traffic at the Falls Road and Seminary Avenue intersection. (Pet. Ex. 9, tables 2-3). While the impact is small, there is an impact nonetheless. Mr. Cornelius explained that because the variance provision of §4A02.4.G requires there be a “net zero impact” on the “F” rated intersection, it would be necessary to do

some private road improvements to the failing intersection to mitigate any effect of the development.

Mr. Cornelius determined that there is a queuing issue on westbound Seminary Avenue at the Falls Road intersection. (Pet. Ex. 10). The left turning lane was found to be too short. The proposal was made to lengthen the left turning lane by 190 feet. This would allow additional vehicles to enter the turn lane, which would alleviate the issue of cars attempting to turn left blocking those cars attempting to go straight through or turn right at the intersection and vice versa. The 190 foot extension would nearly double the length of the existing turning lane and would accommodate the storage of at least eight additional vehicles per cycle at the intersection. (Pet. Ex. 10).

Based on the lengthening of the road, it was determined that the impact would actually be reduced at the intersection. Table 3 of the Traffic Study shows the projected impact of the improvements. In the morning peak hours, at the Falls and Seminary intersection, the delay currently is 42.5 seconds. With the proposed development the delay would be 43.2 seconds. With the proposed development and with the proposed improvements to Seminary Ave. (adding 190 feet to turning lane), the delay would be 42.2 seconds. An improvement to the current delay. In the evening peak hours, at the Falls and Seminary intersection, the delay currently is 26.7 seconds. With the proposed development the delay would be 26.9 seconds. With the proposed development and with the proposed improvements to Seminary Ave. (adding 190 feet to turning lane), the delay would be 26.3 seconds. An improvement to the current delay. (Pet. Ex. 10, table 3). Additionally, with the proposed improvements to Seminary Avenue, the queuing would be improved from approximately 962 feet to 414 feet. (Pet. Ex. 10, table 4).

Once the Traffic Study was completed, Mr. Cornelius sent it to the MDOT State Highway Administration for review. On October 19, 2021, a letter was sent to Mr. Cornelius from the State Highway Administration whereby they accepted the findings and conclusions of the report, and they did not require any additional traffic analyses. (Pet. Ex. 11). The Traffic Study was also sent to Baltimore County Department of Public Works and Transportation (“DPWT”). Mr. Kristoffer Nebre of DPWT responded to Mr. Cornelius and requested some further information, which was ultimately provided by Mr. Cornelius. (Pet. Ex. 12A-B).

Mr. Cornelius further explained that in regards to the request for Special Variance, the “district standard” set forth in BCZR §4A02.4.G.1.a, is to show that there will be a “net zero impact” from the development on the “F” rated intersection at Falls and Seminary.

Protestant called Kristoffer Nebre to testify. Mr. Nebre works for Baltimore County DPWT. He is the Division Chief of Traffic Engineering. Mr. Nebre was testifying as a fact witness, not an expert. Mr. Nebre testified that it is his department that determines the levels of service for the traffic sheds. He has been personally involved in development in a failing traffic shed. In this case, Mr. Nebre testified that after reviewing the Traffic Study performed by Mr. Cornelius, he concluded that the traffic at the Falls Road and Seminary Avenue intersection would have a “net zero impact” after the proposed improvements were completed (extending the left turn lane by 190 feet). When asked about the methodologies used, Mr. Nebre stated that the LCM methodology only shows what is happening at the present time at an intersection. When impact studies are done, LCM is not utilized. The State Highway Administration methods are used.

Mr. Nebre further stated that even with the improvements proposed, the level of service “F” will probably not change based on LCM methodology. Mr. Nebre stated that the proposed

improvement to the road would be an alleviation of the current conditions, but the grading could still be an “F”. As to the issue of the special variance, Mr. Nebre stated that he was not familiar with the legal standard, and he defers those decisions to the fact finder of the individual cases.

Protestants called Susan Shelhoss of 8207 Tallyho Road, Lutherville, MD 21093. Ms. Shelhoss has lived in the area for most of her life. She has resided in her current address for five years. For about 14 years, she lived right near the intersection of Falls Road and Seminary Avenue in the “log cabin” house. She stated that the intersection is getting worse and worse as far as traffic and dangerousness.

Peter George also testified. He resides at 8214 White Manor Drive, Lutherville, MD 21093. He has lived there for about 15 years. He has lived in the area for most of his life. He is very familiar with the intersection. He stated that the intersection is very congested. He also stated that many people use the roads in this area to avoid I-695.

Doug Sachse also testified. He resides at 9 Sedgefield Court, Lutherville, MD 21093. He has lived there since 1984. He shares the same concerns as Ms. Shelhoss and Mr. George. He is very familiar with the Falls Road and Seminary Avenue intersection. He used to travel through it to take his son to school at St. Paul’s. He described the congestion at the intersection.

Douglas Carroll, III also testified. He resides at 1117 Greenspring Valley Road, Lutherville, MD 21093. He has lived there his entire life. He raised his family at this residence, and he now lives there with his wife. He is concerned that the traffic studies have failed them. He said they have been wrong for 30 years, so why should we believe them now. He is further concerned about the congestion in the area.

Elias Poe, IV also testified. He resides at 308 Southwind Road, Ruxton, MD 21204. He lives approximately three and a half miles from Greenspring Station. He owns an investment

firm with his office located in Greenspring Station. He has been working there since 2010. He agreed with the previous people's testimony. He pointed out that Greenspring Station has dramatically increased in size since they opened. He is concerned about the increased traffic in the area from the consistent development.

Section 4 of the BCZR deals with Growth Management. As stated in BCZR §4A00.1, the purpose of the Growth Management law is:

to implement the objectives of the county-wide Master Plan and to adopt standards and guidelines relative to new development in all areas of the county which would result in land use patterns, location of new growth and timing of growth and development that is consistent with preservation of the quality of life in existing neighborhoods, with the ability of the county to provide necessary public facilities and services to support new development, with the ability of the county to correct existing service and facility deficiencies, with the preservation of natural, agricultural and environmental resources and with the promotion of new growth and development in appropriate areas.

BCZR §4A02 deals with Basic Services Maps. The Basic Services Maps are created because:

The County Council finds that important public facilities in certain predominantly urban areas of the county are inadequate to serve all of the development that would be permitted under the regulations of the zones or commercial districts within which those areas lie. Basic Services Maps are hereby established to regulate nonindustrial development in those under-served areas to a degree commensurate with the availability of these facilities. Basic Services Maps are not permanent and will be reviewed annually with reports to the County Council.

Additionally,

Basic Services Maps are not intended to permanently establish either areas of service deficiencies or areas of service availability and adequacy. Such maps will be reviewed annually, as it is the intent of the County Council that existing service deficiencies will be corrected in accordance with the Master Plan and capital improvements program. BCZR §4A02.3F.

In this case, the Growth Management law would prohibit, on its surface, development within the Falls Road/Seminary Avenue traffic shed because of its "F" rating. However, the

Growth Management law provides a mechanism, the special variance, whereby, upon a proper showing, the final subdivision of land (i.e., recordation of plats) and the issuance of building permits for properties within deficient, F-rated areas (depicted on the approved Basic Services Maps) may be approved or issued despite the existing deficiency. This special variance provision is codified in BCZR §4A02.4.G. This section states as follows:

Petitions for special variance from provisions of this subsection.

1. The Zoning Commissioner may, after a public hearing, grant a petition for a special variance from a provision of this subsection, only to an extent that will not violate that provision's purpose, pursuant to a finding:

a. That the demand or impact of the development proposed will be less than that assumed by the district standard that would otherwise restrict or prohibit the development, or that the standard is not relevant to the development proposal; and

b. That the granting of the petition will not adversely affect a person whose application was filed prior to the petitioner's application in accordance with Section 4A02.3.G.2.b.

2. The Department of Planning shall give a report on the petition to the Zoning Commissioner prior to his consideration of the petition.

The requirement of this section is that the Special Variance Petition “not violate the provision’s purpose” BCZR §4A02.4.G.1. Said purpose is found in BCZR §4A02.4.D.1 and states as follows:

D. Transportation.

1. Intent. The transportation standards and maps are intended to regulate nonindustrial development where it has been determined that the capacity of arterial and arterial collector intersections is less than the capacity necessary to accommodate traffic both from established uses and from uses likely to be built pursuant to this article.

In order to determine that the Special Variance Petition does not violate the provision's purpose, the Board must make a finding pursuant to BCZR §4A02.4.G.1.a and BCZR §4A02.4.G.1.b, as described above.

The Special Variance focuses on what impact the proposed development will have on the intersection rated as "F" or failing. This is done so it can be determined whether or not the building permit restriction can be lifted for the development. If the impact from the proposed development is net zero, then a variance can be granted.

Regarding the legal test, BCZR 4A02.4.G.1.a specifically requires that the Board determine that the "demand or impact of the development proposed will be less than that assumed by the district standard that would otherwise restrict or prohibit the development." The logical interpretation of this provision requires the Board: (i) to recognize that, in applying the provision at all, an intersection is failing, which means that it does not have capacity for *additional* traffic (i.e., new subdivision/construction is prohibited due to the lack of capacity); (ii) to evaluate how much additional traffic would be generated by a new development and directed toward the intersection, in general (i.e., the "district standard" for trip generation); (iii) to consider if there are any mitigating circumstances that will affect the *actual* traffic from the proposed development at the intersection (e.g., improvements to the intersection that could impact the demand or impact of the proposed development on the intersection); and (iv) to determine if the *actual* traffic will be *less than* that *assumed* to be generated by the proposed development (e.g., determine if proposed intersection improvements may offset the new traffic that would otherwise increase capacity at the intersection). Indeed, this interpretation is entirely consistent with the testimony of Mr. Cornelius and Mr. Nebre who both agreed that the succinct

exercise to be undertaken by the Board is to determine that there will be a "net zero impact to the intersection." (T. 7/11/23, p. 64-66, 76-77.)

The Protestants argue that the "District Standard" is the Loaded Cycle Methodology, and it is this methodology which must be utilized to determine how the proposed development will impact the failing intersection. While the LCM is the current standard utilized by the county, it is utilized to measure current traffic. The LCM involves a traffic counter which measures traffic within a prescribed window. It measures traffic as it happens. It is not a predictor of future traffic conditions. As Mr. Cornelius and Mr. Nebre stated, that methodology is what is used by DPWT in evaluating the *rating* of an intersection for purposes of preparing the basic services maps themselves; however, they did *not* agree that the LCM should be used for purposes of evaluating a special variance petition. The LCM requires actual physical observation at an intersection in order to perform the analysis, which makes this methodology unworkable for precise predictive analyses. In order to apply the LCM to assess the impact of this development, the Petitioner would have to construct the new homes, then observe the impact of those homes on traffic conditions before and after the mitigation efforts proposed at the intersection, in order to determine whether the mitigation efforts are sufficient. The Board agrees with Petitioner that this is not the proper interpretation of BCZR § 4A02.4.G.1.a.. It is also important to note that there is no requirement in the special variance provision that the traffic grade of the intersection be upgraded from the "F" failing grade. The purpose of the special variance is to develop in the failing traffic sheds.

Pursuant to the testimony, and Traffic Study performed by, Mr. Cornelius, the proposed development alone would not have a "net zero impact" on the failing intersection. Because of that, they began investigating whether a privately funded improvement could provide the

required “net zero impact.” After performing the analysis, it was determined by Mr. Cornelius, and verified by Mr. Nebre, that the 190 feet extension of the left turn lane would actually decrease the delays from what they are currently, in both the morning and evening. This is after the development is finished. (Pet. Ex. 10). Mr. Cornelius testified as an expert Professional Engineer. His un rebutted expert testimony, which was buttressed by the testimony of Mr. Nebre, and evidence presented demonstrates that the Petitioner, after making the proposed improvements, would leave the intersection better off than it is today, even after the subdivision occurs and the 32 homes are constructed. (*See* T. 7/11/23. p. 94.) Furthermore, as previously mentioned, the Traffic Study conducted by Mr. Cornelius was submitted to, and approved by the State Highway Administration, with no additional analyses required. (Pet. Ex. 11).

Because of this, the Board finds that after the left turn lane is constructed, the demand or impact from the development (i.e., the trips to be generated plus the existing trips) will result in a “net zero impact” to the intersection. Therefore, pursuant to BCZR § 4A02.4.G.1.a., the Board finds that the demand or impact of traffic generated by the Torch Hill project will be less than that presumed by the district standard. Further, the proposed 190 feet turning lane extension will have the impact of reducing delays at the intersection.

The Board further finds, pursuant to BCZR § 4A02.4.G.1.b, that the Petition for Special Variance will not adversely affect a person whose application was filed prior to the Petitioner’s application in accordance with BCZR § 4A02.3.G.2.b, as there was no evidence that any applications for reserve capacity use certificates have been filed. The Petitioner here is not seeking a reserve capacity use certificate. As a result, that provision is not applicable in this case.

ZERO FOOT SETBACK VARIANCE

Petitioner filed a Petition for Variance relief from Baltimore Code of Zoning Regulations BCZR §1B01.2.C.1.b to allow a zero-foot front yard setback for an existing home on the property that fronts Seminary Avenue. (Pet. Ex. 4, photo 15 & 16.) The home is estimated to have been constructed between the 1940s and 1950s, meaning it has existed on the property for decades. Baltimore County's Department of Planning ("DOP") requested that the home remain on the property because of its "charm" and esthetic contribution to the Seminary Avenue corridor. (Pet. Ex. 14)

In lieu of demolishing the structure to construct a new residence elsewhere on the property, Petitioner seeks to retain this structure and to utilize it as one of the 32 permissible homes allowed under the Restrictive Covenant Agreement. To preserve the home, as recommended by DOP, a variance is required because the Seminary Avenue right-of-way prevents the home from meeting the minimum 25-foot setback requirement permitted under BCZR. To retain the current structure, the State Highway Authority ("SHA") has permitted the developer to reduce the right-of-way along the portion of Seminary Avenue in front of the house at issue. Petitioner notes that requiring a uniform right-of-way width along the entire property is impossible because such requirement would cause the right-of-way to run through the existing home. Petitioner further argues that if relief is granted, only the right-of-way, not the road, would be setback zero feet from the structure. Petitioner additionally argues that the road will be farther away from the structure, and the portion of road that is situated in front of the structure will be part of the *deceleration lane* serving the new neighborhood, alleging anyone driving in that area will be doing so slowly.

It is also important to note that Protestant's arguments on appeal focused on sewer capacity and special variance for traffic offering, not the setback variance for the existing structure. Protestant offered no expert testimony in opposition of the setback variance. Protestant also failed to provide case law to support its position that the setback variance should not be granted.

Petitioner's witness, Ms. McArthur, testified to why the project satisfactorily meets the variance standard under Section 307.1 of the BCZR. In her testimony, she noted that the structure is unique in that it was erected in the 1940s – 1950s. She further testified that this property is also unique because it is situated closer to the road than other structures on other properties in its proximity due to the historical widening of the road over the years. Ms. McArthur testified that Petitioner would suffer a practical difficulty if the BCZR was strictly construed and the structure was to be demolished. She also provided testimony on an alternative proposal of moving the structure but opined it would not be feasible to do so given the age of the home, its questionable structural integrity, and the fact placing the home farther away from the road would impact the esthetic value DOP sought to preserve. Finally, she testified that granting the requested variance is within the spirit and intent of the BCZR and would not negatively impact the surrounding community.

A variance request is subject to a two-pronged review process outlined in *Cromwell v. Ward*, 102 Md. App. 691 (1995).

- (1) It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
- (2) If variance relief is denied, Petitioner, will experience a practical difficulty or hardship.

Given the unrefuted testimony of Ms. McArthur and application of the *Cromwell test*, the BOA finds the 1940s-1950s home is unique in its shape and size, which makes it unlike the other structures on the property. Therefore, the stated uniqueness of the existing home necessitates variance relief. The BOA also finds that requiring the Petitioner to demolish the existing structure because it cannot meet current front yard setbacks would cause the Petitioner to suffer a practical difficulty and unreasonable hardship. Finally, in considering the DOP's position to retain the existing building, coupled with the lack of opposition from adjacent neighbors, and inadequate evidence from Protestants challenging the approval of the variance, the Petition for Variance is hereby GRANTED.

CONCLUSION

After reviewing the testimony and evidence presented before the ALJ, the Board finds that the ALJ's approval of the development plan was supported by competent, material, and substantial evidence in light of the entire record as submitted and not arbitrary or capricious and affirms the ALJ's decision and adopts its conditions. The Board further finds that the Special Hearing relief to approve the Special Variance under BCZR, §4A02.4.G to allow the Torch Hill Project within the Falls Rd and Seminary traffic shed should be granted. Additionally, the Board grants the requested Variance relief from §1B01.2.C.b for a front yard setback of zero feet in lieu of the required 25 feet for the existing residential structure.

ORDER

THEREFORE, IT IS THIS 8th day of September, 2023, by the Board of Appeals of Baltimore County, hereby:

ORDERED, that the Administrative Law Judge's decision dated October 13, 2022 approving the Torch Hill Project as set forth on the Greenlined Development Plan (Dev. Ex. 2) with conditions be, and it is hereby, **AFFIRMED**; and it is further

ORDERED, that the Administrative Law Judge's decision regarding the Forest Conservation Variance to remove the sixteen (16) specimen trees as listed on the Revised Plan to Accompany the Forest Conversation Variance (Dev. Ex. 10) with the condition that the Developer shall use all reasonable measures and protections during construction to save four (4) of the sixteen (16) Specimen trees and prevent impacts to their critical root zones (CRZs), be, and it is hereby **AFFIRMED**; and it is further

ORDERED, that the Petition for Special Hearing under BCZR, §500.7 and pursuant to §4A02.4.G, to allow the construction of 31 single-family residences within the Falls Rd. and Seminary Rd. traffic shed, be, and it is hereby, **GRANTED**; and it is further

ORDERED, that Variance relief from BCZR, §1B01.2.C.b, to permit a front yard setback of zero (0) ft. in lieu of the required 25 ft. for an existing residential structure on the Property, be, and it is hereby, **GRANTED**.

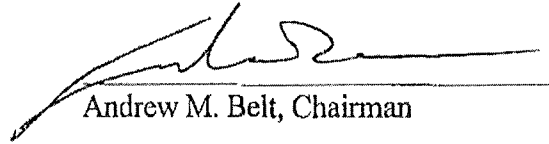
The relief above is granted herein shall be subject to, and conditioned upon, the following:

1. Prior to connecting to Torch Hill Project to the public sewer system, all repair, replacement and/or rehabilitation work required under the 2012 SRRR Plan (whether for sewers, manholes or both) and which is within the sewage path from Torch Hill Project as shown by the blue line on Developer's Ex: 22, shall be completed by the County, its authorized representative and/or the developer, as a condition of the Order. Upon completion, the County shall provide written confirmation of the same.

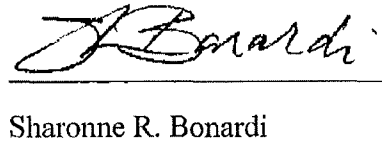
2. Prior to building permits being issued, the Developer will construct the 190 ft. left turn lane extension on Seminary Avenue as depicted on Dev. Ex. 15 and/or as otherwise directed by SHA upon its review and approval of construction drawings for the turning lane extension.

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

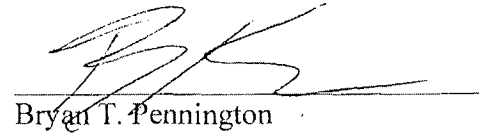
**BOARD OF APPEALS OF
BALTIMORE COUNTY**



Andrew M. Belt, Chairman



Sharonne R. Bonardi



Bryan T. Pennington



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

September 8, 2023

Christopher D. Mudd, Esquire
Patricia A. Malone, Esquire
Venable LLP
210 W. Pennsylvania Avenue, Suite 500
Towson, Maryland 21204

Michael R. McCann, Esquire
118 W. Pennsylvania Avenue
Towson, Maryland 21204

RE: In the Matter of: *Alvin Krongard – Legal Owner*
(Torch Hill)
Case Nos.: 21-274-SPHA and CBA-23-009

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 black ink that reads "Sunny Cannington". The signature is written in a cursive, flowing style.

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Duplicate Original Cover Letters

c: See Distribution List following

In the matter of: Alvin Krongard – Legal Owner
(Torch Hill)

Case Nos.: 21-274-SPHA and CBA-23-009

Distribution List

September 8, 2023

Alvin Krongard
Stacey McArthur/D.S. Thaler & Associates, LLC
Falls Road Community Association, Inc.
Doug Carroll
Deidre Smith
Doug Sachse
Peter George
Office of People's Counsel
Paul M. Mayhew, Managing 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



JOHN A. OLSZEWSKI, JR.
County Executive

November 15, 2022

PAUL M. MAYHEW
Managing Administrative Law Judge
MAUREEN E. MURPHY
Administrative Law Judge

Christopher Mudd, Esquire, cdmudd@venable.com
Patsy Malone, Esquire – pamalone@venable.com
Venable LLP
210 W. Pennsylvania Ave., Suite 500
Towson, MD 21204

Michael McCann, Esquire - michael@mmccannlaw.net
118 W. Pennsylvania Avenue
Towson, MD 21204



RE: **APPEAL** – Development Plan and Zoning Opinion and Order
Case Nos. 08-0919 and 2021-0274-ASA
Project: Torch Hill aka 1400 W. Seminary Avenue
Address: 1400 W. Seminary Avenue, Lutherville, MD

Dear Counsel:

Please be advised that an appeal of the above-referenced case was filed in this Office on November 14, 2022. All materials relative to the case have been forwarded to the Baltimore County Board of Appeals (“Board”).

If you are the person or party taking the appeal, you should notify other similarly interested parties or persons known to you of the appeal. If you are an attorney of record, it is your responsibility to notify your client.

If you have any questions concerning this matter, please do not hesitate to contact the Board at 410-887-3180.

Sincerely,

A handwritten signature in black ink that reads "Paul M. Mayhew".

PAUL M. MAYHEW
Managing Administrative Law Judge
for Baltimore County

PMM:dlw
Enclosure

c: **See Next Page**

Development Plan – PAI # 08-0919
Project: Torch Hill aka 1400 W. Seminary Avenue
1400 W. Seminary Avenue, Lutherville, MD
Page 2

c: Baltimore County Board of Appeals
People's Counsel – peoplescounsel@baltimorecountymd.gov
Jerry Chen – jchen@baltimorecountymd.gov
Lloyd Moxley – lmoxley@baltimorecountymd.gov
Angela Daniel – adaniel@baltimorecountymd.gov
Blandy Becker – blandybecker@gmail.com
Brian Childress – bchildress@dsthaler.com
Bryan Eberle – beberle@obrechtproperties.com
Buzzy Krongard – abkrongard@gmail.com
David Thaler – dsthaler@dsthaler.com
Edward Consroe – econsroe@aol.com
Edward Halle – nedhalle@gmail.com
James Herman – jhermann@baltimorecountymd.gov
Jason Seidelman – jseidelman@baltimorecountymd.gov
Jeff Livingston – jlivingston@baltimorecountymd.gov
Jeff Perlow – jperlow@baltimorecountymd.gov
Jen Busse, Esq. – jbusse@wtplaw.com
Jen Frankovich – jfrankovich@baltimorecountymd.gov
Jen Nugent – jnugent@baltimorecountymd.gov
John Canoles – espijc@aol.com
John Motsco – jmotSCO@dsthaler.com
Kiren Patel – kpatel@baltimorecountymd.gov
Kristopher Nebre – knebre@baltimorecountymd.gov
Lachelle Imviko – limwiko@baltimorecountymd.gov
Mark Buda – mbuda@keelty.com
Marta Kulchytska – mkulchytska@baltimorecountymd.gov
Mickey Cornelius – mcornelius@trafficgropu.com
Michael Friedman – mikefriedman311@comcast.net
Pam Jones – pam.s.jones@aol.com
Renee Hamidi – renee@thevpc.org
Roy Kirby – roykirbyjr@gmail.com
S. Crawford – scrawford@baltimorecountymd.gov
Taylor Bensley – tbensley@baltimorecountymd.gov
Vishnubhai Desai – vdesai@baltimorecountymd.gov
Wannee Kunaprayoon – wkk8506@yahoo.com
Melody Simmons – msimmons@bizjournals.com

IN RE: DEVELOPMENT PLAN HEARING &	*	BEFORE THE OFFICE OF
PETITIONS FOR SPECIAL HEARING	*	ADMINISTRATIVE HEARINGS
& VARIANCE	*	
8 th Election District	*	FOR
3rd Council District	*	
(1400 W. Seminary Avenue)	*	BALTIMORE COUNTY
	*	
TORCH HILL	*	CASE NOS. 08-0919 AND
aka 1400 W. Seminary Avenue	*	2021-0274-SPHA
Alvin B. Buzzy Krongard	*	
Owner/Applicant	*	
	*	
1400 W. Seminary Avenue	*	
	*	
Developer		

* * * * *

ADMINISTRATIVE LAW JUDGE'S ("ALJ")
COMBINED DEVELOPMENT PLAN AND ZONING OPINION & ORDER

This matter comes before the Office of Administrative Hearings ("OAH") for a public hearing on a development proposal submitted in accordance with Article 32, Title 4, of the Baltimore County Code ("BCC"). Alvin B. Krongard, Owner/Applicant (herein known as "Developer") submitted for approval a 2-sheet redlined Development Plan (the "Redlined Development Plan") and a 2-sheet greenlined Development Plan (the "Greenlined Development Plan") prepared by Stacy A. McArthur of D.S. Thaler & Associates, Inc., known as the "Torch Hill Project" (the "Property"). The Developer proposes to develop ± 42.44 acres of land with 31 new single family detached dwellings, as well as retaining the existing dwelling which fronts on Seminary Avenue.

Along with the development plan, the Developer has filed a Petition for Special Variance from Baltimore County Zoning Regulations ("BCZR"), §4A02.4.G, to allow the Torch Hill Project within the Falls Rd. and Seminary Rd. traffic shed. Developer has also requested Variance relief

from the BCZR, §1B01.2.C.b, to permit a front yard setback of zero (0) ft. in lieu of the required 25 ft for the existing home.

In accordance with BCC, §32-4-201 *et seq.*, a Concept Plan Conference (“CPC”) was held on August 11, 2020. A Community Input Meeting (“CIM”) was held on September 17, 2020. A Development Plan Conference (“DPC”) was held on November 3, 2021.

The development and zoning cases were considered as a combined hearing as permitted by BCC, §32-4-230. Details of the proposed development are more fully depicted on the Redlined Development Plan and the Greenlined Development Plan. (Dev. Exs. 1, 2). On June 7, 2022, in compliance with the regulations, the Property was posted with the Notice of Hearing Officer’s Hearing (“HOH”) development hearing, and Notice of Zoning hearing, and then reposted and certified on July 5, 2022. A public virtual WebEx hearing in lieu of an in-person public hearing was conducted on July 7, 2022, July 8, 2022 and August 22, 2022.

Testifying on behalf of the Developer was Stacy McArthur and John Motsco, PE, both of DS Thaler, the engineering firm which prepared the Redlined Development Plan and Greenlined Development Plan. Mickey Cornelius of the Traffic Group also testified. Christopher Mudd, Esquire, Patsy Malone, Esquire and Venable LLP represented the Developer. Michael McCann, Esquire represented the Protestant, Falls Rd. Improvement Association. Counsel for both Parties filed Memorandum in Lieu of Closing Argument on September 30, 2022.

AGENCY WITNESSES

Numerous representatives of the various Baltimore County agencies who reviewed the Plan and attended the hearing, including the following individuals from the Department of Permits, Approvals and Inspections (“PAI”): Jerry Chen, the Project Manager; James Hermann on behalf of Development Plans Review (“DPR”) and Department of Recreation and Parks (“R&P”);

LaChelle Imwiko from Real Estate Compliance (“REC”); and Shawn Crawford from the Office of Zoning Review (“OZR”). Also appearing on behalf of the County was Steve Ford from the Department of Environmental Protection and Sustainability (“DEPS”), and Marta Kulchytska and Jenifer Nugent from the Department of Planning (“DOP”).

Shawn Crawford verified both the DPC comments dated November 3, 2021 and the Final (HOH) comments dated April 4, 2022 from OZR. (County Exs. 1A, 1B). Mr. Crawford testified that the OZR DPC comment about whether the 2 separate parcels comprising the Property would both be used was resolved by the removal of 1 parcel on the Redlined Development Plan. He also verified that misalignment of the zoning line and the lot line was rectified by the approval of a lot line adjustment from the Development Review Committee (“DRC”). Since all issues from OZR had been resolved, Mr. Crawford recommended approval of the Redlined Development Plan.

Mr. Hermann, the Baltimore County Landscape Architect, testified that he approved the Schematic Landscape Plan on April 25, 2022 and as a result, DPR could recommend approval of the Redlined Development Plan from a landscaping perspective. (County Ex. 2). He added that a Final Landscape Plan would be filed in Phase II of the development process. In regard to Open Space requirements, Mr. Hermann stated that for the 32 total proposed units, the required Open Space under BCC, §32-6-108 is 32,000 sf or 0.734 acres (1,000 sf per unit). (County Ex. 3). The Developer will provide 32,006 sf (0.735 acres) of Open Space onsite as shown on the Redlined Development Plan which will be owned and maintained by a private HOA. There are no Master Plan Greenways affected by this Project. As a result, on behalf of R&P, Mr. Hermann could recommend approval of the Redlined Development Plan.

Mr. Patel testified on behalf of DPR and the Department of Public Works & Transportation (“DPWT”) in regard to roadways, sidewalks, storm drains, water and sanitary sewer systems.

DPR's general and site-specific comments were provided in the DPC comments dated November 1, 2021. (County Ex. 4A). Mr. Patel testified that adequate sewer capacity exists in the 8 inch sewers which serve this Property to accommodate the projected flow for 32 homes in the Torch Hill Project. With regard to the Developer's request for a sidewalk waiver along Seminary Ave., the Director of DPWT granted the waiver because there was no existing infrastructure to which any sidewalks could connect. (County Ex. 4B). However, the Director denied the sidewalk waiver along the new public roads within the development, finding that connectivity would be important for residents. (*Id.*). Given that the waiver of sidewalks had been addressed, DPR and DPWT recommended approval of the Redlined Development Plan. (*Id.*). When asked about the position of Traffic Planning and Traffic Engineering Section of DPWT regarding the impact of the Torch Hill Project on the 'F' intersection at Seminary Avenue and Falls Rd., Mr. Patel was not able to provide specific information. However, he did verify that Kristoffer Nebre handled the review for DPWT.

Ms. Imwiko testified for REC and stated that site specific comments which were raised as a result of the DPC, including labeling of easements and other changes, were made on the Redlined Development Plan. (County Ex. 6A). As a result, REC recommended approval of the Redlined Plan. (County Ex. 6B).

Steve Ford testified on behalf of 3 departments within DEPS: (1) Ground Water Management ("GWM"); (2) Stormwater Management ("SWM"); and (3) Environmental Impact Review ("EIR"). GWM provided a comment dated October 6, 2021 to clarify Note 15 on the Development Plan to state that the existing sewage holding tank which serves the existing home (tenant house), will be pumped and abandoned when the home is connected to the public sewer system. (County Ex. 7). On behalf of SWM, Andrew Fish, PE approved the Concept SWM Plan

on July 13, 2021 as confirmed by a SWM comment dated April 21, 2022. (County Ex. 8).

EIR provided DPC comments dated November 3, 2021 referencing the review of a Forest Buffer Variance, Forest Conservation Variances and an Alternatives Analysis as well as redesign of SWM Facility #1. (County Ex. 9A). Subsequently, EIR provided a HOH comment dated April 26, 2022, which requested a change to Note #17 and to clarify the ownership of the Forest Buffer Easement and Forest Conservation Easements. (County Ex. 9B). Mr. Ford acknowledged that those changes were made on the Greenlined Development Plan.

Finally, Mr. Ford verified that the Director of DEPS had approved the Developer's request to remove 16 of 90 specimen trees as set forth in the Director's letter dated April 15, 2022. (County Ex. 10). Mr. Ford testified that the Application for Special Variance met the required factors in BCC, §33-6-116(d) and (e) and that the Developer would be meeting its obligation to mitigate the 12 native trees in fair or better condition by planting 24,750 sf (0.57 acres) of forest onsite in the open meadow portion of the Forest Buffer Easement.

Testifying on behalf of DOP were Ms. Kulchytska and Ms. Nugent. DOP provided a HOH Report dated April 26, 2022 which provided DOP's detailed review of the Redlined Development Plan. (County Ex. 11A). In response to DOP's DPC comments (County Ex. 11F), the Developer provided a point-by-point response and made DOP's requested changes to the Development Plan. (County Ex. 11D). In particular, DOP reviewed and approved a School Impact Analysis ("SIA") with a filing date of September 14, 2021. (County Ex. 11B). Ms. Kulchytska explained that the projected enrollment for Riderwood Elementary School, Ridgely Middle School and Dulaney High School were under the State Rated Capacity ("SRC") at 96.89%, 102.80% and 97.28% respectively. Ms. Kulchytska also stated that DOP reviewed the Redlined Pattern Book dated April 21, 2022 and found that it provided the architectural elevations of the models to be constructed

and that it met all of the requirements of the Residential Performance Standards in BCZR, §260.

Prior to the Director of DPWT granting in part, and denying in part, the Developer's request for a sidewalk waiver, the Director of DOP had provided a letter of support for both requests dated November 1, 2021. (County Ex. 11C). Ms. Kulchystka acknowledged that Seminary Avenue is a scenic route and that the Developer had provided DOP with a Scenic Route Report which demonstrated both the existing and proposed view shed from Seminary Avenue. She stated that DOP was satisfied with the Report. (Dev. Ex. 8).

Finally, the DOP HOH Report addressed the Special Variance Petition as required under BCZR, §4A02.4.G.2 and stated that DOP deferred the request to the DPWT as it was due to the F-rated intersection at Seminary Avenue and Falls Rd. and to the right-of-way widening as requested by DPWT. (County Ex, 11A, p. 2). Upon inquiry, Ms. Nugent explained that the DOP's policy is to defer such decisions to DPWT as the department with expertise in reviewing traffic impact studies and improvements to intersections. Ms. Nugent added that the DOP Director had reached out to DPWT in regard to Special Variance but was not successful in obtaining an answer.

At the request of the undersigned, on Day 3 of the HOH, Kristopher Nebre, PE, Engineer III of Bureau of Traffic Engineering and Traffic and his supervisor, Angelica Daniels, Bureau Chief of Traffic Engineering and Transportation Planning testified. As an Engineer III in Traffic Engineering and Traffic Planning Section of DPWT, Mr. Nebre's duties include handling traffic control inquiries from citizens, reviewing traffic signal construction plans and reviewing traffic impact studies.

By way of background, Ms. Daniels acknowledged that one of the responsibilities of Transportation Planning is to provide technical assistance to the DOP and to evaluate and recommend specific projects in anticipation of future transportation, land use and economic

development needs. (See Balto. County Website, Public Works, Traffic Engineering). Except for the eastbound private road coming out of St. Paul's Schools, Ms. Daniels explained that Falls Rd. and Seminary Avenue are State roads, and the signal at Falls/Seminary intersection is also owned by the State. (County Exs. 5A). As a result, the State, not the County, has jurisdiction to undertake work to physically improve those roadways and/or to make changes to the signal timing or, the State could approve plans by a developer to improve the roadways.

Mr. Nebre explained that the County uses the 'loaded cycle methodology' ("LCM") under the Highway Capacity Manual (1965). He stated that the County is the only jurisdiction in the United States which still uses that method to rate intersections. Under the LCM, the Traffic Engineering/Planning section employs a team of people to perform traffic counts at intersections during a two-hour period to evaluate each approach during both morning and afternoon peak hours. A traffic cycle becomes 'loaded' if on a green light, the last vehicle in line at the light does not get through the intersection. Stated in percentages, failing movements drive the assigned rating; an 'F' rated intersection has a load factor of 86-100%. (See County Website, DPWT). For intersections rated D, E and F, Mr. Nebre explained that DPWT conducts annual traffic counts to reevaluate the ratings each year. For intersections rated A, B and C, the counts are conducted every 3 years. Although he does not determine the boundaries for traffic sheds, he verified that the Property is only included in the traffic shed for Falls/Seminary intersection, and not the traffic sheds for Falls/Greenspring Valley or Falls/Joppa Rd., both of which are also failing intersections.

In regard to Falls/Seminary intersection, based on the actual traffic counts conducted by the County under the LCM, it was rated as an 'F' intersection. Mr. Nebre stated that it has been an 'F' intersection since he began working in the County in 2009. He clarified that the approaches causing the 'F' rating was westbound in the peak morning hours (86%), and eastbound in the

afternoon (90%) coming from St. Paul's Schools.

Mr. Nebre reviewed the Traffic Impact Analysis ("TIA") prepared by Mr. Cornelius. (Dev. Ex. 14). Mr. Nebre was able to explain his email dated December 22, 2021 wherein he requested more information from Mr. Cornelius as to how the level of service at the intersection would be improved from a loaded cycle standpoint and his comment about the proposed condition eastbound 'remov[ing] green time.' (Dev. Ex. 17). In regard to the level of service, Mr. Nebre explained that he wanted to understand what the traffic impact from the Torch Hill Project would be on the intersection and that if the proposed improvement would make the intersection better, that would be positive. In regard to the eastbound traffic, Mr. Nebre recalled that the Developer was proposing signal changes for the eastbound traffic out of St. Paul's Schools but that, in his view, those proposed changes would reduce the amount of time the signal would remain green. He added that ultimately, any signal timing changes would need to be approved by the State Highway Administration ("SHA").

Mr. Nebre explained that the 'district standard' under BCZR, §4A02.4.G.1.a is to determine whether the traffic generated by a proposed development will have any negative impact on the intersection. If improvements to the roadway is proposed, the issue is whether the proposed improvement would accommodate the additional traffic generated by the development such that it would have a net zero impact on the intersection.

Mr. Nebre testified that, for the westbound approach, the Developer here has proposed to lengthen the left turn lane 190 ft. Mr. Nebre agreed that 190 ft. would accommodate 8 additional vehicles. He noted that SHA approved the proposed left turn lane extension on October 19, 2021. (County Ex. 5B). On behalf of DPWT, Mr. Nebre agreed that the proposed left turn lane extension will not make the Falls/Seminary intersection any worse such that the net impact from traffic

generated by Torch Hill development at the intersection would be zero. He also acknowledged receiving Mr. Cornelius' letter dated March 4, 2022 to which he responded by email dated April 28, 2022. (County Ex. 5A, 5C). He testified that, even with the proposed left turn lane extension, the Falls/Seminary intersection may still be rated a level of service of 'F' but that it will be reevaluated each year.

DEVELOPER'S CASE

Stacy McArthur was admitted as an expert in landscape architecture, in BCZR, and in BCC Titles 32 and 33 including specimen trees ("STs"). (Dev. Ex. 4). Ms. McArthur testified that, in the past 35 years, she has worked on at least 100 development projects. For this project, she began her work in May of 2020 and has been to the Property many times. She explained the development proposal in detail as shown on both the Redlined Development Plan and the Greenlined Development Plan. (Dev. Exs. 1, 2). She also created the Pattern Book. (Dev. Ex. 3).

Using an aerial geographic information system, ("GIS") photograph, she explained that the Property is inside the Urban Rural Demarcation Line ("URDL") and will connect to public water and sewer. (Dev. Ex. 5). The aerial photograph shows that the Property is irregularly-shaped, most unimproved parcel located on the corner of Seminary Ave. and Mays Chapel Rd. (*Id.*). Mature trees in an existing forest provide a natural screening along Seminary Ave. and will be protected in a Forest Conservation Easement. (Dev. Ex. 6). An existing residential structure which is proposed to remain, fronts on Seminary Ave., and is accessed by a driveway. The existing driveway is proposed to be removed, grass will be planted, and a new public road will be constructed on the western side of the home to provide access to the development.

Ms. McArthur described the Property as 42.44 acres. It is zoned Density Residential ("DR" 1) which allows for 42 units. However, a covenant was entered into with Meadows at Greenspring

community wherein it was agreed that the maximum number of units would be 32. The Redlined Development Plan shows the changes/additions/corrections requested by the County agencies during the review process. (Dev. Ex. 1). The Greenlined Development Plan includes the Redlined Development Plan in its entirety, and corrects, at the request of DEPS, that the Forest Buffer and Forest Conservation areas will be owned by a private homeowner's association and that Lot 22 extends into the Forest Buffer and Forest Conservation Easements. (Dev. Ex. 2). The only other addition to the Greenlined Development Plan was a note requested by DOP that the Pattern Book will be updated when a builder is selected. (Dev. Ex. 2).

A colored rendering of the Torch Hill Project was provided. She testified that it was consistent with the Greenlined Development Plan. (Dev. Ex. 7). It shows 16 acres of the Forest Buffer and Forest Conservation areas will be preserved by recorded easements. There will be mitigation plantings through reforestation onsite. The layout uses the existing stream crossing. Some lots will extend into the environmental areas. Two (2) SWM devices will be installed to control both water quality and water quantity. Parking for the homes will be provided via garages, driveways and on-street parking. On the western side, between the Property and Mays Chapel Rd. is a strip of land which will be protected by a Land Preservation Trust Easement. (Dev. Exs. 1, 2). Between Lots 4 and 5, there is a wetland area which will remain.

Ms. McArthur opined that the Torch Hill Project meets all of the Residential Performance standards in BCZR, §260 *et seq.* including: retaining existing quality vegetation; integrating the existing home into the development; coordinating building design and layout with existing topography; retaining the existing landscape buffer and adding trees, shrubs and vegetation; and providing for a smooth transition between neighborhoods. She further opined that the Torch Hill Project meets all development regulations in the BCC.

One setback Variance is being requested for the 2-story existing home on Seminary Avenue. She explained that the existing house was constructed between 1940-1950. If required to meet the front yard setback of 25 ft. applicable to the DR zone, the Petitioner would suffer a practical difficulty because the house would have to be demolished.

Ms. McArthur prepared an initial Forest Conservation Variance Application dated August of 2021 stating that 90 STs were on-site and requesting that eleven (11) of those STs be removed. (Dev. Ex. 9). After review by DEPS, the site layout was modified in order to retain additional forest and/or STs. Specifically, in order to retain the forested area north of Lot 22, STs would need to be removed. In addition, a retaining wall near Lot 1 was proposed to be constructed but will require the removal of STs. In order to use and incorporate the existing stream crossing into the design layout, STs would need to be removed in that location. On Lot 5, retention of the wetland area permitted the retention of a ST. As a result of the changes to the site layout, an Amended Forest Conservation Variance Application was filed in February, 2022 requesting that 16 STs of the 90 STs be removed. She indicated that, all attempts would be made not to damage the critical root zones ("CRZ") of 4 of those 16 STs.

Analyzing the factors required under BBC, §33-6-116(d) and (e), she testified that while BCC, §33-6-116(d)(1) is not applicable, the variance request satisfies both (d)(2) and (3) because the 90 STs are scattered throughout the Property which provides a unique circumstance not attributable to the general condition of the neighborhood, and the STs are not consolidated in any particular forest area. The removal of 16 STs will not alter the essential character of the existing neighborhood as the neighborhood is already built-out.

In regard to BCC, §33-6-116(e)(1), the Forest Buffer and Forest Conservation areas to remain will provide better water quality than the 16 scattered STs, 4 of which are in poor condition;

the request to remove the STs is due to limited developable areas and modification of original site layout, neither of which arose from a condition or circumstance caused by the Developer. Finally, within the spirit and intent of Article 33, only 12 of the 16 trees are in fair condition or better and 4.1 acres of reforestation and ST mitigation plantings will be provided on-site.

On cross examination, Ms. McArthur acknowledged that floodplains and wetlands exist in the middle of the Property. A floodplain study was accepted for filing by the County. An Alternatives Analysis was approved by DEPS in January, 2022 and covered all Forest Buffer, floodplain and wetland impacts.

Mickey Cornelius, PE was accepted as an expert in traffic engineering and in the BCZR. (Dev. Ex. 12). Using County records, Mr. Cornelius researched the traffic shed for this Property as depicted by County Basic Services Map and confirmed that it is within the failing traffic shed for Falls Rd/Seminary, but not within the traffic shed for Greenspring Valley/Falls Rd. or Joppa Rd./Falls Rd. (Dev. Ex. 13). He explained that the Property falls within that the County-determined traffic shed because 50% of the trips generated by the 32 homes will proceed through that failing intersection. He also acknowledged that Falls/Seminary intersection has been rated as an 'F' intersection on the Basic Services Map since at least 2000. There has been no initiative to improve it. (Dev. Ex. 33).

At the request of the County and SHA, while not customarily required for a 32-lot development generating 50 or less peak hour trips, but because the Property is located within a failing traffic shed, Mr. Cornelius prepared a TIA. (Dev. Ex. 14). The TIA was approved by SHA by letter dated October 19, 2021. (County Ex. 5B). In seeking DPWT's approval, Mr. Cornelius wrote to Mr. Nebre providing additional information as requested. (County Ex. 5C). Mr. Cornelius followed-up by email to Mr. Nebre on March 16, 2022, to which Mr. Nebre responded in an email

dated April 28, 2022. (County Ex. 5A).

As part of the TIA, the County insisted that 7 intersections be studied, not just Falls/Seminary. (Dev. Ex. 16). Mr. Cornelius explained that in rating intersections, the County uses the 'loaded cycle methodology' and is purportedly the only jurisdiction in the country to do so. He explained that this method requires observing and counting the number of vehicles which are able to proceed through an intersection on a green light. Unfortunately, he stated that this method is limited because it cannot predict future traffic conditions (i.e. from a proposed development). (Dev. Ex. 14, p. 7). Conversely, SHA applies the Critical Lane Volume ("CLV") and Highway Capacity Manual ("HCM") methodologies. Under both CLV and HCM analysis, the Falls/Seminary intersection is rated as a 'D' intersection during the peak morning hours, and 'C' during evening peak hours. (Dev. Ex. 14, pp. 14-15).

The trip generation rates from the Institute of Transportation Engineers ("ITE"), Trip Generation Manual (10th Edition), during projected peak hour trips for 32 single family detached homes, is 28 trips in the morning peak hour, and 34 trips in the evening peak hour. (Dev. Ex. 14, p. 9). Background traffic conditions were calculated to allow for 1.5% annual traffic growth along Falls Rd. He indicated that Seminary Ave. has not experienced a traffic growth over the past 10 years. (*Id.*). Mr. Cornelius testified that 40% of the projected trips from Torch Hill Project would travel east on Seminary Ave., with 60% traveling west. He stated that this results in less than one (1) vehicle per signal cycle being added to the Falls/Seminary intersection.

Mr. Cornelius opined that based on the TIA, the failing traffic movement was westbound on Seminary Ave approaching the intersection. The eastbound road at that intersection comes from St. Paul's Schools and is privately owned. To accommodate the additional vehicles from the Torch Hill Project headed westbound, the Developer proposes to extend the left turn lane 190 ft.

He explained that 190 ft. is the length needed to accommodate 8 additional vehicles. (Dev. Ex. 15).¹ Mr. Cornelius stated that there is sufficient right-of-way to meet the proposed improvement. He added that the queues will be reduced by 500 ft. (Dev. Ex. 14, p. 18).

In regard to the request for Special Variance, Mr. Cornelius explained that the 'district standard' set forth in BCZR, §4A02.4.G.1.a, is to show that there will be no impact from the development on the 'F' rated intersection. In his opinion, without the proposed left-turn lane extension, the 31 new homes would have only a negligible impact in that Torch Hill Project will only generate 1 vehicles every 5 minutes in the morning peak hours, and 1 vehicle every 8 minutes in evening peak hours. With the proposed left turn lane extension, there will be no impact on the intersection. As a result, in his opinion, the Special Variance should be granted.

John Motsco, PE was accepted as an expert professional engineer, in the BCZR and in the BCC. He explained that the Torch Hill Project would be served by connecting to the public gravity-fed sewer system at manhole 59915 which is located between proposed Lots 27 and 28. He testified that DPWT confirmed via email dated September 2, 2021 that capacity existed for the 32 proposed homes. (Dev. Ex. 19).

PROTESTANT'S CASE

The first witness to testify for the Protestants was Randall Grachek, PE an environmental engineer employed by NewFields, Inc. Although he is not licensed as a professional engineer in the State of Maryland, Mr. Grachek was previously accepted as an expert before the OAH in Case No.: CBA-20-006, *In the Matter of CPC Falls Road, LLC (CPC Falls Road Project/Bluestem)* ("Bluestem"). As such, in this case, he was likewise admitted as a professional engineer, in waste water engineering, in the evaluation of sewer systems and their capacity. (Prot. Ex. 2).

¹ The TIA states extension is 150 ft. until it was discovered by the engineers that the roadway could accommodate another 40 ft.

Mr. Grachek explained that Baltimore County has a gravity-fed sewer system with three (3) main trunks lines (Jones Fall; Roland-Run; Towson Run) which flow into the interceptor line under Lake Roland and then out to Baltimore City waste water treatment plants. While he has not visited the Property since the *Bluestem* case, upon his review of the sewer maps provided by the County, the sewage from the proposed project will end up in the Lake Roland interceptor. (Prot. Exs. 4, 5). The County data obtained by Protestant's counsel for the Roland Run interceptor was for 2019 and designates each service area by number, provides the acreage, as well as both the numbers for the upstream and downstream manholes and the coefficient for each pipe. (Prot. Ex. 6).

As in the *Bluestem* case, Mr. Grachek referred to a complaint filed on July 26, 2005 by the Environmental Protection Agency ("EPA") against Baltimore County in the United States District Court of the District of Maryland, Northern Division, Case No.: 1:05-cv-02028-AMD, regarding the discharge of tens of millions of gallons of untreated wastewater containing raw sewage into navigable waters and waters of the State beginning in 1997. (Prot. Ex. 8). Those waters included Towson Run, Lake Roland and the Jones Falls. The lawsuit resulted in a Consent Decree ("CD") dated September 21, 2005 in which the County was provided a legal framework and direction to eliminate sanitary sewer overflows ("SSOs"), the term used to describe when a sewer pipe reaches overcapacity causing sewage to flow into waterways. (Prot. Ex. 7). Mr. Grachek explained that, under the CD, the County was charged with conducting a full evaluation of the system, inspecting it to determine the condition of the pipes, and modeling it with different weather events to determine whether the pipes were at overcapacity. Toward that end, the County hired consulting engineering firm Rummel, Klepper & Kahl, LLP ("RKK") to perform the study. RKK evaluated, inspected, and modeled the system using software to input data showing where the pipes were at

capacity during both dry and wet weather events. (Prot. Ex. 9, 10). It showed 541 defects in a single trunk line (Sewer ID 6888-6887). (Prot. Ex. 18). Specifically, RKK studied 5 different storm events: (1) 2-Year, 6-hour storm; (2) 2-year, 24-hour storm; (3) 10-year, 6-hour storm; (4) 10-year, 24-hour storm; and (5) 20-year, 24-hour storm. (Prot. Ex. 10). RKK prepared a Long Term Capacity Report dated November, 2012 (“RKK-LTC 2012 Report”).

Mr. Grachek clarified that he did not review the RKK modeling but assumed it was correct. He also did not personally investigate or perform his own evaluation of the sewer system but relied upon the results in the RKK-LTC 2012 Report. Mr. Grachek emphasized that the RKK-LTC 2012 Report recommended that the County take corrective action, depending on the storm event, which actions included installing *relief sewers* as shown by the red lines on the maps attached thereto. For the 10-year, 6-hour event, the 10-year, 24-hour event, and the 20-year, 24-hour event, he stated that the RKK-LTC 2012 Report specifically *required* that a relief sewer be installed between manholes (“MH”) 6950 and 22009 of various lengths in linear feet, depending on the storm. (Prot. Ex. 10, p. 14). He explained that a relief sewer pipe is a storage unit which may include an underground vault or additional parallel piping designed to temporarily manage water during these storm events. The relief sewer recommended to be installed between MH 6950-22009 is in Essex Farm Park (the “Essex Farm Relief Sewer”). (Prot. Ex. 11).

He explained that the RKK-LTC 2012 Report also recommended upsizing a 10-inch pipe to an 18-inch pipe as shown by a pink line on the maps attached thereto. (Prot. Ex. 10, p. 14). Finally, the RKK-LTC 2012 Report at Table 6.1 recommended that, in conjunction with installation of the relief sewer, certain manholes be sealed as reflected by yellow circles on the maps. (Prot. Ex. 10, p. 14). He also showed a 2019 photograph of manhole 6888 with its lid ajar which in his view, is due to the surcharge pushing out the manhole cover. (Prot. Ex. 17).

Mr. Grachek researched on My Neighborhood GIS to determine whether the Essex Farm Relief Sewer proposed in the RKK-LTC 2012 Report had been installed and he discovered that it had not. He reviewed an email dated April 29, 2022 from the Chief, Sewer Design Section of DPWT, which also confirmed that the Essex Farm Relief Sewer had not been installed by the County. (Prot. Ex. 16). Mr. Grachek acknowledged that he only investigated whether the Essex Farm Relief Sewer had been installed; he did not know whether the County had performed any other improvements pursuant to the CD. He did not request nor did he review any Certificates of Completion for work performed by the County.

Additionally, he also reviewed a 2019 evaluation by the County of the sewer pipes and opined that the County failed to consider the degradation of each pipe in evaluating their capacity, as shown by the fact that the manning coefficient on the chart remained at .013 for each pipe. (Prot. Ex. 6). He explained that the manning coefficient relates to how rough or smooth the inside of each pipe is. With this data, he opined that the County did not evaluate the pipes for wet weather events. He further opined that this data shows that the Lake Roland interceptor pipe is not a good design, is at overcapacity, will always leak, and in his opinion, must be replaced. Mr. Grachek did not conduct any investigation or evaluation of the sewer system himself, nor did he do any modeling.

Mr. Grachek also reviewed the County's water sampling results from Lake Roland and noted that the sampling from May 23, 2022 indicated that E coli levels were greater than 2,420. (Prot. Ex. 20). He stated that the Code of Maryland Regulations ("COMAR") sets the geometric mean standard at 126. (Prot. Ex. 19). While acknowledging that E coli levels were only 43 on June 1, 2022, and 13.8 on June 15, 2022, he opined that the 2,420 result on May 23, 2012, could only have been the direct result of sewage leaking into Lake Roland from the interceptor. He

believed these levels prompted the County to erect 'Stream Sense' signs at Lake Roland in 2019 warning residents about SSOs. (Prot. Ex. 21).

For the Torch Hill Project, he stated that for the 32 proposed units, the sewage system could be designed using one of two methods: (1) 90 gal/per day per resident; or (2) 150 gal per bedroom per day. He calculated a normal flow from the Torch Hill Project would be 12,000-14,000 gal per day. He then opined if the sewage flow from the Torch Hill Project was the only additional flow into the existing sewer system, it would not have a negative impact. However, he added that if there were many developments over time, and no improvements were made, it would overburden the system which already has known defects. Accordingly, in his opinion, based on industry standards, he would not add flow to this system which is already discharging. He agreed that his opinion is based on the 2012 results in the RKK-LTC 2012 Report.

The next witness to testify was Beth Miller, a member of the executive committee for Green Towson Alliance, a group created in 2015 to monitor development in the County. Ms. Miller investigated development applications within the Jones Falls Sewershed since 2012. She created a chart listing developments which were proposed to be developed, were under construction and were existing. (Prot. Ex. 24). The chart was last updated on September 14, 2020. It lists the estimated sewage for each development based on square feet of the particular project.

DEVELOPER'S REBUTTAL CASE

Mickey Cornelius provided rebuttal testimony that the document provided by Protestant entitled *Methodology Used To Determine Geographic Limits of Traffic Areas Around Deficient Intersections* (Prot. Ex. 1) is from an unknown source and it does not provide the 'district standard' in BCZR, §4A02.4.G.1.a. Mr. Cornelius stated that the district standard in BCZR, §4A02.4.G.1.a is not the LCM but whether the development results in a net zero impact to the failing intersection.

Protestant's document is used to determine traffic sheds around failing intersection. The traffic shed here was verified on maps maintained by DPWT.

John Motsco, PE also testified in rebuttal to respond to Mr. Grachek's testimony concerning the capacity of the County sewer system in the Jones Falls Sewershed. Mr. Motsco stated that Mr. Grachek relied heavily on the RKK-LTC 2012 Report as the basis for his opinion that each one of sewer repairs recommended therein was required to be performed by the County. (Prot. Ex. 10). Mr. Motsco explained that the RKK-LTC 2012 Report contains a list of suggested repairs and was only Step 2 of the Consent Decree process. Mr. Motsco stated that those suggested repairs were only a non-binding, guide based on extreme weather events, and were not required to be performed under the CD for the Jones Falls Sewershed. (Prot. Ex. 7). He explained that the actual required repairs were approved by both EPA and Maryland Department of Environment ("MDE"), and are contained in the Sewershed Repair, Replacement and Rehabilitation ("SRRR") Plan dated December, 2012 (the "2012 SRRR Plan"). (Prot. Ex. 9). Additionally, a Performance Assessment Report dated May 26, 2021 was prepared by RJN Group, Inc. and details the 2012 SRRR Plan work performed by the County ("the 2021 Performance Assessment Report"). (Pet. Ex. 25).

Using Map 6-1 entitled *Sewer, Manhole and Hydraulic Corrective Action Recommendations* which was attached to the 2012 SRRR Plan, Mr. Motsco explained that Map 6-1 depicts the required sewer repairs for the Jones Falls Sewer Shed, and shows by way of a light blue line, the direction of sewage flow from Manhole 59915 to which the Torch Hill Project would connect, as it travels south through the sewer system. (Pet. Ex. 22). The yellow-shaded area on Map 6-1 contains sub-sewer sheds which were determined by the RKK-LTC 2012 Report to exhibit excessive inflow and infiltration ("I&I") as a result of storm water entering the sewer

system. Additionally, he stated that a valve at Texas Station was found to be leaking 100,000 gallons per day of raw sewage into the Jones Falls Watershed. The repairs for that sub-sewer shed area included relining sewer pipes and reconstructing/relining manholes. The sewage from Torch Hill Project will not go through the yellow sub-sewer sheds which is upstream from the Property. All of the required improvements within the yellow sub-sewer sheds comprising approximately 100,000 linear feet have been performed as confirmed by the Certificates of Substantial Completion. (Pet. Ex. 23). Mr. Motsco opined that those improvements, as well as the repair of the Texas Station valve, would increase sewer system capacity downstream during wet weather events, thereby reducing the potential for SSOs.

The area of Essex Farms Park on Map 6-1 is located at the junction of meter basins BC11, BC07 and BC06. Under the 2012 SRRR Plan, the extent of the required repair is only a lining for that sewer pipe (not a relief sewer) and that lining has not been installed. Within the Torch Hill sewage path (blue line on Map 6-1 of the 2012 SRRR Plan), the improvements proposed were only linings and reconstructions under SRRR Plan; no relief sewers or upsizing of pipe sizes were required to be performed in the sewage path. Based on the County Quarterly Reports and Performance Assessment Report, he stated 'almost all' sewer work within the Torch Hill sewage path (blue line) has been performed. (Dev. Ex. 22).

For the Torch Hill Project, Mr. Motsco testified that the maximum sewage peak flow would be 10,000-15,000 gallons per day. Taking into account the Texas Station valve repair alone, he opined that the sewer system has more than enough capacity to accommodate the sewage flow from this Project. The basis for his opinion was the County's confirmation via email from David Bayer of DPWT dated September 2, 2021, that the connection to Manhole 59915 has adequate capacity to service the 32 proposed homes. (Pet. Ex. 19).

Mr. Motsco also explained the Performance Assessment Report for the Jones Falls Sewershed prepared by RJN Group, Inc. dated May 26, 2021 was Step 4 of the CD process (the “2021 Performance Assessment Report”). (Dev. Ex. 25). The 2021 Performance Assessment Report monitored and analyzed the performance of the 2012 SRRR Plan required improvements to determine if they were successful. The conclusion reached was that the work was performed and that the overall system capacity has been improved.

In regard to the photograph of Manhole 6888 which Mr. Grachek opined needed repair. Using My Neighborhood Maps, Mr. Motsco located MH 6888, went into the field to take a photograph of it, along with a photograph showing that it was cast in February of 2020. (Dev. Ex. 24). Using his recent photographs, Mr. Motsco testified that the Protestant’s photograph from 2019 did not reflect the current condition of the MH as it had obviously been repaired.

In regard to E coli readings in Lake Roland, he testified that E coli comes from many sources, including animals, and that a determination cannot be made that the results came from the sewer system. He determined there were 5 testing locations in Lake Roland which was consistent with the 5 testing results on Baltimore County website as produced by the Protestants. (Dev. Ex. 26). Upon further investigation, he stated that the County, through Environmental Health Services (“EHS”), regularly conducts water sampling at all of its recreational areas including bathing beaches and public swimming pools to warn public of health risks. (Dev. Ex. 27).

In Mr. Motsco’s opinion, the source of contamination for E coli cannot be directly attributable to the sewer system. E coli comes from both human and animal sources. The sampling results do not distinguish between those sources because the purpose of the sampling is to warn people if any E Coli exists. He described Lake Roland as an area of high community use and has a dog park in the area where sampling occurs. In regard to the Stream Sense sign photos relied

upon by Mr. Grachek, Mr. Motsco did not observe any Stream Sense sign at Lake Roland when he was there the day before his rebuttal testimony. (Dev. Ex. 29). Mr. Grachek has not visited Lake Roland since 2019. Baltimore County provides notice to the public of water advisories and closings but no such advisory or closing was noted on the County website for Lake Roland. (Dev. Ex. 30).

Mr. Motsco testified that the Jones Falls Sewershed comprises 40 square miles, with 67,000 people living within its boundaries, but only 1/3 of that area was served by public sewer. (Dev. Ex. 28). That leaves 2/3 of the Jones Falls Sewershed area (45,000 people) who served by private septic systems as shown by the hatching on the map of the private septic systems outside of the URDL. (Dev. Ex. 28). With regard to the sewage issues, he opined that the Torch Hill Project complies with all rules, laws and regulations; he did not see any non-compliance warranting disapproval of the Greenlined Development Plan.

In cross examination, Mr. Motsco stated that he had not reviewed the County's sewer capacity analysis for individual developments. (Prot. Ex. 6). While he acknowledged that the County evaluates sewer capacity for each development based on dry weather conditions, this analyses is not inconsistent with the CD. (*Id.*). The CD directed the County to analyze the sewer system in both dry and wet weather, but did not require upgrading or improving the system based on a particular wet weather model (storm event). Mr. Motsco agreed that the goal of CD was to eliminate SSOs through the repair and maintenance of the existing sewer system. Under the 2012 SRRR Plan, there was no need to make improvements to provide for excess capacity because water should not have been leaking into the system in the first place. He reiterated that, under the CD, the County was given the freedom to use their judgment in deciding what repairs/replacements would be performed. In his view, the County has met all requirements of the CD for Jones Falls

Sewershed not just the 4 meter basins/sub-sewer sheds upstream from Essex Farm Park. He added that there is one (1) active SSO at Marnat Rd. located at City/County line caused by an undersized main. This defect must be corrected by the City. Regardless, the Torch Hill Project does not drain through Marnat Rd.

Mr. Motsco agreed that the Essex Farm relief sewer recommended in the RKK-LTC 2012 Report has not been installed because it was not required under the 2012 SRRR Plan to be installed. The maps attached to the 2021 Performance Assessment Report confirm that all necessary repairs and rehabilitation for the Jones Falls Sewer Shed. The Certificates of Substantial Completion were not provided for all Sewer Sheds in Jones Falls but only for 4 meter basins (BC02, BC03, BC04, BC09) which were available on County website. Yet, Mr. Motsco opined that because 100,000 ft of sewer relinings and rehabilitation within those 4 sub-sewersheds/meter basins has been completed, and the repair of the Texas Station valve where previously ¼ million gallons of sewage was passing through that valve had been corrected, those improvements alone would offset any increase in flow from Torch Hill Project. In his view, there would be capacity within the sewer system for this Project. He added that the active SSOs below the Property have “not been active as of late” which in his opinion, is an indication that the repairs upstream have worked. He emphasized that the County was given freedom to determine which areas of the system needed immediate repairs and which repairs should be repaired in the future. He confirmed that the County chose the 2-year and 10 year - 6-hour storm events as its storm models and designed the repairs with those 2 storm events in mind.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The BCC provides that the “Hearing Officer *shall* grant approval of a development plan that complies with these development regulations and applicable policies, rules and regulations.”

BCC § 32-4-229 (emphasis added). In *People's Counsel v. Elm Street Development, Inc.*, 172 Md. App. 690 (2007), the Court of Special Appeals held that if the county agencies recommend approval of a development plan, it is “then up to [protestants] to provide evidence rebutting the Director’s recommendations.” *Id.* at 703. It should also be noted that in Baltimore County “the development process is indeed an ongoing process, and the hearing officer’s affirmation of the plan is just the first step.” *Monkton Preservation Association, et al. v. Gaylord Brooks Realty Corp.*, 107 Md. App. 573, 585 (1996). Indeed, the County agencies will continue to review the Developer’s evolving plans and construction activities through every phase of the development process to insure compliance with all County laws and regulations.

I. Sewer Capacity.

A. The Bluestem Case.

A review of the *Bluestem* Development Plan Opinion and Order by ALJ Beverungen dated August 30, 2019 is necessary here given Mr. Grachek’s testimony in both cases and given that the capacity of the Jones Falls Sewer Shed was the definitive reason for the denial of that development plan by both the ALJ, and as affirmed by the Board of Appeals.

In the *Bluestem* Opinion, the ALJ recited that Mr. Grachek had reviewed “certain documents, primarily the many reports prepared by RKK” and, based on his review of “those documents,” Mr. Grachek opined that “it was not acceptable to add any more sewage to the system since it is over capacity at the present time.” (*Bluestem*, p. 12). In making his fact findings, the ALJ only references the “evaluation” and “study” conducted by RKK which is the RKK-LTC 2012 Report. Although available at the time of the *Bluestem* hearing, the ALJ does not specifically mention the SRRR 2012 Plan. Relying on the RKK-LTC 2012 Report, the ALJ emphasized that “the Lake Roland interceptor had 541 defects, more than any other pipe segment in the Jones Falls

watershed.” (*Bluestem*, p. 23). ALJ Beverungen wrote that RKK “recommended Baltimore County install relief sewers for the Lake Roland & Jones Falls interceptors, which could help to address the overcapacity issues in this area.” (*Bluestem*, p. 23).

Assuming the ALJ was provided with both the RKK-LTC 2012 Report, and the SRRR 2012 Plan, it is certain that he did not have the benefit of the 2021 Performance Assessment Report given that it had not yet been created when the Opinion was written. Importantly, the ALJ mentioned in *Bluestem*, that he was not provided with any evidence of repair, replacement or rehabilitation of the sewer system defects by the County:

There is no evidence in the record to suggest Baltimore County had undertaken such measures, and Mr. Grachek opined ‘the systemic problems identified does not warrant additional sewage being added to the systemic problem, even if it were just a little bit’.

(*Bluestem*, p. 23). The *Bluestem* opinion quotes Mr. Grachek’s testimony wherein: “he [did] not believe the improvements recommended by RKK have been completed.” (*Bluestem*, p. 12). Also informing the ALJ’s decision in *Bluestem* was the lack of rebuttal evidence to counter Mr. Grachek’s testimony:

The Developer did not contradict any of the substantial evidence presented on this point by Protestants and it did not present testimony from an engineer or sanitarian to the effect that the existing sewer is sufficient to accommodate existing and proposed demand. Instead the Developer cites the fact the subject property is not identified as deficient on the County’s basic services map. I believe such reliance is misplaced.

The *Bluestem* Opinion makes clear that no evidence was provided as to planned or completed repairs, replacements and rehabilitation in the Jones Falls Sewershed. (Prot. Ex. 9, p. 6-18). (Prot. Ex. 29, p. iii). Based on the 2012 SRRR Plan and 2021 Performance Assessment Report we know

that work required to be performed had been performed prior to the *Bluestem* Opinion.

B. 2005 Consent Decree.

At the center of debate between the Parties here is whether the RKK-LTC 2012 Report controls the repairs, replacement and/or rehabilitation of the sewer system, or whether the 2012 SRRR Plan dictates the plan of repair. Mr. Grachek conceded here that he did not know what improvements had been completed by the County since *Bluestem* in 2019; he had only researched whether the Essex Farm relief sewer had been installed at between manholes 6950 and 22009. Because of this, he concluded here, as in *Bluestem*, that the Torch Hill Project should not be approved because the sewer system is still at overcapacity. Conversely, Mr. Motsco opined that the repair, replacement and/or rehabilitation by the County, not only in the area upstream of Essex Farm (i.e. BC02, BC03, BC04 and BC09) but all of the required structural improvements have provided the necessary capacity downstream in the system. Putting aside the expert testimony for a moment and considering only the documents, a review of the CD, the RKK-LTC 2012 Report, 2012 SRRR Plan, and the 2021 Performance Assessment Report actually sheds light on the issue.

CD provides the framework for the County to follow in evaluating, inspecting, modeling and repairing/replacing/rehabilitating the deficiencies found in all 32 Sewersheds in the County. (Prot. Ex. 7). The express purpose of the CD was to “eliminate[e] Sanitary Sewer Overflows (“SSOs”). (Prot. Ex. 7, pp. 3-4; p. 8). SSOs are defined in the CD as “any spill, release, or discharge from the Collection System, including all Building Backups.” (Prot. Ex. 7, pp.7-8). The effective date of the CD is the date entered by the Court, or September 21, 2005. (Prot. Ex. 7, p. 5).² Both the EPA and the MDE were parties to the CD and were given authority to review the

² The CD was signed by Honorable Andre M. Davis on September 20, 2005 which ordered that the Clerk enter the executed CD in the docket and to close the case subject to the Court’s continuing jurisdiction to enforce the CD. (See Case No.: 08-0919 file). The copy provided by the Protestant as Protestant Ex. 7 is not signed by the Court.

County's performance by and through quarterly reporting and as otherwise directed therein. (Prot. Ex. 7, pp. 8, 11, 14, 15, 16, 22, 23, 60, 67).

The requirement for the County to prepare the 2012 SRRR Plan is set forth in Section 10.A of the CD. That Section states that upon the County's completion of the sewer system inspection, and after consideration of the monitoring data, the 2012 SRRR Plan would be prepared for the Jones Falls which would serve two (2) purposes:

- (1) describe the deficiencies identified through the sewer system inspection; and
- (2) provide for the performance of repair, replacement, rehabilitation or other corrective action necessary to address those deficiencies.

(CD, Section 10.A).

For all 32 Sewersheds, the County had until early 2020 to complete implementation of the SRRR Plans. (Id.). Pursuant to CD - Sections 10.B and 10.D, both the EPA and MDE were required to approve the 2012 SRRR Plan for the Jones Falls Sewershed. Toward that end, Section 10.B of the CD *expressly* states that each SRRR Plan "shall provide for future repair, replacement, and rehabilitation" of the sewer system for each Sewershed by no later than 4 years after EPA and MDE approve each SRRR Plan. That Section further provides that the County had the discretion to 'prioritize' the work to be performed in each Sewershed based on an evaluation of the rehabilitation activities that are expected to contribute most effectively to the prevention of SSOs.

Under the CD, each SRRR Plan was required to: "Identify all corrective actions taken (including the date completed), or to be taken, by Baltimore County (including but not limited to preventative maintenance, repair, replacement, or rehabilitation) to address the deficiencies identified during inspection of the relevant Sewershed." (CD, Section 10.C.iii). The CD further directs that, *while taking into consideration the RKK-LTC 2012 Report analysis performed for*

each Sewershed, the 2012 SRRR Plan for each Sewershed would propose a plan and schedule for implementing rehabilitation and other corrective action determined necessary to correct deficiencies identified during inspection. (CD, Section 10.C.vi).

The CD also permitted the County to determine the range of storm events applicable for each Sewershed. (CD, Section 10.C.viii, ix). Notwithstanding that the RKK-LTC 2012 Report which simulated five (5) different storms and made repair/replacement recommendations based on each storm event, under Section 9.C.ii(b) of the CD, the County chose the 2 yr. and 10 yr./6 hr. storms because they were *more representative* of actual storm events experienced in Baltimore County. (Prot. Ex. 9, p. 6-12, 6-13). This storm selection matters because both the selected repairs, replacements and/rehabilitations, and the performance testing of completed repairs, were based on those 2 model-predicted storm events, and not all 5 storm events in the RKK-LTC 2012 Report.

Moreover, CD Section 10.D unequivocally states that **each approved SRRR Plan shall be incorporated into, and become enforceable under, the CD**. Conversely, the CD, Section 9.C describes each Long-Term Capacity Report as prepared for each Sewershed as an *evaluation* (or study as described in *Bluestem*) comparable to another evaluation (i.e. the ‘Inflow/Infiltration Evaluation’). Because the LTC Report is an evaluation/study needed to prepare the SRRR Plan, it was required to be completed prior to the date by which the SRRR Plan for each Sewershed was due, and the County was required to summarize and incorporate the results of each LTC evaluation into each SRRR Plan. (CD, Section 9.C). As background information and data, the RKK-LTC 2012 Report is one of the many appendices of the 2012 SRRR Plan (Appendix L). Conversely, the 2012 SRRR Plan is not an appendix to the RKK-LTC 2012 Report.

When describing each LTC Report as an *evaluation*, CD, Section 9.C.ii directs the County to use “the data and information collected and analyzed” [i.e. inspection (CD, Section 8) and

rainfall/flow monitoring (CD, Section 9] to evaluate whether the projects the County proposes to complete pursuant to CD, Section 10 (i.e. SRRR Plans) will “ensure adequate long-term transmission capacity in the Collection System.”

As above, by its express language, the CD unambiguously differentiates between the RKK-LTC 2012 Report and the 2012 SRRR Plan, the former is the precursor evaluation/study containing data collected, and the latter is the actual plan of repair. Given that both documents were written by RKK, and are dated within 1 month of each other, it would make no sense that both provided the approved plan of repair for the Jones Falls Sewershed. It is significant for discussion here that the **2012 SRRR Plan is incorporated into and enforceable as part of the CD**, and was approved by the EPA and MDE as to not only the repairs proposed to be completed, but the time line in which the repairs must be completed. The RKK-LTC 2012 Report is only incorporated into the CD by virtue of it being one of the many appendices to the 2012 SRRR Plan.

C. 2012 SRRR Plan.

Turning next to the language in the 2012 SRRR Plan, it is consistent with the language in the CD, and describes the same 2 purposes for the 2012 SRRR Plan as follows:

- (1) describe the deficiencies in the sewer system (as identified in the RKK-LTC 2012 Report); and
- (2) recommend repair, replacements, rehabilitation or other corrective action necessary to address those deficiencies.

(Prot. Ex.9, p. ES-1). The 2012 SRRR Plan specifically acknowledged that model-predicted corrective actions suggested in the RKK-LTC 2012 Report were ‘recommendations’ and were ‘defined’ after ‘sewer and manhole inspections, smoke and dyed-water testing, and night-time flow isolation investigations.’ Some were superseded as follows:

Some identified structural and condition related corrective actions to correct defects were superseded by the hydraulic

corrective action recommendations, and these defects will be corrected when the hydraulic corrective actions are completed.

(Prot. Ex. 9, p. ES-1). Both the capacity improvements and the structural condition improvements are shown graphically on Map 6-1 attached to the 2012 SRRR Plan. (Prot. Ex. 9).

After the I&I analysis was conducted, the results were that BC02, BC03, BC04 and BC09 meter basins or sub-sewersheds were exhibiting a high degree of I&I into the sewer system and were contributing to the SSOs. (Prot. Ex.9, p. 6-3). Those meter basins are depicted in yellow-shaded area on Map 6-1 of the 2012 SRRR Plan. Additionally, meter basins BC05, BC07, BC14 and BC16 also revealed excessive I&I flowing into the sewer system. (*Id.*). Because of the high degree of I&I, those meter basins received priority, comprehensive repair and rehabilitation to eliminate the I&I as depicted on the legend on Map 6-1 of the 2012 SRRR Plan. (*Id.*).

Notably, the sewage from those repaired meter basins flows through the Essex Farm area (between BC07 and BC11) where the RKK-LTC 2012 Report recommended a relief sewer be installed (MH 6950-22009) to accommodate more sewage capacity. While it is undisputed that this relief sewer was not installed, the 2012 SRRR Plan (Section 6 – *Corrective Action Recommendation Plan*) does not list it as a required repair/replacement. In fact, Section 6 of the 2012 SRRR Plan explains that detailed corrective actions were *selected* by the County, and approved by EPA and MDE, after the manhole, sewer and capacity deficiencies were inspected.

By way of example, while the RKK-LTC 2012 Report recommended sealing five (5) manholes, the 2012 SRRR Plan more specifically detailed that manholes would be either cleaned; frame seals would be added; inflows would be inserted; manhole linings inserted; manholes would be replaced; frame and cover for manhole would be replaced; and/or the frame and cover of the manhole would be reset. (Prot. Ex. 9, p. 6-7). For sanitary sewer improvements, the 2012 SRRR

Plan directed that the specific improvements were: sewer linings would be inserted; insitu (in place) repairs made; point repairs made (excavate and replace); lateral connection repairs would be made; and/or a combination of these repairs if needed to repair a defect. The exact repairs for both manholes and sewers were also provided by meter basin number in Table 6-5.3 of the 2012 SRRR Plan. (Prot. Ex. 9, p. 6-9). Additionally, it was decided under the 2012 SRRR Plan that improvements for the four (4) pumping stations in the Jones Falls Sewershed would take place, as well as improvements to the force mains within those pumping stations. (Prot. Ex. 9, pp. 6-10, 6-11).

In regard to planned sewer capacity improvements for which a relief sewer is designed, the 2012 SRRR Plan details that capacity in the system would be *improved by virtue of the sewer linings, sealings, manhole linings, and manhole sealings*. (Prot. Ex. 9, p. 6-11, 6-12). The County determined, and the EPA and MDE both approved, that the most logical approach to addressing model-predicted SSOs was to complete the comprehensive I&I reduction *rehabilitation* of the manholes and sewers:

1. Complete comprehensive I&I reduction rehabilitation of public manholes and sewers within SSA's exhibiting excessive I&I or other areas that contribute to model predicted SSOs determined by model simulations using the 10-Year/6-hour SCS Type II storm event.
2. Complete select capacity improvements based on a model simulation of the 10-Year /6-hour SCS Type II storm event.

(Prot. Ex. 9, p. 6-16). Based on this language, it is clear that the County concluded that the specific improvements listed above for the sewers and manholes were the capacity improvements needed upstream from the Essex Farm sewer pipes to comprehensively reduce I&I. The planned capacity improvements were listed by meter basins and include BC02, BC03, BC04 and BC09. (Prot. Ex. 9, p. 6-16).

The 2012 SRRR Plan also confirmed that the timeline for completing the improvements for the Jones Falls Sewershed as contained in the 2012 SRRR Plan, was within 6 years of the EPA/MDE approval as follows:

6.15 Corrective Action Implementation Schedule (CD Ref. P.10.Cvi)

The recommended improvements to the Jones Falls Sewershed's collection system which are contained in this SRRR Plan are estimated to be completed within six (6) years of the EPA and MDE's approval of this Plan per Paragraph 10.B of the CD.

(Prot. Ex. 9, p. 6-17). The EPA and MDE approved the 2012 SRRR Plan in 2013. (Prot. Ex. 29, p. iii). Those planned improvements, which were already completed as of December of 2012 (the date of the 2012 SRRR Plan), were depicted on Map 6-1. (Prot. Ex. 9, p. 6-18). Consequently, the deadline for completing the 2012 SRRR Plan improvements was 2019.

Lastly, the language in the 2012 SRRR Plan states that remedial work to eliminate SSOs at the 3 County non-pumping stations had been complete. The only active SSO is Marnat Rd. station because the remaining work has not been completed by Baltimore City; the defect in that sewer pipe is on property located in the City. (Prot. Ex. 9, pp. ES-2; 2-2).

D. 2021 Performance Assessment Report.

The 2021 Performance Assessment Report prepared by RJN Group, Inc. ("RJN") provides further evidence that the 2012 SRRR Plan, not the RKK-LTC 2012 Report, provides the detail of the approved work for the Jones Falls Sewershed. It points out that there were actually two (2) relief sewers constructed in the Jones Falls Sewershed, neither of which was for Essex Farms:

Section 6 of the 2013 SRRR Plan provides detail of the work planned in the Jones Falls Sewershed. Targeted rehabilitation to correct structural defects was completed throughout the Sewershed. Comprehensive rehabilitation to eliminate sources of I&I was completed in SRRR meter basins BC02, BC03, BC04 and BC09.

Rehabilitation construction in the four meter basins (BC02, BC03, BC04 and BC09) targeted for comprehensive rehabilitation for I&I reduction was performed from 2015 through 2019. Comprehensive rehabilitation construction for I&I reduction in basins BC02 and BC03 began in November 2015 and was completed in September 2018, in basin BC04 construction began in May 2016 and was completed in September of 2019. Two relief sewers were also constructed in Jones Falls to increase the capacity of the system, one near Coppermine Terrace and the other relief sewer was constructed within Towson Town Boulevard and will be put in serving in the future.

The 2021 Performance Assessment Report also informs that the relief sewer for Coppermine Terrace has been completed. (Prot. Ex. 29, p. 12). This ‘planned’ relief sewer was shown to be effective in eliminating capacity deficiencies and would prevent future SSOs. (Prot. Ex. 29, p. 12). This lends further support for the conclusion that Essex Farm Relief Sewer was not selected as an improvement under the 2012 SRRR Plan.

Moreover, the results of the 2021 Performance Assessment confirmed that the completed rehabilitation projects which occurred between 2015 through 2019, were effective in reducing groundwater infiltration. (Prot. Ex. 29, p. iii). RJN addressed the effectiveness of the repair, replacement and rehabilitation projects as follows:

4.0 Effectiveness of Repair, Replacement and Rehabilitation Projects

This section evaluates the effectiveness of corrective actions completed in the Jones Falls Sewershed to address capacity and structural issues outlined in the Jones Falls SRRR Plan. The evaluation was performed based on a review of County-provided post-construction inspection records, improvements implemented based on the 2013 SRRR Plan (Section 6.0), and model simulation results using the updated hydraulic model recalibrated based on pre- and post-rehabilitation flow monitoring data.

RJN noted specifically that rehabilitation on public manholes, laterals and sewers within areas that

exhibited excessive I&I reduced model-predicted SSOs. RJN confirmed that the rehabilitation work for I&I removal in BC02, BC03, BC04 and BC09 was completed. (Prot. Ex. 29, pp. 12-13). Certificates of Completion were also provided for the comprehensive work in the area of BC02, BC03, BC04 and BC09 showing that all of that work has been completed upstream of the Essex Farm Park. (Dev. Ex. 23).

From the legend on Map 2 of the 2021 Performance Assessment entitled *Jones Falls Sewershed Repair, Replacement and Rehabilitation Plan, Rehabilitation Completed, rehabilitation work* on manholes and sewers was completed in the Essex Farm area including the following:

- * manhole lining (red circle);
- * lining and reset frame and cover (teal box, red circle); and
- * lining and internal frame seal (orange box, red circle). ³

It is important to note that the 2021 Performance Assessment Report does not only assess the completed work in BC02, BC03, BC04 and BC09 but also provides the results of pre- and post-rehabilitation flow monitoring which was reviewed by RJN to assess the effectiveness of all of the planned repair, replacement and rehabilitation work including both the pumping stations repairs and non-pumping stations repairs/closures. (Prot. Ex. 29, p. 2). This included an analysis of both dry and wet-weather modeling, and an evaluation of the frequency and causes of SSOs in the Jones Falls Sewershed between 2010-2020. The conclusion was that, after rehabilitation, I&I was reduced in BC02, BC04 and BC09. Any infiltration still shown in BC03 was determined to be caused by private septic systems within the MD Fairgrounds and appeared only with seasonal usage. (Prot. Ex. 29, p. 9). RJN concluded that a valve upstream of BC03 contributed to those results.

Wet weather flow capacity assessment was also conducted by simulating the County-

³ The electronic copy of Map 2 is clearer than the hard copy contained in the Protestant's Exhibits.

selected 2-year and 10-year, 6-hour storm events. Comparing the pre-rehabilitation models for all 5 storm events in the RKK-LTC 2012 Report showing predicted SSOs, with the post-rehabilitation condition for the 2 and 10-year, 6-hour storm events, the conclusion in the 2021 Performance Assessment Report was that the rehabilitation work decreased both the occurrence and volume of SSOs as follows:

During wet weather flow conditions in basins where comprehensive rehabilitation was completed, the Jones Falls pre-habilitation condition model predicts eight (8) SSOs for the 2-year, 6-hour, 21 SSOs for the 2-year, 24-hour storms, 23 SSOs for the 10-year, 6-hour storm, 34 SSOs for the 10-year, 24-hour storm, and 39 overflows for the 20-year, 24-hour design storm. (Table 4-1A).

Table 4-1B shows the predicted number of overflows in each meter basin under the post-rehabilitation condition. According to the results, the rehabilitation projects have decreased the occurrence as well as the volume of SSOs in the meter basins where rehabilitation work was completed. The model predicts no overflow for the 2-year, 6-hour, three (3) SSOs for the 2-year, 24 hour storms, four (4) SSOs for the 10-year, 6-hour storm, eleven (11) SSOs for the 10-year, 24 hour storm, and twelve (12) overflows for the 20-year, 24 hour design storm.

Table 4-2 shows the percentage of predicted overflow volume reduced in predicted SSO locations, for each meter basin under the five different storm conditions. For the post-rehabilitation condition, the predicted overflow is reduced between 70% and 100% when compared to the pre-rehabilitation condition.

(Prot. Ex. 29, p. 14). Of specific relevance here is that for the County selected 2 year, 6-hour storm event, the completed work has reduced the SSOs from 8 to zero. Under the 10-year, 6 hour model-predicted storm event, the completed work has reduced SSOs from 23 to 4.

Contrary to Protestant's argument that Map 3 of the 2021 Performance Assessment predicts SSOs along the sewage path from the Torch Hill Project (as drawn by Protestants in yellow) in fact, using the legend on Map 3, no SSOs are shown in red along the sewage path for the 2-year,

6-hour storm. Additionally, no SSOs are shown in yellow along the sewage path for the 10-year, 6-hour storm.⁴ The fact that SSOs appear during the model-predicted 2-year, 24-hour storm (orange) (near BC07 into and underneath Lake Roland) or for the 10-year, 24-hour storm (green), is not relevant here because neither of those 2 storm events are the storm events which apply to the County. (See CD, Section 9.C.ii(b)). As a result, Map 3 does not support the Protestant's cause.

On Maps 2 and 3 of the 2021 Performance Assessment, the sewage path from the Torch Hill Project (shown by yellow line created by the Protestants) is consistent with the Developer's sewage flow path indicated by a blue line drawn by the Developer on the Map 6-1 of the 2012 SRRR Plan. (Dev. Ex. 22).⁵ On neither of these sewage paths does the sewage from Torch Hill flow; it does not flow eastward and upstream between MHs 6950 and 22009 in the Essex Farm area. At best, the Torch Hill sewage will pass the convergence area of BC06, BC07 and BC11 and then head downstream. But again, the completed repair, replacement and rehabilitation of the upstream sub-sewersheds was approved by EPA and MDE to accommodate any capacity issue between MHs 6950 and 22009.

Mr. Motsco testified that, based on his review of County's Quarterly Reports and the 2021 Performance Assessment Report, 'almost all' of the 2012 SRRR Plan improvements have been completed in the blue sewage path line, including reconstructions and linings to further reduce I&I. (Dev. Ex. 22). However, acknowledged that all of the sewer linings downstream of the Torch

⁴ The hard copy of Map 3 shows the yellow line drawn by the Protestant's for the Torch Hill Project sewage flow. The electronic copy of Map 3 does not have the yellow line/path but is much clearer and easier to read than the hard copy.

⁵ The hard copy of Maps 2 and 3 show the yellow line drawn by the Protestant's for the Torch Hill Project sewage flow. The electronic copy of Maps 2 and 3 does not have the yellow line/path but is much clearer and easier to read than the hard copy.

Hill Project, as required under the 2012 SRRR Plan, and which are located in the direct path of sewage flow from the Torch Hill Project, have not been completed. Mr. Motsco confirmed that the remaining downstream improvements only include linings; there are no upgrades in the sizing of pipes, or relief sewers, required downstream of the Torch Hill Project.

Given that the completion date for the 2012 SRRR Plan improvements was 2019, it was not made clear during the hearing why all the improvements have not been completed. It is concerning to the undersigned that the downstream linings (whether for sewers or manhole or both) as required under the 2012 SRRR Plan - *in the direct sewage path for Torch Hill Project* - have not been installed. If linings have been planned, that means the sewers and/or manholes were determined to have defects, and those linings are necessary to correct those defects. While the Developer did not make clear how many downstream linings still need to be installed, or where those downstream linings need to be installed, the point is that the downstream linings need to be installed before any additional sewage from 32 homes in Torch Hill is added to the system. While it may be that 'almost all' of the required work for the Jones Falls Sewershed has been completed, and that DPWT confirmed that sewer capacity exists for the proposed 32 homes, I find that this particular unfinished work is necessary to correct any defects which still exist in the sewage path. (Dev. Ex. 19). Accordingly, prior to connecting the Project to the public sewer system, the completion of all work required under the 2012 SRRR Plan (whether linings for sewers, manholes or both) and which is within the sewage path from Torch Hill Project as shown by the blue line on Developer's Ex: 22, shall be completed as a condition of the Order.

E. E coli in Lake Roland.

Protestant contends that the County's E coli results for Lake Roland are the direct result of sewage leaking from Lake Roland interceptor. Mr. Grachek is not supportive of the Lake Roland

interceptor design and believes it must be replaced. The basis for his opinion is that on May 23, 2022, the County collected water samples from Lake Roland and tested for E coli as it does for other County recreational waterways. The E coli results for May 23, 2022 were in excess of 2420 geo metric means which was far in excess of the COMAR 26.08.02.03-3.A(1)(a) geo metric mean of 126. (Prot. Exs. 19, 20). Between April – June of 2022, the testing results for Lake Roland do show additional dates where the results were both above and below 126. For example, the results on dates immediately following May 23, 2022 shows the geo metric mean was only 13.8 on June 15, 2022, and was only 33.171 on June 1, 2022 – both far below the 126 threshold. If E coli levels are caused by the Lake Roland interceptor, than the geo metric mean would consistently be at higher levels; it would not spike to high and then low levels from week to week. For the results to vary from above the 126 geo metric mean to below, the logical conclusion is that result depends on the extent of the use of Lake Roland Park, which includes a dog park. There was no definitive evidence that the Lake Roland interceptor is leaking, particularly in light of the 2021 Performance Assessment Report which concluded that the approved repairs were effective. To contend that these E coli results are solely from human waste is mere speculation since no testing has made that determination.

There is further information directly countering this point. Mr. Grachek identified the Lake Roland interceptor by MH numbers: 6888 (upstream) and 6887 (downstream) which are both located in flow meter basin TSJF01. (Prot. Ex. 18). He emphasized here, as in *Bluestem*, that Appendix E of the 2012 SRRR Plan (entitled Table 4-3.4 – *Summary of Sewer Defects by Sewer Segment, Jones Falls SRRR – Collection System Investigation*) showed 541 defects for those MH numbers in meter basin TSJF01. (Prot. Ex. 18). This was further support for his position that the Lake Roland interceptor is leaking and must be replaced because it is at overcapacity. However,

the 2012 SRRR Plan explains that Appendix E (Prot. Ex. 18) was the result of manhole inspections using specialized pole mounted manhole camera. (Prot. Ex. 9, p. 4-2). Map 4-1 entitled *Sewer and Manhole Inspections Completed* shows that the Lake Roland interceptor was inspected and reviewed. Appendix E clarifies that in Manholes 6888-6887, 536 of the 541 defects were due to a defective pipe, surface or lining, but that none of the 541 were classified as ‘major defects.’ (Prot. Ex. 18, p. 22). If the interceptor was leaking, it would be a ‘major defect.’

The 2012 SRRR Plan at Table 6-4.2 further reads that with flow meter basin TSJF01, 4 of the manholes were in poor condition and 1 manhole required immediate attention. (Prot. Ex. 9, pp. 6-5, 6-6). Likewise, the sewer segments in flow meter basin TSJF01 at Table 6-4.5 show that of the 28 sewer segments reviewed, 6 were in poor condition and 10 required immediate attention. (Prot. Ex. 9, pp. 6-5, 6-6). Importantly, the 2012 SRRR Plan listed both manhole improvements and sanitary sewer improvements in Appendix O of the 2012 SRRR Plan. (Prot. Ex. 9, p. 6-7). Appendix O was not provided in the Protestant’s exhibits. Summarily, the specific sewer segments and manhole repairs for flow meter basin TSJF01 are also listed in Table 6-5.3 of the 2012 SRRR Plan and included:

- * 15 in-situ (in place repair);
- * 3,226 linear feet of sewer linings;
- * 2 point repair;
- * 14 lateral connection repair;
- * replacing 1 manhole frame and cover;
- * installing 4 frame manhole seals; and
- * installing 5 manhole linings.

(Prot. Ex. 9, p. 6-9). What is more, according to the legend on Map 2 of the 2021 Performance Assessment Report the work in flow meter basin TSJF01 has been completed. While the Protestant contends that Lake Roland interceptor must be replaced, the legend on Map 2 of the 2021 Performance Assessment Report confirms that no rehabilitation work was recommended in BC31

which is the flow meter basin where Lake Roland and the Lake Roland interceptor is located. (Prot. Ex. 29).

For the reasons set forth herein, subject to the conditions set forth in the Order, I find the sewer system has the capacity to accommodate 32 homes from Torch Hill Project and as such it meets requirements, rules, regulations and County policies set forth in BCZR, §4A02.3.G; BCC, §32-4-102(b); DPW Design Manual Sanitary Sewer; and PAI, Development Plans Review Manual.

II. Special Variance – ‘F’ Rated Intersection Falls Rd. and Seminary Avenue.

The only witnesses to testify in regard to traffic and the “F” rated intersection of Falls Rd. and Seminary Ave. were Developer’s traffic engineer, Mickey Cornelius; Angelica Daniels, Bureau Chief, Traffic Engineering and Transportation Planning of DPWT; and Kristopher Nebre, PE, Engineer III, Traffic Engineering and Transportation Planning of DPWT. The Protestant did not present any lay person testimony or expert testimony in regard to traffic issues. There were no citizens or property owners who testified about traffic.

As a starting point, it is undisputed that both Falls Rd. (MD Rt. 25) and Seminary Ave. (MD Rt. 131) are owned and maintained by the State of Maryland. Additionally, the signal at the intersection of Falls Rd/Seminary Ave. is also owned and maintained by the State of Maryland. Using the CLV and HCM methodologies - both of which are used by SHA - the Falls/Seminary intersection is rated as a ‘D’ intersection during the peak morning hours, and ‘C’ during evening peak hours. (Dev. Ex. 14, pp. 14-15). Given that the State does not rate the intersection as failing, the State has not, and likely will not, improved the intersection. Although the County has rated the intersection with an ‘F’ level of service for over 20 years, Ms. Daniels made clear that the County will not incur the cost to improve a State road. As a practical matter, any improvements

made to this intersection would have to be paid for with private funds by a developer.

BCZR, §4A02.4.G.2 requires the DOP to provide the ALJ with a report prior to consideration of the Special Variance. In this case, DOP did provide the HOH Report but deferred the issue to DPWT due to their expertise with traffic issues. (County Ex. 11A). At the beginning of the hearing, DPR, who typically represents DPWT, was not able to answer questions about traffic or the Special Variance Petition. In the interests of transparency, and to provide needed answers to questions on a central issue in the case, the undersigned requested the testimony from DPWT, notwithstanding the presumption that BCC, §32-4-226(c) and (d) presume that no comment from a County agency means the agency is not opposed to a development plan. Both Ms. Daniels and Mr. Nebre were able to provide answers to questions in regard to the applicable traffic shed, the 'F' rated intersection of Falls/Seminary, the County's use of the loaded cycle methodology, and whether the proposed left-turn lane extension will provide a zero net impact on the intersection. When Ms. Daniels confirmed that one of the duties of Traffic Planning and Traffic Engineering Section of DPWT is to provide technical assistance to the DOP, the deferral by DOP in its HOH Report to DPWT for the Special Variance issue made complete sense.

In regard to the Special Variance provision in BCZR, §4A02.4.G, it requires that the Special Variance Petition not violate the provision's purpose. That purpose is set forth in BCZR, §4A02.4.D.1 as follows:

D. Transportation.

1. Intent. The transportation standards and maps are intended to regulate nonindustrial development where it has been determined that the capacity of arterial and arterial collector intersections is less than the capacity necessary to accommodate traffic both from established uses and from uses likely to be built pursuant to this article.

I disagree with the Protestant's argument that the standard to apply in a Special Variance case under BCZR, §4A02.4.G is the LCM. This argument mixes the standard applied by the County to *rate* an intersection, from the standard to apply when a Petition is requested for what is essentially *a waiver or exception* (i.e. Special Variance) from the prohibition on issuing a building permit. The purpose for determining the 'level of service' is to assign a letter grade (i.e. a 'rating') to an intersection, and the purpose of rating an intersection, is to control the issuance of building permits at the outset. The 'F' letter rating is a 'red flag' on the file. The Special Variance, on the other hand, focuses on what impact the particular development will have on the intersection *rated* as *failing*, so that it can be determined whether or not the building permit restriction can be lifted for a project. If the impact from the development is net zero (due to a proposed improvement to the roadway and/or a TIA which calculates the impact as zero), then a waiver of the building permit moratorium can be granted.

And Mr. Nebre was clear in his testimony that in reviewing the TIA he was focused on the impact that the development would have on the intersection of Falls/Seminary to determine whether capacity would exist for the proposed and existing traffic in light of the improvement. He did not need to focus on the LCM rating as the *intersection had already been rated*. He added that if, the proposed improvements could also make the intersection function better, than that would be a good thing. Mr. Nebre is not a professional expert and is not accustomed to testifying in Court. I found his testimony to be objective and credible.

I also find that, based on the testimony of Mr. Nebre and Mr. Cornelius, after the proposed 190 ft. left turn lane extension (Dev. Ex. 15) is constructed, the capacity of the arterial and arterial collector intersections in this traffic shed will not be less than the capacity necessary to accommodate traffic from both established uses and from the Torch Hill Project. Said another

way, I find that, *after* the left turn lane extension is constructed, the demand or impact from the Torch Hill Project (i.e. the trips to be generated plus the existing trips) will result in a net zero impact to the intersection. The uncontroverted evidence was that the failing movement which generated the 'F' level of service rating is the westbound direction and specifically, vehicles queued to turn left on Falls Rd. Because the left-turn lane is too short to accommodate the amount of traffic, it restricts the movement of other traffic heading straight into St. Paul's Schools or right onto Falls Rd. The proposed 190 ft. left-turn lane extension is targeted to address the westbound direction and will accommodate the traffic generated from Torch Hill Project as determined by the TIA. Any delay from the private road eastbound from St. Paul's Schools will be handled by SHA with the signal light adjustment.

Contrary to Protestant's argument, until the County decides that it will no longer apply the LCM methodology, the LCM will still be used by the County to *rate* intersections; this case does not change that. To be sure, LCM is a conservative way to rate intersections and is limited to observations made by traffic counters during a 2-hour window; it does not predict future traffic conditions. Although conservative and limited, in hindsight, the LCM is not a bad thing for the County in regulating development; it stops the permit process until the roadway can be improved. When DPWT conducts annual traffic counts on Falls/Seminary, the level of service may remain at an 'F' rating. If it does, the surrounding community only stands to gain because any future development projects would be required to go through the same process as the Developer here.

But whether Falls/Seminary's *rating* improves or stays the same, the Special Variance does not require a finding that the County's level of service rating will be improved, only that the intersection will be able to accommodate the traffic generated by the Torch Hill Project. This is consistent with the purpose of the Transportation Basic Services Map (above) which is whether

capacity will exist at the intersection to accommodate both existing traffic and that generated by Torch Hill. It is also consistent with the required finding in BCZR, §4A02.4.G.1.a that the demand or impact from traffic generated by Torch Hill, will be less than that presumed by the district standard. In this case, I find that the proposed 190 ft. left-turn lane extension, along with the signal timing changes which SHA will perform, will not only increase capacity, but will reduce delays at the intersection.

Lastly, I also find the Petition for Special Variance will not adversely affect a person whose application was filed prior to the Petitioner's application in accordance with Section 4A02.3.G.2.b, as there was no evidence that any applications for reserve capacity use certificates are on file. The Developer here is not seeking a reserve capacity use certificate here. As a result, that provision is not applicable in this case.

III. Setback Variance.

The Petition for Variance from BCZR, §1B01.2.C.b seeks to allow a 0 ft front yard setback for an existing home which fronts on Seminary Ave. and was constructed in the 1940s-1950s. (Dev. Ex. 6, photos 15 and 16). When the DOP requested that the home remain, it was incorporated into the site layout. The existing home is part of the scenic route on Seminary Avenue as shown in the Scenic Route Study which was approved by DOP. (Dev. Ex. 8).

A variance request involves a two-step process, summarized as follows:

- (1) It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
- (2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

Cromwell v. Ward, 102 Md. App. 691 (1995). I find that the Property is uniquely shaped and sized unlike other properties in the area. I also find that the Petitioner would suffer a

practical difficulty and unreasonable hardship if the existing 1940s-1950s home were required to be demolished because it cannot meet current front yard setbacks. I also find that the requested variance relief can be granted in strict harmony with the spirit and intent of the BCZR and without injury to the health, safety or general welfare, particularly in light of the request from DOP to retain the home as well as the lack of opposition from any adjacent property owner.

IV. Forest Conservation Variance.

On April 15, 2022, the Director of DEPS recommended approval of the Developer's request to remove sixteen (16) of the ninety (90) STs as set forth on the Plan to Accompany Forest Conservation Variance Application dated August, 2021 and then as revised in February, 2022. (Dev. Exs. 9, 10, 11). As originally filed, only eleven (11) STs were requested to be removed. In response to DEPS' request to conserve larger tracts of forest contiguous to the Forest Buffer, the number of STs increased to 16. However, it should be noted that, in removing these STs, 16 acres of the 32 acres (38%) will be permanently preserved by environmental easements. Of the 16 STs to be removed, four (4) are in poor or very poor condition. Of the twelve (12) remaining, mitigation will be provided on-site with tree planting. Pursuant to BCC, §33-6-116(g)(1) and (2), I will grant the Forest Conservation Variance to remove 16 STs as shown on the plan to accompany the Revised Application for Forest Conservation Variance dated February, 2022, and I adopt the reasons set forth in DEPS' Director approval of the Forest Conservation Variance dated April 15, 2022 (Dev. Ex. 11), with the condition that the Developer shall use all reasonable measures and protections during construction to save four (4) of the sixteen (16) STs and prevent impacts to their critical root zones (CRZs).

V. Residential Performance Standards, BCZR, §260.

The Developer submitted a Redlined Pattern Book which was reviewed and approved by the DOP on April 21, 2022. (Dev. Ex. 3). No modifications or waivers of standards have been requested as part of this Greenlined Development Plan. In considering the recommendation of DOP, and my review of the Redlined Pattern Book, I find that the Residential Performance Standards set forth in BCZR, §260 *et seq.* have been met.

VI. School Impact Analysis (SIA).

The Adequate Public Facilities Ordinance found in BCC, §32-6-103(e)(1)(2) states that development approval may not be granted in existing overcrowded school districts (defined as a district where enrollment exceeds 115% of the state-rated capacity (“SRC”)), or if the development plan is projected to generate additional school population that would result in the school district becoming an overcrowded school district. An exception is set forth in BCC, §32-6-103(f)(3) which permits the development if any school in the district adjacent to the overcrowded school district has sufficient capacity to render the overcrowded school less than 115% of the state-rated capacity.

In this case, the School Impact Analysis (“SIA”) as submitted by the Developer and approved by the DOP, confirms that that the projected full time equivalent enrollment (“FTE”) for Riderwood Elementary School (98.09%), Ridgely Middle School (103.36%) and Dulaney High School (97.83%) are each school is below the 115% of the State Rated Capacity (“SRC”). As such, none of the schools are considered to be ‘overcrowded.’ As a result, I find that the Greenlined Development Plan meets Adequate Public Facilities Ordinance found in BCC, §32-6-103(e)(1)(2) and (f)(3).

VII. Open Space.

Under the Adequate Public Facilities Ordinance in BCC, §32-6-108 for the 32 proposed homes, the Open Space is 32,000 sf (1,000 sf per unit). The uncontroverted evidence is that the Developer is proposing to provide 32,006 sf or 0.735 acres of private, Open Space – all of which is onsite - as shown on the Greenlined Development Plan. (County Ex. 3). Accordingly, I find that this requirement has been satisfied.

Conclusion

For a development project to be approved under the Basic Services Map, both sewage and traffic generated by the proposed development must be accounted for in the existing system/infrastructure, or by improvements to that system/infrastructure. The impact that a proposed development will have on the segments of the sewer system and on the particular transportation infrastructure to which it will feed, will determine whether each of these public systems have the capacity, and can therefore accommodate, the additional sewage and traffic generated by the development. After considering the testimony and evidence presented, the exhibits offered at the hearing, and confirmation from the various County agencies that the Greenlined Development Plan satisfies those agencies' requirements, I find that the Developer has satisfied its burden of proof and, therefore, is entitled to approval of the Greenlined Development Plan, subject to the conditions in the Order. I further find that the Special Hearing relief to approve the Special Variance under BCZR, §4A02.4.G to allow the Torch Hill Project within the Falls Rd and Seminary traffic shed should also be granted for the reasons set forth herein. Additionally, I will grant Variance relief from §1B01.2.C.b for a front yard setback of 0 ft. in lieu of the required 25 ft. for the existing residential structure to avoid its demolition and to preserve the scenic view from Seminary Ave.

THEREFORE, IT IS ORDERED by this Administrative Law Judge/Hearing Officer for Baltimore County, this 13th day of **October 2022**, that the Torch Hill Project as set forth on the attached Greenlined Development Plan (Dev. Ex. 2) which is incorporated herein and made a part hereof, be, and it is hereby, **APPROVED**.

IT IS FURTHER ORDERED that the Petition for Special Hearing under BCZR, §500.7 and pursuant to §4A02.4.G, to allow the construction of 31 single-family residences within the Falls Rd. and Seminary Rd. traffic shed, be, and it is hereby, **GRANTED**.

IT IS FURTHER ORDERED that Variance relief from BCZR, §1B01.2.C.b, to permit a front yard setback of zero (0) ft. in lieu of the required 25 ft. for an existing residential structure on the Property, be, and it is hereby, **GRANTED**.

IT IS FURTHER ORDERED, that the Forest Conservation Variance to remove the sixteen (16) specimen trees as listed on the Revised Plan to Accompany the Forest Conversation Variance (Dev. Ex. 10), which Revised Plan is attached hereto and incorporated herein and made a part hereof in its entirety, be, and it is hereby **GRANTED**, with the condition that the Developer shall use all reasonable measures and protections during construction to save four (4) of the sixteen (16) STs and prevent impacts to their critical root zones (CRZs).

The relief above is granted herein shall be subject to, and conditioned upon, the following:

1. Developer's Exhibit 22, Map 6-1 of the 2012 SRRR Plan, depicting the sewage flow from the Torch Hill Project which is attached hereto, shall be incorporated into and made a part of this Order. Prior to connecting to Torch Hill Project to the public sewer system, all repair, replacement and/or rehabilitation work required under the 2012 SRRR Plan (whether for sewers, manholes or both) and which is within the sewage path from Torch Hill Project as shown by the blue line on Developer's Ex: 22, shall be completed by the County, its authorized representative and/or the developer, as a condition of the Order. Upon completion, the County shall provide written confirmation of the same.

2. Developer's Exhibit 15 which is attached hereto, incorporated herein and made a part of this Order. Prior to building permits being issued, the Developer will construct the 190 ft. left turn lane extension on Seminary Avenue as depicted on Dev. Ex. 15 and/or as otherwise directed by SHA upon its review and approval of construction drawings for the turning lane extension.

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



MAUREEN E. MURPHY
Administrative Law Judge
for Baltimore County

MEM:dlm



JOHN A. OLSZEWSKI, JR.
County Executive

PAUL M. MAYHEW
Managing Administrative Law Judge
MAUREEN E. MURPHY
Administrative Law Judge

October 13, 2022

Christopher Mudd, Esquire, cdmudd@venable.com
Patsy Malone, Esquire – pamalone@venable.com
Venable LLP
210 W. Pennsylvania Ave.
Suite 500
Towson, MD 21204

Michael McCann, Esquire- michael@mmccannlaw.net
118 W. Pennsylvania Avenue
Towson, MD 21204

RE: **DEVELOPMENT PLAN OPINION AND ORDER**
Development Plan – PAI # 08-0919
Project: Torch Hill aka 1400 W. Seminary Avenue
1400 W. Seminary Avenue, Lutherville, MD

Dear Mr. Mudd and Mr. McCann:

Enclosed please find a copy of the decision rendered in the above-captioned matter.

In the event any party finds the decision rendered is unfavorable, any party may file an appeal to the Baltimore County Board of Appeals within thirty (30) days of the date of this Order. For further information on filing an appeal, please contact the Baltimore County Office of Administrative Hearings at 410-887-3868.

Sincerely,
A handwritten signature in black ink that reads "Maureen E. Murphy".

MAUREEN E. MURPHY
Administrative Law Judge
for Baltimore County

MEM:dln
Enclosure

c: **See Next Page**

Development Plan – PAI # 08-0919
Project: Torch Hill aka 1400 W. Seminary Avenue
1400 W. Seminary Avenue, Lutherville, MD
Page -2-

c: Jerry Chen – jchen@baltimorecountymd.gov
Lloyd Moxley – lmoxley@baltimorecountymd.gov
Angela Daniel – adaniel@baltimorecountymd.gov
Blandy Becker – blandybecker@gmail.com
Brian Childress – bchildress@dsthaler.com
Bryan Eberle – beberle@obrechtproperties.com
Buzzy Krongard – abkrongard@gmail.com
David Thaler – dsthaler@dsthaler.com
Edward Consroe – econsroe@aol.com
Edward Halle – nedhalle@gmail.com
James Herman – jhermann@baltimorecountymd.gov
Jason Seidelman – jseidelman@baltimorecountymd.gov
Jeff Livingston – jlivingston@baltimorecountymd.gov
Jeff Perlow – jperlow@baltimorecountymd.gov
Jen Busse- jbusse@wtplaw.com
Jen Frankovich – jfrankovich@baltimorecountymd.gov
Jen Nugent – jnugetn@baltimorecountymd.gov
John Canoles – espijc@aol.com
John Motsco – jmotsco@dsthaler.com
Kiren Patel – kpatel@baltimorecountymd.gov
Kristopher Nebre – knebre@baltimorecountymd.gov
Lachelle Imviko – limwiko@baltimorecountymd.gov
Mark Buda – mbuda@keelty.com
Marta Kulchytska – mkulchytska@baltimorecountymd.gov
Mickey Cornelius – mcornelius@trafficgropu.com
Michael Friedman – mikefriedman311@comcast.net
Pam Jones – pam.s.jones@aol.com
Renee Hamidi – renee@thevpc.org
Roy Kirby – roykirbyjr@gmail.com
S. Crawford – scrawford@baltimorecountymd.gov
Taylor Bensley – tbensley@baltimorecountymd.gov
Vishnubhai Desai – vdesai@baltimorecountymd.gov
Wannee Kunaprayoon – wkk8506@yahoo.com
Melody Simmons – msimmons@bizjournals.com

BALTIMORE COUNTY, MARYLAND

Inter-Office Correspondence



TO: Hon. Paul M. Mayhew; Managing Administrative Law Judge
Office of Administrative Hearings

FROM: Jeff Livingston, Department of Environmental Protection and
Sustainability (EPS) - Development Coordination

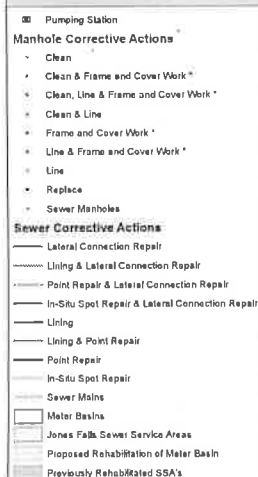
DATE: September 28, 2021

SUBJECT: DEPS Comment for Zoning Item # 2021-0274-A
Address 1400 W Seminary Ave
(Alvin Krongard Property)

Zoning Advisory Committee Meeting of **October 04, 2021.**

X The Department of Environmental Protection and Sustainability has no
comment on the above-referenced zoning item.

Reviewer: Joyce Redman



* Frame and Cover Work includes any of the following corrective actions or a combination of the following corrective actions: Frame Seal, Inflow Insert, Replace Frame and Cover, Reset Frame and Cover and Seal Manholes.

RK&K
ENGINEERS

December 2012

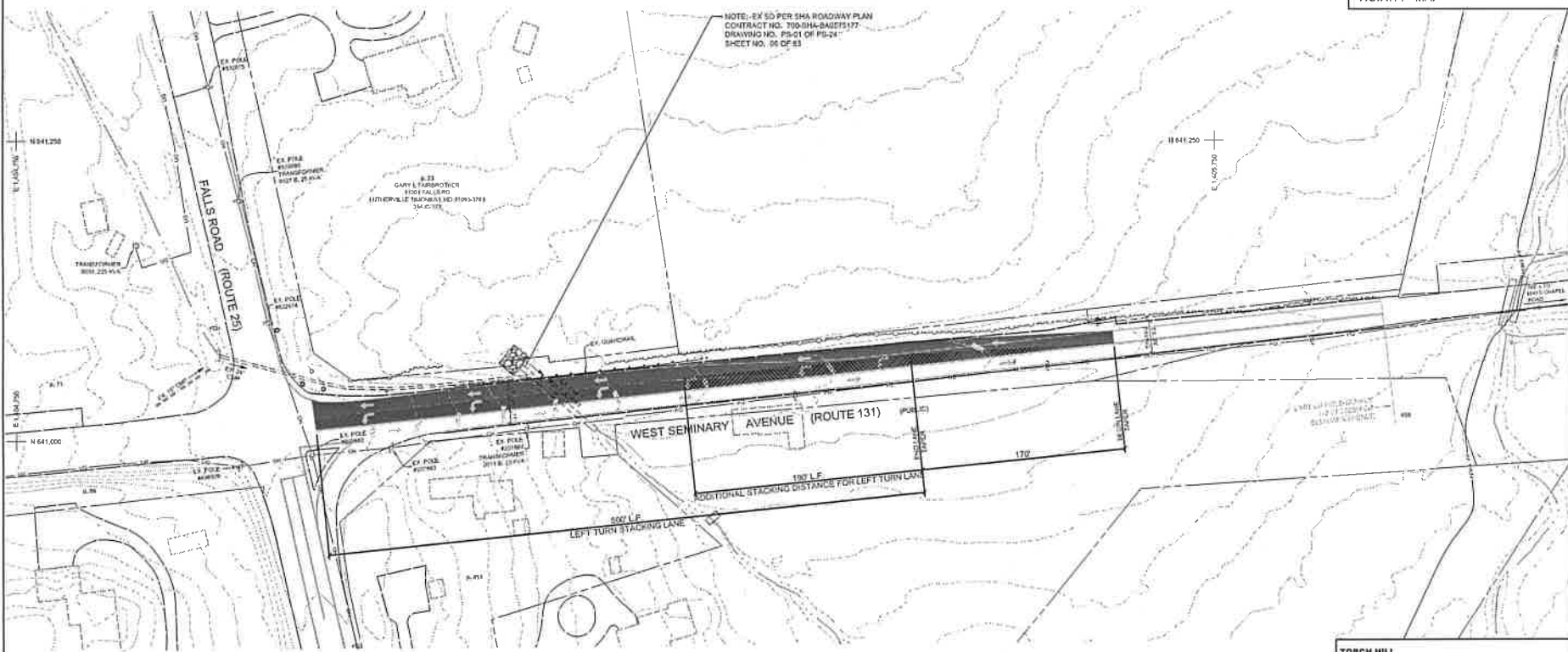
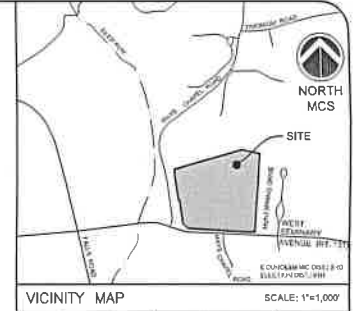
0 100 200 300 400 Feet

Jones Falls Collection
System Evaluation &
Sewershed Plan



Map 6-1
Sewer, Manhole and Hydraulic
Corrective Action Recommendations Map

DEVELOPER'S
EXHIBIT
15



CONCEPTUAL LANE MARKING
AT SEMINARY AVENUE

TORCH HILL
COUNCILMAN/DIST. 3RD
ELECTION DIST. 8TH
REGIONAL PLANNING DISTRICT: LUTHERVILLE
PROJECT MANAGER: JERRY CHOI
PAUL HARRIS, DCE/DIO
BAL-2020-00008

DSThaler & ASSOC., LLC
CIVIL AND ENVIRONMENTAL ENGINEERS SURVEYORS
LANDSCAPE ARCHITECTS & LAND PLANNERS
7115 AMBASSADOR ROAD
P.O. BOX 4503
BALTIMORE, MARYLAND 21244-7428
410-564-0817
www.dsthaler.com

DATE: 11/10/22
SCALE: AS SHOWN
C1: 2
PROJECT NO.: 0417

