

IN RE: DEVELOPMENT PLAN HEARING,  
PETITION FOR SPECIAL VARIANCE, etc.  
2310 W. Joppa Road

*Greenspring Manor*  
9<sup>th</sup> Election District  
3<sup>rd</sup> Councilmanic District

\* BEFORE THE  
\* OFFICE  
\* OF  
\* ADMINISTRATIVE  
\* HEARINGS  
\* Case nos. 08-0922  
\* 2021-0250-SPH  
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**PROTESTANTS’ RESPONSE TO MOTION FOR RECONSIDERATION**

Protestants, Valleys Planning Council, Inc., Falls Road Community Association, Inc., Heatherfield Community Association, Seminary Ridge Owners Association, Boxwood Homeowners Association, The Meadows of Greenspring HOA, and Tally Ho Community Association, submit this response to the Motion for Reconsideration filed by Greenspring Joppa Falls, LLC (the “Developer”).

**ARGUMENT**

**A. The ALJ Did Not Misunderstand The Evidence**

The Developer contends that the ALJ misunderstood the evidence before her, specifically (i) “the intent of internal emails from DPWT staff,” (ii) the “purpose of third party consultant reports obtained by DPWT,” and (iii) “conflicting statements from competing expert witnesses regarding the state of the sewer system serving the Property.” (Mot., p. 1). There is no merit to this assertion.

1. *The email from Dave Bayer and Mr. Cauley's "recommendation"*

The Developer points to an email from Dave Bayer of DPWT (Prots' Ex. 90) in which he states, among other things, that sanitary sewer overflows would occur if Johns Hopkins did not replace the sewer segments below the site and that "zero" is the number of units that could be developed at the site without causing an SSO. (Mot., p. 2). The Developer argues that the ALJ's reliance on this email is contradicted by the testimony of DPW's Eugene Cauley, in which he testified that DPWT recommended approval of the development plan. (*Id.* (citing T. 9/1/22, p. 235).

It was certainly within the ALJ's prerogative and discretion to discredit the "recommendation" of Mr. Cauley in light of all of the other evidence introduced on the issue of sewer capacity. That evidence, which consisted of several witnesses and dozens of exhibits, need not be repeated here but is described in great detail in Protestants' post-hearing memorandum (pp. 2-28) and the ALJ's decision itself (pp. 30, 31, 44-45, 47-58). The recommendation of agency staff is not sacrosanct and, in the case of Mr. Cauley, was simply not sufficient to even raise a presumption in favor of plan approval.<sup>1</sup> Indeed, although Mr. Cauley stated, in conclusory fashion, when asked by the Developer's counsel, that DPWT recommended approval, it was clear that he knew very little about the sewer capacity.<sup>2</sup> With respect to the eight sewer segments, he did not know what development project required replacement of the segments or where the segments are even located, and had only become aware of the issue when he read the memoranda about it. (*Id.*, pp. 212-13, 265-66). When asked whether he could say that replacement of the eight segment would resolve the problems in the sewershed, he could not answer. (*Id.*, pp. 283-84).

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<sup>1</sup> The ALJ agreed, concluding that "the presumption of development plan compliance ... is not found here...." (Op., p. 120).

<sup>2</sup> Counsel for the Developer did not ask any questions of Mr. Cauley regarding sewer capacity.

## 2. *The Ramboll and Hazen reports*

The Developer contends that the ALJ “disregarded” testimony that the Ramboll and Hazen reports were “long term planning documents.” (Mot., p. 3). The “testimony” referenced by the Developer is apparently that of Mr. Leffner, who described the Ramboll Report as “just an example of the County being proactive...doing what they do, which is own, maintain, operate, repair the sewer system.” (T13, p. 133). “I think the Ramb[oll] report was, essentially, a study and improvement that the County planning to do for relining the main under Lake Roland. It’s not necessarily any kind of capacity improvement.” (T13, pp. 134-35). With respect to the Hazen study, Mr. Leffner described the study as “kind of like a further horizon study that the, the County is embarking up” and “kind of an example of the County, [] doing more with regard to the analysis and development of standard County practices beyond what just the Consent Decree requirement would be.... [I]t’s more so a planning document, right? Continuing to identify analysis, capacity studies, long term planning to help influence the County’s future capital spending in the County.” (T13, pp. 134, 135).

The ALJ did *not* disregard this testimony by Mr. Leffner. Indeed, the ALJ made specific reference to it in her summary of the evidence (*see Op.*, pp. 68-69) (Mr. Leffner “described the Hazen and Ramboll reports as the County’s future long term planning for the capital budget” and “testified that neither Hazen nor Ramboll reports were cause of any concern”) and then explicitly rejected his testimony. *Id.*, p. 124 (“I am not convinced by Mr. Lessner’s opinion that [the Ramboll report] was only a ‘planning document’ and only used for ‘capital budget’ purposes”); *id.*, pp. 125-26 (the Hazen Report cannot be discounted as only a ‘planning document’”).

In any event, Mr. Leffner’s view of the reports is hardly credible. The express “primary purpose” of the improvements identified in the Ramboll report is to “minimize the inflow and

infiltration into the interceptors to reduce the likelihood of sanitary sewer overflows.” (Prots’ Ex. 87, p. 1).<sup>3</sup> There is no mention or indication anywhere in the report that it is simply a “long term planning document.” As for Hazen, there is language in the Hazen newsletter (Prots’ Ex. 85) suggesting that the County would *use* the results of the Hazen study for budgeting and planning purposes, but the newsletters as well as Hazen’s Scope of Services (Prots’ Ex. 86) make clear that the study was not simply a “planning document” but rather a “comprehensive evaluation” for the purpose of determining the near-term and long-term capacity of the system and the preparation of a “capacity assessment report.” (Prots’ Ex. 86, pp. 1-19). The ALJ agreed. (*See Op.*, p. 126) (“While the County may *also* use it for capital budget planning, the County hired Hazen to perform a comprehensive evaluation of the accuracy of the data from the RKK models and to update those models”). The suggestion that the Hazen and Ramboll reports are merely “planning” documents and therefore insignificant somehow is fictional.<sup>4</sup>

### 3. *The repairs made by the County*

The Developer states that the ALJ “was not convinced despite the introduction of an email from Dave Bayer, that repairs had been made to the County’s sewer system downstream from the property.” (Mot., p. 3).

First, a close review of the repairs performed by the County (reflected in Dev.’s Ex. 44 and 45B)<sup>5</sup> reveals that, aside from the lining of one sewer segment, the work consisted of simply repairs

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<sup>3</sup> When asked whether he was aware of the purpose the Ramboll report, Mr. Leffner could not recall. (T. 5/31/23, p. 149). When asked whether he had an understanding of the scope of the work called for the report, he said he had “[a] general idea” and was “generally familiar.” (*Id.*). And when shown the report itself, he agreed that the repairs involved “a lot of pipe.” (*Id.*, p. 150).

<sup>4</sup> To be fair, it is unclear what exactly Mr. Leffner meant when he described the reports as “planning” documents. Was he suggesting that the County was not required to undertake the repairs or that the County was “planning” on performing the repairs?

<sup>5</sup> Some of the work identified in these exhibits was not performed because the County believed it was not necessary.

to four manholes. Indeed, Mr. Leffner agreed that these repairs were “minor” in nature and would not cure or correct, for example, the model-predicted SSOs and hydraulic restrictions determined by RJN and reflected in Map 3. (T. 5/31/23, pp. 204, 206).

Second, as the ALJ perceptively pointed out, the repairs were performed in 2014, 2017 and 2019 and, thus, Mr. Bayer would have known about them when he wrote his email on March 22, 2021, *i.e.*, he would not have written that email if he believed that the repairs corrected the deficiencies. (Prots’ Ex. 90).

**B. The ALJ Had More Than Sufficient Basis To Not Simply Accept The Conclusory Recommendation of Mr. Cauley**

The Developer contends that the ALJ erroneously refused to accept the testimony of Mr. Cauley and found that additional testimony from DPWT representative was necessary. The Developer posits that “[a] DPR representative testifies on behalf of DPWT and relays whether there are any open issues or the department recommends approval of the development plan.... The purpose of consolidating DPWT’s position on development plans into one single witness is to prevent HOHs from taking multiple employees away from their jobs to attend and testify. Until very recently, DPR confirmation was deemed to be the ‘best evidence’ – or at least sufficient evidence in an administrative forum, to explain DPTW’s issues and position regarding the development plan.” (Mot., p. 3).

The Developer’s view of the hearing process is skewed and naive. The ALJ is not required to accept the testimony of an agency representative simply because he or she is a County employee and irrespective of what he or she actually says. Moreover, while there is nothing wrong *per se* with having one witness testify on behalf of two agencies, that does not immunize the witness from challenge on issues he or she clearly knows nothing about. Once it becomes clear that the witness’s testimony may be inadequate – as was painfully obvious here in the case of Mr. Cauley - the

impetus is on the Developer, not the ALJ, to call other witnesses, either from the County or its own.<sup>6</sup> Following Mr. Cauley’s testimony, the Developer had more than eight (8) months to figure this out before the hearing concluded on May 21, 2023.

**C. There Is No Basis Whatsoever To Reconvene The Hearing**

Remarkably, the Developer next argues that, because the ALJ departed from the “typical” practice of allowing one witness to testimony for two agencies, she should reconvene the hearing to consider testimony from “a DPWT representative.” (Mot., p. 4) (“Accordingly, Developer requests that the ALJ...”). This testimony, says the Developer, “will clarify” “the state of the sewer system and the purpose of the third party consultant reports....” (*Id.*). Permitting an additional hearing on an “outstanding issue” would be “efficient” and “fair.” (*Id.*, p. 5). Not permitting an additional hearing “would unfairly prejudice a developer that was following the direction of a reviewing agency, because the alternative is to require a developer to proceed all the way through full development plan review and approval process again....” (*Id.*). This would not be the first time, according to the Developer, that the ALJ’s office convened a hearing to take additional testimony. (*Id.*) (*citing* PUD Case No. 09-0843 and 2627 Caves Road).

This argument, frankly, is laughable. The Developer had more than ample opportunity over the eight months of hearings during this case to call any and all County witnesses it wanted. Mr. Cauley’s testimony was on the first day of the hearing, so the Developer had a full eight months to assess whether additional testimony or evidence on sewer capacity was necessary. Moreover, it was obvious throughout the hearing that sewer capacity was a major part of Protestants’ case. Their sewer expert, Mr. Grachek, testified initially on February 10, 2023; Mr. Summers testified on March 27, 2023, and both of them testified again on April 11, 2023. Before the hearing

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<sup>6</sup> Counsel for the Developer did not ask a single question of Mr. Cauley regarding sewer capacity. (T. 9/1/22, pp. 223-236)

reconvened for the last day on May 31, 2023, the Developer had plenty time to assess their testimony and call any and all witnesses they chose. They called only Mr. Leffner on May 31, 2023. Moreover, all of the exhibits pertaining to the sewer issue, including Mr. Bayer's emails, were introduced long before the last day of the hearing. The Developer had plenty of time to assess those documents, review them with County representatives or their own consultants, and present additional evidence. There will be no prejudice, at least none not of its own doing, if the Developer's request to reconvene the hearing is denied.

As the ALJ aptly put it:

[N]either Dave Bayer, nor Lisa Eicholtz, nor any representative from DPWT with knowledge of the sewer system, testified to support Developer's position in rebuttal. If there was a change in DPWT's position or clarification to explain the evidence presented by the Protestants, then testimony and further evidence from [] DPWT was necessary.... The silence is deafening. (Op., pp. 126, 127).

Finally, regarding the two cases cited by Developer, they involved, as the Developer notes, "outstanding issues" that were not addressed during the course of the hearing. For example, in *2627 Caves Road*, the ALJ allowed additional testimony after the close of the hearing because the Planning Office had not submitted its findings on the RC5 Performance Standards to the ALJ prior to the hearing, as the Code requires.<sup>7</sup> There are no "outstanding" issues here, only failures of proof.

**D. The Developer Does Not Dispute The ALJ's Conclusions Regarding Traffic**

Importantly, the Developer does not mention in its motion any of the ALJ's findings and conclusions regarding traffic. The Developer does not address the thirteen (13) fallacies in the traffic impact study that the ALJ found "undermine the expert testimony by Mr. Driban." (Op., p.

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<sup>7</sup> Contrary to the Developer's characterization, the issue on which additional testimony was permitted did not involve the Planning Office's "interpretation and application" of the Performance Standards in the general sense. (See ALJ Op., 20-21).

95).<sup>8</sup> And the Developer does not address the ALJ's conclusion that the development, even with the proposed road improvements, would result in a "worsening of conditions" at Falls/Joppa and Falls/Greenspring Valley roads. (*Id.*, p. 105).

Thus, even if the Developer's arguments regarding sewer are accurate and warrant a reconvened hearing, which they clearly do not, the motion for reconsideration still should be denied. ALJ denied the development plan for both sewer and traffic reasons, independent of each other.

#### **E. The Emergency Access Gate**

The Developer asks the ALJ to allow it to submit a revised development without the emergency access gate at the rear of the site. (Mot., p. 6). This request should be denied, of course, because the Developer has not demonstrated any basis for either (1) reconvening the hearing on the issue of sewer capacity or (2) reversing the ALJ's findings and conclusions regarding traffic.

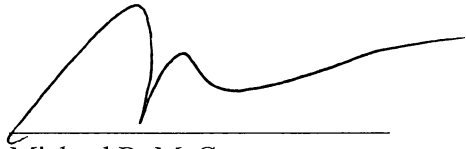
### **CONCLUSION**

The ALJ's Opinion in this case was thorough, well-reasoned, and supported by an extraordinary amount of evidence on both the sewer capacity and traffic issues. The sundry arguments advanced by the Developer in its motion for reconsideration are half-hearted and do not move the dial. After 13 days of hearing, dozens of witnesses, and nearly 200 exhibits, there are no outstanding issues and no basis whatsoever for the ALJ to reconvene the hearing to give the Developer a second bite at the apple. Protestants respectfully request that the motion for reconsideration be denied.

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<sup>8</sup> Mr. Driban's testimony, she found, amounted to a "because I think so" opinion. (*Id.*, p. 96).



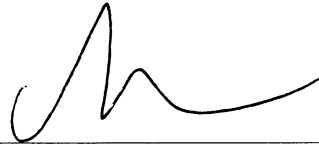


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11<sup>th</sup> of September 2023, the foregoing memorandum was sent via email to all counsel of record.



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