

IN THE MATTER OF : BEFORE THE
ZB 1118M - Erickson at Limestone Valley : ZONING BOARD

**PROTESTANT’S PETITION FOR RECONSIDERATION
OF THE MARCH 3, 2022 DECISION IN THIS CASE**

Alan Schneider, a party in this case, Moves for Reconsideration of the Decision in this case.

Liz Walsh is correct in a few succinct words: “There was no due process, neither rules applicable nor consistently enforced, throughout the interminable hours of hearings... There were no sufficient evidentiary bases for the findings and conclusions...”

MORE: The lack of due process was pervasive. The Proposal failed to meet required criteria. The Howard County Charter and Code was violated. Zoning Board Rules of Procedure were problematic. Howard County’s General Plan was not followed.

The evidence was insufficient both for CEF approval, but are also insufficient for approval of the Petition for a large-scale continuing care facility at the proposed location.

MULTIPLE FAILURES OF DUE PROCESS.

1. On October 23, 2021 Virginia Thomas brought to the attention of the Board by email and requested an opportunity to be heard, to which the Zoning Board failed to respond. Virginia Thomas reported that one of the zoning board members was stating misinformation regarding CCRCs and their Health Centers. The misinformation was that a CCRC CANNOT admit individuals from outside of the independent living community into a CCRC’s assistive living or memory care unit. That is not true. A CCRC can admit a person to the

assistive/memory care unit who has not been a member of the CCRC independent living community.

Specifically, when a doctor states that a person can eventually become qualified for independent living in the CCRC then that person can be admitted to the skilled level nursing section of the CCRC's Health Center. Therefore, the Zoning Board must consider a minimum of MIHU's for the Limestone Valley's 240 units in the Health Center as well as in the 1200 units in the independent living section. In other words, the Order must specifically state that the minimum MIHU 10% requirement for the 240 Health Care units could either transfer from the independent living CCRC units, or from outside the CCRC community.

This failure of due process should be cured pursuant to the Zoning Board's Procedural Rule in Section 2.404.A. and D. which provide for correction of "inadvertence or irregularity" and provides for a public hearing on reconsideration.

2. This inadvertence or irregularity is found throughout all subsections of section (e) of the Order. The MIHU requirement refers to "residential" units. The Order inadvertently omits applicability of the MIHU requirement to Health Care units and inadvertently strictly limits MIHU Health Care units to those who are already occupants of residential units.
3. A further irregularity and omission in section (d) of the Order is inadvertent omission of any rules for distribution of the scholarship fee and benevolent fund. Who gets it? How much? Who makes the determination? Should any distribution of scholarship funds be limited to MIHU recipients? What conditions should be set forth for auditing and reporting requirements? What conditions ensure that the fund is not more beneficial to investors than MIHU applicants?

Also, the issue was raised and inadvertently omitted regarding guaranteed replenishment in perpetuity of the scholarship fund.

Section (d) of the Order specifies that the "monthly fees" should be determined by the Department of Housing and Community Development Board; a

significant omission in the Order is any mention of the initial fee, the amount of the initial fee and monthly fee for the Health Care units.

Due process was denied when Virginia Thomas's offer of testimony on fees was ignored.

4. Another irregularity and impropriety in section (d) of the Order is the delegation of authority to Department of Housing and Community Development Board. There is no statutory authority for the Zoning Board to delegate its authority. The Zoning Board's authority is specifically set forth in the code.

The Zoning Board is not doing its job. It has the responsibility under Zoning Regulations Section 100.0, and Code Section 16.101(a), to plan for the future of Howard County; i.e. to establish conditions beyond existing minimum requirements. Its authority is broader than the authority of other departments.

Deferral to DPZ means that if a project meets minimum regulation requirements, the project must be approved, even though the standards were enacted 20 years ago before recent weather changes delivering more frequent, more severe storms. The watershed protections after Ellicott City flooding did not extend to other Howard County watersheds.

The Zoning Board's authority is broader than the powers of the DPZ and other departments. The Zoning Board's authority is described as:

- a. "It is the intention of the Zoning Board to guide the future growth and development of the County in accordance with a General Plan...(and more specifically in subparagraphs which reinforce the General Plan):

"3. To promote the most beneficial...road system...*having particular regard for the potential...traffic capacity...so as to avoid congestion...and to promote safe and convenient vehicular and pedestrian traffic movements...*" (emphasis added)

"7. To ensure that all development and land uses protect or enhance the natural, environmental...resources of the County,

especially highly fragile and environmentally important features....”

“8. To preserve agricultural land.”

5. Due process was denied by the omission of any hearing on any unknown and potentially unenforceable “alternative compliance”. Due process is denied by failing to hold a hearing on MIHU requirements which are deferred to an unknown agreement with unknown terms and conditions of an unknown “alternative compliance and operating agreement”. “Recordation” is the only requirement. The Order fails to provide a hearing which is required for due process.
6. Due process was denied when Amy Gowan of the Department of Planning and Zoning was unable to answer questions about the concerns raised in sections of the Technical Staff Report. Questions and answers to those important issues were blocked when the County Executive prevented testimony of DPZ officials and other department heads, whose employment is at risk because employment is at the discretion of the County Executive.
7. Due process was denied when the case was closed without recognizing raised hands seeking to speak at the time when Chair Rigby stated “the case is closed”. My hand was raised. I was not recognized before the case was “closed”.
8. Relevant evidence was excluded from testimony by sustaining objections. The exclusion of relevant testimony prevented a decision based on relevant evidence and testimony, including a case law decision on a similar case.
9. Procedures for a virtual hearing were unpublished, unapproved, or not followed.
10. Due process was denied when Petitioner submitted a new “Illustrative Site Plan” after the close of the case. The close of the case prevented cross examination require by due process in an adjudicatory process. The “Illustrative Site Plan” was submitted by letter to the Zoning Board after the close of the case.

- a. Petitioner’s letter removed a parcel of property “from further consideration as part of the instant CEF zoning application”. However, contrary to removal of that parcel, Petitioner’s letter asserts that proffered off-site improvements on the removed parcel will remain. These off-site improvements are identified in the letter as “including the Public Access Road, Route 108 widening, the signal light at Linthicum Lane and access through the Freestate parcel to other portions of the proposed CEF plan”. Opponents could not cross examine because the case was closed.
- b. The new plan includes a new Convenience Store at a new location on the CEF parcel and opponents had no opportunity to cross examine. The Order improperly neglected to exclude any convenience store, gas station, or other use not included in Petitioners Development Plan.
- c. The new plan would require DPZ to revise its Technical Staff Report. Opponents had no opportunity to review any revised TSR.
- d. The letter contained a proffer to keep road changes from the previous Revised Development Concept Plan (RDCP). The RDCP compounded existing problems. New problems included, but are not limited to:
 - i. The RDCP does not have a driveway to the proffered off-site new road. That means that all traffic from the proposed high density Erickson development will enter and exit at a non-signalized point on Route 108. This is contrary to Petitioner’s testimony and traffic power points.

11. Due process was denied when there was no separate hearing scheduled for consideration of conditions or modifications to the Proposed Development. Opponents were unable to participate in the examination of witnesses regarding proposed conditions or modifications.

FAILURE TO COMPLY WITH ZONING BOARD RULES OF PROCEDURE

Section 2.404.C. requires that the Decision and Order contain the basis for the conclusions “upon each contested issue of fact”. Simply stated the detailed expert opposition testimony and exhibits were dismissed with a few words overlooking the contested issues. Highly qualified opponents raised numerous significant issues disputing the testimony professionals highly paid to present the most favorable picture without comprehensive evaluation. The opponents issues were not described, nor were reasons provided for deciding against the opposition issues.

Section 2.404 C. Decision and Order. “The final Decision and Order of the Board shall be in writing, and shall be accompanied by findings of fact as supported by evidence in the record, ***with a concise statement of the conclusions upon each contested issue of fact as well as the reasons or basis therefore and conclusions of law.***”

The Order failed to include conditions meeting traffic goals which are an essential part of planning. Meeting traffic goals are the responsibility of the Zoning Board. When these issues were raised by opponents, Zoning Board procedures require a concise statement of conclusions and reasons for the Board’s decision.

Traffic improvements as conditions must be a part of the Zoning Board’s decision in this case. Consider that the Zoning Board is aware that Governor Hogan announced at a Maryland Association of Counties meeting on August 20, 2019 that the state, which includes SHA, would no long be involved in local land use decisions. Governor Hogan’s Executive Order 01.01.2017.18. The SHA’s deferral to the county must be recognized by the Zoning Board as a requirement the its decision includes conditions on traffic congestion and safety improvements, which were part of opponents testimony and extensive exhibits.

To comply and to fulfill Zoning Board responsibilities in this case the Order must include conditions requiring compliance with existing traffic studies and manuals:

- a. The **2015 SABRA WANG Traffic Study** for Route 108 which concluded that River Hill needs a continuous 5-lane section of MD108 extended from the River Hill commercial area to the elementary school and the high schools. Presented by David Elsaesser in Opposition Exhibits.

- b. **Erickson's additional traffic will increase congestion detrimental** to the community, to the region, and to Howard County. Testimony by Elsaesser and others.
- c. Erickson's outdated traffic survey does not meet or exceed current standards for highway planning as required by the CEF Purpose Statement, as described in testimony.
- d. The Order fails to provide any reasons for concluding that Petitioner met its burden of proof in providing community enhancements. Opponents testified that the side effects of the proposed development are detrimental, and did not contain "features and enhancements which are beneficial to the community". Opponents asserted that Section 121.0.G. Section 121.0.G requirements were not met because the Proposal did not "contain" one or more design features which are beneficial to the community as delineated in accordance with Section 121.0.J.2.A, which "exceed minimum standards required by County Regulations".
- e. The Clarksville Pike **Multi-Modal Traffic Study**-Appendix E. 2035 Ultimate Roadway Design Concept recommends a continuous **5 lane section** to the elementary school and the River Hill High School.
- f. **Howard County Highway Needs Inventory** (2018 Revision) **prioritizes** reconstruction expanding Rt. 108 to 4-5 lanes between the newly expanded Route 32 and Route 29. Erickson's proposal does not meet **existing** highway plans to accommodate growth.
- g. Opponents noted that **Standards are defined** in the Howard County Design Manual Vol III, Roads and Bridges, Chapter 1.

"The transportation system is the major structural element of the rural-suburban-urban community and it dictates, in many instances, the shapes and locations of various land uses in the community. Roads are the principal elements of the transportation system and it is extremely important that they be planned and coordinated in conjunction with the land use plan for a given area. Roads are permanent improvements therefore the greatest care and foresight are needed ..."

- h. Opponents noted that **Section 16.101(a)** requires “Providing the most beneficial relationship between the uses of land and buildings and the circulation of traffic throughout the County.” and (3) Using land and buildings in ways which avoid traffic congestion ...”
- i. Opponents noted that the submitted RDCP compounds rather than resolves issues detrimental to the community. Opponents noted that Petitioner proposes an extra lane from the direction of the elementary school, **but does not provide a needed extra lane Westbound on Route 108**. An extra Westbound lane is needed to adequately handle traffic entering and exiting the proposed CCRC 1400+ units plus the growth in traffic from the River Hill commercial area, high density residential areas, the expanded Route 32, the new housing units on Guilford Road, the new shopping centers and Howard County’s relatively high growth rate.

On many other issues raised by opponents, the Order failed to provide ***a concise statement of the conclusions upon each contested issue of fact as well as the reasons or basis therefore and conclusions of law***, including but not limited to the following issues:

- a. The miscalculation of the need for the proposed CCRC.
- b. The overcalculation of the benefits to Howard County seniors.
- c. The disadvantages to existing businesses in Howard County.
- d. The errors in financial calculations by proponent’s expert.
- e. The adverse impact on surrounding agricultural land.
- f. The detrimental effect on the environment at the proposed location.
- g. The unaffordability to the majority of Howard County seniors.
- h. The growing percentage of seniors who favor living at home.
- i. The adverse impact on Howard County’s infrastructure.
- j. The Order stated that Kelly McLaughlin of the Howard County Housing Affordability Coalition testified expressing conditional support. The Order failed to describe the conditions or provide any rationale for not including those conditions

FAILURE TO COMPLY WITH THE PURPOSE OF THE PSA EXPANSION OR CEF

The purpose of the PSA expansion was to enable a CCRC. The Order in this case contains no condition that the development is strictly for a CCRC. To fulfill the purpose, a condition should be inserted. Testimony requested a covenant stating that the land can only be used as a CCRC and only provide independent living units to seniors age 60+ and also provide long-term care services. This issue was not addressed in the Decision.

Testimony also requested compliance with the PSA and CEF by a covenant on the land and deed that reserves 10% of the units for MIHU recipients and CAN-NOT be used by others.

Opposition testimony also proposed a requirement that Entrance Fees for MIHU recipients be affordable, along with an enforceable agreement that the developer will supply affordable long-term care services for MIHU recipients in the independent apartments or the Health Center.

The failure of the Order to comply with the purpose, the criteria, planning for the future of Howard County, and conformity to the goals in Howard County's General Plan and comprehensive zoning is summarized in the unchallenged, uncontroverted testimony and watershed exhibits of the expert Patuxent River Waterkeeper Fred Tutman, Esq. Excerpts follow:

“There are numerous deficiencies and shortcomings in the applicant's presentation of facts that fail to meet the statutorily required threshold for the approval of a CEF zone. As a matter of law, the applicant bears the sole burden of proof to show that the planned project meets or exceeds the lawful requirements for granting the requested zone. Moreover, there can be no honest or diligent presumption that the burden has been met--on the basis of missing information, redacted information, excluded facts and greatly impaired citizen and protestant testimony in a process that has thus far largely deferred to the flawed legal advice provided by the applicant's Attorneys and then subsequently accepted or endorsed by the County's legal advisors. There are numerous shortfalls,

misdirections, half-truths and misrepresentations of both fact and law throughout the application and throughout the zoning board review process.

"We will try and illustrate a few of the issues here: For example:

"(1) The stated purpose of the CEF is to "encourage the creative development and redevelopment of commercial and residential properties through flexible zoning so that the proposed development complements and enhances the surrounding uses and creates a more coherent, connected development." (Section 121.0.1.9)

"How in the world could putting high density housing in the middle of RC property effectuate the purpose of the CEF where the planned use (high density housing) is inconsistent with the surrounding farmland uses? **The applicant fails to meet the required criteria.**

"(2) County rules require that "the initial CEF plan shall provide "An explanation of key environmental, infrastructure or other relationships between the proposed CEF District and the surrounding community." See: Section 121.0 J.2.A.(3)

"Not only has the applicant failed to make a showing in this regard, but instead has absurdly argued that the environmental protections are actually outside of the lawful scope of review by the Zoning Board, and therefore the review body lacks the authority to hear such information. Simultaneously, the applicant persistently touts the stellar environmental practices and performance within the County; in spite of the State designated "D-" water quality score of the surrounding receiving waters of the Patuxent River-- and maintained that the necessary environmental protections and details will be addressed and applied for at some future point in the County review process.

"These boiler plate assertions not only kick-the-can-down-the-road to some undisclosed, separate process, hopefully designed to impose mandated environmental protections at a later point in the process, but it also distorts the true and proper role and authority of the Zoning Board. Not only is the need for disclosure of environmental protections inherent and deeply relevant to the consideration of the application at all stages of County review, but moreover environmental protections are not simply a check-off box along the path to an assured approval. Such strictures and protections are inherent and relevant at each at every stage of County review. The Zoning Board is responsible like all other review offices of the County for assessing the presence of---even if not the sufficiency of environmental

protections within the scope of its approval/denial criterion, and at all aspects of its analysis of the project. This data is all but absent from the application.

“The need for environmental protections and the obligation of the County to protect water quality, air quality, and sustainability exists at all stages of review and consideration---and not just after the project has been awarded the requested zone and the construction project is all but a certainty. It is surely not the intended role of the County reviewers at each stage to blindly accept such proffers from an applicant with a decided burden to provide certain facts and meet certain criteria---not to defer the environmental protections to some vaguely subsequent body or panel. The idea is to address and be mindful of these requirements throughout the process! **Again, the applicant fails to meet its burden.**

“(3) The CEF zone is intended to "Serve as a transitional area by providing a mix of uses compatible with the surrounding community or developments".

(See: Section 121.0.A.S)

“Let us be clear: at present, the surrounding land is predominantly agricultural plus a gas station. This is not a "transitional" 62 acres, unless the ultimate and undisclosed purpose is to transform all adjacent agricultural land ultimately or eventually to residential or commercial use!

“Finally, it must be said that the earlier proceedings before County's Zoning Board in this matter have been marred by persistent procedural problems. Namely the unrelenting and implicit assertion by the applicant that the Zoning Board is empowered to hear only information and testimony that supports the statutory approval criteria for a "CEF" zone---thereby precluding a thorough, unbiased, 360 degree or even a holistic review of the proposed project and its impacts or merits.

“In effect, opponents to the project seeking to testify and provide information have repeatedly been denied the opportunity to testify about certain issues and required to pre-emptively explain in advance why and how their testimony should be heard by the Zoning Board.

“The Zoning Board must indeed weigh what information it has against the established criteria. But there is no basis in law or within the procedural rules to restrict in advance information brought in good faith by citizens before their Zoning Board. The Board is empowered to hear whatever they wish--and then determine how the proffered information bears on the application, the review criteria and other such fact finding as would and should be allowed in a process truly committed to evaluating the proposed project in its totality. It is incumbent on the

Zoning Board panel to apply what information has been brought to the table to the applicable criteria---but not to tailor the information in the record in order to assure the most expedient approval! It is not apropos to exclude in advance any information brought to the table by citizens in an effort to help the review body to fully understand and evaluate the matters before it.

“The suggestion by the applicant that it is literally unlawful or prejudicial for the Zoning Board to hear certain information---even in advance of the body actually hearing such information---is a facial attempt to sculpt and bias the public record such that it only contains information favorable for approval. This deeply contorted process demands to be challenged and called out as an assault on due process and fairness. Factually and legally, the Board can hear whatever information it wishes and is fully capable of determining which information is relevant and applicable to the criteria at bar. Indeed, isn't that why they were appointed?

“In sum, there are numerous deficiencies in the applicant's presentation of facts and the applicant has not met its burden that would warrant approval---at least based on the information provided. The application lacks lucid information or even good answers related to the mandatory criterion about how it: benefits existing and surrounding uses, impacts on traffic, and on the environment on sensitive lands---warranting various mandated protections such as farmlands, wetland, stream corridors, slopes, etc. There has been no testimony or facts presented related to parks and recreation etc.

“The project if approved would weaken and undermine the zoning scheme of the County and it would perpetrate a grave injustice to the citizens of the County, now and going forward.

NONCOMPLIANCE WITH COUNTY CODE.

ZB 1118M is an amendment to Howard County’s Zoning maps. Therefore Section 202(g) of the Howard County Charter applies. The County Council has the authority, not the Zoning Board.

THE DEPARTMENT OF PLANNING AND ZONING DID NOT REQUIRE THE PETITIONER TO ADEQUATELY EVALUATE ENVIRONMENTAL IMPACTS AND EXPENSES TO TAXPAYERS.

Howard County's digital maps are found at this location:
https://data.howardcountymd.gov/gdfirm/main_Web.aspx

The maps show perennial streams on three perimeters of the proposed project. These maps reveal proximity to floodplains, the proximity of the National Wetlands inventory, and the slope of the land to these natural features. The impact of converting pervious soil to impervious structures on 62 acres would impact the quality of Chesapeake Bay. Reducing contaminants in the waters flowing to the bay is a priority. Remedies include the "rain tax". The impact of the project on our water was not fully evaluated by Petitioner. Impervious surface contamination is remediated by taxpayers in Howard County.

Respectfully Submitted,
s/
Alan Schneider
Clarksville, Md. 21029

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 17th day of March 2022, a copy of the foregoing was electronically delivered to the following:

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