



FREDERICK COUNTY GOVERNMENT

Jessica Fitzwater
County Executive

OFFICE OF THE COUNTY ATTORNEY

Bryon C. Black, County Attorney

Jennifer M. Keefer, Deputy County Attorney

Kathy L. Mitchell, Senior Assistant County Attorney

Andrew J. Ford, Senior Assistant County Attorney

Joshua S. Brewster, Senior Assistant County Attorney

Catherine S. Keller, Assistant County Attorney

Thomas P. Sinton, Assistant County Attorney

MEMORANDUM

To: Frederick County Board of Appeals

From: Kathy L. Mitchell, Senior Assistant County Attorney

Date: October 16, 2023

Re: B-23-19 – Combined Appeal for Gordon Mill Preliminary Plan and Site Plan

This Memorandum is submitted on behalf of the Division of Planning and Permitting in connection with the above-referenced appeals in Case No. B-23-19:

BACKGROUND/FACTS

This appeal arises out of preliminary subdivision plan and site development plan applications for the Gordon Mill development, which were approved by the Frederick County Planning Commission (“Commission”) on April 12, 2023. The applicant, New Market 279 (DC) ASLI VIII¹ (“Developer”), requested preliminary subdivision plan approval for 435 single-family lots and 175 townhouse lots on a +/- 279.2-acre Site located on the east side of Boyers Mill Road in Frederick County, which was formerly known as the Blentlinger property (the “Property”), and also requested approval of a site plan for 175 townhouses.

¹ At the hearing, the Developer referred to itself as “Avanti”, which is Avanti Properties Group, the parent company of New Market 279 (DC) ASLI VIII, LLC.

The Commission held its first public meeting on the Gordon Mill development on February 8, 2023.² At the end of this meeting, the Commission continued consideration of the preliminary plan application to an evening meeting on February 15, 2023, to allow additional public comment.

At the February 15 meeting, the Commission heard additional public comments on the preliminary plan, and discussed the application with County Staff, the Developer, and the Appellants' attorney. At the end of the February 15, 2023 meeting, the Commission continued the discussion of the preliminary plan to an evening meeting on March 15, 2023 for consideration of additional information to be provided by the parties by March 10, 2023, as well as additional comments from the public related to the additional information.

On March 15, 2023, the Commission heard additional testimony related to the information provided by all parties, as well as additional public comment, and there was cross-examination of the Staff and the Developer team by the Appellants and members of the public. At the end of the March 15 meeting, public comment was closed, and the applications were continued to the Commission's April 12 meeting to discuss and decide on conditions of approval and proffers from the Developer, as well as to hear the site plan application.

At the April 12, 2023 meeting, after discussion about conditions and proffers, the Planning Commission granted conditional approval of the preliminary subdivision plan, with

² The staff reports for the Gordon Mill preliminary plan and site plan applications can be found in the record documents for which a link was provided to the Board via e-mail on October 11, 2023 ("Record") at pages 00156 and 00856, respectively.

modifications and conditions as listed in the staff report, and also granted conditional approval of the site plan for 175 townhomes.³

On May 12, 2023, the Appellants filed this appeal, claiming that the preliminary plan and site plan were approved in error.

The appeal filed by the Appellants included four issues. The first two issues listed in the appeal documents involve the Adequate Public Facilities Ordinance (“APFO”). However, in a subsequent filing to consolidate the preliminary plan and site plan appeals (attached as Exhibit 1), the Appellants removed the APFO issues from their appeal to the Board. This is because the APFO issues are the subject of a petition for judicial review that was timely filed in the Frederick County Circuit Court. Section 1-20-22 (A) of the County Code states, in pertinent part:

Any person aggrieved by any action of the Planning Commission pursuant to this chapter [Chapter 1-20 is the APFO] may appeal to the Circuit Court pursuant to Maryland Rules, Title 7, Chapter 200.

Since the APFO issues were appealed separately to the Circuit Court, the Board of Appeals does not have jurisdiction over them.

With the removal of the APFO issues, this Board is left with the following issues to decide for both the Gordon Mill preliminary plan and the Gordon Mill site plan:

1. Does the Preliminary Plan and/or Site Plan fail to comply with the Blentlinger Rezoning Ordinance (No. 14-27-682 November 24, 2014), which requires that, prior to the recordation of any residential plat, the Developer must guarantee one of two road options, which have been identified as: (a) construction of the New Market Bypass (“Bypass”) from Boyers Mill Road to MD 75; or (b) certain MD 75 widening improvements from the Bypass to the intersection just north of the intersection of the Bypass and Old National Pike.

³ The Planning Commission result letters, which indicate the conditional approvals, for the preliminary plan and site plan applications, including conditions of approval and any proffers by the Developer, can be found in the Record at pages 00152 and 00154, respectively.

2. The Preliminary Plan and/or the Site Plan fails to comply with the County’s grading, erosion, and sediment control regulations (Chapter 1-10) and its stormwater management regulations (Chapter 1-15.2) because the stormwater management analysis relies on outdated rainfall data, resulting in impermissible “adverse impacts,” further exacerbated by an improper grant of a modification to the parking standards parking waiver in violation of Subdivision Code § 1-16-30.⁴

ARGUMENT

1. The Appellants’ arguments related to the guarantee are not only incorrect, but the issue cannot be appealed at this time, since the required guarantee must be in place prior to the recordation of any residential plat.

The Appellants appear to be confused about the nature of the financial guarantee required by the Blentlinger Rezoning Ordinance (hereinafter, the “Ordinance”). Condition No. 3 of the Ordinance states:

No residential plat may be recorded until one of the following conditions is met:

Either;

The planned arterial through the Blentlinger PUD and the adjoining Casey PUD, as well as the improvements to MD 75 from the Casey project entrance to just north of the MD 75/MD 144 intersection is guaranteed,

Or;

The planned New Market Parkway [Bypass], as well as the improvements to MD 75 from the Bypass to just north of the MD 75/MD 144 intersection is guaranteed.

The Developer has chosen the second requirement listed above, which is to guarantee the New Market Bypass and the MD 75 improvements from the Bypass to the MD 75/MD 144 intersection.

The Appellants have asserted that the Developer has not satisfied Ordinance Condition No. 3. The Appellants argue that the Adequate Public Facilities (“APFO”) Letter of

⁴ Note that the parking modifications were granted under §1-19-6.210(D), and not under §1-16-30.

Understanding (“LOU”)⁵ conflicts with this requirement, since it allows the Developer to obtain 499 building permits (of 610 permits) before the Bypass and connection to MD 75 must be open to traffic.

The APFO LOU is not a guarantee that a road will be built. The purpose of the LOU is to specify what the developer needs to do to satisfy adequacy requirements for water, sewer, roads, and schools. The Gordon Mill LOU allows 499 building permits to be issued prior to the Bypass and connection to MD 75 being open to traffic, but that requirement is related to road adequacy. The Ordinance Condition requires a financial guarantee that must be in place prior to the recordation of the first residential plat in the Gordon Mill development.

The Appellants also argue that the LOU does not list the required dollar amount of the financial guarantee for the road improvements. Again, that is because the LOU is not the financial guarantee. In addition, that amount is not yet known. To determine the amount required for the financial guarantee, the improvement plans for the road must be approved. This has not yet happened because the improvement plan phase comes after Preliminary Plan approval. When improvement plans have been approved, then the amount of the guarantee – the funds that will be needed to complete the improvements – can be determined. When that has been done, the guarantee can be collected, in the form of a cash escrow, a letter of credit, a bond, or some combination of these methods.

The Appellants’ arguments related to the guarantee must be rejected because Condition No. 3 in the Ordinance is not yet required to be satisfied. The financial guarantee must be provided prior to recordation of the first residential subdivision plat. What was approved in

⁵ A copy of the APFO LOU can be found in the Record at page 00205.

April 2023 was the preliminary subdivision plan. It will be years before the Developer is ready to file final subdivision plats to actually create lots in the development.⁶

2. The Appellants' arguments related to grading, erosion and sediment control and stormwater management (collectively, the "Environmental Regulations") must be rejected because the Planning Commission has no authority to approve, and did not approve, the Environmental Regulations.

The Planning Commission has authority under State law (Land Use Article of the MD Code) and County Code to review and approve preliminary and site plans in compliance with the County subdivision and zoning regulations under the authority of the Land Use Article of the Maryland Code. Section 1-16-1 of the County Code states:

The County Planning Commission has the power and authority to prepare rules and regulations governing the subdivision of land and building development within the county, excluding municipalities. After adoption of such rules and regulations by the local legislative body, *the Planning Commission is empowered to review and rule upon such subdivision of land and building development under the authority granted by Md. Code Ann., Land Use Article.* [Emphasis added.]

In addition, the County Zoning Ordinance is authorized by Title 4 of the Land Use Article of the Maryland Code. Section 1-19-2.160 states that the Planning Commission has authority to review site development plans in accordance with the provisions of the County Zoning Ordinance.

The authority to establish a Planning Commission comes from §2-101 of the Land Use Article of the MD Code. The FCPC's miscellaneous powers and duties are listed in §2-105 of the Land Use Article. The Commission's authority for other areas, such as zoning, subdivision, APFO, MPDUs, DRRAs, and the Comprehensive Plan are found throughout the remainder of Division I of the Land Use Article (Single Jurisdiction Planning and Zoning). Section 1-13-16 of the Frederick County Code establishes the Planning Commission, and §1-13-21 states that the

⁶ The Forecasted Project Schedule, which was submitted by the Developer on 2-14-23, indicates that the first residential plats will be recorded in the last quarter of 2025 or the first quarter of 2026.

“County Planning Commission shall have all the powers, functions and duties provided for in Md. Ann. Code, Land Use Article § 2-105 and 3-101 and following.”

The Planning Commission has no authority to review and approve plans for compliance with grading, sediment, and erosion control or stormwater management regulations. Grading, sediment, and erosion control are regulated by Chapter 1-10 of the County Code, which is authorized by the Environment Article of the Maryland Code, and stormwater management is regulated under Chapter 1-15.2 of the County Code, which is also authorized by the Environmental Article.

The Environmental Article of the Maryland Code does not grant any authority to the Planning Commission. Instead, the Maryland Department of the Environment (MDE) delegates its authority for sediment and erosion control, grading, and stormwater management to County Environmental staff. Section 4-201 of the Environment Article states that the State SWM regulations apply “to development occurring within the unincorporated areas of Frederick County and may apply to the incorporated areas within the geographical limits of Frederick County....” Section 1-15.2-1.0(B) of the County Code states: “The Frederick County Community Development Division [now known as the Division of Planning and Permitting] shall be responsible for the coordination and enforcement of the provisions of this chapter.” These and all other County Code provisions for the Environmental Regulations are reviewed and approved by the MDE. County environmental staff apply the MDE-approved regulations to development applications. The MDE audits the County's program every 3 years or so, except that COVID has delayed the most recent audit.

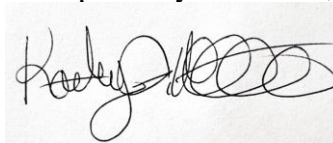
There is nothing in the Maryland Code that authorizes a planning commission to approve or deny compliance with the Environmental Regulations as part of its approval of a development

application. Nothing in the County Code authorizes the Commission to determine whether the Environmental Regulations have been satisfied. In fact, §1-15.2-1.0(B) of the County Code states that: “The Frederick County Community Development Division [now known as the Division of Planning and Permitting] shall be responsible for the coordination and enforcement of the provisions of this chapter.” Even though information about Environmental Regulations may be added to a plan that comes before the Commission, they are not subject to Commission approval or denial.

CONCLUSION

The issues raised by the Appellants in this appeal must be denied, because: (1) the guarantee issue is not relevant until the first final subdivision plat is ready for recording; and (2) the Commission did not approve, and has no authority to approve, either of the plans for compliance with the Environmental Regulations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kathy L. Mitchell', with a stylized, cursive flourish at the end.

Kathy L. Mitchell
Senior Assistant County Attorney



September 20, 2023

Revised at Avanti's request solely to add new footnote 2.

Mr. Andrew Brown, Chairman
Frederick County Board of Appeals
c/o Department of Planning
30 North Market St.
Frederick MD 21701

RE: Appeal of Gordon Mill Preliminary Plan B275398.
Appeal of Gordon Mill Site Plan B275399
Request for Consolidation of Appeals

Dear Chairman Brown and Board Members:

On behalf of Cleanwater Linganore, Inc., Betsy Smith, and the remaining appellants in the two above-referenced appeals, please accept this request to consolidate the two appeals into one case (with Case No. B275398 the lead case number).

This request is based on the following reasons:

1. All parties concur that, in accordance with §1-20-22(A) of the Adequate Public Facilities Ordinance ("APFO Approval"), issues arising from the preliminary and site plan approvals are not subject to BOA review but instead are subject to review by the Circuit Court.
2. The APFO Approval is pending review in the Frederick County Circuit Court.¹
3. Given the Circuit Court's jurisdiction over the APFO Approval, the appellants hereby withdraw their APFO-related challenges to the Preliminary and Site Plan appeals now pending before the BOA. Appellants specifically **withdraw** the following two issues noted in their appeal:
 - (a) The Preliminary Plan fails to satisfy the 2014 APFO code standards with respect to school capacity (the 2014 APFO school standard was established as the APFO standard for the property because the property is subject to the terms of a 2014 Developer Rights and Responsibilities Agreement ("DRRA"); and

¹ The Planning Commission's APFO approval in connection with the Gordon Mill preliminary and site plans is pending review in the Frederick County Circuit Court, *i.e.*, Civil Action No. C-10-CV-23-000319 (preliminary plan) and Civil Action No. C-10-CV-23-000320 (site plan). The Circuit Court consolidated these two cases into one, with Civil Action No. C-10-CV-23-000319 being the lead case.

(b) The Preliminary Plan fails to satisfy the Adequate Public Facilities Ordinance (Frederick County Code Chapter 20) with respect to road adequacy.

4. There are, however, other issues subject to BOA review in both appeals.²
5. The Planning Commission voted to approve the Gordon Mill Preliminary Plan immediately followed by consideration of -- and a vote to approve -- the Project's Site Plan.
6. During the Site Plan hearing before the Planning Commission, appellants asked the Planning Commission to incorporate the record of the Preliminary Plan proceedings into the record of the Site Plan proceedings, and the Planning Commission agreed.

Therefore, the same record will serve as the basis for the Board's review in both the Preliminary Plan and Site Plan appeals.

7. The County, through its counsel ("Respondent County"), and the Gordon Mill applicants NEW MARKET 279 (D.C.) ASLI VIII, LLC, its affiliated companies, Avanti Strategic Land Investors VIII, L.L.L.P., APG ASLI VIII GP, LLC, Avanti Properties Group III, L.L.L.P., APG III GP, LLC, Avanti Management Corporation and JNP Capital Management, its development manager ("Respondent Avanti"), by and through its legal counsel, Bregman, Berbert, Schwartz & Gilday, LLC, consent to this motion.³

Additionally, Appellants, with the consent of Respondent County and Respondent Avanti, further request as follows:

That the Board grant this request without a hearing, as all parties formally entered in this appeal have consented.

Respectfully Submitted,

Michele McDaniel Rosenfeld

Michele McDaniel Rosenfeld

Cc: Kathy Mitchell, Senior Assist. County Attorney, Counsel for Respondent Planning Commission
Soo Lee-Cho, Esq., Counsel for Respondent Avanti

² Respondent Avanti's consent to the relief requested herein shall in no way be construed as or deemed to be evidence of an admission, concession, or waiver of any kind regarding its rights, claims, and/or defenses related to these appeals. All rights are reserved.

³ Respondent Avanti's consent to the relief requested herein shall in no way be construed as or deemed to be evidence of an admission, concession, or waiver of any kind regarding its rights, claims, and/or defenses related to these appeals. All rights are reserved.