

**PETITION OF KATHY HUDSON,  
*et al.***

**FOR JUDICIAL REVIEW OF THE  
DECISION OF THE MAYOR &  
CITY COUNCIL OF BALTIMORE**

**IN THE CASE OF:**

**APPLICATION OF OVERLOOK  
SUB 1 LLC AND OVERLOOK  
SUB 2 LLC FOR A PLANNED UNIT  
DEVELOPMENT**

**Bill No. 17-0049  
Ordinance No. 17-037**

**IN THE  
CIRCUIT COURT  
FOR  
BALTIMORE CITY**

**Case No. 24-C-17-004307**

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**MEMORANDUM OPINION**

Overlook Sub 1 LLC and Overlook Sub 2 LLC, two entities of the same developer, seek to build a large apartment building, to be known as The Overlook at Roland Park, on a twelve-acre property in north Baltimore. Following an administrative process, the Baltimore City Council passed and then-Mayor Catherine Pugh signed an ordinance approving the development as a planned unit development (“PUD”). Three groups of opponents of the development filed actions in this Court seeking judicial review of the PUD approval. Those three actions have been consolidated into this action.

Petitioners Hunter and Margaret Cochrane filed the first action for judicial review. They own a home on St. George’s Road on property that shares a boundary line with the proposed development site. Petitioners Lehr Stream Neighborhood Association, Inc., Roland Park Civic League, Inc., Robert Williams, Barbara K. Shapiro, Sheila Riggs, Nancy Cormeny, Sabina-Mattfeldt Community Improvement Association, Inc., Edward Clawsey, Mary Clawsey, John McIntyre, and Andrew Brooks filed the second petition. Those petitioners include three

neighborhood associations and other property owners in the vicinity of the proposed development, including some whose properties abut the development site. The third action was filed by Petitioners Kathy Hudson and Phil Spevak, also property owners in the area. The Cochranes have filed one set of memoranda in this Court. All of the remaining petitioners have filed memoranda collectively, and the Court will refer to them as the “Lehr Stream Petitioners.” No opposing party has raised any issue of standing concerning any Petitioner.

Respondents Overlook Sub 1 LLC and Overlook Sub 2 LLC now own or have contractual rights to the development site and are affiliated with Blue Ocean Realty, LLC and Jonathan Ehrenfeld. Except where precision is necessary, the Court will refer to both Overlook companies and Mr. Ehrenfeld simply as the “Developer.” The Mayor and City Council of Baltimore (the “City”) have also participated as a Respondent.

The matter came before the Court on January 29, 2018 for a hearing. Petitioners and Respondent appeared represented by counsel. The Court apologizes to the parties and counsel for its long delay in rendering this decision.

A central issue in this action is the timing of this development proposal in relation to Baltimore’s adoption of a comprehensive new zoning ordinance known as “TransForm Baltimore.” TransForm Baltimore was finally adopted by the City Council on December 5, 2016, signed by the Mayor on December 8, 2016, and made effective on June 5, 2017. The Developer submitted its PUD application before June 5, 2017, but the City did not approve the application until after the effective date. The zoning law before June 5, 2017 existed as a separately designated Zoning Code. For convenience, the Court will refer to it as the “old” or “former” Zoning Code. TransForm Baltimore, as amended, is now codified as Article 32 of the Baltimore City Code, although it is still given the short title, “Zoning Code of Baltimore City.”

Baltimore City Code, Art. 32, § 2-301. The Court will refer to it as TransForm Baltimore or the “new” or “current” Zoning Code.

### **Facts and Procedural History**

#### **1. The Proposed Development**

The site at issue is 12.762 acres of undeveloped land in north Baltimore near the northeast corner of the intersection of Northern Parkway and Falls Road. It was once part of a single property totaling 20.663 acres situated in that corner of the intersection. A relatively narrow strip of about six acres of land along the east side of Falls Road, north of Northern Parkway, was separated in 1962, and a large apartment building then known as Belvedere Towers was built on that portion. Belvedere Towers was recently renamed The Falls at Roland Park (“The Falls”) and is now owned by another entity affiliated with Blue Ocean Realty, LLC and Mr. Ehrenfeld. There is a service station immediately at the northeast corner of Northern Parkway and Falls Road. It is not important for purposes of this action, but the Court assumes this is the 0.7-acre property also separated from the original 20.663-acre property in 1962.<sup>1</sup>

The 12.762-acre property that resulted when the Belvedere Towers property was separated is landlocked. The southern edge of it reaches Northern Parkway, but there is no access to the roadway at that point because of steep slopes. For access to either Northern Parkway or Falls Road, the property depends on the property on which Belvedere Towers, now The Falls, is located. The Falls has three vehicle access points – one on Northern Parkway and two on Falls Road. Because Northern Parkway is a divided highway at that point, only westbound vehicles can enter The Falls from Northern Parkway, and vehicles leaving The Falls

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<sup>1</sup> It may be noted that the 12.762 acres of the property at issue, approximately six acres of the Belvedere Towers property, and 0.7 acres for the service station property do not total 20.663 acres, but the discrepancy is not important for this action.

from the driveway can only turn right or westbound on Northern Parkway. The Falls Road entrance closest to the Falls Road/Northern Parkway intersection is through the service station lot. The other Falls Road entrance is farther north on Falls Road almost directly opposite Mattfeldt Avenue.

To the north and east of the property are several properties, most of them with single-family homes. To the north is Cliffhurst Road. Cliffhurst Road appears to have one segment connecting to Falls Road that provides access to three properties. Those include the residential properties of Petitioners Clawsey and Cormeny. There is a section of undeveloped right-of-way and then what appears to be another section of developed roadway designated as Cliffhurst Road that connects to St. George's Road. St. George's Road runs to the east where it connects to Roland Avenue. The Cochranes, Petitioners, own a property on St. George's Road. As will be discussed, potential access to the property over the Cliffhurst and St. George's Road rights-of-way has been an issue for many years.

The property is located on the eastern slope of the Jones Falls valley. The slope begins farther to the west at the Jones Falls and rises to Falls Road. The Sabina-Mattfeldt neighborhood is located in that area east of the Jones Falls and west of Falls Road. Going to the east, the land rises steeply from Falls Road, first over the narrow Belvedere Towers property and then over the 12.762-acre parcel at issue. The elevation at that section of Falls Road is approximately 228 feet. Less than 1000 feet to the east, at the intersection of St. George's Road and Cliffhurst Road, the elevation is 360 feet. That computes to an average grade of about 13%.

Under the old Zoning Code, the 12.762-acre property was split-zoned as two zones of approximately six acres each. The western portion of the property, abutting the Belvedere Towers property, was designated R-6; the portion to the east, more irregular in shape, was

designated R-1. The proposed apartment building – The Overlook – would stand entirely on the six-acre R-6 portion of the site. Indeed, as will be discussed in more detail, the Developer and the City later restricted the PUD to those six acres of the property only. As initially proposed in the application, the building was to have two lower levels of parking with 267 parking spaces for residents and visitors and four levels above the parking decks with 132 living units. In the course of the application process, the Developer revised the proposal to 148 living units and 264 parking spaces, but the revision did not increase the overall size of the building. Instead, it involved reconfiguration of one parking level to include both living units and parking.

A key issue is the height of the proposed building. The proposed Overlook building would be approximately eighty feet tall. The existing apartment building, The Falls, stands near the bottom of the slope, parallel to Falls Road. It has a long, thin north-south footprint – approximately 675 feet long and only about sixty feet wide – and is set back fewer than fifty feet from Falls Road. The Overlook would be parallel to The Falls and uphill from it. The buildings would be only about 150 feet apart, but because of the slope, the first floor elevation of The Falls is 268 feet and the garage slab elevation of The Overlook would be 293 feet. In gross terms, The Falls would be the taller building, but because The Overlook would sit on much higher ground, The Overlook’s roof would stand about 27 feet higher than the existing roof of The Falls. That is a significant detraction to Petitioners, some of whom live on St. George’s Road at the top of the hill above the property. The plans show The Overlook’s roof to have an elevation of 360 feet, about twenty-five to thirty feet higher than the land on which the Cochranes’ house is situated.

The R-6 designation under the old zoning law calculates the permissible height of a proposed structure based on its floor area ratio. Former Zoning Code, § 4-906(a). Although no

party introduced the detailed floor area ratio calculation,<sup>2</sup> no party disputes that the proposed building, as configured, could be eighty feet tall under the old zoning law. In contrast, TransForm Baltimore takes a different approach to building height. It is not disputed by any party that an apartment building on this site under TransForm Baltimore would be subject to a 35-foot height limitation.

## **2. Ownership of the Property**

Council Bill No. 17-0049, introducing the PUD application for The Overlook project, was introduced in the Baltimore City Council on April 3, 2017. The original Council Bill refers to the developer as Blue Ocean Realty, presumably meaning Blue Ocean Realty, LLC. It is not clear, however, that Blue Ocean Realty, LLC or any entity affiliated with it owned the property as of April 3, 2017. Indeed, even as ultimately adopted, the PUD ordinance does not include a recorded deed of the property to Blue Ocean Realty, LLC or to either of the Overlook Sub companies. In the PUD ordinance, the title status of the property is explained by a May 24, 2017 memorandum of the Developer’s counsel with attachments (the “May 24, 2017 Memorandum of Counsel”). The last recorded deed shown is an October 1986 Deed identified in the May 24, 2017 Memorandum of Counsel as the “Title Deed” and “the vesting deed of the Property into the current owner.” The 1986 Deed is from Belvedere Associates, a partnership of Milton Diener and Harold A. Reznick, to Mr. Diener and his wife and Mr. Reznick and his wife. This Deed did not convey any of the property but served to establish or to confirm easements and rights-of-way between the properties that had been divided in 1962.

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<sup>2</sup> In general terms, the permissible number of living units is determined by dividing the total area of the lot by the minimum square footage for each unit, 1,500 SF. The permissible height of the building then depends on the footprint or floor area of the proposed building. A building with a smaller footprint – a smaller floor area per floor – can be taller to accommodate the number of permitted units. A building with a larger footprint will be shorter.

The ownership interests of the Developer are shown only indirectly. Attached to the adopted PUD Ordinance as Exhibit G to the May 24, 2017 Memorandum of Counsel is a “Declaration of Restrictive Covenants.” The first paragraph of the Declaration refers to a May 2017 effective date, but the line for the specific day is blank. The notary statements indicate that the document was signed on May 23, 2017. The Declaration is made by Blue Ocean Realty, LLC as Declarant for the benefit of North Roland Park Improvement Association, Inc. and Poplar Hill Association, Inc. The recitals state that “Declarant is the owner of the real property located in Baltimore City, Maryland, which is more fully described on **Exhibit A.**” Exhibit B to the Declaration (and Exhibit H to the May 24, 2017 Memorandum of Counsel) is an undated Covenant Agreement between “Blue Ocean, LLC”<sup>3</sup> and Jonathan Ehrenfeld, on the one part, and North Roland Park Improvement Association, Inc. and Poplar Hill Association, Inc., on the other part. It contains a series of covenants, including a commitment to build only on the R-6 portion of the property and to preserve the remaining portion of the property as “permanent green space.” The May 24, 2017 Memorandum of Counsel describes this Declaration and the Covenant Agreement prospectively:

Blue Ocean intends to record the Declaration upon its acquisition of the Property. . . . Pursuant to the Declaration, Blue Ocean will subject the Property to the terms of the restrictive covenants contained in the Covenant Agreement.

May 24, 2017 Memorandum of Counsel at 3.

After the May 24, 2017 Memorandum of Counsel, and not explained by it, is a copy of a May 30, 2017 Operating Agreement of Overlook at Roland Park LLC. The Agreement recites

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<sup>3</sup> The Court has reviewed the business entity listings of the Maryland State Department of Assessments and Taxation. There is a listing for a “Blue Ocean, LLC,” but it shows the entity as “dissolved.” There is a listing for Blue Ocean Realty, LLC in good standing.

creation of the entity on May 30, 2017 and ownership entirely by Jonathan Ehrenfeld as its sole Member. Although the purposes of the entity include buying, selling, and managing real property, there is no statement that Overlook at Roland Park, LLC owns or will own this property.

Immediately after the Operating Agreement are copies of two Assignments of Agreement of Sale. They refer to being “made and entered” in June 2017, but the lines for the specific day are blank. One of them refers to “that certain Agreement of Sale, dated as of March 13, 2017 (the ‘**Purchase Agreement**’), by and between the Assignor, as the Purchaser, and MILTON AND LILIAN DIENER REVOCABLE TRUST, as the Seller.” The Assignor in that Assignment is Princess Leah, LLC; the Assignee is Respondent Overlook Sub 2, LLC. The second Assignment refers to “that certain Agreement of Sale, dated as of December 1, 2016 (the ‘**Purchase Agreement**’), by and between the Assignor, as the Purchaser, and HAROLD REZNICK AND CYNTHIA REZNICK, as the Seller.” The Assignor in the second Assignment is also Princess Leah, LLC; the Assignee is Respondent Overlook Sub 1, LLC. Jonathan Ehrenfeld appears to have signed both Assignments as the “Manager” or “Authorized Person” for all of the entities involved: Princess Leah, LLC, Overlook Sub 1, LLC, and Overlook Sub 2, LLC.

It thus appears that an Ehrenfeld entity, Princess Leah, LLC, entered into separate agreements on December 1, 2016 and March 13, 2017 to purchase the separate Diener and Reznick interests in the property. One may assume that the purchase of the property had not been closed as of sometime in June 2017 because the assignments from Princess Leah, LLC to the two Overlook entities was an assignment of the Purchase Agreements, not an assignment of a perfected interest in the property. It is not clear on what basis Blue Ocean Realty, LLC intended

to assert itself as owner of the property. In the administrative process, Blue Ocean Realty, LLC asked that the two Overlook entities be substituted as the owners of the property, and that amendment was made before the PUD was approved.

### **3. City Planning Department and Commission Review**

As noted, the formal administrative process began with the filing of Council Bill No. 17-0049 in the City Council on April 3, 2017. The bill was assigned to the Land Use and Transportation Committee (the “Committee”). As required by the PUD process, the Committee on April 6, 2017, referred the application to multiple City agencies, boards, and commissions for review and recommendations. The referrals included referrals to the Planning Commission, the Board of Municipal and Zoning Appeals, and the Department of Transportation.

The Planning Department staff prepared a Staff Report dated May 4, 2017, and the Planning Commission convened a hearing on the same date. Based on discussions with the Developer during the staff review process, the proposal was amended to increase the number of living units from 132 to 148. The Planning Department staff supported this change, noting that it resulted from interior layout changes and did not affect the footprint or height of the proposed building. The staff also supported substitution of four new plan sheets, dated April 27, 2017, to reflect refinements in the proposal. Following the hearing, the Planning Commission adopted the staff recommendation and recommended approval of the PUD by the City Council, with the recommended amendments.

The Planning Department staff noted the change in height restrictions from the old zoning law to the new TransForm Baltimore requirements, recognized the Developer’s purpose to take advantage of the more permissive old law, and endorsed that approach:

[T]he change to a flat height limit instead of the Floor Area Ratio (FAR) would preclude this development, as proposed, being built.

The current proposal is to build a building that is roughly 80' tall and the new zoning code would cap a multi-family development at 35' for interior lots and 45' for corner lots.

Because of this change in regulation, the developer has decided to request the establishment of a residential planned unit development through City Council Bill #17-0049 as a way to “vest” current property rights as the City transitions to a new zoning code. This PUD, if enacted, would allow for the redevelopment of this site with the proposed multi-family building.

Planning Staff is in support of this approach, which though allowing a building taller than would be allowed under TransForm Baltimore, protects the R-1 portion of the site from development because the proposed development is to be built only on the R-6 portion of the site, which accounts for approximately half of the lot area. Because the R-1 portion has more tenuous environmental features, it is more advantageous to encourage that development only be on the R-6 portion of the site.

Staff Report at 2. The staff then reviewed the “PUD Standards”:

This proposal must satisfy the requirements of the governing standards for PUDs per §9-112 of the Zoning Code. In Staff’s review, it finds that the proposed PUD does satisfy the standards of the Required Findings and Required Considerations as outlined in Title 14 “Conditional Uses”, as well as the standards in §9-112(a)(2), §9-112(b) and §9-112(c) of the zoning code. In summary, Staff offers the following considerations:

- The use and bulk provisions under this proposed PUD are appropriate and would not adversely affect the surrounding area.
- The proposed development meets several of the city’s Comprehensive Master Plan goals, including returning vacant properties to productive use; and increasing housing choice.
- The proposed development reflects the character of the adjacent building and respects the surrounding neighborhood by maintaining green space through permanent easements. Therefore, this proposed PUD should not be detrimental to the character and nature of existing and contemplated development in the immediate area.

- The location of the PUD has been thoughtfully considered to accommodate the existing topography of the land. There are tremendous slopes across the entirety of the PUD. The established height takes the topography into consideration.
- The proposal will not create any situation that should negatively impact future development potential or the use, maintenance or value of neighboring areas already developed.
- The new construction will not impact the availability of light, air, open space, and street access. The development is proposing to make use of existing entrances and exits, but will modify them to better function.
- The proposed development will not reduce the protection of residents, visitors, or neighboring residents from fire, health hazards, or other dangers.

*Id.* at 3.

The Planning Commission held a hearing on the application on May 4, 2017. Commission staff presented its recommendation, and the Commission heard from a representative of the Transportation Department. At that point, the Transportation Department had not yet completed its traffic impact study. Al Barry spoke as a representative of the Developer, and Mr. Ehrenfeld himself also addressed the Commission. The Commission also heard from Robert Williams, a resident of St. George’s Road and a trustee of the Lehr Stream Neighborhood Association, Curt Houston and Fife Hubbard, both residents of the Sabina-Mattfeldt neighborhood, Jamie Riordan,<sup>4</sup> a resident of Poplar Hill Road, Scott Wheeler, from the Lehr Stream Neighborhood Association, Hunter Cochrane, a resident of St. George’s Road, Sue

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<sup>4</sup> The spelling in the transcript is “Reardon,” but the Court believes the correct spelling is Riordan based on other written materials in the administrative record.

Joslow, President of the Poplar Hill Association, and Rosemary Mountain and Shelley Sehnert, respectively a director and the President of the North Roland Park Association.

Without attempting to capture all the information presented to the Commission, the Commission clearly learned that there were disagreements among the neighborhood organizations in the area of the proposed development. Two of those organizations, the North Roland Park Association and the Poplar Hill Association, had entered into agreements with the Developer. The Lehr Stream Neighborhood Association is a newly formed organization arising out of opposition to the proposal and unhappiness with the positions taken by the other organizations. The Commission also heard that effects on traffic and the height of the proposed building were prime concerns. The Developer stated that the building had been scaled down by one floor in the course of discussions and that, in the Developer's view, lowering the height further by building all or part of the parking underground was not economically feasible because of rock on the site. The Developer acknowledged that it had given neighbors conflicting or inaccurate information about the height of the building relative to the height of the existing Belvedere Towers because of an error by the project engineers. There was also substantial discussion of the means of assuring that the buffer portion of the property would never be developed and the issue of assuring that Cliffhurst Road and St. George's Road would never be used to provide access to the development. At the end of the meeting, all Commission members present voted to approve the Commission staff recommendation.

#### **4. City Transportation Department Review**

The City Department of Transportation considered the project separately. As stated, the Transportation Department's representative reported at the Planning Commission hearing on May 4, 2017 that the traffic impact study was not yet complete. The Acting Director of the

Department of Transportation, however, provided a May 2, 2017 memorandum to the City Council in which he stated: “The Traffic Impact Study (TIS) for 1190 West Northern Parkway is complete.” He stated that a copy of the TIS was attached, but the Traffic Impact Study report that is attached to that memorandum in the administrative record is dated June 6, 2017, more than one month after the memorandum.

In his memorandum, the Acting Director of the Department of Transportation noted that both vehicle and pedestrian ingress and egress for the project would have to be provided by an easement over the existing Belvedere Towers property. The Developer’s site plan included proposed improvements to the existing northern entrance on Falls Road, but because that entrance is located on the Belvedere Towers property, it “is not included in the proposed planned unit development (PUD), and therefore cannot be evaluated by the TIS. DOT recommends that the improvements to this intersection be removed from the PUD.” The Acting Director summarized four proposed pedestrian, transit, and visibility improvements recommended for inclusion in the PUD:

1. Installing advance warning pedestrian signs at the intersection of Falls Road and Northern Parkway;
2. Upgrading the transit stop at that intersection for pedestrian safety;
3. Refreshing crosswalk markings at that intersection; and
4. Removing vegetation to improve visibility near the existing entrance on Falls Road and Cliffhurst Road.

The Traffic Impact Study was performed for the Department of Transportation by a contractor. In the TIS, the Department briefly reviewed the existing pedestrian and bicycle conditions in the study area. The TIS also identified the existing transit lines that serve the area.

There are four MTA bus routes in the area with five bus stops.<sup>5</sup> One unique feature is that there is a bus stop located on a triangular traffic island in the Northern Parkway/Falls Road intersection formed by a separated right turn lane. The Mount Washington station of the Light Rail line is located north of the proposed project off Kelly Avenue.

To assess the impact of the proposed project on vehicle traffic, the TIS contractor considered the project based on 148 new dwelling units and 297 new parking spaces to be constructed in 2019.<sup>6</sup> The TIS contractor studied eight intersections near the proposed project:

1. Falls Road at Smith Avenue;
2. Falls Road at Kelly Avenue;
3. Falls Road at Mattfeldt Avenue/existing north entrance;
4. Falls Road at Shell Station/existing south entrance;
5. Northern Parkway at access drive/existing entrance;
6. Northern Parkway at Falls Road
7. Northern Parkway at I-83 northbound ramps; and
8. Northern Parkway at I-83 southbound ramps.

Three scenarios were included: (1) existing conditions as of 2017; (2) projected “Year 2019 Background Conditions,” including projected growth without the project; and (3) projected “Year 2019 Build-Out Conditions,” including the projected growth in Year 2019 Background Conditions plus traffic volumes resulting from the completed project. For each intersection and

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<sup>5</sup> The text identifies four bus routes. Two additional bus routes are included in one table.

<sup>6</sup> The assumption of 297 parking spaces apparently was an error. The correct number of parking spaces, as revised, was 264.

scenario, the Department evaluated “Measures of Effectiveness (MOE) of Levels of Service (LOS), delay, and capacity.”

The intersection of Northern Parkway and Falls Road is a major intersection. Northern Parkway at that point is a six-lane divided roadway classified as a “primary arterial roadway.” Just west of that intersection it provides north and southbound ramp access to Interstate 83, the Jones Falls Expressway. Falls Road at the intersection is a four-lane undivided roadway classified as a “minor arterial roadway.” The Maryland State Highway Administration 2016 Traffic Volume Map identified average daily traffic volume of 42,660 vehicles per day on Northern Parkway and 14,875 vehicles per day on Falls Road. The field observations for May 2017 reported in the TIS show traffic queues at the intersection of up to forty vehicles or 1000 feet in one direction during the morning peak period and up to thirty-five vehicles or 875 feet in one direction during the evening peak period. As observed: “In general, congestion was present along both directions of Northern Parkway throughout the morning and evening peak hours. Congestion was heaviest on Falls Road northbound during the evening peak and southbound during the morning peak.”

To reach a current comparison of expected traffic conditions with and without the proposed project – the “build” and “no build” alternatives – the Department first projected from the observed 2017 conditions to a “Background Conditions” scenario as of 2019. The TIS notes that no improvements to the applicable transportation network were planned before the build-out year of 2019. The TIS allowed for general growth from 2017 to 2019 and for expected additional traffic associated with a planned expansion at Sinai Hospital, which is located to the west on Northern Parkway. This is the “no build” scenario for 2019.

To assess the traffic effects of the proposed project – the “build” scenario for 2019 – the TIS contractor performed a detailed trip generation analysis based on the proposed capacity of 148 dwelling units. Although the TIS also states that it is based on 297 parking spaces, it does not appear that the number of parking spaces factors into the trip generation analysis. The contractor used the methodology from the *Trip Generation Handbook* of the Institute of Transportation Engineers, with what the contractor described as “a minor reduction of approximately 5% . . . to account for the proximity to transit facilities.” The analysis projected adding 935 daily vehicle trips to increase the average daily traffic volume on Falls Road to 15,625 vehicles and on Northern Parkway to 43,400 vehicles. The contractor distributed the projected additional vehicle trips based on assumptions concerning the directions people would travel to and from the project.

The Department of Transportation rates intersections based on level of service, delay, and volume-to-capacity ratio. As explained in the TIS:

The level of service (LOS) is a letter designation that corresponds to a certain range of roadway operating conditions. The levels of service range from A to F, with A indicating the best operating conditions and F indicating the worst, or a failing, operating condition. The volume-to-capacity ratio (v/c ratio) is the ratio of current flow rate to the capacity of the intersection. This ratio is often used to determine how sufficient capacity is on a given roadway. Generally speaking, a ratio of 1.00 indicates that the roadway is operating at capacity. A ratio greater than 1.00 indicates that the facility is operating above capacity as the number of vehicles exceeds the roadway capacity.

The TIS culminates in a side-by-side comparison of the results for each study intersection in each of the three scenarios analyzed. Four of the eight study intersections end the study with levels of service of D or lower. One of those intersections includes the northern entrance to the project and is analyzed separately for different vehicle movements.

Falls Road at Northern Parkway is the busiest of the eight study intersections. It was rated based on 2017 conditions as a failing or F intersection during both the morning and evening peak periods. That F rating holds through both the “no build” and “build” scenarios for 2019. The measures for volume-to-capacity ratio and delay decline in both the “no build” and “build” scenarios. The volume-to-capacity ratio for that intersection goes from 1.14 (2017) to 1.18 (2019 “no build”) and 1.20/1.21 (2019 “build”).<sup>7</sup> The delay measure rises from 124.4/119.5 seconds (2017) to 131.7/131.4 seconds (2019 “no build”) and 135.6/134.2 seconds (2019 “build”). In other words, in this analysis, construction of the project would produce a 0.02 or 0.03 increase in the volume-to-capacity ratio and additional delays of three or four seconds at that intersection.

The TIS grouped together the intersection of Falls Road and Mattfeldt Avenue and the existing northern entrance/exit to Belvedere Towers, but it provides separate data for each direction of that intersection. The eastbound direction is Mattfeldt Avenue meeting Falls Road, which provides ingress and egress to the Sabina-Mattfeldt community.<sup>8</sup> The westbound direction is the Belvedere Towers access road meeting Falls Road.<sup>9</sup> Those intersections do not have traffic signals other than stop signs. The TIS notes that this northern Belvedere Towers entrance is to be improved as part of the project, but the TIS does not consider the effect of those

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<sup>7</sup> Where two values are given separated by a slash, they are the values in the TIS for morning/evening periods.

<sup>8</sup> The Court assumes but is not certain that eastbound is limited to vehicles traveling eastbound on Mattfeldt and then either turning north or south on Falls Road or crossing Falls Road into Belvedere Towers.

<sup>9</sup> The Court similarly assumes but is not certain that westbound at this intersection is limited to vehicles traveling westbound on the Belvedere Towers access road and then either turning north or south on Falls Road or crossing Falls Road into Mattfeldt Avenue.

proposed improvements. Both of these intersections were rated as F or failing during both morning and evening peak periods as of 2017 and for both of the 2019 projected scenarios. The eastbound Mattfeldt Avenue intersection earned that rating despite having adequate capacity. The volume-to-capacity ratio for that intersection was 0.27/0.13 in 2017 and was projected to be 0.31/0.15 in the 2019 “no build” scenario and 0.33/0.15 in the 2019 “build” scenario. Projected delays increased from 132.1/59.1 seconds (2017) to 158.7/66.7 seconds (2019 “no build”) and 171.8/70.0 seconds (2019 “build”). In other words, in this analysis, construction of the project would produce additional delays exiting Mattfeldt Avenue of about three to thirteen seconds. That increased delay in the morning period amounts to an 8.3% increase.

The Court would expect the most substantial effect in the “build” scenario to be on the westbound direction of this intersection because that direction measures traffic exiting the project at this access point, but the TIS does not quantify that effect precisely because at certain limits the volume-to-capacity ratios and delays are expressed only as “greater than” values. Thus, for 2017, the westbound direction of this intersection is already listed as having a volume-to-capacity ratio of “>2.00” for the morning period and 1.28 for the evening period. For the 2019 “no build” scenario, this ratio increases to >2.00 and 1.51, and for the 2019 “build” projection, it is >2.00 for both the morning and evening periods. In other words, this entrance is already at more than twice its capacity in the morning peak period. The TIS does not express how much farther over twice capacity it would become with the project, but the increase in the values for the evening period – from 1.28 to 1.51 to >2.00 – is an indication of the projected effect.<sup>10</sup> For

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<sup>10</sup> The increase from 1.28 to 1.51 for 2017 to 2019 “no build” is puzzling because this entrance only serves Belvedere Towers. Although there is some information in the record about potential increases in the number of units in the existing Belvedere Towers, the Court does not believe the TIS specifically allowed for that possible change. This projected increase may be a result of a generalized increase applied for overall growth from 2017 to 2019.

the westbound direction, the values given for delay are even less illuminating because both values for all three scenarios are “>300” seconds of delay, that is, a consistent morning and evening delay of at least five minutes using that exit from Belvedere Towers.

The two other study intersections with level of service grades of D or worse are both north of the proposed project: Falls Road at Kelly Avenue and Falls Road at Smith Avenue. Both of these intersections have traffic signals. At Kelly Avenue, the intersection degrades from D/D in 2017 to D/E in the 2019 “no build” scenario and stays at D/E in the 2019 “build” scenario. The volume-to-capacity ratio for that intersection goes from essentially at capacity in 2017 (1.00/1.02) to ratios of 1.05/1.07 for both “no build” and “build” projections in 2019. The delays increase from 42.2/54.8 seconds in 2017 to 47.1/60.6 seconds in the “no build” scenario and 47.3/60.7 seconds in the “build” scenario. In other words, the TIS projects almost no effect on that intersection from the project. At Smith Avenue, the intersection degrades from C/C in 2017 to D/C for both the 2019 “no build” and “build” scenarios. The volume-to-capacity ratio for that intersection remains under capacity in all scenarios: from 0.55/0.56 in 2017 to 0.57/0.58 for both “no build” and “build” projections in 2019. The delays increase from 34.0/32.0 seconds in 2017 to 35.2/33.0 seconds in the “no build” scenario and 35.2/33.1 seconds in the “build” scenario. In other words, the TIS also projects almost no effect on that intersection from the project.

All of the other studied intersections have current A, B, or C ratings and those ratings do not drop below C with the proposed project. The westbound direction of the southern Belvedere Towers entrance onto Falls Road does degrade from B/C in both 2017 and 2019 “no build” to C/C in the 2019 “build” scenario.

The TIS Summary includes the following conclusions:

The results from the Background Conditions analysis [2019 “no build” scenario] indicate that the only degradation in overall intersection LOS, due to regional traffic growth of 1% and background trips from the Sinai Hospital expansion project, is the intersection of Falls Road at Smith Avenue where a 3 second increase in average intersection delay resulted in a change in LOS from D to E during the PM peak hour.

\* \* \*

The total Future Traffic Conditions analysis [2019 “build” scenario] indicates that the new trips generated by the proposed development will not result in any degradation of LOS from the 2019 Background Conditions [2019 “no build” scenario].

TIS at 34.

#### **5. Land Use and Transportation Committee Hearing**

The City Council’s Land Use and Transportation Committee conducted a public hearing on the PUD bill on June 7, 2017. Chairman Edward Reisinger presided, and Councilmembers Sharon Green Middleton, Robert Stokes, Sr., Mary Pat Clarke, Leon Pickett, III, Ryan Dorsey, Isaac Yitzzy Schleifer, and Eric Costello were present. Tr. at 3. Councilmember Schleifer was not a member of the Committee, but the proposed project is in his district, and he was the sponsor of the bill. Chairman Reisinger noted that “we have a large crowd,” and he thanked all in attendance for their interest in the issue. Tr. at 6-7.

The Committee began with reports from each City agency that had reviewed the proposal. Tamara Woods from the Department of Planning addressed the Committee first. Tr. at 7. She noted that the Planning Commission had approved the Planning Department’s staff report on May 4, 2017, including proposed amendments. *Id.* The record suggests that the Committee members had before them the Planning Department report and the proposed amendments. Tr. at 8, 9. One amendment increased the number of proposed dwelling units from 132 to 148. Tr. at

8. Another amendment substituted all of the existing exhibit sheets, dated March 27, 2017, with new exhibit sheets, dated April 27, 2017. *Id.* Ms. Woods noted, however, that that proposed amendment substituting the April 27, 2017 plan sheets had already been superseded by the Developer's submission of a new set of plan sheets on June 2, 2017. *Id.*

Ms. Woods then reviewed the Planning Department staff report. Tr. at 9. She immediately highlighted the June 5, 2017 effective date of TransForm Baltimore (just two days before the hearing) and the effect on the law and criteria applicable to the project. Tr. at 9. Under the old law the property was split-zoned R-1 and R-6; under the new law, the zones are R-1A and R-6. Tr. at 9. The change of six acres of the property from R-1 to R-1A was irrelevant because the Developer does not propose to develop that portion of the property. Tr. at 10. The R-6 zone under the old and new law have the same requirement of 1,500 square feet per dwelling unit; the significant change is in the way the permissible building height is determined. Tr. at 9-10. For an R-6 zone, the old law applied a floor area ratio (FAR) requirement. Tr. at 10. The permissible height is determined not in absolute terms but based on the footprint of the proposed building in relation to the total area of the property. Tr. at 11. In contrast, TransForm Baltimore imposes a simple 35-foot height restriction in R-6 zones. Tr. at 11. According to Ms. Woods, "what the PUD does is allow the developer to vest the rights of the old zoning code, so that means they can build under the floor area ratio and actually be able to build the 80-foot tall building that they're proposing[.]" Tr. at 10.

Ms. Woods also identified as an important factor the proposal to confine development to the R-6 portion of the property:

Because the R1 portion has more tenuous environmental features, it is more advantageous to encourage that development only be on the R6.

So basically, they have a right to build all over the property, but the proposed plan is really moving the development to only one portion. And this is part of what the PUD does.

If approved by the City Council, you're approving the development plan versus without the PUD, they would be able to go and do whatever they would want per zoning throughout the entirety of the site. The PUD actually is locking in the development plan.

Tr. at 11-12.

Ms. Woods then pointed out that the Planning Commission had reviewed the required PUD factors under both "911.2" and sections 14-204 and 14-205, "review[ing] the required findings and recommend[ing] they be approved based on those." Tr. at 12. She summarized those "required findings" and "required considerations":

The use involved permissions under the PUD are appropriate and would not adversely affect the surrounding areas.

The proposed development meets several of the City's comprehensive master plan goals, including the turning vacant property to productive use and increasing housing choice.

The proposed development reflects the character of the adjacent building and respects the surrounding neighborhood by maintaining green space throughout the permanent easements.

Therefore, this proposed PUD should not be detrimental to the character and nature of the existing contemplated development in the immediate area.

The location of the PUD has been thoughtfully considered to accommodate the existing topograph[y] of the land. There are tremendous slopes across the entirety of the PUD. The established height takes the topograph[y] into consideration.

The proposal will not create any situation that should inevitably impact future development potential or the use made into value of neighboring areas already developed.

The new construction will not impact the availability of light air open space and street access.

The development is proposing to make use of existing entrances and exits, but will modify them to better function, but they are already in place on the site.

The proposed development will not reduce the protection of residents, visitors, or neighboring residents from fire, health, health hazards, or other dangers.

Tr. at 14-15. Reviewing the conditional use factors, Ms. Woods summarized further:

That the establishment of the location, construction, maintenance, operation of the conditional use will not be detrimental or endanger[ ] the public health, security, welfare.

The use is not in any way precluded by any other law, including applicable urban renewal plans. There is no urban renewal plan on this site.

The authorization is not otherwise in any way contrary to the public interest. In fact, as I stated, it is in line with the City's comprehensive master plans, so really, it is in line with the City's public interest.

The authorization is in harmony with the purpose and intent of this article and the required considerations.

Tr. at 16.

Ms. Woods acknowledged that the Traffic Impact Study had not been completed when the Planning Commission met and approved the proposal on May 4, 2017. Tr. at 17. She stated that the Planning Commission would coordinate further with the Department of Transportation in the final design process with considerations concerning the entrances and exits. *Id.*

Ms. Woods emphasized again that five or six acres of the property would not be developed and would be protected by a "permanent easement" for forest conservation through a "deed restriction." Tr. at 17-19.

Councilmembers had a number of questions for Ms. Woods at different times during the hearing. Councilmember Costello focused on the timing of applications relative to the effective

date of TransForm Baltimore. He asked: “Had the applicant not submitted the application for the PUD prior to June 5th, but had instead applied for a building permit, what would have been the outcome of that?” Tr. at 24. Ms. Woods answered that that would present a question whether the application was far enough along in the design process to be considered a completed application by June 5, 2017 – a determination that would have been made by the Zoning Administrator. *Id.* Councilmember Costello then clarified his question: “If . . . they had submitted . . . a completed building permit application, to what extent . . . would they be allowed to build what’s currently planned?” Tr. at 25. Ms. Woods repeated that the permitted height in an R-6 zone under the old law was governed by the more flexible floor area ratio while the R-6 zone under TransForm Baltimore has a straight 35-foot height limit. Tr. 25-26. Councilmember Costello sought confirmation that this meant “that the PUD . . . that’s before this Council today[ ] actually limits what the developer can do as a matter of right[.] \* \* \* So without this PUD, the developer could do more than is being currently proposed.” Tr. at 26. Ms. Woods agreed: “Under . . . the past zoning code, they would actually be able to do more dwelling units than they’re actually proposing to do. . . . [T]his is where [floor] area ratio becomes very fluid. So it really depends on the footprint of the building. . . . [W]hatever footprint you use is actually gonna help determine your final height. . . . But what the PUD does, it’s locking in the development plan, and it’s locking in the process as well.” Tr. at 27. She ultimately confirmed his statement that “if not for the PUD, concessions that are being made by the developer, that they could do more than what is currently proposed as a matter of right[.]” Tr. at 28.

Later in the hearing, Councilmember Middleton asked about consideration of the effect of the proposed development on property values. Tr. at 49. Ms. Woods responded:

[W]e didn’t look at the valuation of property. What . . . Title 9 refers to is the impact from the physical development

standpoint, and so we didn't look at the dollar value of the property, but more of the evaluating what was the proposed development doing impacting the properties.

And so from our standpoint, it is rather far from the actual houses that are there. The closest houses from the portion – I'll speak to the R6 portion because the R1 portion is actually proposed to go into permanent easement. The closest residents are along Cliffhurst, and the proposed development is actually within the limits of what the zoning code would require. So by virtue of that, we did not see that there would be any impact to – negative impact to the value of the properties because the developer is actually doing what could be – if they were even go by right within the limits of the law outlined by the zoning code for the City of Baltimore.

Tr. at 49-50.

The Council Committee heard from a representative of the City Law Department, Rick Turnwell,<sup>11</sup> whose report was consistent with a June 2, 2017 letter to the City Council from Chief Solicitor Victor K. Tervalo. Tr. at 20.<sup>12</sup> Mr. Turnwell stated that the critical question in determining what law applied to the proposal was whether “we have a complete application on file prior to June 5th, 2017.” Tr. at 20-21. “Based on what was filed prior to June 5, the one that I took a look at, it appeared to me that the applicant had a complete application as of Friday, June 17th. For this reason, the Law Department concludes that the development can be governed under the old code.” Tr. at 21. This reference to June 17 must be either a misstatement by Mr. Turnwell or a mistake in transcription because the hearing occurred on June 7, 2017.<sup>13</sup>

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<sup>11</sup> Mr. Turnwell is identified in the hearing transcript as a “Law Clerk.” Tr. at 20.

<sup>12</sup> The City Law Department's comments came between Ms. Woods's report and most of the questions posed to her.

<sup>13</sup> The City states in its memorandum that this is a transcription error, that the audio recording shows Mr. Turnwell stated the completion date to be June 2, 2017. The Court has not listened to the recording, but Petitioners have not disputed the City's assertion.

Mr. Turnwell stated further: “[Y]ou just heard facts from the Planning Commission. If you find facts that are identical or similar to those facts that the Planning Commission or the Planning Department just provided, the Law Department is prepared to approve the Bill for form sufficiency.” *Id.*

The Council Committee then heard briefly from representatives of the Board of Municipal and Zoning Appeals, the Housing and Communities Department, the Baltimore Development Corporation, the Department of Public Works, the Parking Authority, and the Fire Department. Those agencies all stated either no objection to the proposal or adoption of the Planning Department’s recommendation. Tr. at 31-33.

Valorie LaCour then presented to the Committee for the City Department of Transportation. Tr. at 33. As noted above, the Traffic Impact Study is dated June 6, 2017, the day before the Committee hearing. Ms. LaCour apparently had slides she showed to the Committee which appear to be in a supplement to the administrative record filed with the Court. Her presentation closely tracked the information in the TIS. With respect to the level of service ratings for intersections, she said “[t]he Department of Transportation uses D as sort of its level of it’s a D or better, it’s pretty good, if it’s less than a D, there – there are issues.” Tr. at 38. She further described the intersection where Mattfeldt Avenue and Cliffhurst Road<sup>14</sup> meet Falls Road as “an odd intersection with offsets and acute angles.” Tr. at 39. Summarizing, she stated:

[T]he existing conditions capacity analysis indicate[s] that most intersections are at a level of service D or better in the AM and PM peak, except for Falls Road and Northern Parkway, and the existing entrance at Falls Road at approximately Mattfeldt or Cliffhurst.

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<sup>14</sup> Ms. LaCour probably meant the Belvedere Towers access road. Although Cliffhurst Road is offset across Falls Road from Mattfeldt Avenue, the TIS studied the separate Belvedere Towers access road as an intersection in conjunction with Mattfeldt Avenue. The intersection of Cliffhurst Road and Falls Road was not specifically studied in the TIS.

\* \* \*

The only degradation in overall level of service is Falls Road and Smith Avenue, and there's a three-second increase in delay, and level of service goes from D to an E in the PM peak.

Tr. at 42-43. Ms. LaCour noted the proposed amendment that would require the Developer to commit \$18,000 to fund pedestrian and transit improvements at or near the intersection of Falls Road and Northern Parkway. Tr. at 34, 43, 47-48.

Chairman Reisinger asked if there are any plans to address the failing intersection at Northern Parkway and Falls Road. Tr. at 45. Ms. LaCour said that intersection is on the Department's priority list of all intersections that are rated "F and worse," but "[i]t has not risen up to the top three intersections that we can fund through our capital improvement funding yet." Tr. at 46. In answer to another question, Ms. LaCour described the "interesting maneuver that happens" at the Northern Parkway/Falls Road intersection:

When you're coming northbound on I83 and you take the exit to Northern Parkway, if you want to go north on Falls Road, you literally have to weave over four lanes of traffic. Typically, that works because another driver is courteous enough to hopefully let you in. It happens every once in a while. Otherwise, . . . you either are going to turn right on Falls Road and try to make a U-turn, or you're going to go up Northern Parkway and make a U-turn.

But there's a strange weave that happens if you want to go northbound on Falls Road from 83.

Tr. at 55-56.<sup>15</sup>

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<sup>15</sup> This is the maneuver that a resident of The Falls or The Overlook would have to make if she or he were commuting by vehicle from downtown Baltimore using Interstate 83 North. Because Northern Parkway is a divided highway at that point, the entrance to the buildings from Northern Parkway is only accessible to traffic that is westbound on Northern Parkway. To reach the other two entrances on Falls Road without performing this "strange weave," a driver would have to

At the end of the City agency reports, Chairman Reisinger announced the plan for the remainder of the hearing. He allocated thirty minutes for a presentation by the Developer, thirty minutes for a presentation by a pre-planned panel of community members, and then “regular testimony from the audience.” Tr. at 58-59. Al Barry, a consultant, spoke first on behalf of the Developer. Tr. at 62. He immediately sought to explain “why would we do a voluntary planning and development<sup>16</sup> when we had the ability to build 197 units with no height at all.” Tr. at 63. He described this as “a voluntary gesture on our part when we began negotiating with the neighborhoods in December of last year to try to reach an agreement with as many groups as possible.” Tr. at 63. He referred to the Developer as having “[taken] over an option on this property last year” and as having a desire “to meet with as many of the neighborhood groups as possible.” Tr. at 64. Mr. Barry also sought to dispel any notion “that a planned unit development is a loophole in some fashion.” Tr. at 65. He described the PUD process as “a vigorous process” that would prevent the Developer from making major changes without engaging in a further process with the City. Tr. at 65.

Mr. Barry told the Committee that in the course of discussions with community groups, “we reduced the density, we reduced the height than what we started out with.” Tr. at 66. He also stated that the Developer had agreed to an amendment “at the request of the St. George’s residents who are opposing this, . . . to take the entire 6 acres of forest conservation out of the planned unit development.” Tr. 67-68. He explained:

We don’t understand why they wanted to do that. They asked us to do that. They must have their own motives for that. They can talk to that. But at their request and the Councilman’s request, an

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take an alternate route that approaches the Northern Parkway/Falls Road intersection from a different direction.

<sup>16</sup> This is probably an erroneous transcription of “planned unit development.”

amendment that you will ideally review and vote on today, was to take this green area out of the . . . PUD.

What it does not do is change the covenant restrictions with North Roland Park and Poplar Hill, and it also does not change in any way the City's own Forest Conservation Plan which protects it in and of itself.

Tr. at 68.

Jonathan Ehrenfeld, founder and president of Blue Ocean, including the Developer, then addressed the Council Committee. Tr. at 68-69. He described the existing Belvedere Towers as “a jewel [of] an asset whose owners were not willing to invest the resources needed to bring the property to life and in line with the exceptional neighborhoods that surround it.” Tr. at 71. Blue Ocean purchased that property and began “the overhaul of the property,” including renaming it The Falls at Roland Park. Tr. at 71. He then described Blue Ocean's interest in the adjacent twelve-acre property:

[A]s recently as a year ago, a lobbying effort was initiated by some neighbors to encourage then-current Councilwoman, Rikki Spector, to downzone the property from R6 to R1 to restrict or significantly limit development of the subject property.

Despite these requests, the Councilwoman refused to downzone the property, as she determined that it was in her constituents['] best interest to leave the property R6, thereby allowing for its future development as an apartment community.

With the R6 zoning upheld by our Council representative, we entered into a contract of sale to purchase the parcel. Had the property been downzoned, we would not have had any interest in purchasing it. The R6 zoning was essential in this case, because under the R6 zoning classification, as you heard, we were permitted by right to build approximately 197 apartments. Further, R6 did not specifically limit the height of the future building or buildings. All we had to do was determine what resources were necessary to construct our building. We would then be free to submit an application to the City for a building permit, gain their approval, and immediately start construction.

With a unit count of 197 and an unrestricted height, the team at Blue Ocean, together with myself, was very excited about the project. We felt that the potential project was sorely needed in an area that was vibrant, yet did not offer new, upscale rental housing to those who desired it . . . .

. . . Though we had tremendous excitement and passion for the Overlook, we reminded ourselves of our commitment to the community and our commitment to do what we can to promote peace, harmony, and friendship in our community.

With this front and center in our minds, we placed our forward progress on temporary hold and, over the last seven months, together with our consultants, designers, and engineers, met with our neighbors to listen to their concerns and see what we could do to make our project as pleasant and beneficial as possible for our community.

\* \* \*

In all, we have attended over 20 community meetings. We are thankful to our neighbors for their gracious hospitality, as well as their thoughtful feedback.

Tr. at 72-74. Mr. Ehrenfeld stated that Blue Ocean made “significant concessions” to reach agreements with the North Roland Park Improvement Association and the Poplar Hill Association. Tr. at 75. He listed three concessions:

1. Designation of “approximately 6 acres of green space to serve as a buffer between the future building and the adjacent neighbors and community.”
2. “[R]estrictions that prevent future access from the property through the surrounding streets, thereby limiting ingress and egress to Falls Road and Northern Parkway.”
3. “Finally, though the property was zoned by right for approximately 197 units and no height restriction, we agreed to only develop 148 units and limit the height of the building to four levels above a two-level foundation structure primarily used for parking.”

Tr. at 76. He gave the Committee his perspective on the continued opposition by some community members:

Though we were successful in coming to terms with two associations, we regret that we cannot make an agreement with some of the neighbors. These individuals have instigated a campaign to prevent development at all cost. Despite my team's many efforts to negotiate and work with them, after many months of negotiating with these individuals by making concession after concession, only to be presented with additional unreasonable demands, it became clear that their mission was just to prevent any development in the area regardless of size, height, or unit count by, among other things, spreading false information about the project, engaging in personal attacks, and even offering free busing for the people that came here today. They simply oppose any development on the site and in the neighborhood.

Tr. at 77-78.

Councilmembers asked a number of questions of Mr. Ehrenfeld, including questions concerning the affordability of the apartments in the proposed development and whether the relatively high number of parking spaces to be provided both added unnecessary cost and made the project less transit-oriented. Tr. at 90-101.

The Committee heard from Shelley Sehnert, the President of the North Roland Park Improvement Association. Tr. 81. She described that Association's discussions with the Developer and the agreement they reached. She described the Association's "primary concerns": "We value the urban forest, the natural land, the wildlife, and the lack of vehicular traffic on the small, non-connecting streets." Tr. at 84. She gave her view that "Mr. Ehrenfeld had agreed to all these restrictions since the very first meeting" and that he "was willing to work with us in good faith all along." Tr. at 84, 85. She said that some residents engaged in the discussions in what she believed to be good faith, but that she reached the conclusion "that no matter how long the negotiations extended or how willing Mr. Ehrenfeld was to compromise, no agreement would

be reached.” Tr. at 83-84. She also stated her belief, based on the Traffic Impact Study, that the development would not “cause catastrophic traffic gridlock.” Tr. at 87.

The first opponent of the project to address the Committee was Shale Stiller, an attorney who represents several of the Petitioners in this action. Tr. at 102. Mr. Stiller referred to the “very large notebook” that opponents submitted to the Committee. Tr. at 103. He argued that zoning regulations must seek to lessen traffic congestion and that traffic in the area presents “a terrible situation,” particularly with respect to the maneuver necessary to travel from northbound I-83 to eastbound Northern Parkway to northbound Falls Road. Tr. at 104-05. He referred to “an exhibit in this book that says this intersection is the second most dangerous intersection in the City of Baltimore.” Tr. at 110.

Mr. Stiller offered “in this binder an expert opinion of a real estate agent” who had visited neighboring properties and who opined that “the average property will go down in value by 10 to 20 percent” and certain properties “could go down as much as 40 percent” if the project were built. Tr. at 105-06. He said that trees would be removed on the north side of the property, with the result that “the bucolic, the beautiful view that these houses have . . . is going to be taken away by this enormous building.” Tr. at 106. In discussions, he said that Mr. Ehrenfeld initially said the proposed building would be no taller than Belvedere Towers. Tr. at 106. “And then suddenly, couple months later, he said, ‘Well, this building is going to exceed the height of the Belvedere Towers by 16 feet,’ and then he changed his mind again and went up to 26 feet.” Tr. at 106. According to Mr. Shiller:

This building will be an absolute eyesore. The top of this building, because it can be seen from all over the properties up on top of this big hill, which will exceed Belvedere Towers by 26 feet, it’s gonna ruin . . . the view of many of the houses up top. But the houses along Cliffhurst, they’re really going to be damaged.

Tr. at 107.

Addressing the agreement between the Developer and two neighborhood associations, Mr. Stiller asserted that the North Roland Park Improvement Association, Inc. had forfeited its charter and therefore could not enter into the agreement. Tr. at 107-08. He also claimed that association had violated certain of its bylaws and that the Poplar Hill Association had not kept its members informed of negotiations. Tr. at 109. He claimed that majorities of the residents in the areas covered by these associations now opposed the project. Tr. at 111-12. On these points Mr. Stiller referred to various items in the binder submitted to the Committee.

Mr. Stiller questioned whether the Developer's status with respect to the property was a contract to purchase it or "only an option." Tr. at 113. He questioned "whether someone who has only an option to buy the property is even entitled to a PUD." *Id.*

Finally, Mr. Stiller raised the question of "councilmanic courtesy." Tr. at 114. He had the following exchange with the Committee Chair:

[MR. STILLER:] The sort of ethos here that whatever the Councilman for the district wants with respect to zoning, he gets.

Now, this – the Councilman here is an honorable man, there is no question about that, but we've introduced into the record something that, from a perception point of view to the citizens of Baltimore, looks bad.

The principal fundraiser at a big fundraiser last year when the Councilman was running for office was Mr. Ehrenfeld. And developers do this. There's nothing wrong –

CHAIRMAN REISINGER: Shale. Shale, I don't – let's not go there. Okay?

MR. STILLER: Well, this is as a matter of law.

CHAIRMAN REISINGER: I know. But I mean –

MR. STILLER: Okay.

CHAIRMAN REISINGER: – what you’re doing is an integrity issue, which I don’t appreciate.

MR. STILLER: This is not integrity. I’m not saying he did anything wrong.

CHAIRMAN REISINGER: Let’s stick to the PUD and –

MR. STILLER: All right. Well, I’m saying –

CHAIRMAN REISINGER: – the facts.

MR. STILLER: – that this is – this is simply something that the Council should be examining.

Tr. at 114-15. With that, Mr. Stiller introduced the next speaker in opposition to the project.

Jamie Riordan<sup>17</sup> identified himself as a resident of the Poplar Hill neighborhood and a member of the Lehr Stream Neighborhood Association. Tr. 116. He said that he, like Mr. Barry, is “qualified to serve as an expert witness in real estate investment and development matters on a national level.” Tr. at 116. Mr. Riordan said that “traffic is a real problem which affects everyone utilizing Falls Road, Northern Parkway, and area feeder roads. Everyone in Sabina-Mattfeldt, Roland Park, Mount Washington, Poplar Hill, The Orchards, and every commuter, and every parent and child driving to our area schools. This is an issue for all of us.” Tr. at 116. He asserted that State Farm Insurance had once labeled the Northern Parkway/Falls Road intersection “the most dangerous intersection in the State of Maryland.” Tr. at 117. He complained that the City’s Traffic Impact Study had been distributed only at 4:30 p.m. the day before the hearing, with some appendices and recommendations not provided until the day of the hearing. Tr. 118-19.

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<sup>17</sup> Here again, the transcript uses the spelling “Reardon,” but the Court believes the correct spelling is Riordan based on other written materials in the administrative record.

Mr. Riordan summarized a technical review of the traffic issues provided in the opponents' binder from Rick Chellman, a licensed engineer and fellow of the Institute of Traffic Engineers. Tr. at 119. Mr. Riordan stated the following criticisms:

1. The Traffic Impact Study did not take account of increased traffic resulting from plans to increase the number of apartments in the existing Belvedere Towers from 238 to 292 units.
2. The standard code used in the TIS for predicting the number of vehicle trips resulting from the proposed project produced an estimate of approximately 100 peak vehicle trips. The proposed project features 148 apartments and 297 parking spaces. Given the cost of building parking in the structure, it is unlikely the Developer would build far more parking spaces than needed. Use of 297 parking spaces by new residents is likely to produce far more than 100 new peak vehicle trips.
3. Similarly, the TIS assumed a reduction in vehicle trips based on transit use by some new residents. Given the luxury level rents projected for the project, transit usage by those residents is likely to be at a significantly lower level than is seen for more affordable housing.

Tr. at 119-21. Mr. Riordan suggested that the proposed project would actually generate “over 900 trips per day, the majority of who will use an intersection already exceeding 100 percent of its capacity utilization.” Tr. at 121.

Mr. Riordan criticized the City Transportation Department for “complacency” – aspiring to raise this or any failing intersection only to a grade of D. Tr. at 122. He argued:

[The Department] treat[s] the failing condition [of the main intersection] as a binary matter; it's either failing or not. The way the additional degradation is present[ed] is effectively, well, it's already an F, and will still be an F, so it's okay, who cares. This logic fails to acknowledge that, yes, delay past 80 seconds is a failing a grade, but it does not require a professional engineer to understand that 130 seconds of delay is much worse than 81 seconds of delay. Even though both are graded as F, this is a 50

percent increase in existing delays without taking existing background traffic levels into account.

Tr. at 122. He asserted that the Department had failed to include in the TIS several parameters required in traffic studies and that this project should require the Department to do a mitigation study. Tr. at 123-24. At the end of Mr. Riordan's presentation, Chairman Reisinger asked: "Do we have a copy of your report?" Tr. at 124. Mr. Riordan answered simply, "Yes." *Id.* As noted, earlier he had referred the Committee to Mr. Chellman's report included in the opponents' binder. Tr. at 119.

Mary Ann Meers addressed the Committee next. Tr. at 125. She has lived on Poplar Hill Road since 1985 and noted that members of her family have had "three accidents at that intersection" and that she had an accident at Falls Road and Smith Avenue just three months before the hearing. Tr. at 125. Ms. Meers primarily addressed the lack of involvement of members of the Poplar Hill Association, other than board members, in that Association's decision to reach an agreement with the Developer and what she described as a failure to engage the community more broadly in the process. Tr. at 125-29. She noted that the Lehr Stream Neighborhood Association was formed specifically to oppose this project. Tr. 127. At the beginning of her presentation, Ms. Meers referred to materials in the opponents' binder. Tr. at 125. At the end of her presentation, Chairman Reisinger invited her to submit "a copy of [her] testimony." Tr. at 129.

Bob Williams spoke next. Tr. at 129. He is a resident of St. George's Road and the President of the Lehr Stream Neighborhood Association. Tr. at 129. Mr. Williams stated his basic opposition to the project:

[T]he overlook is too big, it's too tall, it will create unwanted traffic, and it will significantly affect the homes on the hill and right off Falls Road, primarily on Cliffhurst Road. And these are

little country houses that are in the far reaches of our neighborhood at the end of the Poplar Hill geology and are currently sheltered from the Belvedere, but will not be sheltered . . . from the Overlook.

Tr. at 130. He then gave his perspective on some of the discussions that led to the current proposal, beginning with history before Mr. Ehrenfeld and Blue Ocean were involved:

[T]he Belvedere Tower was built pursuant to a series of 1963 agreements that permitted the Belvedere to be built, and a 100-unit apartment to be built over the next 50 years, and that was a limit . . . not a minimum.

\* \* \*

[U]nder the settlement, there were permanent restrictive covenants that prohibited access to Cliffhurst Road and St. George's Road, and no new roads connected to Cliffhurst or St. George's Road may be built.

In other words, the basic deal for the Belvedere was, you can build up Belvedere, you can build 100 more units, but you can't ever go up the hill, you can't ever access the other roads, and you can't impact the serenity, and the peace, and the quiet of the houses that ring around the top of the hill.

\* \* \*

Blue Ocean bought the Belvedere Tower around July 5th, 2016. I said 17.

On September 25th, Dr. Sehnert, Rikki Spector, Jonathan Ehrenfeld, and others met to discuss a zoning change for the Belvedere Towers which would apply under the new Transform Baltimore code.

And the change that Rikki was wanting and that was suggested was R9, and we were told at the time that the reason for the zoning change was to conform the Belvedere, which had been built before the current code that just expired, to conform to the new code.

The alarming question there was, well, that would mean 457, 75 units. Mr. Ehrenfeld agreed in that meeting that he would only increase the current limit up by another 54 units. It is

reported that he did consider purchasing the lots behind the Belvedere, but they were not economic, that nothing really could be built there, and especially on the other 6 acres.

On September 29th, and this is document 5 under tab 3, C3, Jonathan wrote to Dr. Sehnert and Ms. Spector confirming the conversation. He requested that the new zoning be R8, which would accommodate his agreement to commit to using no more than 54 new units in the Belvedere . . . .

\* \* \*

[W]hat I'm drawing out here is that there were a number of months when Mr. Ehrenfeld had not decided whether he was going to buy, option the property, or whether he was going to build a building.

By the time he decided to build a building, it was March. And there was a lot of talk about if you don't satisfy me, I'll build 197, but if you do, I'll build 157. And he was a gentleman about it, I have no complaints with him.

But the bottom line point is this. Without the PUD, which was submitted without a building that had been fully designed, . . . Mr. Ehrenfeld could not build this building under current zoning rules, he would have to build it . . . under the Transform Baltimore rules.

Notwithstanding that, we came very close to an agreement with Mr. Ehrenfeld. We had two items that were our key items; one was that we did not want the roof of the new building to be higher than the roof of the Belvedere, not taller versus shorter, but that the roof line up or that the new building be less. After submitting the PUD, two days later, we received a document from Mr. Ehrenfeld that said, "Regrettably, the building was going to be higher. It's now two and a half stories higher, which is a major impact on the people that live around the rim," and he said that this was a mistake . . . made by his engineer.

Tr. at 130-34.<sup>18</sup> Mr. Williams challenged the fundamental perspective of the Planning Department that the PUD application had the effect of ““vest[ing] current property rights as the City transitions to a new [zoning] code.”” Tr. at 135. According to Mr. Williams:

We do not understand why vesting property rights for an undesigned building that does not have time to submit a new permit is appropriate.

The idea that the PUD is limiting, I said, is wrong.

The planning staff making the trade between the buffer and the building is really, in effect, trading us something we already had for something that we don't want.

Tr. at 135.

In the course of Mr. Williams's statement, Chairman Reisinger pressed him to conclude, noting that the planned panel of project opponents had already exceeded its allotted thirty minutes, with another planned speaker to come. Tr. at 133, 135-36. That final speaker for the planned panel of opponents was John Murphy, an attorney who represents some of the Petitioners in this action. Tr. at 136. Mr. Murphy kept his comments very brief. He argued for a specific standard for evaluating a proposed PUD:

When you do a PUD, you're directed by the very first sentence of the PUD ordinance to encourage the best possible design. It's not what's allowed under a prior zoning, you're now in the realm of a PUD. You have to encourage and achieve the best possible design.

Tr. at 136-37. He urged that the appropriate comparison is not to what was permitted of right under the old zoning law, but what would be permitted with the 35-foot height restriction under the new R-6 zoning classification:

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<sup>18</sup> Whether there is a direct quotation within this passage and the placement of the quotation marks appear to be matters in the discretion of the transcriber.

I don't believe you can say, "Well, the developer could have done this before." He could have done it before, he had 45 years to build a building before. You just can't walk in and get a building permit, you know. You walk in – you don't just say, "I apply for a building permit," you have to have plans, construction plans, and that's what the building permit is issued on.

So the standard of achieving the best possible design, look at what you've done over the last ten years to achieve that standard.

Tr. at 137-38.

That concluded the presentation by the planned group of opponents. Chairman Reisinger then took an informal poll of those present for the hearing, first asking supporters to stand, then asking opponents to stand. Tr. at 138. He then began with statements from others in attendance, imposing a two-minute limit on each speaker. *Id.* Warren Butelier, a resident of the Poplar Hill neighborhood, objected to the Developer's ability to "come in at the last minute" to take advantage of the old zoning law and offered his view that the Poplar Hill Association had reached an agreement with the Developer without an "open forum." Tr. at 139-40. Carol Everson, a resident of the Sabina-Mattfeldt neighborhood, objected to the proposed development as "a quality of life issue for me," citing in particular the effects on "open green space" and traffic. Tr. at 140-41. Susan Newhouse, a resident of Roland Park, opposed the project based on traffic and overcrowding of schools. Tr. at 142. Sheila Ryggs, a resident of Poplar Hill Road, opposed the project based on "absolutely horrendous" traffic, the lack of sufficient openness in the Poplar Hill Association's consideration, and the already undesirable size and appearance of the Belvedere Towers building. Tr. at 143-44. Francis Turner, a resident of St. George's Road, opposed the project and questioned the adequacy of the representativeness of both the leadership of some of the neighborhood associations and the area's Councilmember. Tr. at 144-45.

Lawrence Griffith, a resident of St. George's Road, opposed the project, citing both traffic and school overcrowding. Tr. at 145-46.

Susan Joslow, the President of the Poplar Hill Association, spoke in favor of the project. Tr. at 146-47. She noted that the agreement her Association reached with the Developer was supported unanimously by the Association's board, and she described it as a "win/win for our community and for the developer." Tr. at 147. She described preserving six acres as "permanent green space," prohibiting any further development on the property, preventing vehicle access to Poplar Hill, Cliffhurst, and St. George's Roads, and providing notice of any future PUD changes as "protections by the covenant agreement [that] would not otherwise be available to our community." Tr. at 147-48. Ms. Joslow agreed with concerns expressed about traffic, "[a]lthough the Overlook Project is not projected to have a significant impact on traffic," and urged consideration in the future of traffic mitigation measures. Tr. at 148. Later in the hearing, Councilmember Pinkett asked Ms. Joslow to explain her change in position from previous reported comments opposing development of the property. Tr. at 157. Ms. Joslow said that the earlier comments involved a different proposed developer and a challenge to the zoning of the property, that the circumstances had changed, and that she had learned more about the issues. Tr. at 157-59.

Hunter Cochrane, a resident of St. George's Road and one of the Petitioners in this action, spoke against the project. Tr. at 149. He identified his property as "one of the closest properties to the parcel." *Id.* Mr. Cochrane emphasized that there are two existing covenants that permanently restrict access from the development property to St. George's Road or Cliffhurst Road, "[s]o this notion that the developer has given anything away or that the neighborhood associations have received anything that was necessary is a moot argument."

Tr. at 149-50. He proposed to introduce two petitions signed by residents or members of the North Roland Park Improvement Association and the Poplar Hill Association stating that they did not support the project or those associations' agreements with the Developer. Tr. at 150-52. Mr. Cochrane also stated that the existing entrances to the Belvedere Towers did not comply with the Americans with Disabilities Act. Tr. at 152.

Finally, Mr. Cochrane asked the Chair if there would be an opportunity to cross-examine witnesses. Tr. at 152-53. Chairman Reisinger responded that factual questions could be put to particular agencies. Tr. at 153. The following exchange then occurred with Ms. Woods, the representative of the Planning Department:

MR. COCHRANE:<sup>19</sup> [H]ow long would it take to get a completed permitted application for a building . . . of this type and . . . structure?

MS. WOODS: I can't speak directly to the timeline. The developer would have to go through the required City development review processes, and it would be contingent upon how quickly they move forward, and so it's a very iterative process.

MR. COCHRANE: Is there an average time typically that it takes to get a building permit once an application is submitted?

MS. WOODS: I can't speak to that.

\* \* \*

MR. COCHRANE: [One] of the gentlemen on the Committee brought this specific subject up earlier, and the question was whether there is a by right of the developer to do this.

Clearly if there was a by right of the developer, is it also – isn't it also true that he had a by right to do a 148-unit as proposed without using a PUD?

MS. WOODS: It is possible.

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<sup>19</sup> The Court has corrected the spelling of Mr. Cochrane's name.

MR. COCHRANE: [L]et me rephrase my question. Is it also true that the developer could have a done a by right development of a 148-unit apartment building similar in size and scope to the one proposed in the PUD?

MS. WOODS: Under the old zoning code, yes.

MR. COCHRANE: So yes, he could have done a by right for the 140.

MS. WOODS: Under the old zoning code, and this speaks to my earlier testimony that the difference between the [floor area ratio] and the height limits. So that's the big distinguishing point from June 4th to June 5th.

Tr. at 154-56.

Chairman Reisinger made a statement about the need for the Department of Transportation in the future to address traffic issues in the area, Tr. at 159-61, then he proceeded to voting. "What I need to move forward is a finding of facts. Do I have a motion to move the finding of facts?" Tr. at 161. The motion was made, seconded, and passed on a voice vote with Councilmember Clarke abstaining. Tr. 161-62. Chairman Reisinger then identified the three proposed amendments from the Department of Transportation, the Planning Department, and the Developer and proposed consideration of them together. Tr. at 162. A motion was made and seconded, and the amendments passed on a voice vote, again with Councilmember Clarke abstaining. Tr. at 162-63. Chairman Reisinger then invited action on the bill: "Now I need a motion to move the Bill favorable as amended." Tr. at 163. That motion was made and seconded, and Chairman Reisinger then announced a roll call vote. *Id.* He voted "yes." *Id.*

Councilmember Middleton, Vice Chair of the Committee, offered her vote with an explanation. Tr. at 163. She stated that her district is "in very close proximity to this particular project, [and] I have been paying very close attention to everything that has been going on." Tr. at 164. She noted the work that had gone into TransForm Baltimore, the importance of PUDs

as part of the new law, and the “strong role and connection of community associations” in the PUD process. Tr. at 164. She expressed her hope “that the people that are residents in this area can have dialogue and communication after this and as this project moves forward.” Tr. at 164-65. She then said:

This particular project is in the Fifth District. It’s the decision of the Fifth District Councilperson.

And on that note, I’ll stop here, and my vote is a yes.

Tr. at 165.

Councilmember Clarke explained that her abstention was because her family lives on Mattfeldt Avenue. Tr. at 165-66. Councilmember Costello voted “yes” without further explanation. Councilmember Dorsey stated his concerns that the proposed development included too many parking spaces, which encouraged “car dependency” and increased the cost of development. Tr. at 166-68. Citing the City’s “significant income disparity along racial lines” and the relatively high projected rents for the project, Councilmember Dorsey stated: “This project, I can only conclude then, perpetuates racial segregation and is, in effect, structural racist.” Tr. at 168-69. He stated that reducing the number of excess parking spaces and the cost to build them could allow the designation of ten of the proposed 148 units as affordable housing. Tr. at 169. He then stated:

However, I still believe and have faith in the agencies who have reported here today that this PUD was entered with legal sufficiency, and it does meet the Planning Department’s requirements, and that I am limited in my ability to – to control things that I would like to see better, and will plan to make such changes in the way we set policy in Baltimore City for the future.

At the moment, though, I believe that this is a supportable Bill, and I vote yes.

Tr. at 170. Councilmember Pinkett voted “yes” with a brief explanation, and Councilmember Stokes voted “yes” with no further explanation. Tr. at 170-71. Chairman Reisinger announced that the bill passed as amended with six “yes” votes and one abstention, and he adjourned the hearing. Tr. at 171. The transcript notes conclusion at 3:15 p.m., which was three hours after the announced starting time of 12:15 p.m.

## **6. Opponents’ Materials Submitted to the Committee**

As noted, several of the opponents in the organized panel referred to a large binder of materials submitted to the Committee. The Administrative Record does not reveal exactly when or how the opponents of the proposed development submitted this binder of materials, but the record contains a stack of materials, approximately 2.5 inches thick, tabbed in a way that corresponds with the references made during the Committee hearing. The cover sheet bears the date of the hearing, June 7, 2017, and indicates the materials were prepared by Petitioner Lehr Stream Neighborhood Association, Inc. There is a four-page Summary and five-page Table of Exhibits, both of which include arguments advanced by the opponents.

Tab I presents copies of several statutes and Baltimore City Code provisions.

Tab II presents a transcript of the May 4, 2017 Planning Commission hearing – not otherwise in the administrative record – and a copy of the May 9, 2017 transmittal of the May 4, 2017 Staff Report of the Planning Department. There are also copies of what appear to be the slides used by Planning Department staff to present at the Planning Commission hearing.

Tab III is listed in the Table of Exhibits as “The Alleged Approval by North Roland Park Improvement Association, Inc.” The exhibits include papers offered to support the opponents’ arguments that the North Roland Park Improvement Association had forfeited its charter and was not in good standing when it entered into the Covenant Agreement with the Developer and that it

had not abided by certain terms of the by-laws. A significant portion of these materials (Tab III.C.3) consists of detailed email messages and other communications among opponents, officers of the North Roland Park Improvement Association, representatives of the Developer, and Councilmembers concerning both zoning of the existing Belvedere Towers property and the proposed development. The materials behind Tab III also include, *inter alia*, a 2006 Neighborhood Covenant Agreement, the recorded Brown-Belvedere Agreement, and documents showing the recent creation of the Lehr Stream Neighborhood Association, Inc. The Table of Exhibits identifies Tab III.C.6 as presenting signed petitions of residents of St. George's Road, but there is nothing behind that tab in the Court's copy of the materials. Those "petitions" may appear in one of the administrative record supplements.

Tab IV is listed in the Table of Exhibits as "Poplar Hill – Similar machinations." The materials are less extensive than those included behind Tab III, but similarly include detailed email messages and other communications among opponents and officers of the Poplar Hill Association.

The materials behind Tab V relate to the traffic issues. These materials include a May 31, 2017 draft of the Traffic Impact Study that apparently was made available, at least to some community members, and an email exchange in which the Department of Transportation declined to release to opponents the "Synchro" data on which at least part of the TIS was based. The most substantial item behind this tab is the TIS Review Preliminary Report, dated June 6, 2017, provided by Chester E. Chellman, P.E., L.L.S., of TND Engineering in Portsmouth, New Hampshire. (Tab V.E.) Mr. Chellman's primary criticism of the TIS involved the estimate of the number of new peak vehicle trips that the development could be expected to produce. He acknowledged that the TIS used the land use code for "apartment" in the ITE Trip Generation

Manual, the industry standard. He observed that the ratio of covered parking spaces to units for the development was high and that the Developer was unlikely to build expensive parking unnecessarily. Mr. Chellman stated his expectation that 300 vehicles associated with the development would generate more than 76 morning and 99 evening new peak trips. He suggested it would have been more appropriate for the TIS authors to use the trip generation rates for single family dwellings rather than for apartments. Mr. Chellman did not provide any revised projections based on the different assumptions he suggested. He also noted that no consideration had been given in the TIS for the possible expansion in units at the existing Belvedere Towers and that the Department of Transportation did not give attention to any mitigation measures for the worsening of intersections, including “consideration of the reduction in the size or nature of the proposed PUD.” (Tab V.E at 7.)

The materials behind Tab VI include a June 6, 2017 letter from Daniel Motz, a realtor with Coldwell Banker Residential Brokerage. (Tab VI.B.) He stated that he has been a licensed real estate broker for sixteen years and that he has brokered more than 100 transactions in the area. He studied plans for the Overlook project and walked the area, including the lots of several homes on St. George’s Road and one home on Cliffhurst Road. He cited the “very quiet green space,” “bucolic setting,” and “large lushly landscaped lots” of these properties. He described them as “unique in the City and essential for the attraction and retention of top executive talent for the City’s largest employers.” He opined that the new building “would severely impair the views from many of these properties” and the removal of trees “would eliminate the privacy these properties offer.” He also cited the effects of “noise and debris” during construction. “I estimate that the value of 1018 St. George’s Road and 1110 Cliffhurst Road would decrease in

value by 40% and the other affected properties would decrease in value by 15% to 20%, and perhaps even more.”

Tab VII is labeled “Flawed Councilmanic Courtesy Procedures,” and Tab VIII is labeled “False representations by prior owners (Diener-Reznick) to Planning Commission in 2013 . . . .”

## **7. Supplements to Administrative Record**

The City filed its first supplement to the Administrative Record (Paper No. 5/1) on October 5, 2017. Most of that supplement is a document titled “Testimony & Exhibits of Hunter Cochrane owner of Property 1015 W. St Georges Rd.” and ten numbered exhibits with it. Those exhibits include documents relating to historical agreements about development of the property (Exhibits 1-5), a series of “Poplar Hill Declarations,” statements signed by Poplar Hill residents stating their unawareness of and disagreement with certain actions of the Poplar Hill Association (Exhibit 7), a series of “NRPA Declarations,” similar statements signed by North Roland Park residents stating they disagree with certain actions of the North Roland Park Association (Exhibit 8), excerpts of the Planning Department Site Plan Review Guidelines and drawings of two of the entrances to the Belvedere Towers property (Exhibit 9), and a letter from the President of the Sabina-Mattfeldt Community Association to then-City Council President Bernard C. “Jack” Young (Exhibit 10). The first supplement also includes documents identified as:

- A letter from the President of the Roland Park Civic League to Councilmember Sharon Green Middleton;
- A letter from the President of the Sabina-Mattfeldt Community Association to then-City Council President Young (same as above);
- An email from Emily Hiller, a resident of St. George’s Road;
- Written statement of Jamie Riordan;
- Written statement of Mary Ann Mears;

- A letter from John C. Murphy, Esquire to the Committee;
- Written statement of Nancy Cormeny;
- A letter from Susan M. Newhouse to then-Council President Young and Councilmember Middleton;
- Written statement of Robert L. Williams;
- A written “Summary” of the position of the Lehr Stream Neighborhood Association, Inc.;
- Written statement of Susan Joslow;
- An email from Caroline McKeldin Wayner, President of the Wyndhurst Association;
- A printout of the presentation by the Transportation Department concerning the traffic impact study;
- Five sheets of photographs, plans, or renderings concerning the proposed PUD;
- A document titled “Seventh Version of Agreement with opposition – rejected in large part due to 25’ building height”;
- A copy of the folder cover for the bill file for City Council Bill 17-0049;
- A copy of the Cochranes’ Petition for Judicial Review;
- A copy of a Certificate of Posting concerning notice of the Bill;  
and
- A document titled “Percentages of residents who reside in the North Roland Park or Poplar Hill Areas and have signed written oppositions to Ordinance 17-0049.”

From the descriptions, most of these appear to be items submitted at or around the time of the Committee hearing, but only some of them were referred to at the hearing.

The City filed a Second Supplement to the Record (Paper No. 5/2) on November 29, 2017. That supplement included (1) proposed amendments to Bill No. 17-0049 submitted to the

Land Use and Transportation Committee; (2) four plan sheets dated March 27, 2017; and (3) four plan sheets dated April 27, 2017.

J. Carroll Holzer, Esquire, counsel for one group of Petitioners, wrote to the Court on January 12, 2018. He indicated that his paralegal had inspected the court files in this action and was unable to locate the thirteen plan sheets that are referred to as item 1 in the initial Table of Contents of the Administrative Record (Paper No. 5).<sup>20</sup> With his letter, Mr. Holzer provided full-size printouts of those plan sheets. These are the revised June 2, 2017 sheets.

On January 24, 2018, just before the Court hearing, the City filed a Third Supplement to Record (Paper No. 15). This is an Affidavit as to Authenticity of City Council Stamp on June 2, 2017 Letter re Overlook PUD – City Council Bill 17-0049, dated January 24, 2018, with an attached June 2, 2017 letter from Alfred W. Barry III, the Developer’s representative to Chairman Reisinger accompanying the revised exhibit or plan sheets for the Overlook PUD application.

The parties have also submitted various attachments to their memoranda. Perhaps the most notable of those is Exhibit G to the initial memorandum filed by Petitioners Hunter and Margaret Cochrane. This is a document from the City Office of Council Services titled “Hearing Notes” and dated June 12, 2017. It provides a synopsis of the June 7, 2017 Committee hearing, including a narrative summary of the “Major Issues Discussed.”

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<sup>20</sup> Docket entry 5000 includes a notation that “[t]here is also a rolled up blue print that has a label volu[me] #00 with this record.” The Court assumes these are the revised plans, but the Court has not located them in the Clerk’s Office and instead has used the additional copies provided by Petitioners’ counsel.

At the hearing, Petitioners offered without objection two enlarged boards. One is an aerial photograph of the site and the immediate area around it. The other is a map of a larger area, including the site.

## **Discussion**

### **I. Standard of Review**

All of the parties agree that approval of the PUD by the City Council was a quasi-judicial “zoning action” that is subject to judicial review. *Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 395 Md. 16 (2006) (holding that amendment of existing PUD in Baltimore City is quasi-judicial in nature). This classification of the City Council’s decision is critical because “a zoning action by the City Council” is subject to statutory judicial review “in accordance with Title 7, Chapter 200 of the Maryland Rules.” Md. Code, Land Use § 10-501. *See Md. Overpak Corp.*, 395 Md. at 32 (interpreting predecessor provisions in Md. Code, Art. 66B § 2.09). Following extensive analysis of both the nature of the action and the language and history of the statute, the Court held:

To summarize, the pertinent criteria for determining whether a particular action by the Mayor and City Council is a “zoning action” are: first, there must be a determination that the process observed by the governmental body in [e]ffecting an alleged zoning action was quasi-judicial in nature, rather than legislative. A quasi-judicial proceeding in the zoning context is found where, at a minimum, there is a fact-finding process that entails the holding of a hearing, the receipt of factual and opinion testimony and/or forms of documentary evidence, and a particularized conclusion, based upon delineated statutory standards, for the unique development proposal for the specific parcel or assemblage of land in question. Second, if the governmental act in question involves a quasi-judicial process, the inquiry moves to the question of whether it qualifies as a “zoning action.” Where the City Council exercises its discretion in deciding the permissible uses and other characteristics of a specific parcel or assemblage of land upon a deliberation of the unique circumstances of the affected land and its surrounding environs, a “zoning action” is the result.

*Id.* at 53.

The contrast between a legislative act and a quasi-judicial act is crucial for the standard of judicial review to be applied. *WV DIA Westminster, LLC v. Mayor and Common Council of Westminster*, 462 Md. 369, 395 (2019). Legislative acts are “not subject to ordinary judicial review; instead, they are subject to very limited review by the courts.” *Kenwood Gardens Condominiums, Inc. v. Whalen Properties, LLC*, 449 Md. 313, 338 (2016) (holding that preliminary resolution adopted by County Council as part of Baltimore County PUD process was legislative, not quasi-judicial, act) (quoting *Md. Overpak Corp.*, 395 Md. at 33, and *Gisriel v. Ocean City Bd. of Supervisors of Elections*, 345 Md. 477, 490 n.12 (1997)). When an act is legislative, a court considers only whether the governmental body “was acting within its legal boundaries.” *Kenwood Gardens Condominiums, Inc.*, 449 Md. at 338 (quoting *Talbot County v. Miles Point Property, LLC*, 415 Md. 372, 393 (2010), and *County Council of Prince George’s Cty. v. Offen*, 334 Md. 499, 507 (1994)). With an adjudicatory or quasi-judicial decision, in contrast, the court reviews the decision “to determin[e] 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.” *Kenwood Gardens Condominiums, Inc.*, 449 Md. at 325 (quoting *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005)). This familiar standard involves significantly closer judicial scrutiny than is given to legislative acts, but the review is still “narrow.” *Id.* A court affords no deference to agency errors of law, but a court must “defer to the regulatory body’s fact-finding and inferences, provided they are supported by evidence which a reasonable person could accept as adequately supporting a conclusion.” *Id.*

## **II. Issues Presented**

Petitioners advance multiple attacks on the City's action approving the Overlook PUD.

The Court reorders and organizes the issues into three categories:

1. Arguments that the City erred as a matter of law in even considering the PUD application or at least in considering it under the former Zoning Code;
2. Challenges to procedural aspects of the City's consideration of the PUD application; and
3. Challenges to the merits of the City's action.

The Court will discuss the issues in this order, although ultimately many of the issues are interrelated.

## **III. Preliminary Legal Challenges to Consideration of the PUD Application**

### **A. Single-Use PUD**

Some Petitioners argue that approval of this application as a planned unit development was inappropriate because a PUD cannot be used for a single-use development. They cite the description of a PUD in *Maryland Overpak Corp.* as "a relatively modern zoning concept created to provide a degree of flexibility in uses and design not available under strict Euclidian zoning."

395 Md. at 22 n.4. Similarly:

In contrast to Euclidean zoning, which "divide[s] a community into districts, and explicitly mandate[s]" certain uses, the PUD is an "'instrument of land use control which . . . permits a mixture of land uses on the same tract.'" Generally, it "is a zoning technique that encompasses a variety of residential uses, and ancillary commercial, and . . . industrial uses."

*Rouse-Fairwood Dev. Ltd. P'ship v. Supervisor of Assessments for Prince George's Cty.*, 138 Md. App. 589, 623 (2001) (quoting 5 Ziegler, Rathkopf's *The Law of Zoning and Planning* (4th Ed. Rev. 1994), § 63.01(c), at 63-4 to 63-5).

Petitioners are correct that PUDs may be used – and perhaps more often are used – to permit mixed-use developments, but they have not shown that PUDs may *only* be used for mixed-use developments. Petitioners cannot identify any old or new Zoning Code provision that requires mixed uses in every PUD, and the PUD provisions implicitly support single-use PUDs. The former Baltimore Zoning Code treated PUDs differently based on whether they were to be located in a Residential, Office-Residential, Business, or Industrial District. *See* former Baltimore City Code, Zoning Code, Title 9, Subtitles 2-5. If a PUD, like this one, were to be located in a Residential District, then the PUD could include any use classified as either a permitted use or a conditional use for the underlying district, *id.* § 9-202(a) and (c), or any use allowed as a permitted use or a conditional use in an O-R, B-1, B-2, or M-1 District, *id.* § 9-203. This creates the flexibility to mix uses within a PUD. But the former Zoning Code also provided flexibility within residential uses. A PUD in a Residential District that was otherwise limited to single-family detached dwellings (R-1, R-1A, R-1B, and R-3) could include single-family attached, single-family detached, and multiple-family detached dwellings. *Id.* § 9-202(b). If a PUD in a Residential District encompassed two or more types of Residential Districts within its boundaries, permitted density could be determined on an overall or aggregated basis. *Id.* § 9-209(c). Thus, for example, a developer could propose a ten-acre PUD comprised of two five-acre parcels zoned R-1 and R-3. Those underlying districts would permit only single-family dwellings and only six units per acre in the R-1 area and nine units per acre in the R-3 area. In a PUD, however, the developer could aggregate this density to build a total of seventy-five units, and the developer could propose to build those units in other configurations like single-family attached or multifamily detached structures. This would be a single-use PUD, but one that took advantage of the flexibility permitted for “a unitary development plan.” *Id.* § 9-101(a).

TransForm Baltimore preserves this same flexibility. Instead of providing four separate subtitles for PUDs located in Residential, Office-Residential, Business, or Industrial Districts, the Zoning Code now provides more generally that PUDs are permitted in all districts except I-1, I-2, and MI Districts, Baltimore Code, Art. 32, § 13-201(c), and that “[u]nless otherwise specifically provided by the ordinance establishing or amending the planned unit development, all requirements of the underlying zoning district apply,” *id.* § 13-201(b). The Zoning Code now provides more generalized authority for the City to make exceptions to those district regulations for PUDs:

Exceptions to the regulations contained in this Code, including *use*, bulk, yard, parking, and sign regulations, may be granted through the planned unit development process, as may be desirable to achieve the objectives of the proposed planned unit development, as long as the exceptions are fully consistent with and authorized by this title.

*Id.* § 13-202(c) (emphasis added). Granting such exceptions now requires consideration of nine different factors, including a demonstration of “a substantial benefit to the City,” and a separate demonstration by the applicant of “superior design and enhanced amenities.” *Id.* § 13-204.

The use and bulk restrictions for each zoning district are now provided in tables that are part of the Zoning Code. Thus, for example, the permitted and conditional uses for the R-1 through R-4 zones are shown in Table 8-301, and the bulk and yard regulations for those zones are shown in Table 8-401. Similarly, the same information for the R-5 through R-10 zones is shown in Tables 9-301 and 9-401,<sup>21</sup> for Commercial zones is shown in Tables 10-301 and 10-401, and for Industrial zones is shown in Tables 11-301 and 11-401. If a mixed-use PUD with a combination of certain retail, office, and multi-family dwelling uses were proposed in a

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<sup>21</sup> Table 9-401 is where the height restrictions for the R-6 zone of 35 feet for structures on interior lots and 45 feet for structures on the corner of certain streets are provided.

Community Commercial District (C-2), *id.* § 10-204, for example, no exception would be needed because all three of those uses are permitted uses in a C-2 zone, *id.* Table 10-301. If the same mixed-use PUD were proposed in an R-6 zone, an exception would be required because retail and office uses are not permitted or conditional uses in that zone. Table 9-401. There is arguably more flexibility for single-use PUDs under TransForm Baltimore because a narrower range of different uses are more likely to be allowable without an exception in a particular zone. There is nothing in TransForm Baltimore that specifically requires that a PUD can be used only when the proposed uses are mixed.

The Court therefore concludes that neither the former Zoning Code nor TransForm Baltimore prohibits single-use PUDS.

#### **B. Applicable Transition Provision**

Recognizing the need to transition from one zoning code to another, the City Council included in TransForm Baltimore a series of transition rules. Baltimore City Code, Art. 32, § 2-203. Such transition provisions are not unusual. *See Board of Cty. Comm'rs of Calvert Cty. v. Pritchard*, 312 Md. 522, 528-31 (1988) (interpreting provision of county zoning ordinance that created two-year grace period for building applications after effective date of comprehensive rezoning before automatic downzoning of certain districts). The transition provisions begin with a series of subsections concerning preexisting structures, lots, and uses. Baltimore City Code, Art. 32, § 2-203(b)-(g). Section 2-203 then has three subsections applicable to already-approved zoning actions: “[p]reviously established planned unit development[s],” “[p]reviously issued building permits,” and “[p]reviously granted variances and conditional uses.” *Id.* § 2-203(h)-(j).

The subsection concerning already-approved PUDs provides:

(h) *Previously established planned unit development.*

For planned unit developments established before June 5, 2017, transition rules are set forth in § 13-102 {"Transition rules"} of this Code.

*Id.* § 2-203(h). Section 13-102(a) provides generally that “planned unit developments approved before the effective date of this Code (June 5, 2017) remain valid as long as they continue to comply with all requirements and conditions of their approvals and with the Zoning Code regulations in effect immediately preceding the date of those approvals.” *Id.* § 13-102(a). There is then a provision requiring that “[a]ny amendments to these previously approved planned unit developments will be categorized as either engineering corrections, minor changes, or major changes.” *Id.* § 13-201(b).

After these three subsections for already-approved actions, § 2-203 contains a single subsection for “[p]ending applications”:

(k) *Pending applications.*

- (1) An application that has been submitted and considered complete before June 5, 2017, or before the effective date of any relevant amendment to this Code is governed by the Code provisions in effect when the application was submitted.
- (2) A new application submitted after June 5, 2017, or after the effective date of any relevant amendment to this Code is governed by the Code provisions in effect when the application was submitted.
- (3) If a pending application is modified after its submittal, the Zoning Administrator must review the application to determine if the proposed modifications constitute a new application. If the Zoning Administrator determines that the modifications constitute a new application, the application must be resubmitted under the Code

provisions then in effect at the time of the resubmittal.

*Id.* § 2-203(k). This is the subsection on which the Developer and the City rely.

The Court applies the well established principles of statutory construction to these provisions, beginning with the plain language of the statute or ordinance. *See Blackstone v. Sharma*, 461 Md. 87, 113-14 (2018); *Kaczorowski v. Mayor & City Council of Baltimore*, 309 Md. 505, 513 (1987); *Eastern Outdoor Advert. Co. v. Mayor & City Council of Baltimore*, 128 Md. App. 494, 519-21 (1999) (applying these principles to Baltimore City Zoning Ordinance). By its plain language, § 2-203(h) does not apply here. That subsection applies only to “planned unit developments *established before* June 5, 2017.” *Id.* § 2-203(h) (emphasis added). The referenced transition rules in § 13-102 plainly reinforce that limited application to “planned unit developments *approved before* the effective date of this Code (June 5, 2017).” *Id.* § 13-102(a) (emphasis added). The PUD application at issue was pending on June 5, 2017, and the PUD therefore was neither “established” nor “approved” before that date.

Petitioners do not argue otherwise. They recognize that § 2-203(h) plainly does not apply to the Developer’s pending application. They argue instead that § 2-203(k) cannot be interpreted to apply to PUD applications, primarily because § 2-203(k)(3) refers specifically to the Zoning Administrator and the Zoning Administrator has no role in PUD applications. In Petitioners’ view, this means there simply is no transition provision for pending PUD applications. In their construction, TransForm Baltimore became applicable in full to all PUD applications that had not reached final approval as of June 5, 2017.

Petitioners’ argument runs counter to the logical structure of the transition provisions. *See Patton v. Wells Fargo Fin. Maryland, Inc.*, 437 Md. 83, 96-97 (2014) (“But the ‘plain meaning’ of a statute can only be assessed in the context in which it appears.”). Like

subsection (h), which applies to “[p]reviously established” PUDs, subsections (i) and (j) immediately following it apply to “[p]reviously issued building permits” and “[p]reviously granted variances and conditional uses.” Each of these three types of authorizations are the subject of initial “applications,” and there is a separate transition subsection for each type of approval when the approval was accomplished before the effective date of TransForm Baltimore. Subsection (k) then deals more generally with “[p]ending applications” in a single subsection. The plain implication is that subsections (h), (i), and (j) deal with three types of applications when the applications were already approved as of the effective date and subsection (k) deals with the same three types of applications if the application was still pending on the effective date.

This conclusion based on the structure of the provisions is reinforced by the use of “application” to refer to requests to establish a PUD. The old Zoning Code referred to “an application for approval of a Planned Unit Development.” Former Baltimore City Zoning Code, § 9-105(a). Although TransForm Baltimore uses some different terminology in connection with the PUD approval process, *see, e.g.*, Baltimore City Code, Art. 32, § 13-301(a), it still specifies that “the property owner or developer seeking the legislative authorization is considered *the applicant* for purposes of this title,” *id.* § 13-301(c)(2)(i) (emphasis added). Other provisions governing the PUD process also refer to “the applicant.” *Id.* §§ 13-302(a), (b), (c) and 13-303(a). TransForm Baltimore provides that “[t]he preliminary consultation does not require the filing of an application or payment of a fee,” *id.* § 13-302(d), implying that what follows at the later stages of PUD approval is an “application.”

Petitioners are correct that § 2-203(k)(3) assigns a role to the Zoning Administrator when that official does not have a role in the PUD process. That reference is not entirely consistent

with interpreting “application” in § 2-203(k) to include an application for a PUD, but carving PUD applications out of the scope of § 2-203(k) on that basis alone would lead to an illogical or even absurd result. *Compare Patton*, 437 Md. at 97-98 (holding that canons may be used in context of ambiguous language to “avoid[ ] an illogical or unreasonable result, or one which is inconsistent with common sense”) (quoting *Kaczorowski*, 309 Md. at 514), *with Stanley v. State*, 390 Md. 175, 184 (2005) (“Even if it may be, to us, illogical and irrational, there is no basis for the Court to refuse to give effect to the clear direction of the General Assembly.”), *quoted in Guttman v. Wells Fargo Bank*, 421 Md. 227, 234 (2011). Such an interpretation would mean that the otherwise thorough series of transition rules in § 2-203 would leave a gap for determining the law applicable to any PUD application pending as of June 5, 2017. That illogical result is easily avoided by recognizing that the role assigned to the Zoning Administrator to assess the effect of modifications to applications of most types does not apply to modifications of pending PUD applications. The other two, more general subparts of § 2-203(k) apply to PUD applications that were complete and pending as of June 5, 2017.

The Court therefore concludes that Art. 32, § 2-203(k) of the transition provisions applies to this and any other pending applications for PUDs.

### **C. Completeness of the Developer’s Application**

Petitioners argue that, even if the TransForm Baltimore transition rules apply to PUD applications, the Developer was not permitted to take advantage of those rules because its PUD application was not complete as of June 5, 2017. The City Law Department reviewed this issue and concluded otherwise.

On the issue of completeness, Petitioners correctly look to § 9-107 of the former Zoning Code. Section 9-106(a) provides that “the applicant must submit to the City Council a formal

application for approval of the Development Plan,” and § 9-107 specifies thirteen components that “must” be included in a Development Plan “at a minimum.” Former Zoning Code, §§ 9-106(a), 9-107. Petitioners claim the Developer’s application did not include one of the required components – “a copy of . . . all existing and proposed protective covenants.” *Id.* § 9-107(12)(ii). Petitioners are correct with respect to the Developer’s initial submission, but the absence of covenants was cured with the substitute sheets that are dated June 2, 2017. Although Petitioners questioned whether these revised plan sheets were in fact submitted before June 5, 2017, the submission on June 2, 2017 is established by the City’s Third Supplement to Record. That submission includes a cover letter from Mr. Barry, on behalf of the Developer, with a stamp showing receipt by the City Council President’s Office on June 2, 2017. The administrative record therefore supports the City Law Department’s conclusion that the PUD application was complete before June 5, 2017.

**D. Application of § 2-203(k)(1)**

The applicable TransForm Baltimore transition provision, § 2-203(k)(1), provides:

An application that has been submitted and considered complete before June 5, 2017, or before the effective date of any relevant amendment to this Code is governed by the Code provisions in effect when the application was submitted.

Baltimore City Code, Art. 32, § 2-203(k)(1). Beginning with the Planning Department’s consideration of the issue, the City, through both its Law Department and the Planning Department, applied this provision as an all-or-nothing proposition. That is, the City approached this PUD application effectively as if TransForm Baltimore had not been enacted. The Court disagrees. The Court concludes that the transition provision must be applied separately to determine (1) the structure that the Developer was entitled to build “by right” as of June 5, 2017 and (2) the criteria that should be applied to the Developer’s discretionary PUD application.

## 1. “By Right” Development of the Property

As the City points out, transition provisions of this sort are not unusual in zoning schemes. They provide a sensible and fair means to move from one zoning map to a different zoning map. The harshest potential consequence of such a transition is that the owner of a particular property may transition to a more restrictive zoning classification, thereby limiting or even eliminating certain profitable uses of the land. Such a consequence is commonly mitigated by provision for a grace period – a period of time when a property owner has notice of the new restrictions and may develop the property under the existing zoning before the new restrictions take effect. As cited by the City, *Board of Cty. Comm’rs of Calvert County v. Pritchard*, 312 Md. 522 (1988), illustrates the application of such a transition provision.

The Pritchards owned an undeveloped twenty-one-acre parcel of land at a rural highway intersection in Calvert County. *Id.* at 524. Effective May 9, 1984, Calvert County enacted a comprehensive rezoning ordinance under which it created a new “rural commercial” classification for “existing commercial enterprises located outside Town Centers and Marine Commercial Districts at the time of the 1984 Comprehensive Rezoning.” *Id.* at 524-25. The new ordinance included a transition provision for undeveloped properties in the new rural commercial zones. *Id.* at 525. Undeveloped rural commercial properties were “allowed to retain commercial zoning for a period of two years from the adoption of this Ordinance.” *Id.* If a property owner obtained “an approved site plan” within that initial two-year period, then the owner was given an additional two-year period “to complete substantial construction of their buildings.” *Id.* If a property owner either failed to obtain site approval by the first two-year anniversary or, having received site approval, failed to complete construction substantially by the

four-year anniversary, then the property “shall be automatically zoned consistent with the zoning in the area.” *Id.*

In August 1985, approximately fifteen months into the first two-year grace period, a contract purchaser from the Pritchards, Compson Development Company, submitted a proposal for a shopping center on the property to the Calvert County Planning Commission. *Id.* at 526. The Planning Commission gave preliminary approval to the plan in November 1985, conditioned on limiting access to the shopping center from only one of the intersecting roads. *Id.* Compson took some additional procedural steps, but it never achieved site plan approval. *Id.* at 526 & 526 n.3. On May 7, 1986, just two days before the first two-year anniversary of the ordinance, the Pritchards in their own names submitted shopping center plans identical to those submitted by Compson. *Id.* at 526. Two weeks later, the Planning Commission disapproved those plans on the ground that the property had reverted from rural commercial to rural zoning on May 8, 1986. *Id.* The Pritchards sought judicial review of that action.

The Pritchards argued first that they met the two-year deadline of the ordinance by submitting a plan before the deadline that was “approvable.” *Id.* at 528. The Court rejected that argument based on the plain meaning of “approved” in the ordinance. *Id.* at 528-29. The transition provision was “a matter of legislative grace.” *Id.* at 529.

Owners of [undeveloped land in the new rural commercial zone] were given two years within which to obtain an approved site plan and an additional two years within which to complete substantial construction of their principal buildings. The legislative body concluded that two years was a reasonable period within which to prepare, submit and obtain approval of the site plan for any size project utilizing rural commercial zoning. Indeed, the validity of that legislative conclusion is demonstrated by Compson’s experience in obtaining the response of the Commission within several months after Compson’s submission. . . . Under the subject ordinance the initial benefit of the saving clause is achieved only by site plan approval . . . .

*Id.* at 530. Next, the Pritchards argued that the ordinance was unconstitutionally vague under due process principles because it did not specify the deadline for a property owner to submit plans to achieve site approval by the end of the two-year grace period. *Id.* at 531-32. The Court found no such constitutional defect:

[T]he Pritchards were on notice on May 8, 1984, that their property would be downzoned in two years absent an approved site plan. The ordinance identifies the reviewing agencies which must approve a site plan before a building permit will be issued. Because the size and complexity of a specific project will affect the length of time required for agency review, prudence dictates that one who owned undeveloped rural commercial land as of May 8, 1984, would inquire of the appropriate Calvert County officials as to how far in advance of the automatic downzoning a site plan for a specific type of project should be submitted in order to obtain approval within the two-year period. Due process does not require greater specificity as to the timing of an application than that provided in [the ordinance].

*Id.* at 532. The Court also turned away the Pritchards' procedural due process and equal protection arguments. *Id.* at 532-36. The Pritchards' right to develop a commercial project expired when they did not meet the deadline of the first two-year grace period. *Id.* at 530-31.

The transition provisions in TransForm Baltimore differ in their particulars from those in the Calvert County ordinance, but they operate in much the same way to determine a developer's vested rights. Instead of a statute with an almost immediate effective date and a relatively long grace period for certain property owners, the City Council combined a delayed effective date with transition provisions that permitted a property owner to preserve zoning status under the old Zoning Code by making a complete application for building permits. Developers in Baltimore surely knew that TransForm Baltimore was in the works long before it was enacted. When the City Council gave final approval to the comprehensive rezoning in December 2016, the ordinance provided that none of its provisions would be effective for six months, until June 5,

2017. That delayed effective date also became the deadline for property owners to complete building applications under the old law. Section 2-203(k) provides that an application that was submitted and substantially complete by that date would be governed by the former Zoning Code rather than TransForm Baltimore. Under ordinary vested right principles, any such project would preserve that zoning status as long as the project continued at a reasonable pace toward completion. *See, e.g., Sizemore v. Town of Chesapeake Beach*, 225 Md. App. 631 (2015) (restaurant project with zoning permit under old law was protected from subsequent downzoning until owners failed for years to proceed with construction).

Thus, the Developer in this case knew the applicable rules as it approached this potential project against the backdrop of the enactment of TransForm Baltimore. The Developer knew that fundamental zoning changes were coming to Baltimore even before TransForm Baltimore was finally adopted. When the law was formally passed, the Developer still had six months in which to secure any development rights under the old law by submitting a complete building permit application. The Developer in this case did not submit any building permit application for this property as of June 5, 2017, much less a complete application. Thus, the Court concludes that the Developer's *right* to erect a structure based on the former Zoning Code parameters expired on June 5, 2017 because the Developer did not have a complete building permit application for the property pending on that critical date. Put another way, because there was no pending and complete building permit application for this property on June 5, 2017, the TransForm Baltimore provisions controlling development of this property *as a matter of right* became effective on June 5, 2017.

This conclusion does not mean the Developer could not proceed with its pending PUD application. That application was pending and complete on June 5, 2017 and therefore was to be

considered under the PUD criteria of the old Zoning Code. But a PUD application is not a building permit application, and the differences have crucial implications for this case.

## **2. The PUD Criteria**

Under the former Zoning Code, the PUD process begins before an application is submitted with the owner or developer engaging in “a preliminary conference with the Planning Commission or its designated representative to review the scope and nature of the proposed [PUD].” Former Zoning Code, § 9-105(a)(1). The “detailed Development Plan” emerges in part from this preliminary process. *Id.* § 9-105(a)(2). The developer then submits “a formal application for approval of the Development Plan” to the City Council “in the form of a proposed ordinance.” *Id.* § 9-106. Although not stated in the Zoning Code, this step requires the support and sponsorship of the Councilmember for the district in which the proposed PUD is to be located. As discussed above, the Development Plan must include, at a minimum, thirteen prescribed elements. *Id.* § 9-107.

Consideration by the City Council must begin with referrals to the Board of Municipal Zoning and Appeals, the Planning Commission, and “other agencies as provided in Title 16 {“Legislative Authorizations”} of this article.” *Id.* § 9-111(a). Title 16 specifically includes referral to the Director of Transportation, who must undertake traffic mitigation, including a Traffic Impact Study, in certain circumstances. *Id.* §§ 16-301(b) and 2-305(b). Section 9-112, titled “Governing standards,” creates one pair of mandatory requirements for any PUD, one hortatory feature, and a series of required considerations. The pair of requirements are provided in subsection (b) and involve a comparison of the land uses that would be permitted in the PUD with the land uses permitted in the existing zone:

The uses that would be allowed under this title but not under the basic regulations governing the underlying district in which they are located:

- (1) *must* be necessary or desirable for and appropriate to the primary purpose of the Planned Unit Development; and
- (2) *may not* be of a nature, or so located, as to adversely affect the surrounding neighborhood.

*Id.* § 9-112(b) (emphasis added).<sup>22</sup> The hortatory feature involves a comparison of the bulk regulations that would apply under the PUD to those provided in the existing underlying zone:

The application of bulk regulations under this title, which are expressed in terms of the overall density for the entire Planned Unit Development rather than on a lot-by-lot basis, *should result* in overall development that is no less beneficial to the residents than would be obtained by application of the basic regulations for the underlying district.

*Id.* § 9-112(c) (emphasis added).<sup>23</sup>

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<sup>22</sup> Somewhat similar compatibility findings are required under the TransForm Baltimore PUD requirements. There must be “findings” that: “(1) the use is compatible with the surrounding neighborhood; (2) the use furthers the purpose of the proposed classification; and (3) the PUD master plan developed . . . ensures that there will be no discordance with existing uses.” Baltimore City Code, Art. 32, § 13-203(b).

Perhaps the most significant difference between the old and new PUD requirements is the addition in TransForm Baltimore of specific considerations and findings required if the PUD involves “an exception from district regulations.” Baltimore City Code, Art. 32, § 13-204(a). To be granted such an exception, the applicant must demonstrate both “superior design and enhanced amenities” and “a substantial benefit to the City.” *Id.* § 13-204(b) and (c). The new law gives eleven non-exclusive examples of what will qualify as a “substantial benefit to the City.” *Id.* § 13-204(d). This exception provision would apply if the PUD would introduce land uses not otherwise permitted in the zone.

<sup>23</sup> TransForm Baltimore does not have a PUD provision that parallels this provision in the old Zoning Code. Instead, PUD exceptions to the underlying bulk regulations require the same more extensive exception criteria as apply to use exceptions. *See* Baltimore City Code, Art. 32, §§ 13-202(c), 13-204.

The City agencies reviewing the proposed PUD “must consider” two sets of standards. *Id.* § 9-112(a). One set of standards, listed in § 9-112, is specific to PUDs. The City is correct that while consideration of these factors is mandatory, no specific outcome for each consideration is required. *See Mid-Atlantic Power Supply Ass’n v. Maryland Pub. Serv. Comm’n*, 143 Md. App. 419, 439 (2002) (concluding that Public Service Commission sufficiently considered each statutorily enumerated factor in its decision).<sup>24</sup> The PUD-specific considerations are:

- (i) [Whether] the plans for the Planned Unit Development are in general conformance with:
  - (A) all elements of the Master Plan; and
  - (B) the character and nature of existing and contemplated development in the vicinity of the proposed Planned Unit Development;
- (ii) [Whether] the Planned Unit Development will preserve unusual topographic or natural features of the land;
- (iii) [Whether] the design of the Planned Unit Development will best utilize and be compatible with the topography of the land;
- (iv) [Whether] the physical characteristics of the Planned Unit Development will adversely affect:
  - (A) future development or the value of undeveloped neighboring areas; or
  - (B) the use, maintenance, or value of neighboring areas already developed;

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<sup>24</sup> Seizing on the last of the seven considerations that follow, Petitioners are thus incorrect in arguing that the PUD could be approved only if it would “permit design features that would not be possible by application of the basic district regulations.” *Id.* § 9-112(a)(2)(vii). The City Council was only required to consider whether the PUD would have design features that otherwise would not be permitted.

- (v) [Whether] with respect to availability of light, air, open space, and street access, the Planned Unit Development will secure for its residents and neighboring residents substantially the same benefits as would be provided by application of the basic district regulations;
- (vi) [Whether] with respect to fire, health hazards, and other dangers, the Planned Unit Development will secure for its residents and neighboring residents substantially the same protection as would be provided by application of the basic district regulations; and
- (vii) [Whether] the Planned Unit Development will permit design features that would not be possible by application of the basic district regulations.

*Id.* § 9-112(a)(2).<sup>25</sup>

In addition, the City agencies must consider “the standards in Title 14 {“Conditional Uses”} of this article governing conditional uses.” *Id.* § 9-112(a)(1). That reference incorporates four required findings from Title 14:

The Board may not approve a conditional use unless, after public notice and hearing and on consideration of the standards prescribed in this title, it finds that:

- (1) the establishment, location, construction, maintenance, and operation of the conditional use will not be detrimental to or endanger the public health, security, general welfare, or morals;
- (2) the use is not in any way precluded by any other law, including an applicable Urban Renewal Plan;
- (3) the authorization is not otherwise in any way contrary to the public interest; and
- (4) the authorization is in harmony with the purpose and intent of this article.

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<sup>25</sup> Most of these PUD-specific considerations are preserved under TransForm Baltimore in the required “Approval Standards” for PUDs. Baltimore City Code, Art. 32, § 13-203(a)(2).

*Id.* § 14-204.<sup>26</sup> Although these required findings are introduced through the “must consider” language of § 9-112(a), they differ from the § 9-112(a)(2) considerations in that they require normative findings. Approval “may not [be given] unless” all four principles are satisfied. *Id.* § 14-204. The “standards prescribed in this title” for making these conditional use findings are thirteen factors that must be considered “where appropriate” “[a]s a guide to [the] decision on the facts of each case”:

- (1) the nature of the proposed site, including its size and shape and the proposed size, shape, and arrangement of structures;
- (2) the resulting traffic patterns and adequacy of proposed off-street parking and loading;
- (3) the nature of the surrounding area and the extent to which the proposed use might impair its present and future development;
- (4) the proximity of dwellings, churches, schools, public structures, and other places of public gathering;
- (5) accessibility of the premises for fire and police protection;
- (6) accessibility of light and air to the premises and to the property in the vicinity;
- (7) the type and location of adequate utilities, access roads, drainage, and other necessary facilities that have been or will be provided;
- (8) the preservation of cultural and historic landmarks;
- (9) the provisions of the City Master Plan;
- (10) the provisions of any applicable Urban Renewal Plan;
- (11) all applicable standards and requirements of this article;

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<sup>26</sup> TransForm Baltimore also preserves the requirement that a PUD satisfy the requirements for approval of a conditional use. Baltimore City Code, Art. 32, § 13-203(a)(1). The required findings and considerations for conditional uses in Article 32, § 5-406 are almost identical to those quoted here from §§ 14-204 and 14-205(a) of the former Zoning Code.

- (12) the intent and purpose stated in § 1-401 {Purposes of article"} of this article; and
- (13) any other matters considered to be in the interest of the general welfare.

*Id.* § 14-205(a).

As will be seen below, the application of these criteria involves a comparison of the features of the proposed PUD to what would be permitted on the property “by right.” Review of the City Council’s action on the merits turns on whether the City Council applied the legally correct comparison. Before that consideration of the merits, the Court must consider the procedural issues raised by Petitioners.

#### **IV. Procedural Challenges**

Petitioners present at least four process-based challenges to the hearing conducted by the City Council through its Land Use and Transportation Committee. With respect to the hearing itself, they argue first that the Committee allotted insufficient time for the hearing and second that their ability to cross-examine witnesses was restricted or impaired. Third and most broadly, Petitioners allege that the Committee failed to issue a written decision sufficient to permit judicial review. Fourth, Petitioners challenge the concept of “councilmanic courtesy.” Before considering each of these arguments, the Court examines the hearing process more generally.

##### **A. Quasi-Judicial Hearings**

The two hallmarks of a quasi-judicial administrative proceeding in the zoning context are: “(1) [that] the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property; and (2) [that] there is a deliberative fact-finding process with testimony and the weighing of evidence.” *Maryland Overpak Corp.*, 395 Md. at 33 (citations omitted). The exact structure of the hearing process may vary. In Baltimore County, for

example, the PUD approval process begins with a County Council resolution that is considered legislative in nature. *Kenwood Gardens Condominiums, Inc.*, 449 Md. at 331-38. If the County Council passes this preliminary resolution, then “the application undergoes an extensive review and approval process by various Baltimore County planning and zoning agencies before concluding in a final public hearing before an administrative law judge.” *Id.* at 320. The agency and ALJ hearing stages “account[ ] for all the substantive, fact-intensive elements missing from the resolution process.” *Id.* at 337. The ALJ’s decision is subject to review by the Baltimore County Board of Appeals, and the Board of Appeals’s decision is subject to judicial review. *Id.* at 322-23, 338. In *Kenwood Gardens Condominiums, Inc.*, “the ALJ held a five-day hearing where both sides had an opportunity to present testimony and evidence, including cross-examination and rebuttal arguments.” *Id.* at 338. In the Baltimore County PUD approval process, it does not appear that there is any consideration of or action on the application by the County Council after the decisions by the ALJ and the Board of Appeals.

In its recent decision in *WV DIA Westminster, LLC v. Mayor & Common Council of Westminster*, the Court of Appeals provided an extensive description of the quasi-judicial process used by the Westminster Common Council in adopting an ordinance denying a developer’s application to amend the Wakefield Valley General Development Plan (GDP). The Court held first that the Common Council’s action was quasi-judicial rather than legislative. 462 Md. at 395-407. The Court then affirmed the decision as supported by substantial evidence and not based on an error of law. *Id.* at 413-19. For purposes of this case, the complexities of the interplay between the Wakefield Valley GDP and Westminster’s subsequently enacted Zoning Ordinance are not important. The relevance here is the example of a process endorsed as a valid exercise of the quasi-judicial function.

After applying for an amendment to the GDP, the developer made an initial presentation to the Westminster Planning and Zoning Commission, the Commission held two public hearings, and the City's Planning Director provided a recommendation to the Common Council. *Id.* at 380-84. Although the Mayor and Common Council of Westminster later argued that the decision on the application was legislative rather than quasi-judicial, *id.* at 396, the Common Council conducted its hearings as quasi-judicial hearings. At the beginning of the first hearing, which was a public hearing, "[t]he Council approved and adopted 'the rules of procedure for quasi-judicial proceedings as presented [by an attorney for the City].'" *Id.* at 384. In summarizing the application, the Planning Director also gave an overview of the procedure for the hearing:

[A] quasi-judicial process . . . is similar to a courtroom process but it is less formal. Evidence is submitted. People give testimony. It does follow a set of procedures. And after the public hearing[,] the [ ] Council would make a decision based on findings that they would make in a number of areas, and [the] Council uses the evidence presented during this hearing to support those findings.

As part of this process[,] the Council must make findings in six areas pursuant to [Westminster Code] Subsection 164-188J[.]  
\* \* \* And that's the process that we're about to undertake this evening. It's a little bit different from the process that the [C]ommission uses which is a recommendation process only.

*Id.* at 384-85 (quoting hearing transcript; most alterations in appellate opinion). The Planning Director testified to the Planning Commission's recommendation and answered questions from both Councilmembers and the developer's attorney. *Id.* at 385-87. The developer called five expert witnesses who testified in support of the application. *Id.* at 387-89. The Council also "heard from citizens who urged the Council to deny the Application" and then adjourned the hearing. *Id.* at 389. From the description of the hearing, it does not appear that any of the

opponents from the general public had counsel at the hearing or sought to cross-examine any of the witnesses.

The Westminster Common Council conducted another hearing approximately one month later. *Id.* The Planning Director stated: “[T]he community ha[s] been alerted to the fact that the public hearing has been closed and that this hearing is for your deliberation and discussion of the matter.” *Id.*<sup>27</sup> The attorney representing the City explained that the Council’s deliberations should involve “a discussion and debate about each of your views of the application of these six criteria to the facts that were adduced before you in the hearing last month.” *Id.* at 389-90.

When a question arose whether the Planning Director’s statements at the deliberative hearing amounted to additional evidence, one Council member stated: “I think we all ought to make sure and be reflective of the fact that we’re making our decision based on all the information we heard during the hearing phase as well as the public input phase and not anything that was said this evening by [Planning Director] Mackey. I think we understand that we have to put that out of our mind because clearly that probably isn’t completely in compliance with the quasi-judicial hearing aspect of what we’re required to do here.” *Id.* at 390 n.11. After deliberating, the Council voted to deny the application based on a failure to meet one of the six criteria. *Id.* at 390.

Two months after the second hearing, the Common Council met again and adopted the ordinance denying the application. *Id.* at 391. The Council also incorporated in the ordinance “an attached written decision, which set forth findings.” *Id.* “The Council’s written decision

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<sup>27</sup> The appellate opinion is not entirely clear on this detail, but this Court infers that the second hearing of the Common Council was open to the public and not an executive session. It is clear from the opinion that the deliberations of the Council were transcribed and that the Planning Director, the City’s attorney, and attorneys for the developer were present at the second hearing.

described the Application, Westminster’s adoption of the Zoning Ordinance and the criteria of Westminster Code § 164-188J, the history of the Wakefield Valley GDP, and the adoption of the 2009 Comprehensive Plan.” *Id.* The Council “discussed relevant law” and included specific findings in its written decision. *Id.* at 391-94.

Finally, the Court in *Mayor and Council of Rockville v. Woodmont Country Club*, 348 Md. 572 (1998), emphasized the importance of the opportunity for cross-examination in a fact-specific quasi-judicial hearing process. The Court considered the two-step process by which the City of Rockville first decides whether a particular public improvement project may result in special benefits to specific properties and then determines the special assessments to be levied against those properties based on the special benefits to the City. *Id.* at 576. The projects were construction of Wooten Parkway and an associated water main. *Id.* at 576-77. Rockville levied a special assessment of approximately \$3 million against Woodmont Country Club based on special benefits to its property. *Id.* at 579-80. Both before and at the public hearing on the amounts of the special assessments, Woodmont sought to cross-examine the two appraisers who provided valuations of the special benefits. *Id.* at 579. Rockville denied the requests and did not produce the appraisers at the hearing, *id.*, apparently relying on their written appraisals. The City did permit Woodmont to present its own witnesses, including testimony from its own appraiser. *Id.* at 580. After the hearing, the City Attorney had the City’s appraisers review Woodmont’s appraisal and comment on it. *Id.* When Woodmont objected to this process, the City gave Woodmont an opportunity to respond to the additional reports from the City’s appraisers. *Id.*

The Court rejected Rockville’s contention that the entire process was a legislative process. “[W]here the Council was holding a hearing, receiving written and oral testimony, and considering evidence to determine the specific amount of special benefit to a particular piece of

property, the Council at that point was acting in a quasi-judicial capacity, even if earlier actions in the process or the final act of passing an ordinance to levy a special assessment constitute legislative functions.” *Id.* at 585. “This is classically the type of adjudicatory determination[ ] to which the right of cross-examination attaches.” *Id.* at 583. The Court further rejected Rockville’s argument that the process was fundamentally fair because Woodmont had an opportunity to challenge the appraisals through presentation of its own evidence. “[T]his Court has repeatedly held that the opportunity to present testimony is ordinarily not an adequate substitute for cross-examination.” *Id.* at 591.

The process used in Baltimore City follows some of these features. The process starts with introduction of the PUD application as a proposed ordinance, but there is no preliminary resolution process as in Baltimore County. The application is then referred to relevant City agencies for review. The City Planning Commission and Planning Department staff serve an important role in coordinating this review. As occurred here, the Planning Commission conducts a public hearing that provides a first, non-adjudicatory opportunity for public input. Perhaps the sharpest distinction with the Baltimore County process is return of the matter to the City Council for adjudication, rather than delegating the hearing and decision function to an ALJ and the Baltimore County Board of Appeals. The public adjudicatory hearing occurs before the Land Use and Transportation Committee of the City Council, with full City Council action based on the recommendation of that Committee.

Petitioners do not challenge the basic contours of this process in the City, nor would such a challenge succeed. In its basic elements, the process followed in Baltimore City – review by City agencies followed by a public adjudicatory hearing conducted by members of the City Council – is very similar to the process followed by the City of Westminster and approved by the

Court in *WV DIA Westminster, LLC*. The only significant difference is delegation of the hearing function to a committee of the City Council rather than conduct of the hearing by the full Common Council in Westminster. There is no reason why a committee hearing with the necessary procedural features followed by a decision based on specific findings, which are then adopted by the full City Council, cannot satisfy the requirements of a quasi-judicial proceeding.

**B. Length of the Hearing and Availability of Cross-Examination**

Petitioners' first two challenges to the way the Land Use and Transportation Committee hearing was conducted are that they were given insufficient time to present their evidence and arguments and that they were denied effective cross-examination of witnesses. The Court finds no merit in these specific attacks.

The Chair of the Committee allotted ninety minutes for the hearing. After hearing the reports of the several City agencies, the Chair fairly sought to accommodate the need to hear all interested parties by allocating thirty minutes to the developer and its representatives, thirty minutes to one group of opponents, which included counsel for one of the groups of Petitioners in this Court, and time to hear from other members of the public in attendance. Although Petitioners challenge the total time allotted as ninety minutes, the hearing in fact lasted approximately three hours. There clearly was time pressure, but the transcript reveals the Chair working hard to give all present an opportunity to be heard. Most importantly, Petitioners do not identify any essential witness they wished to call who could not be called, nor has any Petitioner or other member of the public complained that she or he was denied an opportunity to speak.

On the specific topic of cross-examination, Petitioner Hunter Cochrane was the only person to request an opportunity to cross-examine any witness. Tr. at 152-53. Chairman Reisinger said: “[I]f you have a particular agency you want to ask a question, but . . . it’s got to

pertain to the testimony of that agency, the fact, nothing else.” Tr. at 153. Mr. Cochrane then asked a series of questions of Ms. Woods representing the Planning Department and then said: “Thank you very much. That concludes my cross examination questions.” Tr. at 156.

Petitioners now complain there was no opportunity for cross-examination of the Developer’s representatives, but the transcript reveals that no Petitioner sought such cross-examination. *See Gibson v. Talbot Cty. Bd. of Zoning Appeals*, 250 Md. 292, 299 (1968) (holding that cross-examination at zoning hearing may be restricted reasonably and that opponents “who did not specifically request the right to cross-examine have waived it”). The cross-examination was minimal, but the Chair never denied any person an opportunity to ask questions.

Viewing the proceeding as a whole, the Court concludes that the time pressure did not fundamentally prevent any person from having a fair opportunity to challenge the evidence presented in support of the PUD, to present evidence opposing the PUD, or to present argument on the issues. The Court concludes that the hearing itself satisfied the procedural requirements for this quasi-judicial proceeding.

### **C. Written Findings of Fact and Conclusions of Law**

The more significant procedural issue is with the nature of the Committee’s decision. As discussed above, the Committee hearing ended with Chairman Reisinger inviting action: “What I need to move forward is a finding of facts. Do I have a motion to move the finding of facts?” Tr. at 161. The only thing in the administrative record before this Court that might qualify as this “finding of facts” – and what the City advances as the findings to be reviewed – is a two-page document. Because of its importance, the Court sets out the text in full:<sup>28</sup>

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<sup>28</sup> The font size has been made uniform. Boldface is as in the original.

**LAND USE AND TRANSPORTATION COMMITTEE**

**FINDINGS OF FACT**

MOTION OF THE CHAIR OF THE LAND USE AND TRANSPORTATION COMMITTEE: THE CITY COUNCIL ADOPTS THESE FINDINGS OF FACT CONCERNING A PLANNED UNIT DEVELOPMENT FOR

**City Council Bill No. 17-0049**

**Planned Unit Development – Designation –  
Overlook at Roland Park**

According to the Baltimore City Zoning Code, agency reports and public testimony an amendment to the Planned Unit Development is being granted under:

**Title 9-112**

After consideration of:

- (1) the standards in Title 14 (Conditional Uses) of this article governing conditional uses; and
- (2) the plans for the Planned Unit Development are in general conformance with:
  - (A) all elements of the Master Plan; and
  - (B) the character and nature of existing and contemplated development in the vicinity of the proposed Planned Unit Development;
- (3) the Planned Unit Development will preserve unusual topographic or natural features of the land;
- (4) the design of the Planned Unit Development will best utilize and be compatible with the topography of the land;
- (5) the physical characteristics of the Planned Unit Development will not adversely affect:
  - (A) future development or the value of undeveloped neighboring areas; or

- (B) the use, maintenance, or value of neighboring areas already developed;
- (6) with respect to availability of light, air, open space, and street access, the Planned Unit Development will secure for its residents and neighboring residents substantially the same benefits as would be provided by application of the basic district regulations;
- (7) with respect to fire, health hazards, and other dangers, the Planned Unit Development will secure for its residents and neighboring residents substantially the same protection as would be provided by application of the basic district regulations; and
- (8) the Planned Unit Development will permit design features that would not be possible by application of the basic district regulations.

**Title 14-204**

Upon finding that:

- (1) the establishment, location, construction, maintenance, and operation of the conditional use will not be detrimental to or endanger the public health, security, general welfare, or morals;
- (2) the use is not in any way precluded by any other law, including an applicable Urban Renewal Plan;
- (3) the authorization is not otherwise in any way contrary to the public interest; and
- (4) the authorization is in harmony with the purpose and intent of this article[.]

**LAND USE AND TRANSPORTATION COMMITTEE**

[Signatures of the Chair and the other five Councilmembers voting for the bill.]

As argued by Petitioners, these findings of fact are pure boilerplate. With the exception of the bill number and the designation, the Committee uses exactly the same document in

connection with approval of other PUDs. Almost all of the text is simply the text of the applicable Zoning Code provisions. There is a generic reference to “agency reports and public testimony,” but no specifics of that evidence or how it relates to any of the required criteria. Indeed, the form used erroneously states that “an *amendment* to a Planned Unit Development is being granted” (emphasis added), but this bill involved the initial approval of the PUD. The approval was done with amendments to the bill, but the action was an initial approval of a PUD, not the amendment of an existing PUD.

Almost identical language, with some additions, appears in the record in excerpts from the Journal for the City Council of Baltimore. The Journal for the session on June 12, 2017 at 2:00 p.m. indicates first and second reading of the bill. The entry begins with the following two additional paragraphs:

Councilmember Reisinger, for the Land Use and Transportation Committee, reported that the Committee has complied with the Land Use Article of the Maryland Code and recommends the adoption of Bill No. 17-0049 favorably, with amendments.

An ordinance approving the application of Blue Ocean Realty, contract purchaser of certain property located at Ward 27, Section 15, Block 4820E, Lot 021, to have that property designated a Residential Planned Unit Development; and approving the Development Plan submitted by the applicant.

Then follows the heading, “Findings of Fact,” and the exact same text set forth above. The Journal entry then sets out the six amendments to the bill and ends with: “The bill, as amended, was read the second time and ordered printed for third reading.” Third reading and final passage on a unanimous, 14-0 vote is reflected in the Journal for the session on June 19, 2017.

An explanation of the agency’s specific findings of fact and law is fundamental to the limits on judicial review. *Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 552

(1999). The Court in *Bucktail* quoted at length from more general administrative agency review cases:

Judicial review of administrative agency action is narrow. The court's task on review is *not* to “substitute its judgment for the expertise of those persons who constitute the administrative agency,” *Bulluck v. Pelham Woods Apts.*, 283 Md. 505, 513 (1978), quoting *Bernstein v. Real Estate Comm.*, 221 Md. 221, 230 (1959), *appeal dismissed*, 363 U.S. 419 (1960). A reviewing “Court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency.” *United Steelworkers of America AFL-CIO, Local 2160 v. Bethlehem Steel Corp.*, 298 Md. 665, 679 (1984). A court's role is limited to determining if 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 Cty.*, 336 Md. 569, 576-77 (1994) (emphasis in original) (some citations omitted). Thus, “[f]indings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions.” *Bucktail, LLC*, 352 Md. at 553.

Courts have criticized administrative bodies for adjudicatory decisions that amounted to “filling out a preprinted form” with “no findings of fact worthy of the name,” *Turner v. Hammond*, 270 Md. 41-55-56 (1973); for “simply . . . parrot[ing] general statutory requirements or rest[ing] on broad conclusory statements,” *Rodriguez v. Prince George's Cty.*, 79 Md. App. 537, 550, *cert. denied*, 317 Md. 641 (1989); and for findings of fact that “amount to a simple repetition of the nine statutory requirements and nothing more,” *Ocean Hideaway Condominium Ass'n v. Boardwalk Plaza Venture*, 68 Md. App. 650, 662 (1986).

The City cites *Critical Area Comm'n for the Chesapeake and Atlantic Coastal Bays v. Moreland, LLC*, 418 Md. 111 (2011), for the Court's rejection of the “assertion that the [agency] must describe the evidentiary foundation for each of its findings, immediately following each

finding, to enable meaningful judicial review.” *Id.* at 128. But the administrative decision under review in *Moreland, LLC* was in no way comparable to the boilerplate findings used by the City Council here. After the property owner’s critical area variance request was heard and denied by an administrative hearing officer, the Anne Arundel County Board of Appeals conducted “three nights of evidentiary hearings” and rendered “a fourteen-page memorandum opinion.” *Id.* at 114. The Court quoted portions of at least six paragraphs of the Board’s decision to illustrate the Board’s specific findings based on the evidence before it. *Id.* at 124-26. The Court quoted long passages from the Board’s decision summarizing the testimony of two expert witnesses and of several neighboring property owners. *Id.* at 126-28. This exposition was the predicate for the Court’s conclusion, quoted by the City here, that “*Moreland’s* assertion that the Board of Appeals must describe the evidentiary foundation for each of its findings, immediately following each finding, to enable meaningful judicial review does not have a foundation in our jurisprudence.” *Id.* at 128.

The City omits quotation of the next sentence of the *Moreland, LLC* opinion: “What does have a grounding in our jurisprudence is that there has to be articulated evidence in support of a conclusory finding.” *Id.* The Court then cited *Bucktail, LLC* and three other decisions – *Annapolis Market Place LLC v. Parker*, 369 Md. 689 (2002), *Mastandrea v. North*, 361 Md. 107 (2000), and *Alviani v. Dixon*, 365 Md. 95 (2001) – to explain that jurisprudence. After discussing each case in detail, the Court concluded:

When the Board of Appeals merely states conclusions, without pointing to the evidentiary bases for those conclusions, such findings are not amenable to meaningful judicial review and a remand is warranted, as we determined in *Bucktail* and *Annapolis Market Place*. In contrast, our discussions in *Mastandrea* and *Alviani* make clear, that when the Board of Appeals refers to evidence in the record in support of its findings, meaningful judicial review is possible. The present case falls within the ambit

of the latter cases, because, in its determination that the Moreland variances should be denied, the Board explicitly summarized evidence presented by several witnesses supporting its conclusions, albeit in a separate section, enabling meaningful judicial review. That evidence, intellectually and logically, can be viewed only as bearing on what persuaded the Board to conclude as it did.

*Id.* at 134.

The City and the Developer try to distinguish *Turner, Bucktail, LLC, Pistorio v. Zoning Bd. of Howard Cty.*, 268 Md. 558 (1973), and *Bd. of Cty. Comm'rs for Prince George's Cty. v. Ziegler*, 244 Md. 224 (1966), as cases that require written findings only when the agency acts contrary to a recommendation or contrary to the weight of the evidence. For example, “where the planning staff and the Planning Commission have recommended approval of Bucktail’s project and found that it complies with all applicable requirements, it is not sufficient for the Council to simply express conclusions, without pointing to the facts found by the Council that form the basis for its contrary conclusion.” *Bucktail, LLC*, 352 Md. at 558. Although that is a feature of some of those cases, *Moreland, LLC* shows the Court applying the principle of *Bucktail, LLC* even when that feature is not present. Moreover, there was substantial evidence introduced here against the PUD application, warranting a decision explaining the City Council’s consideration of that evidence.

In defense of the absence of any specific findings of fact in the City Council’s “Findings of Fact,” the City also cites a footnote in *MBC Realty, LLC v. Mayor and City Council of Baltimore*, 403 Md. 216 (2008). The Court there observed that in that case and in *Armstrong v. Mayor and City Council of Baltimore*, 169 Md. App. 655 (2006), “the Zoning Article [did] not require specifically that the City Council make written findings of fact or conclusions of law in accordance with legislative criteria (in granting the conditional use) that are supported by competent and substantial record evidence.” 403 Md. at 238 n.18. “[I]n neither case were the

City Council’s views as to how those considerations are fulfilled on the record before it required to be expressed in the act of approval.” *Id.* The text associated with that footnote describes the process under review in more detail. Before the City Council could consider the bill, a hearing was required before the Land Use and Planning Committee.

The agency and departmental reports . . . were required to consider numerous site-specific and statutory factors in framing their analysis and recommendations regarding the proposed use. Thus, the conditional use was approved after the City Council considered multiple reports and recommendations from its relevant agencies and departments, framed in terms of the 13 considerations set out [in the Zoning Article], and public comment received at an obligatory public hearing. Such a process, though concluding with a purely legislative act, i.e. the adoption of Ordinance 03-515, suggests that the Mayor and City Council here engaged in a “zoning action” in granting the conditional use, rather than a purely legislative exercise.

*Id.* at 238-39 (footnote 18 omitted).

The City might also have emphasized *Maryland Overpak Corp.* itself, where the Court stated that “[t]he mode of fact-finding and particular formalities observed in the process can vary depending on the nature of the matter being considered by the hearing body.” 395 Md. at 38. There is no particular discussion in that case about any required form for the City Council’s decision on a PUD amendment. The Court emphasized more generally that adjudication in particularized land use matters “usually entails at least the holding of a hearing, the receipt of factual and opinion testimony and forms of documentary evidence, and *a particularized conclusion as to the development proposal for the parcel in question.*” *Id.* (emphasis added). Although the Court was not referring to a specific type of written decision, it stressed that “[t]hese site-specific findings of fact are necessary not only to inform properly the interested parties of the grounds for the body’s decision, . . . but also to provide a basis upon which judicial review may be rendered.” *Id.* at 40 (citations omitted).

Consistent with the description of the process in *MBC Realty, LLC*, the Court in *Maryland Overpak Corp.* noted that multiple City agencies had reviewed the proposed PUD amendment and provided reports, “which served as the source of many of the conditions attached ultimately to approval of the amendment,” and that the Land Use and Planning Committee had conducted a public, recorded hearing at which it “heard testimony from the developer and members of the public regarding a number of topics concerning the PUD and its putative effects on the community.” *Id.* at 43. It compared “[t]his process of receiving evidence and creating a record upon which the City Council then must rely in deciding the ultimate question” to the processes involved in *Woodmont Country Club* and *Mossburg v. Montgomery County*, 329 Md. 424 (1993). “In both of those cases, as was done here, findings of fact were made based on reports from governmental agencies and departments and a public hearing, wherefrom the final governmental decision-maker drew its findings as to the pending matter affecting a particular piece of property.” *Id.* at 44.

*Maryland Overpak Corp.*, *Armstrong*, and *MBC Realty, LLC* all dealt with the fundamental issue whether the actions of the Mayor and City Council of Baltimore in those cases were quasi-judicial in nature and therefore subject to closer judicial review, as opposed to legislative acts subject to more deferential review. In each of those cases, the Court examined the processes employed in considerable detail, but in none of those cases was the Court called upon to decide whether the absence of a written final decision with findings of fact in any particular form made it impossible to carry out judicial review. Still, the processes described in those cases culminating in quasi-judicial decisions by the City Council are very similar to the process followed by the City in this case. Most important is the Court’s admonition that “[t]he mode of fact-finding and particular formalities observed in the process can vary depending on

the nature of the matter being considered by the hearing body.” *Maryland Overpak Corp.*, 395 Md. at 38.

More recent cases provide examples of written administrative decisions rendered in similar types of cases. In *Kenwood Gardens Condominiums, Inc.*, the Court contrasted the Baltimore County Council’s preliminary resolution allowing the PUD process to proceed, which the Court held was legislative in nature, with the subsequent quasi-judicial process. The initial resolution step before the County Council was “best characterized as conclusory factual assertions requiring little or no factual inquiry. The Resolution consists of the proposed name and location of the PUD, a perfunctory review of the procedural and statutory factors that inform the decision, and a declaration that the proposal meets the objectives of the Baltimore County Master Plan 2020.” 449 Md. at 336. For the “fact intensive findings as demonstrated in *Overpak*,” *id.*, the Court looked instead to the adjudicatory phase of the process: a five-day hearing before an ALJ that “culminated in a final conclusion by the ALJ based upon a factual determination on the record and consideration of many statutory and regulatory standards,” *id.* at 338, and then the decision by the Board of Appeals on review of the ALJ’s decision, which was “the agency’s final decision in the matter,” *id.* at 322. As discussed above, the adjudicatory process in *WV DIA Westminster, LLC* produced a written decision adopted by the Westminster Common Council to explain its action at length. *See* 462 Md. at 391-94. Very recently, citing *Bucktail, LLC*, the Court of Appeals has approved the practice of the Prince George’s County Council, sitting as the District Council in an adjudicatory capacity, to give tentative approval of a decision at one meeting, to delegate to a staff attorney the task of preparing its written decision, and then to adopt that written decision at a subsequent meeting. *Grant v. County Council of Prince George’s Cty.*, 465 Md. 496, 512 (2019). In each of these cases, the ultimate

administrative decision to be reviewed was a detailed written decision explaining the findings and conclusions made based on the evidence presented.

The Court does not hold here that the City Council or any of its committees must in every quasi-judicial matter render a written decision in a certain form or of a certain minimum length. There likely are instances in which it is sufficient for the City Council or a committee to adopt the rationale proffered to it by the Planning Department or another City agency, incorporating a report or other document as the findings and reasoning supporting its decision. But in the circumstances of this case, the City Council's form findings of fact are deficient as a basis for judicial review. The Developer is simply wrong when it contends that "the Committee's findings of fact *specifically adopted* the agency reports, including the particularized findings of the Planning Commission, and *much* of the testimony presented at the Hearing." Developer's Memo. at 13 (emphasis added).<sup>29</sup> Even assuming the City Council or the Committee could simply adopt the recommendations of a City department as the basis for its decision, it did not do that here. The "Findings of Fact" only refer to "agency reports and public testimony." There is no statement of explicit adoption, like "based on the Planning Department's recommendations" or "for the reasons stated in the Planning Department's report." The reference may support an inference that the Committee considered the agency reports and public testimony, but it does not identify what in those reports or testimony provides the rationale for the action. Indeed, the

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<sup>29</sup> The Developer also cites the Hearing Notes that appear as Exhibit G to the Cochrane Petitioners' memorandum, suggesting that the Committee members' consideration of the Planning Department's consideration of the required findings of fact "is echoed in the Hearing Notes." Dev.'s Memo. at 13. The Hearing Notes are the work product of a staff person dated five days after the hearing. Unlike in *Grant*, 465 Md. at 512, there is no indication that the Committee delegated to this staff member responsibility to prepare a decision for the Committee, and there certainly is no indication that the Committee then reviewed the notes and adopted them as the Committee's findings.

Developer's careful qualification that the Committee adopted "*much* of the testimony presented" undermines the argument. The generic reference to "public testimony" in the "Findings of Fact" must refer to all the testimony, both in favor of and opposing the project. The Committee could not have rationally adopted all of that testimony, yet the "Findings of Fact" make no distinction between what the Committee accepted and what it rejected.

The Court might also look to the transcript of the hearing for the operative basis for the Committee's action, but that source also is bereft of any definite information. The motion was couched simply as "a motion to move the finding of facts," Tr. at 161, not "a motion to adopt the Planning Department's recommendations" or "a motion to approve the bill based on the findings of the Planning Department."

There is a more fundamental problem in this case with simply assuming that the Land Use and Transportation Committee, and therefore the City Council, adopted the findings and recommendations of the City Planning Department. Petitioners submitted, and the Committee received, a substantial amount of written evidence at the hearing. Petitioners prepared a binder of material for each Committee member, and those binders apparently were made available to the members at the beginning of the hearing. In the course of their testimony and arguments, Petitioners made reference to some of these materials, but there was no specific opportunity for Committee members to review this volume of evidence. Two specific examples illustrate the problem.

First, Petitioners provided the written opinion of Daniel Motz, a licensed realtor with Coldwell Banker Residential Brokerage. (Tab VI.B.) He opined that the proposed building would affect negatively the value of neighboring residential properties: "I estimate that the value of 1018 St. George's Road and 1110 Cliffhurst Road would decrease in value by 40% and the

other affected properties would decrease in value by 15% to 20%, and perhaps even more.” *Id.* This evidence was potentially relevant to the required finding that “the physical characteristics of the Planned Unit Development will not adversely affect . . . the use, maintenance, or value of neighboring areas already developed.” Former Zoning Code § 9-112(a)(2)(iv)(B). Although the Planning Department staff included this factor in its review of the application, no specific evidence of valuation of nearby properties was introduced before the Planning Commission. As the Planning Department representative stated: “[W]e didn’t look at the valuation of property. What . . . Title 9 refers to is the impact from the physical development standpoint, and so we didn’t look at the dollar value of the property, but more of the evaluating what was the proposed development doing impacting the properties.” Hearing Tr. at 49. Thus, this evidence introduced at the Land Use Committee hearing was the first and only evidence of its type put before the Committee.

There may be valid reasons why the Committee members would reject this evidence as sufficient to demonstrate that the PUD application did not meet one of the required criteria. They might have concluded as a matter of law – as the Planning Department representative suggested – that they should not consider evidence of specific, individual devaluations of property. Or they might have rejected Mr. Motz’s conclusion about the adverse effect on valuations as a factual matter – deciding either that his opinions did not have a sufficient basis or simply were not credible. Or they might have accepted his opinions and decided that those specific adverse effects were insufficient to warrant disapproval of the proposed development. The Court, however, has no way of knowing how – or even whether – Committee members considered this particular evidence. The Court cannot review the legal or factual sufficiency of a wholly unexplained administrative decision.

The second example is the traffic impact analysis. The Committee certainly had ample evidence of the City's analysis of the traffic impacts. The written analysis of the City Transportation Department was provided, and a representative of that Department testified and summarized the conclusions. But the final traffic impact analysis was not available until just days before the hearing. The Planning Department had information about traffic, but the impact analysis had not been completed when the Planning Commission held its hearing, so the written Planning Department recommendation did not include commentary on the traffic issues. At the Committee hearing, Petitioners provided a written critique of the traffic impact analysis provided by an expert, Mr. Chellman. Jamie Riordan, who described himself as "qualified to serve as an expert witness in real estate investment and development matters on a national level," summarized the critique orally. Tr. at 116-24 (quotation at p. 116).

Members of the Land Use Committee likely have experience and facility with understanding traffic issues of this sort, but these are detailed technical matters. The Committee members may have had a sufficient opportunity to review the City's traffic impact analysis and to understand and accept the conclusions summarized by City witnesses, but it is impossible to conclude in these circumstances that the Committee members also had an opportunity to weigh those conclusions against the criticisms leveled by Petitioners' traffic expert. Indeed, on this issue the impossibility of the process extends one step further. During the hearing, Councilmember Dorsey stated "it has been implied that this is the worst intersection in Baltimore City." Hearing Tr. at 59. He asked the Transportation Department representative for a ranking of City intersections by traffic volume and number of accidents. Ms. LaCour described several higher volume intersections and offered to provide a chart with that information within a few days. *Id.* at 60-61. The Chair asked her to do that. *Id.* at 61. Although that information might

not be critical to the Committee’s resolution of the issues, the notion of leaving the record open for additional evidence but then voting on findings at the end of the hearing highlights the problem of deciding factual issues without a full opportunity to review the evidence. Perhaps a valid final conclusion is that the City Transportation Department used a valid methodology and correctly concluded that the marginal effects of this project would be negligible, but the Court on this record cannot be confident that the Committee members actually considered the opposing evidence and reached a reasoned conclusion on the traffic issues.

The essence of a quasi-judicial process focused on facts relating to this particular property and the immediately adjacent area is a fair opportunity for all parties to present evidence on the issues and then a decision that considers and weighs all that evidence in light of the prescribed considerations. That result could be achieved in various ways, but on this record, the Court cannot conclude that the Committee members took the time to consider all the evidence presented. The Committee, and therefore the City Council, have not sufficiently articulated the basis for their decision. A remand would be necessary for this reason even if there were no other errors affecting the action.

**D. “Councilmanic Courtesy”**

Petitioners advance a passionate and somewhat elaborate attack on the idea or practice of “councilmanic courtesy.” In its purest or most extreme form, they describe the practice as one in which all land use decisions assigned to the City Council and involving a specific parcel of property are dictated by the Councilmember for the district in which the property is located. Petitioners contend the practice was manifest in this instance (1) because the PUD application could only be introduced before the City Council by Councilmember Schleifer, in whose district the proposed Overlook project would be built, and (2) because the members of the Land Use and

Transportation Committee inappropriately deferred to Councilmember Schleifer even though he did not sit on that Committee.

Although Petitioners allege in the barest terms that the Developer exercised undue political influence over Councilmember Schleifer because Mr. Ehrenfeld supported the Councilmember's political fundraising efforts, their challenge to councilmanic courtesy is actually more abstract. They argue more generally that the practice encourages developers to cultivate political influence over Councilmembers from districts in which they may be planning projects. Petitioners then argue even more generally that deference by other Councilmembers to the member representing the home district of the project is anti-democratic. In Petitioners' view, those deferring Councilmembers fail to fulfill their obligations to represent their individual constituents or the City as a whole:

This entire proceeding reflects the rubber stamping of one councilman's support of a development proposed by the most significant sponsor, fundraiser, and financial contributor to his campaign. Historically, there was a time when each district was represented by three people. But today, with the combination of councilmanic courtesy and single-member districts, the entire process is controlled by only one individual. That individual sets the stage and controls the process for the entire City: the Planning Commission, the Land Use Committee, and the City Council itself. The other members of the City Council are essentially bystanders. Not one of the other 13 members of the Council mentioned in their concluding remarks even a single piece of the massive evidence produced by Petitioners. This was the antithesis of a representative and deliberative legislature where all parts of the City should debate the merits and demerits of proposed legislation. It is an "open secret" in Baltimore City that this practice does exist. Virtually everyone involved with the zoning process knows that it exists. A prime effect of this practice is the fact that the citizens of Roland Park – the main part of District 6 – were deprived of representation by their councilwoman. She stated a FACT when she said: "It's the decision of the Fifth District Councilperson. And on that note, I will stop here, and my vote is yes."

Lehr Stream Pets.' Reply Memo. at 9-10 (quoting Tr. at 153).

The Court views the issue differently, as two separate issues. First, there is the question of any improper action or motive on the part of Councilmember Schleifer. That claim fails both for lack of any proof and because the Councilmember's primary individual act – introducing the proposed ordinance – was a legislative act. Second, the Court's primary concern is with any practice of deference at the Committee or full City Council levels. That concern arises not from legislative principles – whether Councilmembers are appropriately representing their constituents – but from the fact that the PUD process is a quasi-judicial process. In this instance, Councilmembers are expected to be adjudicators, not legislators. The Court will examine the two issues separately.

At the Committee hearing, counsel for some of the Petitioners raised the political relationship between the Developer and Councilmember Schleifer, and the Chair quickly steered away from the issue. As already quoted above, the following exchange occurred:

[MR. STILLER:] The sort of ethos here that whatever the Councilman for the district wants with respect to zoning, he gets.

Now, this – the Councilman here is an honorable man, there is no question about that, but we've introduced into the record something that, from a perception point of view to the citizens of Baltimore, looks bad.

The principal fundraiser at a big fundraiser last year when the Councilman was running for office was Mr. Ehrenfeld. And developers do this. There's nothing wrong –

CHAIRMAN REISINGER: Shale. Shale, I don't – let's not go there. Okay?

MR. STILLER: Well, this is as a matter of law.

CHAIRMAN REISINGER: I know. But I mean –

MR. STILLER: Okay.

CHAIRMAN REISINGER: – what you’re doing is an integrity issue, which I don’t appreciate.

MR. STILLER: This is not integrity. I’m not saying he did anything wrong.

CHAIRMAN REISINGER: Let’s stick to the PUD and –

MR. STILLER: All right. Well, I’m saying –

CHAIRMAN REISINGER: – the facts.

MR. STILLER: – that this is – this is simply something that the Council should be examining.

Tr. at 114-15.

The Chair correctly rebuffed this claim for two reasons. First, Petitioners offered no specific factual foundation for any allegation of impropriety. At most, they asserted that Mr. Ehrenfeld provided lawful support for Councilmember Schleifer in the electoral process. Mr. Stiller couched these suggestions of inappropriate influence with the qualifiers that the Councilmember is “honorable” and that neither he nor Mr. Ehrenfeld “did anything wrong.” Petitioners cannot rely on innuendo without any substance.

Second, even if there were some real allegation of wrongdoing – which there was not – this particular attack involves the beginning of the PUD process. The former Zoning Code provides that, after the preliminary conference, a PUD application must be in the form of a proposed ordinance. Former Zoning Code § 9-106(b). The practice is that the proposed PUD ordinance will not be introduced before the City Council unless it has the support of the Councilmember in whose district the proposed PUD is located. This is akin to the process in Baltimore County that specifies that a PUD application must be submitted to the councilmember of the affected district and that the County Council then must pass a resolution before the PUD application advances to a hearing before an administrative law judge. *Kenwood Gardens*

*Condominiums, Inc.*, 449 Md. at 331-32. The Court held that those initial steps in the Baltimore County process involved legislative acts; the process became quasi-judicial only once it advanced to a hearing before an ALJ and then the Baltimore County Board of Appeals. *Id.* at 332.

The opponents of the PUD at issue in *Kenwood Gardens Condominiums, Inc.* offered specific evidence that the developer made illegal campaign contributions to the councilmember who sponsored the initial resolution. *Id.* at 319. That contention was supported by the developer's guilty plea to violating campaign finance laws. *Id.* at 319 n.2. The Court, however, ultimately agreed with both the ALJ and the Board of Appeals that these allegations were beyond the scope of review in the quasi-judicial part of the process because they affected at most the legislative part of the process. "[T]he courts are not ordinarily 'concerned with whatever may have motivated the legislative body.'" *Id.* at 338 (quoting *Workers' Comp. Comm'n v. Driver*, 336 Md. 105, 118 (1994)). The allegations about the developer were confined to the Council's preliminary legislative acts and therefore subject to only very limited review. *Id.* at 338-39. The opponents of the PUD could not show any effect on the adjudicatory part of the process. *Id.* at 340.

Petitioners' claims here that Mr. Ehrenfeld had some influence over Councilmember Schleifer – without even a hint of illegal or inappropriate conduct – are similarly irrelevant to the City Council's ultimate quasi-judicial decision to approve the PUD ordinance. Councilmember Schleifer was present, but he did not sit as a voting member of the Land Use and Transportation Committee. His support was no doubt important, but his only formal act was to introduce the ordinance and then to vote on it when it eventually came before the full City Council.

Petitioners' more substantial claim about "councilmanic courtesy" concerns the voting members of the Land Use and Transportation Committee. Although Petitioners see the Developer's alleged influence over Councilmember Schleifer projected onto all of the Committee members, they allege no specific impropriety on the part of any Committee member. Instead, this is simply a claim that Councilmembers inappropriately defer to the position of their colleague representing the district in which the PUD will be located. As summarized above, Petitioners argue this is an abdication of *legislative* responsibility. The Court sees the issue as a problem of *quasi-judicial* responsibility.

As already discussed, the essential features distinguishing a quasi-judicial decision are "(1) [that] the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property; and (2) [that] there is a deliberative fact-finding process with testimony and the weighing of evidence." *Maryland Overpak Corp.*, 395 Md. at 33 (citations omitted). This function requires impartial decision makers. *Regan v. State Bd. of Chiropractic Examiners*, 355 Md. 397, 408-09 (1999) ("The doctrine that every person is entitled to a fair and impartial hearing 'applies to an administrative agency exercising judicial or quasi-judicial functions,' and 'is specifically applicable' to issues of disqualification . . . .") (citations omitted); *see also Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities"); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("[A]n impartial decision maker is essential.). The Court of Appeals therefore assumed "that the 'appearance of impropriety' standard set forth in our cases involving judges and some others is applicable generally to the participation of members of Maryland administrative agencies performing quasi-judicial or adjudicatory functions." *Regan*, 355 Md. at 410.

Ordinarily, the extent of the deference a Councilmember gives to the position of the sponsoring Councilmember may be subtle. Here, Councilmember Middleton announced it explicitly. After expressing her attention to the issues and her concerns for the residents in the area, she stated:

This particular project is in the Fifth District. It's the decision of the Fifth District Councilperson.

And on that note, I'll stop here, and my vote is a yes.

Tr. at 165. The Court agrees with the City and the Developer that this statement does not necessarily capture the totality of Councilmember Middleton's reasons for her vote, but it betrays a degree of deference inconsistent with the concept of quasi-judicial decision making. The Councilmembers to whom this quasi-judicial process is delegated receive property-specific evidence and are expected to weigh it and to determine if it satisfies specific criteria prescribed by law. This is not to say it is an entirely rote process. Many aspects of the inquiry involve the exercise of discretion. On close questions, some measure of deference to other Councilmembers may be appropriate, but the discretion and any possible deference must be exercised within the framework of the required considerations. Complete or controlling deference cannot satisfy the requirements of a decision rendered impartially based on the evidence presented and the required statutory criteria.

Interestingly, Petitioners also rely on the voting explanation of Councilmember Dorsey. The Court concludes that his statement actually suggests an appropriate approach to the quasi-judicial function. In explaining his vote, Councilmember Dorsey elaborated on his questions and comments earlier in the hearing concerning "the extremely excessive number of parking spaces planned here," which he viewed as "encouraging and supporting car dependency." Tr. at 167. He opined that this made the project unnecessarily expensive. Tr. at 168. In "a city with a

significant income disparity along racial lines,” he found “this development is exclusive of literally every average resident of Baltimore City, even more so of the majority black population whose median income is significantly lower than the white populations.” *Id.* “This project, I can only conclude then, perpetuates racial segregation and is, in effect, structural racist.” Tr. at 169. He suggested that reducing the number of parking spaces could reduce construction costs and enable the Developer to include a certain number of affordable units to help address the “significant homelessness [in Baltimore] that is driven very significantly by a lack of housing availability at the median income and just below median income levels.” *Id.* “I believe that a development that is truly good for Baltimore and has Baltimore’s interests at heart would take this into serious consideration and make all efforts to accommodate those needs.” Tr. at 169-70.

Agree with them or not, Councilmember Dorsey’s statements to this point were legislative. They captured his views of significant issues of public concern and how this development might or might not fit with policy objectives to address those concerns. But he then pivoted:

However, I still believe and have faith in the agencies who have reported here today that this PUD was entered with legal sufficiency, and it does meet the Planning Department’s requirements, and that I am limited in my ability to – to control things that I would like to see better, and will plan to make such changes in the way we set policy in Baltimore City for the future.

At the moment, though, I believe that this is a supportable Bill, and I vote yes.

Tr. at 170. Although this Court concludes that the Planning Department’s rationale does not satisfy the applicable legal requirements, Councilmember Dorsey’s recognition that those criteria were the proper basis for his decision reflects an appropriate acceptance of the constraints on him

as a quasi-judicial decision maker. In his explanation of his vote, he properly separated his role as a legislator on some issues from his role as a quasi-judicial adjudicator in this instance.<sup>30</sup>

In the abstract, the Court concludes that councilmanic courtesy in its purest form – complete deference by one Councilmember to the position of another based solely on the fact that the proposed project is in the district of the other member – is inconsistent with a quasi-judicial decision maker’s obligation to decide the issue impartially based on the evidence presented and the required statutory criteria. Like all real cases, this one is neither abstract nor pure. The record shows one Councilmember giving a high degree, but not absolute deference to the sponsoring Councilmember. It also shows other Councilmembers either grappling with the issues or voting without explicit explanations of their reasoning. Because the Court is reversing the decision on other grounds, the Court declines to decide in isolation whether this record requires reversal on the ground that the Committee’s decision was improperly affected by councilmanic courtesy.

## **V. The Merits**

In the absence of either a written decision containing specific findings of fact and conclusions of law or even an explicit adoption of the findings and conclusions of an agency, the Court can review the City Council’s decision to approve this PUD only by making certain assumptions. The Court must assume first that the City Council, through its Land Use and Transportation Committee, meant to adopt wholesale the conclusions contained in the Planning

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<sup>30</sup> One member of the Westminster Common Council accurately captured the idea of acting as an adjudicator in plain terms: “I think we all ought to make sure and be reflective of the fact that we’re making our decision based on all the information we heard during the hearing phase as well as the public input phase and not anything that was said this evening by [Planning Director] Mackey. I think we understand that we have to put that out of our mind because clearly that probably isn’t completely in compliance with the quasi-judicial hearing aspect of what we’re required to do here.” *WV DIA Westminster, LLC*, 462 Md. at 390 n.11.

Department's report. Second, because the Planning Department did not have before it the final traffic impact study, the Court also must assume the City Council meant to adopt the Transportation Department's report, even though that report does not contain recommended findings under the specific PUD criteria. Third, the Court must assume that the Committee considered and meant to reject every item of evidence presented by Petitioners or other opponents of the project that was not considered by either the Planning Department or the Transportation Department. This evidence includes the written opinions offered by Mr. Motz about the diminution in property values that would be caused by the project and the criticisms of the traffic impact study offered in Mr. Chellman's report or by witnesses at the Committee hearing. Even indulging the City and the Developer those assumptions, the Court concludes that the City Council's action is unsustainable because it is based on a fundamental error of law. The Court also comments first on a less significant error that has not been argued by any Petitioner but that should be reconsidered on remand.

**A. Consistency with the City's Master Plan**

One of the required considerations for approval of a PUD under the former Zoning Code is "whether . . . the plans for the Planned Unit Development are in general conformance with . . . all elements of the Master Plan." Former Zoning Code, § 9-112(a)(2)(i)(A). The Planning Department duly considered this factor and offered the conclusion:

The proposed development meets several of the city's Comprehensive Master Plan goals, including returning vacant properties to productive use; and increasing housing choice.

Planning Department Staff Report at 3. Although no Petitioner has challenged this conclusion, the idea that the Planning Department would recognize this project as "returning vacant

properties to productive use” is striking because this project has nothing to do with vacant housing.

The Court takes judicial notice of LIVE EARN PLAY LEARN, City of Baltimore Comprehensive Master Plan 2007/2012: A Business Plan for a World-Class City (Nov. 21, 2006, Revised July 9, 2009) as it is publicly available on the Planning Department’s web site. [http://www.baltimorecity.gov/sites/default/files/070909\\_CMPfullplan.pdf](http://www.baltimorecity.gov/sites/default/files/070909_CMPfullplan.pdf) (last viewed December 19, 2019) (“City Master Plan”). In its examination of “Key Trends,” the City Master Plan describes Baltimore’s severe population loss since 1950 and important demographic changes during the same time:

The population declined over the next half century to 651,154 in 2000 – a loss of approximately 30 percent from our peak population in 1950. Since 2000, annual population estimates indicate a leveling off of population decline and a slight future increase in population . . . .

City Master Plan at 52. This population loss and other factors have produced a serious problem with vacant and deteriorated housing stock:

The percentage of owner-occupied homes fell between 1950 and 1990, but increased slightly in 2000, from 48.6 percent in 1990 to 50.3 percent in 2000. Although homeownership increased slightly during the 1990s, vacancies due to uninhabitable conditions more than doubled, from 6,049 in 1900 to 13,846 in 2000. The spike in the number of vacancies is partially due to improved monitoring and reporting, but it also reflects severe disinvestment in some areas. The number of vacant and abandoned houses increased gradually from 1995 to 2002 and has since leveled off.

*Id.* at 52. A graph on the next page shows this sharp increase in “Vacant & Abandoned Housing in Baltimore 1970-2009.” *Id.* at 53.

The City’s problem with vacant and abandoned housing matches most directly with Goal 1, Objective 2 in the LIVE section of the Master Plan. *Id.* at 72. Goal 1 is “Build Human

and Social Capital by Strengthening Neighborhoods,” and Objective 2 under that goal is “Strategically Redevelop Vacant Properties Throughout the City.” *Id.* The specific items under Objective 2 are:

- Establish a multi-tiered property tax to encourage development of vacant property and parcels
- Develop a vacant housing reclamation strategy for Transitional and Distressed neighborhoods
- Support creation of a Community Garden Land Trust(s) to hold title to community-managed open spaces and gardens (See also PLAY, Goal 3, Objective 2)

*Id.* The Master Plan elaborates on the second of these items:

Project 5000 has been and will continue to be a successful program for addressing the disposition of vacant properties in Competitive, Emerging, and Stable neighborhoods as defined in Housing Typology (See Appendix M); this important initiative should continue. Additionally, an aggressive vacant housing reclamation strategy should be developed in Transitional and Distressed areas that considers the following: development of a database that inventories and tracks vacant and abandoned buildings and land parcels; buildings that are vacant/abandoned for more than 6 months must register and pay an annual sliding fee; abandoned property owners should be required to carry minimum insurance on property in case of damage to neighboring homes from collapse and/or fire; RFP’s offered to CDC’s, community organizations, and other interest groups to convert and/or purchase vacant lots and buildings into community gardens, parks, recreation areas, etc.

*Id.* at 77. The Housing Typology in Appendix M to the Master Plan classifies most of Baltimore’s housing market in five different categories: Competitive, Emerging, Stable, Transitional, and Distressed. *Id.* at 222-23. One of the hallmarks of “distressed” areas is “[t]hese neighborhoods . . . have nearly 4 times the levels of vacant homes and vacant lots as found in other categories.” *Id.* at 223.

The proposed Overlook project is to be built on raw land, that is, land that has never been improved with any structure. Although this land might literally be described as “vacant property,”<sup>31</sup> the property cannot conceivably be regarded as contributing to the City’s vacant and abandoned housing problem. Most simply, there has never been housing of any type on this property. Even considering the broader area, the maps included as part of the Master Plan’s Housing Typology show the area in which this property is located as the highest grade of “competitive” housing in the City.<sup>32</sup> *Id.* at 222. In “competitive” housing areas, “[f]oreclosure, vacancy and abandonment rates are all very low.” *Id.* at 223. The Master Plan provides specifically that the existing Project 5000 program is sufficient to address vacant properties in competitive, emerging, and stable neighborhoods; the need for a new “aggressive vacant housing reclamation strategy” is in transitional and distressed areas. *Id.* at 77. Both the Master Plan objective – to “strategically *redevelop* vacant properties throughout the City,” *id.* at 72 (emphasis added) – and even the phrasing used by the Planning Department in its staff report for this proposed project – “*returning* vacant properties to productive use,” Staff Report at 3 (emphasis added) – specifically involve *restoring* a prior use of the property, not developing previously undeveloped land. It may be that this proposed development is consistent with – or at least not inconsistent with – the City Master Plan for other reasons, but it is not because building a new

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<sup>31</sup> For example, the Housing Typology in the City Master Plan includes a calculation of the City’s housing “holding capacity.” City Master Plan at 224-28. For purposes of that calculation, “[v]acant’ properties include parcels with no existing physical improvements on the site whereas ‘underutilized’ properties consist of parcels that fall into one or more of the following categories . . . .” *Id.* at 224-25. The categories include properties that have been the subject of a Vacant House Notice or that meet the City’s “Quick Take” criteria. *Id.* at 225.

<sup>32</sup> Another section of the City Master Plan identifies “Growth Promotion Areas” where additional resources are needed to spur growth. *Id.* at 167-68. One of the characteristics of those areas is “the significant amount (20% or greater) of vacant housing stock and/or land.” *Id.* at 167. This proposed project is not located in a Growth Promotion Area. *Id.* at 168.

apartment building on previously undeveloped land will help address the existence of vacant and abandoned housing structures elsewhere in Baltimore.

If anything, the objectives of the City Master Plan more apt for this proposed project are those that relate to open space. The Master Plan identifies natural resources and open space as significant strengths of Baltimore: “Our large parks and stream valleys feature scenic vistas that rival those of other great cities across the globe.” *Id.* at 118. It stresses the importance of preservation of natural spaces:

Aside from their recreation benefits, parks and natural land function to moderate the microclimatic conditions in the City. The trees, fields and natural stream valleys offer an aesthetic alternative to a continuous landscape of roads and buildings. These areas also provide habitat for many species of animals and plants, including migratory woodland birds and waterfowl. As the City is redeveloped in the next decade, some acquisition will be important both for protection of Baltimore’s natural resources and for the general ecological health of the region.

*Id.* at 125. Those interests are reflected in Goal 3, Objective 2 in the PLAY section of the Master Plan. *Id.* at 130. Goal 3 is “Increase the Health of Baltimore’s Natural Resources and Open Spaces for Recreation and to Improve Water Quality and to Improve Neighborhood Social, Economic, and Environmental Well-Being,” and Objective 3 under that goal is “Protect and Enhance Baltimore’s Natural Habitat and Environmental Resources.” *Id.*

Although the Planning Department did not identify this aspect of the project in connection with the City Master Plan, the Department emphasized the value of preserving approximately six of the twelve acres initially included within the proposed PUD as open space. Of course, that benefit is counterbalanced by building on approximately six acres that are now undeveloped. The Court does not suggest that this private property is inappropriate for development because it has never been developed before or that it is somehow appropriate for

public parkland. Rather, the Court only suggests that it is now open space and that consideration of its development in relation to the City Master Plan should recognize that fact.

The Planning Commission and Department are the City agencies with the lead role in developing the City Master Plan. *Id.* at 260-62. Their mistaken reliance on the impact of this proposed project on the City's vacant housing problem as one of the two ways in which the PUD would advance the Master Plan can only be described as those agencies giving surprisingly uncritical attention to their own Master Plan.

### **B. Comparison to the Developer's "By Right" Option**

As concluded above, the City Law Department and Planning Department misapplied the transition rule in TransForm Baltimore, Art. 32, § 2-203(k), to mean that the Developer's completed PUD application, pending as of June 5, 2017, vested in the Developer a *right* to build a structure within the far more generous height restrictions of the old Zoning Code. The Court concludes that the Developer could have preserved that development right only by filing a completed building permit application before June 5, 2017. When the Developer failed to take that step, its "by right" ability to build an eighty-foot structure expired and the new thirty-five-foot height limit of TransForm Baltimore took effect for this property.

The Planning Department built its entire recommendation to the City Council on this erroneous premise. In its written report, the Planning Department clearly identified the change in the building height requirements and endorsed the Developer's use of the PUD process to avoid the new limitation:

[T]he change to a flat height limit instead of the Floor Area Ratio (FAR) would preclude this development, as proposed, being built. The current proposal is to build a building that is roughly 80' tall and the new zoning code would cap a multi-family development at 35' for interior lots and 45' for corner lots.

Because of this change in regulation, the developer has decided to request the establishment of a residential planned unit development through City Council Bill #17-0049 as a way to “vest” current property rights as the City transitions to a new zoning code. This PUD, if enacted, would allow for the redevelopment of this site with the proposed multi-family building.

Planning Staff is in support of this approach, which though allowing a building taller than would be allowed under TransForm Baltimore, protects the R-1 portion of the site from development because the proposed development is to be built only on the R-6 portion of the site, which accounts for approximately half of the lot area. Because the R-1 portion has more tenuous environmental features, it is more advantageous to encourage that development only be on the R-6 portion of the site.

Staff Report at 2. Ms. Woods testified before the Land Use and Transportation Committee on behalf of the Planning Department and reinforced this point: “[W]hat the PUD does is allow the developer to vest the rights of the old zoning code, so that means they can build under the floor area ratio and actually be able to build the 80-foot tall building that they’re proposing[.]” Tr. at 10.

Committee members returned to this premise repeatedly during the hearing.

Councilmember Costello in particular focused on the timing of the application relative to the effective date of TransForm Baltimore: “Had the applicant not submitted the application for the PUD prior to June 5th, but had instead applied for a building permit, what would have been the outcome of that?” Tr. at 24. Ms. Woods answered that that would depend on whether the application was far enough along in the design process to be considered a completed application by June 5, 2017. *Id.* Councilmember Costello clarified his question: “If . . . they had submitted . . . a completed building permit application, to what extent . . . would they be allowed to build what’s currently planned?” Tr. at 25. Ms. Woods repeated that the old law had a higher and more flexible height limit based on floor area ratio compared with a straight 35-foot height limit

under TransForm Baltimore. Tr. 25-26. Councilmember Costello sought confirmation that this meant “that the PUD . . . that’s before this Council today[ ] actually limits what the developer can do as a matter of right[.] \* \* \* So without this PUD, the developer could do more than is being currently proposed.” Tr. at 26. Ms. Woods agreed: “Under . . . the past zoning code, they would actually be able to do more dwelling units tha[n] they’re actually proposing to do. . . . [T]his is where [floor] area ratio becomes very fluid. So it really depends on the footprint of the building. . . . [W]hatever footprint you use is actually gonna help determine your final height. . . . But what the PUD does, it’s locking in the development plan, and it’s locking in the process as well.”<sup>33</sup> Tr. at 27. She ultimately confirmed his statement that “if not for the PUD, concessions that are being made by the developer, that they could do more than what is currently proposed as a matter of right[.]” Tr. at 28.

Jonathan Ehrenfeld, founder and president of the Developer, stated that the Developer could have applied for a building permit for any even larger building but chose instead to invoke the PUD process:

The R6 zoning was essential in this case, because under the R6 zoning classification, as you heard, we were permitted by right to build approximately 197 apartments. Further, R6 did not specifically limit the height of the future building or buildings. All we had to do was determine what resources were necessary to

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<sup>33</sup> To the extent Ms. Woods was stating that the Developer could have built 197 units and instead was committing to a PUD with a limit of 148 units, that is correct. To the extent she was implying that the maximum number of units permitted for the property changed from the old Zoning Code to TransForm Baltimore, that is not the case. The maximum number of units is determined by the size of the property divided by the requirement of 1,500 square feet per dwelling unit. The 1,500 square feet requirement is the same for R-6 zones under both the old and the new law, so the number of permitted units (197) is the same. The important change was from the floor area ratio method of determining permissible building height to the new 35-foot height limit. As a practical matter, the new limit might make it more difficult to configure buildings on the site with the maximum number of permitted units, but the maximum number of units remains 197.

construct our building. We would then be free to submit an application to the City for a building permit, gain their approval, and immediately start construction.

With a unit count of 197 and an unrestricted height, the team at Blue Ocean, together with myself, was very excited about the project. We felt that the potential project was sorely needed in an area that was vibrant, yet did not offer new, upscale rental housing to those who desired it . . . .

. . . Though we had tremendous excitement and passion for the Overlook, we reminded ourselves of our commitment to the community and our commitment to do what we can to promote peace, harmony, and friendship in our community.

With this front and center in our minds, we placed our forward progress on temporary hold and, over the last seven months, together with our consultants, designers, and engineers, met with our neighbors to listen to their concerns and see what we could do to make our project as pleasant and beneficial as possible for our community.

Tr. at 72-74.

Among the Petitioners presenting at the Committee hearing, Petitioner Robert Williams, a resident of St. George's Road and President of Petitioner Lehr Stream Neighborhood Association, stated most clearly Petitioners' challenge to the City's and the Developer's "vesting" premise. Mr. Williams first gave his perspective on the negotiations with the Developer, including his conclusion that the Developer did not leave sufficient time to produce an engineered building permit application by June 5, 2017:

Blue Ocean bought the Belvedere Tower around July 5th, 2016. I said 17.

On September 25th, Dr. Sehnert, Rikki Spector, Jonathan Ehrenfeld, and others met to discuss a zoning change for the Belvedere Towers which would apply under the new Transform Baltimore code.

And the change that Rikki was wanting and that was suggested was R9, and we were told at the time that the reason for

the zoning change was to conform the Belvedere, which had been built before the current code that just expired, to conform to the new code.

The alarming question there was, well, that would mean 457, 75 units. Mr. Ehrenfeld agreed in that meeting that he would only increase the current limit up by another 54 units. It is reported that he did consider purchasing the lots behind the Belvedere, but they were not economic, that nothing really could be built there, and especially on the other 6 acres.

On September 29th, and this is document 5 under tab 3, C3, Jonathan wrote to Dr. Sehnert and Ms. Spector confirming the conversation. He requested that the new zoning be R8, which would accommodate his agreement to commit to using no more than 54 new units in the Belvedere . . . .

\* \* \*

[W]hat I'm drawing out here is that there were a number of months when Mr. Ehrenfeld had not decided whether he was going to buy, option the property, or whether he was going to build a building.

By the time he decided to build a building, it was March. And there was a lot of talk about if you don't satisfy me, I'll build 197, but if you do, I'll build 157. And he was a gentleman about it, I have no complaints with him.

But the bottom line point is this. Without the PUD, which was submitted without a building that had been fully designed, . . . Mr. Ehrenfeld could not build this building under current zoning rules, he would have to build it . . . under the Transform Baltimore rules.

Notwithstanding that, we came very close to an agreement with Mr. Ehrenfeld. We had two items that were our key items; one was that we did not want the roof of the new building to be higher than the roof of the Belvedere, not taller versus shorter, but that the roof line up or that the new building be less. After submitting the PUD, two days later, we received a document from Mr. Ehrenfeld that said, "Regrettably, the building was going to be higher. It's now two and a half stories higher, which is a major impact on the people that live around the rim," and he said that this was a mistake . . . made by his engineer.

Tr. at 130-34.<sup>34</sup> Mr. Williams then challenged the Planning Department’s view that the PUD application had the effect of ““vest[ing] current property rights as the City transitions to a new [zoning] code.”” Tr. at 135. According to Mr. Williams:

We do not understand why vesting property rights for an undesignated building that does not have time to submit a new permit is appropriate.

The idea that the PUD is limiting, I said, is wrong.

The planning staff making the trade between the buffer and the building is really, in effect, trading us something we already had for something that we don’t want.

Tr. at 135.

John Murphy, an attorney who represents some of the Petitioners in this action, kept his comments to the Committee very brief:

When you do a PUD, you’re directed by the very first sentence of the PUD ordinance to encourage the best possible design. It’s not what’s allowed under a prior zoning, you’re now in the realm of a PUD. You have to encourage and achieve the best possible design.

Tr. at 136-37. He urged that the appropriate comparison is not to what was permitted of right under the old zoning law, but what would be permitted with the 35-foot height restriction under the new R-6 zoning classification:

I don’t believe you can say, “Well, the developer could have done this before.” He could have done it before, he had 45 years to build a building before. You just can’t walk in and get a building permit, you know. You walk in – you don’t just say, “I apply for a building permit,” you have to have plans, construction plans, and that’s what the building permit is issued on.

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<sup>34</sup> Whether there is a direct quotation within this passage and the placement of the quotation marks appear to be matters in the discretion of the transcriber.

So the standard of achieving the best possible design, look at what you've done over the last ten years to achieve that standard.

Tr. at 137-38.

Petitioner Hunter Cochrane, a resident of St. George's Road, was the only opponent of the project to question other witnesses. He asked Ms. Woods, the Planning Department representative, about the time that would be needed to complete a building permit application:

MR. COCHRANE: [H]ow long would it take to get a completed permitted application for a building . . . of this type and . . . structure?

MS. WOODS: I can't speak directly to the timeline. The developer would have to go through the required City development review processes, and it would be contingent upon how quickly they move forward, and so it's a very iterative process.

MR. COCHRANE: Is there an average time typically that it takes to get a building permit once an application is submitted?

MS. WOODS: I can't speak to that.

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MR. COCHRANE: [One] of the gentlemen on the Committee brought this specific subject up earlier, and the question was whether there is a by right of the developer to do this.

Clearly if there was a by right of the developer, is it also – isn't it also true that he had a by right to do a 148-unit as proposed without using a PUD?

MS. WOODS: It is possible.

MR. COCHRANE: [L]et me rephrase my question. Is it also true that the developer could have a done a by right development of a 148-unit apartment building similar in size and scope to the one proposed in the PUD?

MS. WOODS: Under the old zoning code, yes.

MR. COCHRANE: So yes, he could have done a by right for the 140.

MS. WOODS: Under the old zoning code, and this speaks to my earlier testimony that the difference between the [floor area ratio] and the height limits. So that's the big distinguishing point from June 4th to June 5th.

Tr. at 154-56.

Even without a clear statement of the Committee's reasoning for approving the PUD application, this record shows that the Committee members were impressed with the notion that the Developer was actually making concessions – agreeing to be “locked into” a plan with fewer units and a lower building height than the Developer could have built “by right.” In its memorandum to this Court, the City emphasized this idea that the Developer was requesting less than it had a right to build. City's Memo. at 20 n.10. But the testimony supported a conclusion that it is very unlikely that the Developer had enough time from when it gained legal control of the property to complete the design and engineering work that would have been necessary to achieve a complete building permit application by June 5, 2017. Although Mr. Ehrenfeld presented his decision to forgo that approach in favor of a PUD application as a choice to enhance community involvement in the development process, the determinative factor may have been time. The PUD application required far less extensive engineering work and would permit a much longer timeline for construction. Because the Planning Department did not attach any legal significance to the difference between meeting the June 5, 2017 deadline with a completed building permit application as opposed to a PUD application, the Planning Department – and apparently the Committee – did not see any need to grapple with the factual questions whether the Developer could have completed a building permit application and why it chose to use a PUD application instead. This Court also need not resolve whether the record would support

specific factual findings on this issue because the undisputed fact is the Developer never applied for a building permit. In this Court’s view, that fact, for whatever reason, extinguished the Developer’s *right* to build an eighty-foot structure with either 148 or even 197 dwelling units.

The PUD approval process is inherently comparative. Because PUDs usually are used to accomplish some development objective that could not be achieved through the existing lot-by-lot zoning classification, the development proposal is evaluated in comparison to what would be permitted under the otherwise applicable zoning. Under the old Zoning Code, this basic comparative perspective was established in the overarching design provisions at the very beginning of the PUD title. Thus, “Planned Unit Developments are intended to encourage the best possible design of building forms and site planning under a unitary development plan . . .,” former Zoning Code, § 9-101(a), and are to be used where “[u]nitary control over an entire development, rather than lot-by-lot regulation, will produce a well-designed development that will have a beneficial effect on the health, security, general welfare, and morals of the City and the neighboring areas,” *id.* § 9-101(b). Several of the required criteria for consideration are explicitly comparative. Thus, for example, the reviewing agencies and the City Council must consider whether:

- (v) with respect to availability of light, air, open space, and street access, the Planned Unit Development will secure for its residents and neighboring residents substantially the same benefits *as would be provided by application of the basic district regulations*;
- (vi) with respect to fire, health hazards, and other dangers, the Planned Unit Development will secure for its residents and neighboring residents substantially the same protection *as would be provided by application of the basic district regulations*; and

- (vii) the Planned Unit Development will permit design features that would not be possible *by application of the basic district regulations*.

*Id.* § 9-112(a)(2) (emphasis added).

Of particular significance here, a comparison must be made between the density and bulk of structures that would result from the PUD as whole and what would result from application of the bulk regulations on a lot-by-lot basis:

The application of bulk regulations under this title, which are expressed in terms of overall density for the entire Planned Unit Development rather than on a lot-by-lot basis, should result in overall development that is no less beneficial to the residents than would be obtained by application of the basic regulations for the underlying district.

*Id.* § 9-112(c). Bulk regulations generally are “the provisions of [the Zoning Code] that control: (1) the size of structures; and (2) the relationships of structures: (i) to each other; (ii) to open areas; and (iii) to lot lines.” *Id.* 3-201(a). “[B]ulk regulations under this title,” as used in § 9-112(c) referring to Title 9, means several “Uniform Regulations” under Title 9, Subtitle 1, Part V and then more specific “Bulk Regulations” provided as Part II of each subsequent subtitle of Title 9 applicable to each type of PUD. Those “Bulk Regulations” applicable to Residential Planned Unit Developments appear in Title 9, Subtitle 2, Part II. Most important for this action is the “Uniform Regulation” that provides: “In a Planned Unit Development, the basic building height limitations for the underlying district may be increased to the extent specifically provided in the approved Development Plan.” *Id.* § 9-123(a). The specific bulk regulations for PUDs in residential zones require that a PUD in an R-6 zone contain at least two acres, *id.* § 9-208(a)(2),

and have aggregate gross density not exceeding twenty-nine dwelling units per acre, *id.* § 9-209(a)(2).<sup>35</sup>

The Committee’s comparison should have been between the proposed eighty-foot building with 148 units and the available “by right” configuration under TransForm Baltimore – up to 197 units in one or more structures not exceeding a height of thirty-five feet. This is not to say the PUD application could not be approved. The PUD provisions under the former Zoning Code (and under TransForm Baltimore) permit a non-conforming approach if it satisfies the statutory criteria. Thus, the Committee might have considered the benefits and detriments of concentrating density in a taller structure compared to the same number of units (or fewer or more units) in a lower structure or structures. To do so, the Committee in effect would be granting an exemption that would effectively more than double the allowable building height – from thirty-five feet to approximately eighty feet. This record is clear that the Committee did not engage in that comparison. Instead, starting from the erroneous premise that the Developer was actually sacrificing some of its “by right” development options, the Committee ratified the Planning Department’s recommendation without any critical consideration of the merits of granting such an exemption. Because of this error of law fundamentally affecting the nature of

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<sup>35</sup> Where two or more residential zones are included in a PUD, the Code allows the density permitted in each of the zones to be aggregated for the PUD as a whole. *Id.* § 9-209(c). That provision became no longer applicable when the Developer requested amendment of the PUD to limit its boundaries to the R-6 portion of the property. If the PUD had remained defined as the total 12.76 acres, the aggregate maximum number of dwelling units under TransForm Baltimore would have been 200. The 6.8-acre R-6 portion would support 197 units (6.8 acres x 29 units/acre = 197.2 units or  $296,267 \text{ SF} \div 1,500 \text{ SF/unit} = 197.51$  units), and the 5.96-acre R-1A portion would support three units ( $5.96 \text{ acres} \div 2 \text{ acres/unit} = 2.98$  units). The maximum aggregate density under the old Zoning Code would have been 236. The permitted density for the R-6 zone was the same, but the former R-1 zone permitted minimum lot sizes of 7,300 SF or approximately one-sixth acre. The former R-1 portion therefore would have supported thirty-nine additional units ( $259,267 \text{ SF} \div 7,300 \text{ SF/unit} = 35.52$  units).

the City Council’s action, the PUD approval must be vacated and sent back to the City Council for consideration in the correct comparative context.

**Conclusion**

For all these reasons, the Court concludes that the Developer submitted a timely and complete PUD application under the former Baltimore Zoning Code that should be considered under the criteria provided in the former Zoning Code. The Court concludes that the “Findings of Fact” adopted by the Land Use and Transportation Committee and by the full City Council are insufficient to provide a basis for judicial review. The Court also concludes that the City Council erred as a matter of law, based on the erroneous recommendations of the City Law Department and Planning Department, in assessing the PUD application as if the Developer continued to have a right to build an eighty-foot structure under the former Zoning Code’s flexible, floor area ratio height restrictions. On remand, the City Council must reconsider the PUD application using the PUD criteria under the former Zoning Code but based on a comparison to the density and bulk regulations that now apply to this property under TransForm Baltimore.

***Judge Fletcher-Hill’s signature appears on  
the original document in the court file.***

December 20, 2019

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Judge Lawrence P. Fletcher-Hill