

AUG 21 2017

SIGNATURE:

IN THE MATTER OF:

THE KEY SCHOOL, INC.

* BEFORE THE
* BOARD OF APPEALS
* OF ANNE ARUNDEL COUNTY
* CASE NO. BA 44-15A
*

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CLOSING ARGUMENT OF ANNE ARUNDEL COUNTY, MARYLAND

ANNE ARUNDEL COUNTY, MARYLAND, and the Anne Arundel County Office of Planning and Zoning (the “County”), by and through Nancy McCutchan Duden, County Attorney, and Gregory J. Swain, Supervising County Attorney, hereby submits its written Closing Argument.

I. FACTS AND BACKGROUND

The County adopts by reference herein the “Background” set forth on pages 2 through 13 of Petitioner The Key School Inc.’s Closing Memorandum of Law, filed with the Board on or about July 21, 2016.

II. APPLICABLE LAW

This case concerns application of the County’s Adequate Public Facilities ordinance for roads (the “APFO”), found in Title 5 of Article 17 of the County Code; specifically, §§ 17-5-401 *et. seq.* and § 17-4-901.

Generally, the County’s APFO is intended to ensure that adequate public schools, roads, sewers, water supply, fire suppression and storm drain facilities exist to service new development. The Code establishes thresholds for these facilities and if it is shown that the impact of the new development will exceed the threshold, the developer will be required to test the facility to determine the extent of the new impact. If the testing indicates that the new impact will cause a public facility

to fall below the minimum standard in the impact area, the developer will be required to mitigate the impact by providing upgrades to the facility to expand the capacity of the impacted public facility.

The threshold test to determine the adequacy of road facilities is set out in § 17-5-40(a)(1) & (2) of the County Code:

- (a) **Generally.** Except as provided in subsection (b) and in § 17-6-504(9), a development passes the test for adequate road facilities if in the scheduled completion year of the development it creates 50 or fewer daily trips or if:
 - (1) the road facilities in the impact area of the proposed development will operate at or above the minimum of 'D' level of service after including the traffic generated by the development; and
 - (2) road facilities in the impact area of the proposed development will have an adequacy rating of not less than 70 as defined by the Anne Arundel County road rating program or, if not rated by the Anne Arundel County road rating program, have been found by the County to be adequate with respect to road capacity, alignment, sight distance, structural condition, design, and lane width, except that the requirements of this subsection (a)(2) do not apply to development in a commercial revitalization district, to scenic or historic roads in the impact area of the proposed development, or to roads other than those that front on the cluster lots in a cluster development in an RA or RLD District;

This test looks at several factors and is, to some extent, progressive. If the new development can be shown to generate fewer than 50 trips a day, no additional study or mitigation is required and the development passes the APFO test for roads. If it will generate more than 50 trips a day, a scoping letter identifying the roads to be studied and a traffic impact study ("TIS") on those roads is required to determine the road's level of service and road rating post-development. A road will pass the APFO if, after taking into account the new impact from development, it operates at a "D" or higher level of service and maintains a road rating of "70" or higher or, if the rating is less than 70 pre-development, does not diminish the road rating below pre-development ratings. The calculation of the level of service and the road rating is based on formulas set out in the County Transportation Manual. If the study indicates that the roads will operate at less than a "D" level of service or with a

road rating less than “70” (or a rating that is lower than the pre-development rating if that rating is less than 70), traffic mitigation (including a mitigation plan) is required.

If mitigation is required, that mitigation must “provide capital improvements to increase road capacity to resolve existing roadway deficiencies and to mitigate the traffic impact of all phases of a proposed development by providing roadways adequate for the project.” ANNE ARUNDEL COUNTY CODE, § 17-5-8901(h). This takes the form of improvements to the road, including widening, repaving, etc., as necessary to increase the capacity or safety of the road to the extent necessary to raise the road rating and level of service to at least pre-development standards.

III. ARGUMENT.

The issue before the Board is a narrow one: whether the traffic mitigation plan satisfied the County’s APFO with regard to roads. Put another way, the pivotal question is whether the mitigation plan approved by the County maintained or increased the rating and level of service of the affected roads over pre-development levels.

A. Scoping.

Since the subject property is located on the Bay Ridge peninsula, there are expanded requirements applied to the scoping analysis to determine which roads must be studied to gauge the impact of the new development. Under § 17-5-403 of the County Code, the following provisions apply to property located on certain peninsulas, including the Bay Ridge peninsula:

(b) **Certain peninsulas and other areas.** Notwithstanding the provisions contained in § 17-5-401(a), the Planning and Zoning Officer may assess, in the aggregate, the impact on roads of development in certain peninsulas and other areas, as described below, for the purpose of determining whether mitigation under § 17-5-901 is appropriate. The impact area shall be extended through the second intersecting arterial road and along that arterial road to the third intersecting arterial road if the development is located:

* * * * *

(3) east of the intersection of Bay Ridge Avenue and Bay Ridge Road and will use Bay Ridge Road as the sole route out of the peninsula;

Notably, this section allows the PZO to assess impact “in the aggregate” when analyzing the scope of a TIS on a peninsula.

The Applicant submitted and received approval for a scoping letter that proposed to include four intersections for study:

- Carrollton Road at the entrance to the proposed athletic facility
- Forest Drive @ Carrollton Road
- Forest Drive @ Hillsmere Drive
- Forest Drive @ Spa Road.

The scoping letter also proposed studying two road sections (1) Carrollton Road from the site access to Forest Drive; and (2) Forest Drive from Carrollton Road to Spa Road. This scope was not contested by the Protestants nor was an alternative scope offered. The scoping letter was admitted as Petitioner’s **Exhibit 15**, and the County’s letter approving the scope as admitted as **Exhibit 16**.

B. The Traffic Impact Study and Results.

The TIS, completed in accordance with the approved scope, was admitted as **Exhibit 17**. This TIS, as with any TIS, took into account not only the additional traffic impact attributed to the new development, but also the projected impact from all other development projects in the area that were “in the pipeline” – meaning projects currently under review by the County or the City of Annapolis. The conclusions of the TIS were set out page 25 of Exhibit 17, and indicate that one intersection and two road sections would fail and therefore require mitigation: (1) the intersection of Forest Drive and Spa Road (which was already at an “E” level of service) would fail based on 6 additional trips per day in the evening; (2) Carrollton Road from the site to Old Bay Ridge Road

(pre-development road rating of 68, post-development road rating of 65); and (3) Carrollton Road from Old Bay Ridge Road to Forest Drive (pre-development road rating of 57, post-development road rating of 55). Although the Protestants disagreed with the traffic generation rates used by the consultant in the TIS, and their expert testified that the TIS should have considered other uses (such as tournaments) into account in calculating the trip generation rates, no competing TIS was offered by the Protestants to rebut these result.¹

C. Mitigation.

As a result of the TIS, the Applicant submitted two mitigation proposals. The first proposed to overlay the two failing sections of Carrollton Road, which would maintain the “68” road rating for the longer section of Carrollton from the site to Old Bay Ridge Road and would raise the road rating for the remaining section from a “55” to a “59.” Since the intersection of Forest Drive and Spa Road was already at an “E” level of service, and the proposed development would add only six additional trips in the evening, and one of the other large projects in the pipeline was likely to be required to do substantial mitigation at that intersection, the Applicant proposed that the over-mitigation on Carrollton Road would offset the additional impact at this intersection. This first mitigation proposal was rejected by the County.

The second mitigation proposal, Petitioner’s **Exhibit 19**, proposed to do overlay the entire section of Carrollton Road from the site access to Forest Drive, and, in addition, uniformly widen the road width to 22 feet with two marked 11 foot travel lanes. The proposed mitigation would improve the road rating for the section from the site to Old Bay Ridge Road from “68” to “73” and improve

¹ Protestants attacked Petitioner’s deviation from the ITE Trip General Manual, one of the industry-accepted reference tools that provides trip generation rates for various uses. Petitioner’s expert explained that the ITE Manual was not applicable since the use (private school fields not open to the public) was not included in the manual. The County agreed that the ITE Manual would not control and that other factors must be used instead.

the road rating for the section from Old Bay Ridge to Forest Drive from a “57” to a “64.” Petitioner again requested to offset the deficiency at the Spa Road intersection with the over-mitigation on Carrollton Road.

This second mitigation proposal was approved by the County, with certain conditions. See Petitioner’s **Exhibit 20**. The County approved of the road widening and approved using the mitigation on Carrollton to offset the deficiency of the intersection at Spa and Forest. Testimony from Larry Tom, the Planning and Zoning Officer (“PZO”), and David Braun, Engineering Manager, confirmed that the over-mitigation at Carrollton could be used to offset the failure at the Spa Road intersection based on two factors: (1) for peninsulas, § 17-5-403 allows the PZO to assess impact on roads in the aggregate, which means over-mitigation in one area can be used to offset a failure elsewhere provided overall there are road improvements that increase capacity sufficiently to allow offset, and (2) § 17-5-901(a) of the Code requires the developer to provide improvements that increase the capacity of each facility (here being roads) so that post-development capacity is equal to or greater than pre-development capacity; mitigation is not required for each individual road provided the aggregate road facility gains additional capacity overall equal or greater than pre-development conditions.

The County also approved the road widening to 22 feet overall, with two marked 11 foot travel lanes, but, in light of the concerns about pedestrian safety and access, added a condition that the Applicant provide a “pedestrian access easement” and construct a pedestrian trail on-site parallel to Carrollton Road from the site access point to the southwest corner of the property. Finally, the County required the Applicant to submit a revised TIS should there be any future addition to or intensification of the uses upon which the TIS was based.

While the Protestants did not agree with the mitigation proposal, asserting that it did not go far enough, there was little consistency in their version of an alternate proposal. Various witnesses testified that no development should be allowed unless Carrollton Road was brought to current County standards for a collector road (meaning 22 foot total width, 11 foot travel lanes, 8 foot shoulder), or that the road should be made even wider, with at least some type of shoulder, or that sidewalks should be installed from the site all the way to Forest Drive, or that the entrance to the site should be moved to the southwest corner, or that the intersections of Carrollton and Forest Drive and Forest Drive and Hillsmere Road should also be improved, or that various conditions on the use of the site should be imposed.

D. Compliance with County Law.

As noted above, the sole issue before this Board is whether the traffic mitigation plan approved by the County met the standards of County law. The standards for a mitigation plan are set out in § 17-5-901(a) (the general standard for all mitigation, quoted above) and § 17-5-901(h) (specific to road mitigation) of the County Code. Because this site is on a peninsula, the PZO could and did assess impact in the aggregate, and pursuant to § 17-5-901(a) could also assess mitigation in the aggregate and take into account the overall expanded capacity of the entire road facility to offset the minor deficiency in the intersection of Spa and Forest (six additional trips) with the over-mitigation. Applicant's traffic expert, Ken Schmid, testified that the over-mitigation on Carrollton Road was five times the minimum required; in other words, the improvements to Carrollton Road would increase capacity sufficient to handle five times the additional traffic the new use would generate. Notably, there was no testimony to contradict his conclusions, either as to the scope of the mitigation provided, nor to his calculations as to how the road improvements would improve the road ratings and level of service for Carrollton Road. While Protestants' expert did criticize some of

the methods employed, and opined that shoulders could make the road operation safer, he did not offer any analysis as to why those Petitioner's numbers were incorrect nor did he offer his own calculations of road ratings and level of service pre- and post- development.

Since mitigation of impact was required by the results of the traffic study, Petitioner was required to demonstrate that the proposed road improvements increase "increase capacity and improve environmental effectiveness or safety of each public facility that is below the minimum standard in the impact area so that the capacity, environmental effectiveness or safety of the facility in the scheduled completion year will be equal to or greater than if the development had not been constructed." COUNTY CODE, § 15-5-901(a). Petitioner is also required to demonstrate that the road improvements "increase road capacity to resolve existing roadway deficiencies and to mitigate the traffic impact of all phases of a proposed development by providing roadways adequate for the project." COUNTY CODE, § 17-5-901(h). Petitioner's expert demonstrated this in the road rating analysis attached to Petitioner's Exhibit 19, which shows that the road improvements proposed would increase/improve the road rating for the section of Carrollton Road from the site to Old Bay Ridge from a "68" to a "73," and for the remaining section, from a "57" to a "64." Petitioner's expert also testified that while "safety" was not an explicit component of the road rating analysis, the specific components of the road rating system (i.e., pavement condition, sight distances, roadside friction, etc.) was what made a road safe, and a higher road rater necessarily meant a safer road. This conclusion was not rebutted.

Protestants made much of the various proposals that would make the road "safer" – such eight foot shoulders, or sidewalks, or abandoning the development, or requiring Petitioner to meet all the standards of a the County Design Manual (which dictates standards for new roads) for Carrollton Road. While this was an interesting exercise to demonstrate the various aspects of road design,

making the road “safer” was not what the County Code required of Petitioner. Their burden was to demonstrate that the road post-development had improved capacity and function over the road pre-development. Petitioner demonstrated that the proposed improvements would meet this standard, and therefore the traffic mitigation plan should be approved by the Board.

The additional conditions agree to by Petitioner on the final days of the hearings before this Board, admitted as Petitioner’s **Exhibit 26**, should provide additional assurance that the use will not expand beyond that advanced by the Petitioner, and would require a new TIS if the traffic counts show impact beyond the predicted level, as well as new mitigation if warranted.

III. ADOPTION BY REFERENCE.

The County agrees with and adopts by reference herein the argument set out on pages 13 through 19 of Petitioner’s Closing Memorandum of Law.

CONCLUSION

The Applicant had the burden of demonstrating that its proposed road improvements will “increase capacity and improve environmental effectiveness or safety of each public facility that is below the minimum standard in the impact area so that the capacity, environmental effectiveness or safety of the facility in the scheduled completion year will be equal to or greater than if the development had not been constructed,” and that the road improvements “increase road capacity to resolve existing roadway deficiencies and to mitigate the traffic impact of all phases of a proposed development by providing roadways adequate for the project.” COUNTY CODE § 17-5-901(a) and (h). Petitioner has adequately demonstrated that the proposed mitigation meets these standards (see Exhibit 19) and the Protestants have not rebutted Petitioner’s conclusions. The Petitioner has therefore met the County’s standards for traffic mitigation, and the Board should approve the traffic mitigation plan.

/S/

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Date: August 21, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21th day of August, 2017, a copy of the foregoing Closing

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