



BOARD OF APPEALS  
OF THE CITY OF ANNAPOLIS

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ANNAPOLIS, MARYLAND 21401  
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**915 CHESAPEAKE AVENUE  
THE LOFTS AT EASTPORT LANDING  
CASE NUMBER APL2018-002**

**APPEAL FROM THE CERTIFICATION BY THE DIRECTOR OF PLANNING AND  
ZONING OF ADEQUATE PUBLIC FACILITIES DATED NOVEMBER 26, 2018 FOR  
THE LOFTS AT EASTPORT LANDING**

**ORDER GRANTING IN PART AND DENYING IN PART CROSS MOTIONS FOR  
RECONSIDERATION**

The Board has entered a Decision and Order vacating the Certification by the Director of Planning and Zoning of Adequate Public Facilities (APF) in the above referenced matter finding that Appellants had demonstrated that five of the nine certified public facilities were inadequate. The Order further directs that the application be remanded to the Director for further action consistent with the Board's Decision and Order.

Applicants timely moved for reconsideration of the Decision and Order on the grounds that the determination by the Board that the relevant agencies of the City government failed to publish required supplemental APF standards was in error, and that the Board has no authority to remand the matter to the Director. Appellants urge denial of Applicants' motion and cross move the Board to find that the four remaining public facilities are inadequate.

The Board takes notice of the existence of published supplemental standards for determination of the adequacy of certain public facilities that were not referred to by any party during seven nights of hearings. Applicants concede that they were unaware of the supplemental standards until after the filing of their Motion for Reconsideration. However, the existence of the supplemental standards does not change the result. The Board's Decision and Order clearly states: We decline to decide that these failures [to publish supplemental standards] alone require that a finding of adequacy be rejected.

Moreover, several of the supplemental standards do nothing to supplement the standards found in the City Code. Another is clearly outdated and inapplicable and others clearly support the Board's Decision.

Applicants contend that, where the relevant departments certify to the Director the adequacy of their facilities, the Director has no discretion to deny the issuance of a Certificate of Adequate Public Facilities, and the Board, standing in the shoes of the Director, cannot set aside the Director's required certification. Applicants' contention, if accepted, would render the right to appeal meaningless. Moreover, counsel for Applicants has conceded that the Director's duty to issue a certification is not absolute. Rather, the Director may reject a determination by a department head that is defective on its face. The Board has found that each of the five rejected departmental determinations was defective on its face.

The Annapolis Code of Ordinances at 21.30.020 B.2. provides the Board with all necessary authority to remand the matter to the Director:

*The Board of Appeals may affirm or reverse, wholly or in part, or may modify the order, requirement, decision or determination as ought to be made or the Board may issue a new order, requirement, decision or determination. To that end, the Board has all the powers of the officer from whom the appeal is taken.*

Appellants' cross motion is denied as untimely. Motions for reconsideration must be filed within 10 days of the Board's decision. Appellants' cross motion was not. Moreover, the Board finds that the evidence and the law it relied upon in rejecting Appellants' contention regarding four of the nine challenged facilities fully supports the Board's Decision and order.

It is therefore ORDERED that Applicants' Motion for Reconsideration is granted to the extent that the Board's original Decision and Order will be vacated and replaced by the Decision and Order on Reconsideration set forth below, and is denied in all other respects. Appellants' cross motion is denied in its entirety.

## **REVISED FINAL DECISION AND ORDER UPON MOTION FOR RECONSIDERATION**

### **Introduction**

This is an appeal from the issuance by the Director of the Department of Planning and Zoning of a Certificate of Adequate Public Facilities in connection with the proposed redevelopment of a portion of the Eastport Shopping Center to be known as the Lofts at Eastport Landing. The applicant Appellees are Eastport Plaza, LLC, Solstice Partners, LLC, and SPRE Eastport, LLC. The Appellants, two residents of Eastport who live near the project, are Steven H. Rogers and Chuck T. Henney.

The hearing in this matter began on the evening of June 4, 2019 and continued over six additional evenings concluding on January 7, 2020. The Board heard from approximately 30 witnesses and received in evidence nearly 100 exhibits. The City and the Applicants



were represented by able counsel. Appellant Rogers and Appellant Henney appeared pro se. Consistent with Board Rule 8, the hearing was conducted as a de novo hearing with the Board admitting relevant and probative evidence whether or not it had been part of the record before the Director. Also consistent with that rule, the Appellants have been assigned the burden of proving that the Applicants are not entitled to the Certification of Adequate Public Facilities.

For the reasons set forth below, the Board finds that Appellants have demonstrated that Applicants have failed to satisfy the standards for adequate public facilities under five of the nine facilities covered by the Adequate Public Facilities Ordinance (APFO). The certificate issued by the Director will be vacated and the application remanded to the Director to address the five deficient facilities as described in this Decision and Order.

### **The Adequate Public Facilities Ordinance**

Chapter 22 of the Code of Ordinances of the City of Annapolis contains the City's adequate public facilities law. The first subchapter of Chapter 22 (22.02.010) is titled Purposes. The purposes described include assuring that development is in concert with the Capital Improvement Program and the growth objectives of the Comprehensive Plan, assuring that development protects public health and safety, promotes the general welfare and conserves the environment, and assuring that development fits harmoniously with the fabric of the community.

The article defines inadequacy to mean that adequate facilities are not currently available to serve existing development and the proposed project. Chapter 22.04.010. The Department of Planning and Zoning has overall responsibility for administering Chapter 22 and it relies on other executive branch departments to make specific determinations of adequacy for the facilities for which each department has responsibility. Chapter 22.08.010.

Nine subsequent subchapters of Chapter 22 address each of nine public facilities covered by the APFO. The public facilities subject to the adequacy certification requirement are:

1. Fire, Rescue, Emergency Medical and Fire Inspection Services (22.12)
2. Police Protection (22.14)
3. Public Maintenance Services (22.16)
4. Water and Sewer Facilities (22.18)
5. Recreational Facilities (22.20)
6. Traffic Impact Analysis (22.21)
7. Non-Auto Transportation Facilities (22.22)
8. Stormwater Management Facilities (22.24)
9. School Facilities (22.25)

Most of those subchapters begin with a statement of an adequacy goal for the facility and describe minimal standards for testing adequacy. Subchapter 22.08.010 requires the executive branch departments responsible for determining the adequacy of a facility to



publish on the City's website additional standards that each department uses in determining adequacy and which supplement the standards set forth in the subtitle for each facility. When presented with an application for a certification of adequate public facilities for a particular project, each of the relevant departments is required to produce to the Department of Planning and Zoning written findings and conclusions as to the adequacy of the facilities for which each of those departments is responsible. Chapter 22.08.030. If each department responds that facilities are adequate, the Director will issue the requested certification. Chapter 22.08.040. If one or more facilities are determined to be inadequate, the Director will deny certification or engage with the applicant in certain procedures available under Title 22 to address the inadequacies.

The testimony and documentary evidence are clear that the Director forwarded the Applicants' application to each of the departments designated in Chapter 22 and that each of the departments replied, in various fashions, that the public facilities under their responsibility were adequate. In some cases, those departmental determinations were based solely on standards set forth in the relevant ordinance. In other cases, the determinations were based on additional standards used by the departments some, but not all, of which were published as supplemental standards as required by Chapter 22.

Some of the departmental determinations contained some of the specific findings and conclusions as required by Chapter 22.08.030. Others did not. The Department of Public Works simply concluded, in a letter consisting of two sentences, that three distinct facilities were adequate. None of the departments' determinations addressed consistency of the determinations with the purposes of the APFO as set forth in Chapter 22.02.010.

Moreover, in at least two cases, the departments misapplied the definition of "inadequacy" to find that facilities that were inadequate to serve existing development were adequate because the project was not likely to exacerbate the existing inadequacy.

Appellants challenge the validity of each of the nine determinations of adequacy.

This appeal raises novel issues concerning whether and how the more general purposes and goals of the APFO are to be implemented, the effects of the failures of certain of the departments to publish appropriate supplemental standards, and the failure of some of the departments to produce adequate findings and conclusions. We decline to decide that these failures alone require that a finding of adequacy be rejected. Rather, we evaluate the evidence regarding the adequacy of each facility below. However, we do hold that those departments that are, on remand, required to adopt or revise, and implement supplemental standards, must do so in a manner consistent with the purposes of the APFO, setting forth a reasonable description of the means by which the standards are to be applied.

We hope that our decision will inspire the other administering departments to meet their responsibility to publish appropriate supplemental standards and produce more than perfunctory findings and conclusions.

### **Fire, Rescue, Emergency Medical and Fire Inspection, Chapter 22.12, Administered by the Fire Department**

This Chapter contains rather detailed standards for testing adequacy. It also contains this unqualified exemption:

A proposed project that will include a sprinkler system or systems in accordance with Section 17.12.010 shall be deemed to have adequate facilities under this Chapter.

The subject project will have a sprinkler system compliant with Section 17.12.010. We are compelled to uphold the Fire Department's determination of adequacy with knowledge that there has been no actual basis for a determination of adequacy with regard to emergency medical services.

### **Police, Chapter 22.14, Administered by the Police Department**

The standards contained in Chapter 22.14 include a budgeted police officer ratio of 3.2 police officers per 1000 of population. The ordinance does not specify how that ratio is to be calculated. The supplemental standards require a calculation based on the 2000 census.

The Police Department's determination of adequacy started with the population of Annapolis from the 2010 census without appropriate adjustment for changes since 2010. We find that the use of the unadjusted 2010 census number is unreasonable in light of the requirement of Chapter 22.10.020 that the Police Chief annually assess and otherwise measure the facility for which he is responsible. The Police Department then added to the 2010 census population, as required by another section of Chapter 22, an assumed increase based on the 98 dwelling units for this project and 321 dwelling units for other projects in the pipeline, assuming, with no justification, one resident per dwelling unit. Even using these unsupportable assumptions (no annual population increase and one resident per unit) the ratio was a failing 3.19. The Police Department excused the failure with yet another unsupported assumption: that some of the 321 expected dwelling units would not be built.

We find that the Department's determination of adequate police coverage is unsupported by the evidence and the law. On remand, the Police Department will be required to support, publish and apply methods and assumptions for the calculations of the required ratio and response times consistent with the purposes of the APFO.

### **Public Maintenance Services, Chapter 22.16, Administered by the Department of Public Works**

The services covered by this subchapter are trash removal, snow removal and road maintenance. It is clear from the evidence that trash and snow removal will be the



responsibility of the owners of the project and not the Department of Public Works. We credit the evidence offered by the Department of Public Works that its ability to maintain the city streets is adequate and will continue to be adequate following completion of this project.

We affirm the Department of Public Works' determination of adequacy of public maintenance facilities.

### **Water and Sewer, Chapter 22.18, Administered by the Department of Public Works**

Despite the perfunctory findings and conclusions of the Department of Public Works, the Department and the Applicants provided persuasive evidence at the hearing that public water and sewer, including water for fire suppression, currently available to residents in the area, are adequate and will continue to be adequate upon completion of the project. Appellants' objections were based mainly on reliance on alternative professional standards and a proffered need for additional testing. We find that the standards and tests applied were appropriate. We affirm the Department of Public Works' determination of adequacy of sewer and water.

### **Recreational Facilities, Chapter 22.20, Administered by the Department of Recreation and Parks**

The standards of Chapter 22.20 require a calculation of required public recreational space based on the number and type of units in the project. We accept the evidence that the Department of Parks and Recreation properly calculated the amount of recreational space required for this project. However, Chapter 22.20 does not indicate what qualifies as public recreational space. The required supplemental standards fail to adequately describe how the department actually addresses these issues.

In our view, the standards used by the Department to calculate public recreational space are arbitrary and inconsistent with the purposes of the APFO in several respects. The Department counts as public recreational space public parks within a one-half mile radius of the project measuring distance by straight line. The Department fails to demonstrate how the distance is to be calculated. Assuming that one-half mile is a reasonable distance, straight line measurement is not. In some cases, it results in distances considerably more than one-half mile from the project for citizens traveling by car, public transit or non-automotive means. Moreover, convincing evidence demonstrated that some of the public parks included in the Department's tally were outside of the one-half mile, straight-line radius. Finally, the Department counted toward the required public recreational space the restaurant and common patio space within the project. In our view, it is inconsistent with the purposes of the APFO to count as public recreational space privately controlled areas where public access may be restricted.

We find that the Department's determination of adequate public recreational space is

unsupported by the evidence and the law. On remand, the Department of Recreation and Parks will be required to support, publish and apply methods and assumptions used in its calculations of the required public recreational space consistent with the purposes of the APFO.

### **Traffic Impact Analysis, Chapter 22.21, Administered by the Department of Transportation**

Subchapter 21 contains no goals and no standards. It merely describes the requirements for a traffic impact analysis. Neither the Department of Transportation nor the Department of Planning and Zoning has published the supplemental standards.

A Traffic Impact Analysis was performed and found that the intersection of Bay Ridge Avenue and Tyler Avenue will operate at level E unless signals are optimized, in which case it will operate at level D. It also indicates that the intersection of Chesapeake Avenue and Americana Drive has and will continue to have problems. Significant questions were raised about the currency of the analysis and the design and methods used including the failure to consider the use of Americana by the Post Office. The Certificate of Adequacy issued by the Department of Planning and Zoning requires the optimization of signals at Bay Ridge and Tyler Avenues and the posting of fire lanes.

In certifying adequacy, the Department of Transportation applied an erroneous legal standard concluding that there is adequacy because the traffic increase related to the project will have negligible impact when it is clear that current service is inadequate.

We find that the Department of Transportation's determination of adequacy is unsupported by the evidence and based on an erroneous legal standard. On remand, the Department of Transportation will be required to justify and apply standards for adequacy of traffic flow consistent with the purposes of the APFO.

### **Non-Auto Transportation, Chapter 22.22, Administered by the Department of Planning and Zoning**

The goals of Subchapter 22 are to increase accessibility and to ensure reasonable and accessible alternatives to automobile travel for bicycles, pedestrians and public transit. The required supplemental standards fail to adequately prescribe how these goals are to be accomplished. The evidence shows that the Director's certification of adequacy ignores multiple opportunities to advance those goals and, perhaps more importantly, fails to address the purpose of the APFO to assure that the proposed development protects the public health and safety and promotes the general welfare of the community. Those overlooked opportunities include the widening of sidewalks and reconfiguring of the road to allow insertion of a safe bike lane, and the development of a multi-modal transport center.



We find that the Department of Planning and Zoning's determination of adequacy is unsupported by the evidence. On remand, the Department of Planning and Zoning will be required to justify and publish and apply standards of adequacy consistent with the purposes and the goals of Subchapter 22.

In the context of non-auto transportation as well as other facilities, Appellants have questioned the ownership of a fourteen-foot strip of property along Bay Ridge Avenue referred to as the "widening strip." The relevance of the ownership of the widening strip is whether the Applicants have sufficient rights to use it as contemplated by Applicants' proposal. On remand, the Director shall satisfy herself or himself that that is the case.

### **Stormwater Management, Chapter 22.24, Administered by the Department of Public Works**

The goal of Subchapter 24 is to assure that the stormwater infrastructure at the project and downstream of the project can handle a ten-year storm. The only standard set out in Subchapter 24 is compliance with Chapter 17 of the City Code. The Director's certification of adequacy contains no findings and only the barest conclusion.

The Board heard extensive evidence regarding the adequacy of the City's storm water infrastructure. Appellants assert that those facilities are inadequate to deal with toxic substances that will migrate from the site to surface and ground water. Applicants and the Director rely on evidence that the Maryland Department of Environment has concluded that any migration of pollution will not exceed legal limits.

Appellants also challenge the adequacy of the pipes and other infrastructure necessary to conduct storm water away from the site. Applicants' calculations demonstrate that the pipes and infrastructure are adequate in that they comply with professional engineering standards. Appellants further contend that the inadequacy of the pipes and infrastructure is conclusively demonstrated by evidence of extensive stream channelization and erosion where the storm water outfall pipe meets Back Creek. Applicants had proposed mitigation at the outfall pipe in a previous proposal but eliminated it from the current proposal.

The Board credits the testimony that any pollution that migrates from the site to ground water or surface water will be within legal limits. Should it become the case that migrating pollution exceeds legal limits, it will be the responsibility of other agencies to address that pollution.

While it appears that the calculations accepted by the Department of Public Works demonstrating that the storm water infrastructure meets engineering standards and, in theory, is adequate, the clear photographic and testimonial evidence of stream channelization and erosion at the outfall pipe proves the contrary. The supplemental standards appear to require that an existing stream channelization be corrected. Neither the determination of the Director of Public Works nor the certification of the Director require the applicant to make such correction.



We find that the Department of Public Works' determination of adequacy is unsupported by the evidence. On remand, the Department of Public Works will be required to justify, publish and apply standards of adequacy consistent with the purposes of Chapter 22 and the goals of Subchapter 24.

### **Schools, Chapter 22.25, Administered by the Department of Planning and Zoning**

The goal of subchapter 25 is to assure that the enrollment of schools affected by the project do not exceed legislatively adopted capacity limits as established by the semi-annual publication of a school utilization chart.

The Department of Planning and Zoning has determined that expected enrollment in the affected schools will not exceed the prescribed limits and, therefore, that school facilities are adequate.

While Appellants quibble about some of the calculations of projected enrollment, Appellants' primary objection to the determination of adequacy is that the public schools are controlled by Anne Arundel County and that the County has more stringent school capacity standards. We accept the Director's calculations and, unusual as it may be, we do not find the divergence from County standards to be a basis for a finding of inadequacy. The City has the authority to determine its own capacity standards.

We find that the calculations performed by the City and the standards applied are appropriate and correct. We affirm the Director's determination of adequacy.

### **Harmonious Design**

Chapter 22 contains no subtitle on this subject but, rather, requires harmonious design in section A. 3. of Subchapter 22.02.010. We credit the testimony of Planning and Zoning personnel that they considered this requirement and found that it was satisfied. While we heard much impassioned testimony to the contrary, we agree that sufficient harmoniousness has been demonstrated that we will affirm that conclusion.

### **Order**

The Director's Certification is vacated and the application is remanded to the Director with instructions to return the application to each of the departments. The departments will revise and resubmit to the Director their written findings and conclusions specifically addressing how their determinations take into account the purposes of Chapter 22.02.010 as well as the other department-specific deficiencies addressed in this Decision and Order.

The Decision and Order is issued this 17th day of March 2020.

Robert P. Gallagher  
Robert P. Gallagher, Chair *JMR*

Michael P. Walsh  
Michael P. Walsh, Member *JMR*

Andrew T. Burnett  
Andrew T. Burnett, Member *JMR*

Nadine C. Chien *JMR*  
Nadine C. Chien, Ph.D., J.D., Member

Notice Judicial Review

Any person aggrieved by the decision stated in this Decision and Order may petition for judicial review to the Circuit Court of Maryland for Anne Arundel County within 30 days from the date of this Opinion and Order. A petition for judicial review is governed by Title 7 of the Maryland Rules of Procedure.



message

**Robert Gallagher** <bobgallagher113@gmail.com>

Thu, Mar 5, 2020 at 10:06

: Jacquelyn Rouse <JMR@annapolis.gov>, andrew burnett <Andrew@potterburnettlaw.com>, Michael Walsh  
tymichaelpwalsh@comcast.net>, nadine chien <nc576243@gmail.com>  
: Christian Zazzali <czazzali@hitt-gc.com>

Here is my draft order disposing of the cross motions for reconsideration and revising our decision and order to correct inaccurate references to published supplemental standards and the fee-in-lieu.

Nadine has proofed it and I think it is in good shape. Jacqui could possibly clean up the signature lines - my technical capacities are very limited.

Please let Jacqui know if you are comfortable with her signing for you. I am.

Thanks.



**BOADecisionandOrder1.docx**

79K

message

Michael Walsh <attymichaelpwalsh@comcast.net>

Mon, Mar 16, 2020 at 10:12 /

Reply-To: Michael Walsh <attymichaelpwalsh@comcast.net>

: Jacquelyn Rouse <jmr@annapolis.gov>, Robert Gallagher <bobgallagher113@gmail.com>, Nadine Chien <nc576243@gmail.com>,  
drew Burnett <Andrew@potterburnettlaw.com>

: Christopher Beard <chris@attorneybeard.com>

approve and authorize you to sign for me.

Michael Walsh

On March 16, 2020 at 9:47 AM Jacquelyn Rouse <jmr@annapolis.gov> wrote:

In case I missed your email while I was out last week, I need signature authorizations from Andrew, Michael and Nadine

Jacquelyn M. Rouse, AICP

Planning Administrator

City of Annapolis Planning & Zoning Department

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jmr@annapolis.gov

On Thu, Mar 5, 2020 at 2:18 PM Jacquelyn Rouse <jmr@annapolis.gov> wrote:

I have formatted the final changes as per Chair Gallagher. Please review and authorize signature.

Jacquelyn M. Rouse, AICP

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message

Andrew Burnett <Andrew@potterburnettlaw.com>

Mon, Mar 16, 2020 at 10:15

; Michael Walsh <attymichaelpwalsh@comcast.net>, Jacquelyn Rouse <jmr@annapolis.gov>, Robert Gallagher  
obgallagher113@gmail.com>, Nadine Chien <nc576243@gmail.com>

; Christopher Beard <chris@attorneybeard.com>

approve and you can sign for me.

ANDREW T. BURNETT

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PotterBurnettLaw.com

From: Michael Walsh <attymichaelpwalsh@comcast.net>

Sent: Monday, March 16, 2020 10:12 AM

To: Jacquelyn Rouse <jmr@annapolis.gov>; Robert Gallagher <bobgallagher113@gmail.com>; Nadine Chien <nc576243@gmail.com>;  
Andrew Burnett <Andrew@potterburnettlaw.com>

Cc: Christopher Beard <chris@attorneybeard.com>

Subject: Re: Lofts

approve and authorize you to sign for me.

Michael Walsh

On March 16, 2020 at 9:47 AM Jacquelyn Rouse <jmr@annapolis.gov> wrote:

In case I missed your email while I was out last week, I need signature authorizations from Andrew, Michael and Nadine

Jacquelyn M. Rouse, AICP

Planning Administrator

City of Annapolis Planning & Zoning Department

145 Gorman Street

message

**dine Chien** <nc576243@gmail.com>

Mon, Mar 16, 2020 at 9:55 /

: Jacquelyn Rouse <jmr@annapolis.gov>

: Robert Gallagher <bobgallagher113@gmail.com>, Michael Walsh <attymichaelpwalsh@comcast.net>, Andrew Burnett  
ndrew@potterburnettlaw.com>, Christopher Beard <chris@attorneybeard.com>

Dear Jacqui:

approve for signature.

Nadine

On Thu, Mar 5, 2020 at 2:19 PM Jacquelyn Rouse <jmr@annapolis.gov> wrote:

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Jacquelyn M. Rouse, AICP

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