UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0140

September Term, 2014

CARROLL COUNTY PLANNING AND ZONING COMMISSION, *ET AL.*

v.

SILVERMAN COMPANIES, LLC

Kehoe,
Berger,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: June 17, 2015

This case involves the contemplated development of a retirement and assisted living facility. It comes to us as the multifaceted appeal of the approval of (1) a site plan, (2) a conditional use, and (3) a parking variance by the Board of Zoning Appeals for Carroll County ("BZA"). The appellants argue that the BZA failed to follow the proper standards for determining consistency with a county's master plan, and used improper criteria for granting the combined conditional use and the parking variance.[1]

For the reasons that follow, we find no error with the BZA's analysis of consistency with the Master Plan and with the BZA's grant of the conditional use and affirm as to both. We find, however, that the BZA applied the wrong standard in granting the requested parking variance, and therefore, we vacate and remand as to that issue alone.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a concept plan proposal by Appellee Silverman Companies, LLC, ("Silverman") to build a mixed use facility, called Adam's Paradise, consisting of retirement home and assisted living units at 5825 Oklahoma Road in Eldersburg. Silverman first presented its application for the proposed concept plan to the various county reviewing agencies, including, among others, the Design and Architectural Review Committee and the Bureau of Resource Management. The plan was also reviewed in a

[1] The Appellee, Silverman Companies, LLC, also argues that the Carroll County Planning and Zoning Commission and its Secretary, Philip R. Hager, lack standing to petition for judicial review. However, LU § 4-401 gives "an officer or unit of the local jurisdiction" the right to file a request for judicial review of a decision of the board of appeals. As Hager qualifies, we reject Silverman's argument.

public session of the County Technical Review Committee. All reviewing agencies and the County Technical Review Committee approved the concept plan.

The next step was to present the plan to the Carroll County Planning and Zoning Commission ("Commission"). Silverman presented the concept plan to the Commission for the first time on April 17, 2012. At that time, Silverman's plan included a 100-unit assisted living/Alzheimer's care facility and a 135-unit independent living structure, for a total of 235 units, in multiple buildings. The proposed concept plan was rejected by the Commission, which asked Silverman to revise the planned project.

Silverman revised the plan to include 190 units, consisting of 90 assisted living and 100 independent living, in a single building. The revised plan was re-submitted to the various agencies for review, and again received all required agency approvals. Silverman presented the revised plan to the Commission on July 17, 2012. The Commission, however, requested Silverman consider revising the concept plan again. Silverman declined and the Commission denied its application.

Silverman appealed the Commission's denial of the concept plan to the Carroll County Board of Zoning Appeals ("BZA"). At the same time, Silverman applied to the BZA for a conditional use and a parking variance. Over the course of several months, the BZA conducted hearings on all three issues, and on December 3, 2012, the BZA conditionally granted Silverman's site plan, but further reduced the density of the development to 178 total units. The following week, the BZA approved the conditional use and the parking variance application.

Appellants, the Commission, Phillip R. Hager ("Hager"), Executive Secretary to the Commission, and James T. Arnold ("Arnold"), a neighboring land owner, appealed all three aspects of the BZA's decision to the Circuit Court for Carroll County. Following a one-day hearing, the circuit court affirmed the decision of the BZA. The Commission, Hager, and Arnold then noted this appeal. [2]

DISCUSSION

This Court reviews administrative agency decisions under the "fairly debatable" standard. *Mills v. Godlove*, 200 Md. App. 213, 223 (holding that the correct test "to be applied is whether the issue before the administrative body is 'fairly debatable,' that is, whether its determination is based on evidence from which reasonable persons could come to different conclusions.") (Internal citations omitted). To be "fairly debatable," there must be "substantial evidence on the record to support the decision." *Id.* at 224. It is a test of "reasonableness, not rightness," *Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 399 (1979), which affords a degree of deference to the administrative agency. *Bd. of Phy. Quality Assurance v. Banks*, 354 Md. 59, 69 (1999).

That degree of deference requires this Court to refrain from substituting its judgment for that of the BZA. *State Admin. Board v. Billhimer*, 314 Md. 46, 58 (1988). We exercise restrained judicial judgment and defer to the BZA's factual findings and inferences drawn from those facts. *Supervisor v. Asbury Methodist Home*, 313 Md. 614, 625 (1988); *see*

[2] For ease of reference, in terms of this appeal, the Commission, Hager, and Arnold will be referred to collectively as the Commission.

also Critical Area Com'n for the Chesapeake and Atlantic Coastal Bays, et al. v. Moreland, LLC, et al., 418 Md. 111, 123 (2011) [hereinafter *Moreland*] (holding that review of the BZA's decision is in the light most favorable to the BZA and the BZA decision is presumed valid).

1. Consistency with Comprehensive Plan

The Commission's first challenge is that approval of the Adam's Paradise project is not consistent with the governing comprehensive plan.

a. Comprehensive Plans Generally

A county's comprehensive plan sets the tone for future development. "Generally, a comprehensive plan is described as 'a general plan to control and direct the use and development of property in a locality, or a large part thereof, by dividing it into districts according to the present and potential use of the property.'" *Maryland-Nat. Capital Park and Planning Com'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 86 (2009) [hereinafter *Greater Baden*] (citing E.C. Yokley, Zoning Law and Practice § 5-2 (4th ed. 2003)) (also explaining that the terms "master plan," "general plan," and "comprehensive plan" are often synonymous[3]).[4] To ensure that a comprehensive plan is fully developed, it

[3] The terms, however, are not synonymous in all counties. In Division I of the Land Use Article, the term "plan" includes the general plan, master plan, comprehensive plan, function plan, or community plan. LU § 1-101(l). In Division II of the Land Use Article for the Maryland-National Capital Park and Planning Commission pertaining to Prince George's and Montgomery Counties, however, the terms are each given specific, separate, meanings. LU §§ 21-104—106.

[4] For consistency, we will use the term "comprehensive plan" whenever possible.

must contain certain elements, such as a goals and objectives element and a land use element, while there are other, permissive elements, such as community renewal elements that a county's planning commission may choose to include. LU § 3-102.

During the process of creating, adopting, and periodically reviewing a comprehensive plan, the planning commission must provide copies of the recommended comprehensive plan to adjoining jurisdictions, as well as to State units and local jurisdictions responsible for financing or constructing the necessary public improvements. LU § 3-203(c). The planning commission must also hold at least one public hearing before forwarding the proposed comprehensive plan to the legislative body, and must include in its report the recommendations of any unit or jurisdiction that commented on the comprehensive plan. LU § 3-203(b), (d). The legislative body may then adopt (1) the whole comprehensive plan; (2) a comprehensive plan for one or more geographic sections or divisions of the local jurisdiction; or (3) an amendment or extension of or addition to the comprehensive plan. LU § 3-205(d). If the county legislative body fails to act within 60 days after the recommendation is submitted, then the recommendation is considered approved. LU § 3-205(d)(2).

In contrast to the more general and over-arching comprehensive plan, counties are also given the authority to establish zoning. *See generally*, LU § 4-201. The Carroll County Code of Ordinances separates Carroll County into 12 types of zoning districts. Carroll County Code § 158.070-158.081. For each zoning district, possible uses are divided into four categories: generally permitted uses; uses that require special permission; accessory uses; and prohibited uses. *See, e.g.*, Carroll County Code § 158.074(C), (D), and

(E). Those uses that require special permission are referred to in Carroll County as "conditional uses." This is different terminology from the State and many other counties which use the term "special exception" but it is only the terminology that differs. *See* Carroll County Code § 158.002 (defining the term "conditional use" as having the same meaning as "special exception" the Land Use Article of the Maryland Code).

The degree to which counties are free to grant conditional uses or special exceptions that contravene their own comprehensive plans, has evolved over time. Prior to 1970, State law gave county boards of zoning appeal the power to grant special exceptions that were "in harmony with" the general purpose of the zoning ordinance. *Trail v. Terrapin Run*, 403 Md. 523, 538 (2008) (citing former Md. Code Article 66B § 7, "Board of Zoning Appeals"). In 1970, the General Assembly changed the general definition of special exception in State law so that local governments could only grant special exception uses that "conform" to the plan. *Id*. at 538. In 2008, however, the Court of Appeals in *Terrapin Run*, held that the 1970 change to the term "conform" did not change the traditional use of "in harmony with" analysis for special exceptions. *Id.* at 527. Rather, the Court of Appeals held that local master plans were not mandatory in nature, and that the General Assembly never intended to "impose absolute requirements on local governments in their practices involving their local land use programs." *Id.* at 575.

The General Assembly's response to the *Terrapin Run* decision was swift and decisive. During the next legislative session, the General Assembly enacted the "Smart, Green, and Growing – Smart and Sustainable Growth Act of 2009," which in uncodified, preliminary language, stated the legislature's intent to "overturn the ruling in [*Terrapin*

Run]. 2009 Md. Laws, ch. 181, at 2. "The General Assembly [was] concerned that a broader interpretation of [*Terrapin Run*] could undermine the importance of making land use decisions that are consistent with the comprehensive plan." *Id.* To that end, the General Assembly changed the law so that conditional uses or special exemptions may now be granted only upon a finding that the proposed use is "consistent with the Plan." LU § 1-101. Therefore, both sections 1-101(p) and 1-303 of the Land Use Article of the Annotated Code of Maryland now require that for a local government to grant a special exception, or a conditional use, it must first find that such a use is "'consistent with' or has 'consistency with'" the county's comprehensive plan.

b. The Freedom Community Comprehensive Plan

The proposed Adam's Paradise development would be located within the Freedom Community Comprehensive Plan, one of several comprehensive plans located in Carroll County. The Freedom Community Comprehensive Plan covers an area of 44 square miles in the southeastern corner of Carroll County, and includes the town of Eldersburg. The current Freedom Community Comprehensive Plan was approved in 2001 to update the then-existing plan to account for the rapid growth in the area. As part of creating the Freedom Community Comprehensive Plan, the participants drafted a vision statement for the community: "To create a community that is functional and aesthetically pleasing, modern and sensitive to the environment, welcoming [to] people of all ages and income levels as well as businesses and industries that want to locate in our community of neighborhoods."

c. The Adam's Paradise Project

The specific zoning for the proposed Adam's Paradise project is within an R-20,000 Residence District of Carroll County. Pursuant to the Carroll County Code, the principal permitted uses in an R-20,000 area are: agriculture; religious establishments, schools, and colleges; single family dwellings; buildings and properties of an education, or community service-type; and conversion of pre-1965 buildings to accommodate two families. Carroll County Code § 158.073(C). Section 158.073(D) of the Carroll County Code lists the conditional uses that require BZA authorization, which include nursing homes, retirement homes, continuing care retirement communities, and assisted-living facilities. Therefore, to build a retirement home or assisted-living facility in Carroll County in an R-20,000 Residence District requires the BZA to authorize a conditional use. Moreover, as discussed above, State and local law require that the BZA find that approval of the proposed conditional use is "consistent with" or has "consistency with" the Freedom Community Comprehensive Plan. On appeal, the Commission attacks the BZA's determination that the Adam's Paradise project is consistent with the Freedom Community Comprehensive Plan in three ways: (1) the BZA's analysis of consistency was too limited; (2) the BZA erroneously emphasized consistency with the zoning ordinance provisions rather than consistency with the Freedom Community Comprehensive Plan; and (3) the BZA failed to account for the project's compatibility with the surrounding neighborhood. We address each in turn.

i. Consistency Analysis

The Commission's first assignment of error is that the BZA failed to properly discuss whether the proposed Adam's Paradise development was consistent with the Freedom Community Comprehensive Plan. The Commission argues that the BZA's discussion was "extremely limited" and insufficiently specific. Because the BZA explicitly summarized testimony regarding the proposed development's consistency with the Plan, we shall affirm the BZA's finding that the proposed development is consistent with the Freedom Community Comprehensive Plan.

The proper analysis for the BZA to follow when determining if a proposed conditional use is consistent with a comprehensive plan is to consider whether the development will "further, and not be contrary to" the plan's: policies, timing of implementation, timing of development, timing of rezoning, development patterns, land uses, and densities or intensities. LU § 1-303. There is no requirement that the BZA specify the evidence supporting each finding. *Moreland,* 418 Md. at 128. Rather, it is sufficient that the BZA summarize the evidence presented in making its decision. *Id*. at 134 (holding that "evidence, intellectually and logically, can be viewed only as bearing on what persuaded the Board to conclude as it did."). In this case, the BZA did not write out its considerations for each of the items listed in section 1-303 of the Land Use Article. The BZA did, however, summarize, in its findings of fact, the evidence presented and considered in making the decision as required by Carroll County Code § 158.133(G). The factors found in § 158.133(G) of the Carroll County Code are sufficiently similar to the Land Use Article § 1-303 factors to cover the required considerations, as we will explain

more fully below. Pursuant to Section 158.133(G) of the Carroll County Code, the BZA "*shall* give consideration" to 11 factors when analyzing a conditional use application. Those factors are:

> (1) The number of people residing or working in the immediate area concerned;
>
> (2) The orderly growth of a community;
>
> (3) Traffic conditions and facilities;
>
> (4) The effect of the proposed use upon the peaceful enjoyment of people in their homes;
>
> (5) The conservation of property values;
>
> (6) The effect of odors, dust, gas, smoke, fumes, vibrations, glare, and noise upon the use of surrounding property values;
>
> (7) The most appropriate use of land and structures;
>
> (8) Public convenience and necessity;
>
> (9) Type and kind of structures in the vicinity where public gatherings may be held, such as schools, religious establishments, etc.;
>
> (10) Compatibility; and
>
> (11) The purpose of this chapter as set forth herein.

Carroll County Code § 158.133(G). These factors cover substantially the same considerations as is required to determine consistency with a comprehensive plan under section 1-303 of the Land Use Article. While the factors required the by the Land Use Article and the Carroll County Code do not align as one-for-one equivalents, the factors from both sources overlap thematically. This overlap does not mean that the Carroll County Code factors replace the Land Use Article factors. Rather, the overlap results in the required Land Use Article factors being covered by the analysis of the Carroll County

Code factors. For example, the Land Use Article requires consistency with the comprehensive plan's policies. The theme of consistency with plan policies is covered by the Carroll County Code factors of orderly growth of a community (#2), and the most appropriate use of land and structures (#7). It could also be argued that additional Carroll County Code factors address the theme of the comprehensive plan's policies. This overlap continues through all the other factors.

As we shall quote below, the BZA carefully analyzed each § 158.133(G) factor:

> **A. The number of people residing or working in the immediate area concerned.**
>
> The Board was well aware that the project was in the R-20,000 Residential District.…[T]he Board was aware that a school was nearby and a Senior Center was .6 miles away from the site. The Board considered the permitted uses for the zone.
>
> **B. The orderly growth of a community.**
>
> The Carroll County Code anticipated that assisted living facilities and retirement communities would be needed in the R-20,000 Residential District. There was evidence about the need for retirement communities in the county. There was evidence about the ages of people in the area that would be of age to benefit from the proposed site. The use was consistent with the master plan and the comprehensive plan…
>
> **C. Traffic conditions and facilities.**
>
> Traffic conditions were addressed with the engineer that conducted the study…. No county officials seemed to have any serious traffic concerns. In fact, the Planning Commission deleted traffic concerns as a reason for denying the concept plan when the motion to consider it was made…

D. The effect of the proposed use upon the peaceful enjoyment of people in their homes.

There was evidence about how the facility would impact the community. The buffering and spacing in this project would help people enjoy their own homes. There would be a building setback of more than three hundred feet.… The staff working at the facility and visitors was already considered in the traffic impact study. People living at the facility would probably not have the need for two cars to be in use daily as would be the case for a typical four person family with two adults and two children. The traffic created by the facility would probably not occur during the peak periods of traffic, because seniors generally try to avoid driving during those times. Seniors would not be out late at night and would not be making a lot of noises. The lighting used at the site would be the required lighting for the building and the parking lot. Therefore, the lighting would not be much of an eyesore. The landscape screening would eventually help with the neighbors' view of the property even though the screening would not be fully grown when planted.

E. The conservation of property values.

Through the evidence there was a major difference of opinion about what could happen to the property values if the proposed site was constructed.… The Board accepted Mr. Cueman's testimony with regard to density and that such a site was permitted by both the master plan and the comprehensive plan. The Board did not find that property values would decrease if the revised concept plan was followed…

F. The effect of odors, dust, gas, smoke, fumes, vibrations, glare, and noise upon the use of surrounding property values.

Odors, dust, gas, smoke, fumes, vibrations, glare, and noise was considered but not thought to be an issue in the case…

G. The most appropriate use of land and structures.

The Board considered the most appropriate use of the land. The land does not provide many options for development. The

topography [includes] a steep incline. The Board has the benefit of comparing 27 equivalent single dwelling units in the same space. With the revised concept plan changing the layout from two buildings to one building meant that less of the land would be needed for building structures. Therefore, more of the land would be left in its natural state. The project would provide for large setbacks, large blocks of open space and preserved forested areas for natural screenings.

H. The purpose of this chapter as set forth herein.

The purpose of this chapter is to allow property owners to use their property as they saw fit as long as it also fits in the legislative scheme of things.…The Board also found that the legislative scheme allowed nursing homes, retirement homes, continuing care retirement communities and assisted-living facilities to be located in residential districts. The subject proposal integrates the need for elderly and assisted living use with the express objective in the Code to locate such uses in the R-20,000 Residential District.

I. Type and kind of structures in the vicinity where public gatherings may be held, such as schools, religious establishments, and the like.

The Board heard evidence that the facility was just .6 miles away from a senior center. The Board found that the proposed use was complimentary to the newly constructed senior center…

J. Compatibility.

Compatibility is presumed under *Schultz v. Pritts* absent a showing of adverse impacts at this location above and beyond those at other locations in the R-20,000 Residential District. Mr. Cronyn found that the proposed use was compatible with the neighborhood. He opined that the spacious layout, buffering and attractive appearance of the facility would have a relatively benign effect on the neighborhood. The Board reduced the density such that the maximum possible number of units would not be created.

K. Public convenience and necessity.

> As to public convenience and necessity the Board considered the need for assisted living/Alzheimer's units and independent living units. There was evidence that the site was served by an existing road.… The site was in close proximity to the senior center. The people at the site would have access to people they knew who used the senior center and senior center participants would have access to people who visited from the site. There was testimony that the market area was made up of a rapidly aging population. As a result, the public necessity for a variety of elderly housing was more evident in 2012 than in 1971 when the law was adopted.
>
> * * *
>
> The Board was convinced that authorization of the request with regard to a conditional use was consistent with the purpose of the zoning ordinance, appropriate in light of the factors to be considered regarding conditional uses of the zoning ordinance, and would not unduly affect the residents of adjacent properties, the values of those properties, or public interests. Based on the fact that the concept plan was consistent with the Master Plan, the Board found that the proposed project would not generate adverse effects … greater here than elsewhere in the zone.

As illustrated by the lengthy discussion of these factors, the BZA more than sufficiently considered the consistency of the Adam's Paradise conditional use request with the Freedom Community Comprehensive Plan. As noted above, the factors that the Carroll County BZA is required to analyze for conditional use applications come from Carroll County Code § 158.133(G). The overlapping coverage of the Carroll County Code factors, combined with the lack of a requirement that the BZA specify evidence supporting each of

the Land Use Articles factors, convinces us that the BZA's analysis was more than sufficient.[5]

ii. Relationship of R-20,000 District to the Plan

The Commission also argues that when determining consistency with the comprehensive plan, the BZA placed too much weight on the provisions of the zoning ordinance for the R-20,000 district. The Commission contends that the BZA's consideration of the conditional uses permitted within an R-20,000 district erroneously emphasized the project's consistency with the zoning ordinance rather than consistency with the Freedom Area Comprehensive Plan. The Commission centers this argument on the testimony of Ned Cueman, former Director of Planning for Carroll County, and complains that "Cueman maintained that by [the] bare reference [to R-20,000], the 2001 Freedom Plan thereby somehow incorporated the Zoning Ordinance provisions for the R-20,000 district as if they were now somehow part of the Comprehensive Plan text."

We find, however, that a natural reading of the Freedom Community Comprehensive Plan, while it may not incorporate the requirements of the R-20,000

[5] The Commission also cites *Greater Baden* for the proposition that the BZA's findings of fact must be meaningful and not simply quotations of statutory criteria. In *Moreland,* however, the Court of Appeals distinguished between those cases where a board of zoning appeals' (or County Council's) opinion does not articulate *any* evidence to support adverse findings, and those cases where the opinion contains clear adverse findings as well as summaries of evidence supporting those findings. *Moreland,* 418 Md. at 128. Here, the BZA thoroughly summarized the evidence presented and the findings of fact. Therefore, while the Commission is correct that the BZA's findings of fact must not be simple quotations of statutory criteria, the Commission is incorrect in asserting that the BZA's analysis in this case was not meaningful.

ordinance, does express a connection between the R-20,000 district and the Medium-Density Residential designation found in the Freedom Plan. The text of the 2001 Freedom Plan explained that it was necessary to update the comprehensive plan to ensure the land use plan and zoning met current and future needs:

> One of the primary purposes for updating a comprehensive plan is to *ascertain whether the land use plan and zoning that have been previously established are suited to meet present and future requirements*. The land use plan that follows is based not only on demographic projections and geographic and natural constraints of the land, but also on the specific intent of the citizens of the area who have been involved throughout the planning process.

(Emphasis added).

The 2001 Freedom Community Comprehensive Plan goes on to describe the current land use designations and to introduce two new designations:

> **Existing Land Use Designations**
>
> The following are descriptions of the land use designations that can be found on the existing land use designation map from the 1977 Freedom Comprehensive "Mini" Plan and are carried over to the 2001 Freedom Community Comprehensive Plan.
>
> * * *
>
> *High-Density Residential* – High-Density Residential designation refers to those areas that permit single-family detached units, attached units, duplexes, and multi-family dwellings. This land use designation applies to those areas that are currently zoned R-7,500 and R-10,000…
>
> *Medium-Density Residential* – Medium-Density Residential designation refers to those areas that are reserved for single-family homes with a density of no more than two units per acre. This area for single-family homes is designed

> to be a transition from the denser mix of High-Density Residential and the sparsely-populated Low-Density Residential and Conservation designated areas. This land use designation applies to those areas that are currently zoned R-20,000.
>
> *Low-Density Residential* – Low-Density Residential designation refers to those areas with a density of no more than one unit per acre. This land use designation applies to those areas that are currently zoned R-40,000…
>
> * * *
>
> **Proposed New Land Use Designations**
>
> The following are descriptions of the proposed new land use designations that can be found on the land use designation map that accompanies this plan.
>
> *Employment Campus* – The Employment Campus designation provides a setting for business and industrial parts which promote a common theme… Landscape and open space requirements are designed to produce a college-type environment…
>
> *Boulevard District (Floating Zone)* – The Boulevard District (BD) designation applies specifically to identified segments of MD 26 and MD 32 within the Freedom [Comprehensive Plan Area]. The areas so designated shall have lighting, landscaping, design elements, land uses, and access control measures as detailed in the Boulevard District guidelines document.

The 2001 Freedom Community Comprehensive Plan specifically outlines the existing land use designations found in the 1977 Plan, and carries them over to the new 2001 Plan, as well as adds two new designations: (1) Employment Campus; and (2) Boulevard District. Land use designations are short "vision statements" describing the plan or purpose of each designation. A land use designation is not the same as a zoning

district. While several of the land use designations do carry the same name as zoning districts, the land use designations and zoning districts are not equivalents. Land use designations do not include the regulatory scheme found in the zoning code. Rather, the goals of the land use designations are carried out through the specifics of the zoning code. Maryland Department of Planning, Smart Green & Growing Planning Guide 2013, Pub. No. 2013-05 (Sept. 2013) [hereinafter Planning Guide].

The Adam's Paradise development would be located in a Medium-Density Residential land use designation area. The Medium-Density Residential land use designation specifically states that the designation applies to areas currently zoned R-20,000. While the Medium-Density Residential land use designation does not then go on to incorporate all the restrictions and regulations found in the Carroll County Code for the R-20,000 zoning district, it does indicate that the vision for the Medium-Density Residential land use designation was intended to coincide with the uses allowed in an R-20,000 zoning district. The Commission's argument suggests that the BZA should have erased the reference to the R-20,000 zoning district from the Medium-Density Residential land use designation. This argument, however, fails to recognize that while land use designations are part of the comprehensive plan, and thus part of a long-term vision for the area, that "the visions encompassed in a local comprehensive plan are implemented through zoning ordinances and regulations." Planning Guide at 6. "The most fundamental planning implementation tool is zoning." *Id*. at 25. Therefore, we find no error in the references to the R-20,000 zoning district in the BZA's analysis of consistency.

iii. Compatibility with the Existing Neighborhood

The Commission also argues that the BZA's analysis of the consistency of the master plan lacked sufficient analysis of the proposed Adam's Paradise project's compatibility with the existing neighborhood. The Commission bases this argument on the definition of special exception found in § 1-101(p) of the Land Use Article:

> "Special Exception" means a grant of a specific use that:
>
> …
>
> (2) shall be based on a finding that:
>
> …
>
> (ii) the use on the subject property is consistent with the plan *and is compatible* with the existing neighborhood.

LU § 1-101(p) (emphasis added). The Commission argues that the BZA decision does not include the finding of compatibility required by § 1-101(p).

This argument, however, misses the mark because the BZA specifically analyzed the compatibility of the proposed conditional use. The BZA's analysis of compatibility was part of its analysis of the factors required by § 158.133(G) of the Carroll County Code. As quoted above, the BZA wrote:

> **J. Compatibility.**
>
> Compatibility is presumed under *Schultz v. Pritts* absent a showing of adverse impacts at this location above and beyond those at other locations in the R-20,000 Residential District. Mr. Cronyn found that the proposed use was compatible with the neighborhood. He opined that the spacious layout, buffering and attractive appearance of the facility would have a relatively benign effect on the neighborhood. The Board

> reduced the density such that the maximum possible number of units would not be created.

The BZA also considered the proximity of the new Senior Center, the need for a retirement community in the county and evidence about the ages of people in the area. While these additional considerations were not specifically labeled "compatibility," they certainly support the finding that the proposed Adam's Paradise development is compatible with the existing neighborhood. The Commission's contention, therefore, is without merit.

For each of these reasons, we find that the BZA properly determined that Adam's Paradise is compatible with the comprehensive plan.

2. Conditional Use

In granting Silverman's request for a conditional use, the BZA reduced the size of the development from 190 to 178 units. According to the Commission, the BZA should have specified how many assisted living "beds" and how many retirement "units" when reducing the density from 190 to 178 total combined "units." The Commission argues that the granted conditional use is unlawful due to the failure to specify the combination of beds and units. [6]

The Carroll County zoning ordinance sets out the density requirements for both assisted living facilities and retirement homes. Carroll County Code §158.073(G)(2).

[6] Silverman argues that the Commission has not preserved this argument for our review. Specifically, Silverman argues that the Commission never objected to the Circuit Court regarding the BZA's failure to specify between beds and units and therefore cannot (continued…)

Under this law, assisted living facilities are allowed a maximum density of 1 bed per 3,000 square feet. *Id.* Retirement homes are allowed to be of a density "as determined by the Planning Commission but not exceeding 1 [dwelling unit] per 3,000 square feet." *Id*. Beds and dwelling units, however, are not equivalent. A "unit" in a retirement home may contain more than one bed. The original Silverman proposal included 100 assisted living beds and 135 independent living units for a total of 235 combined units. The second Silverman proposal lowered each to 90 assisted living beds and 100 independent living units for a total of 190 combined units contained in one 156,621 square foot building. The BZA, however, approved 178 combined units without specifying whether they are to be beds or units, or in what combination.

A close inspection of the record reveals that the BZA arrived at 178 combined units by comparing Silverman's proposal to the average density of other similar facilities that already exist in the area. The BZA relied upon a density comparison chart, Appellant's Exhibit 23, which we have reproduced below:

(…continued)
raise that specific issue on appeal now. The Commission did, however, appeal from the approval of the conditional use application to the Circuit Court. That appeal was a broader allegation of error. We, therefore, will exercise our discretion and will address the more specific question of whether the BZA erred by failing to differentiate between assisted living beds and retirement units. Rule 8-131(a).

COMPARABLE EXISTING RETIREMENT PROJECTS	
	Density in Units/Acre
Winifred Manor (Eldersburg)	13.4
Nells Acres (Eldersburg)	12.19
Sunnybrook (Westminster)	8.6
Average:	11.4 units/acre

ADAMS PARADISE (15.617 acres)			
		Units	**Beds** *
Using same density as Winifred Manor	13.4 units/acre x 15.617 acres	209 units	272 beds
Using same density as Nells Acres	12.9 units/acre x 15.617 acres	201 units	261 beds
Using Same Density as Sunnybrook	8.6 units/acre x 15.617 acres	134 units	174 beds
Using Average of Three Comparables	11.4 units/acre x. 15.617 acres	178 units	231 beds

*Assume 30% of Independent Living Units are two (2) beds.

In its conclusion, the BZA wrote that it started the density discussion by recommending 144 units, which it derived using this formula: 12.16 acres[7] multiplied by a density of 10.42 equals 144 units.[8] The BZA eventually decided, however, that a second method of determining density was preferable. "It was the 11.4 units/acre average found in Appellant's Exhibit 23 [above] multiplied by 15.61 acres in Appellant's exhibit 23. That provided a density of 177.84," which was rounded to 178 units. Thus, the BZA implicitly

[7] 12.16 acres represents the non-conservation zone acreage of the Adam's Paradise property. 15.617 acres, used in the other calculations, represents the entire property.

[8] The BZA states in their written opinion that the first formula used was 12.16 acres multiplied by 10.42 density to equal 144 units. 12.16 multiplied by 10.42 actually equals 126.7. This mathematical error, or more likely, the transcription error, however, has no bearing on the outcome.

found 11.4 units/acre—the average of the three comparable developments—to be an appropriate density for the Adam's Paradise development.

Under the exceedingly deferential standard of "fairly debatable" the BZA's decision to set the total number of "units" at 178 must be upheld if there is substantial evidence on the record to support the decision. Given the BZA's discussion of comparable facilities and the goal density of 11.4 units/acre, we conclude that there is indeed such evidence in the record that reasonable minds might accept as adequate. Under the Carroll County Code, the required finding is of density, not of the specific split between beds and units. Therefore, it is sufficient that the BZA approved the conditional use by giving the number of total combined units allowed. The density used by the BZA in calculating the total combined units will allow Silverman to determine the number of beds and the number of units. The BZA's approval implicitly requires, however, that Silverman maintain a density of 11.4 units/acre when determining the number of beds and units to build. We, therefore, affirm the BZA's approval of 178 total combined units subject to a density of 11.4 units/acre.

3. Parking Variance

The Commission's final contention is that the BZA improperly granted the requested parking variance, allowing Silverman to build only 120 parking spaces instead of the 180 spaces that would be required by the Carroll County Code. The Commission contends that the BZA's analysis was improper at the first two stages of the parking variance analysis, as the BZA (1) improperly considered only Silverman's convenience, failing to determine that the property was unique and unusual, and (2) improperly used the

"practical difficulty" standard rather than the "unwarranted hardship" standard in reviewing the application. While we find that the BZA properly determined that the property was unique and unusual, we hold that the BZA used the wrong legal standard in granting the variance. We explain.

The Carroll County zoning ordinance sets out the minimum number of parking spaces required for different types of property uses. Carroll County Code § 155.077. For example, a fast food restaurant is required to have 14 parking spaces for every 1,000 square feet while a bank is only required to have 1 space for every 200 square feet. Different uses, such as banks, don't have the same level of car traffic as other uses, such as fast food restaurants, and thus don't need as many parking spaces.

Calculating the number of parking spaces needed for the Adam's Paradise development involves adding parking spaces for the two kinds of occupancy. First, the Code requires that the assisted living portion of the development have one parking space for every 4 beds plus one space for every 2 employees on the maximum shift. Carroll County Code § 155.077. Second, the retirement community portion of the development must have 1.5 spaces for each dwelling unit. *Id.* According to the second revised project plan, the assisted living portion of the Adam's Paradise development is proposed to have 90 beds. Based on the number of beds and employees, 30 spaces would be required for the assisted living portion of the Adam's Paradise development. The retirement community portion of Adam's Paradise was proposed to have 100 units, which requires 150 spaces. This would equal a total of 180 spaces. Silverman, however, requested a variance to reduce the number of required spaces from 180 to 120 spaces.

A variance "permits a use which is prohibited and presumed to be in conflict with the ordinance." *North v. St. Mary's Cnty.*, 99 Md. App. 502, 510 (1994). A variance is defined in the Carroll County Code of Ordinances as:

> a relaxation of the terms of this chapter … where such variance will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the results of the actions of the applicant, a literal enforcement of the chapter would result in practical difficulty or unreasonable hardship.

Carroll County Code § 158.002.[9] This creates a three-part test to determine if the grant of a variance is proper: (1) whether there are conditions peculiar to the property that are not a result of the applicant's actions; (2) whether literal enforcement of the chapter will result in "practical difficulty" or "unreasonable hardship" because of those conditions;[10] and (3) whether the variance would be contrary to public interest. The Commission attacks the BZA's decision on the first two factors.

a. Peculiar Property Conditions

The first step of determining whether to grant a variance, which the Commission argues the BZA completely skipped, requires the BZA to determine whether there are conditions peculiar to the property that are not a result of the applicant's actions. In cases under analogous statutes, this test is phrased as requiring that the property is "unique and

[9] Under the 2004 version of the Carroll County Code of Ordinances, § 158.002 was relabeled § 223-2.

[10] Although Carroll County Code § 158.002 uses "practical difficulty or unreasonable hardship," as will be fully explained below, other portions of the Carroll County Code use a different formulation.

unusual in such a way as to cause a disproportionate impact." *Umerley v. People's Counsel for Baltimore Cnty*, 108 Md. App. 497, 506 (1996). "'Uniqueness' of a property for zoning purposes requires that the subject property to have an *inherent* characteristic *not shared* by other properties in the area, *i.e.* its shape, topography, subsurface condition, environmental factors, historical significance … or other similar restrictions." *North*, 99 Md. App. at 514 (emphasis added). We hold that the use of the phrase, "conditions peculiar to the property" in the Carroll County Code conveys the same message.

The Merriam-Webster Dictionary defines "peculiar" as: (1) "characteristic of only one person, group or thing"; and (2) "different from the usual or normal." "Condition" is defined by Merriam-Webster as "the physical state of something." Thus the phrase, "conditions peculiar to the property," on its face, means that the physical state of the property is different from the usual or normal, or that the physical state of the property is characteristic of only that property. This definition to us, conveys the same meaning as "inherent conditions not shared by other properties" in the area, as defined in other cases.

The Commission's argument that the BZA skipped this step in its analysis, however, is simply wrong. The BZA addressed the conditions of the property in its January 7, 2013, written opinion, finding that, "[t]he property was unique in part based on the extreme slope where the parking lot would be located," and would, as a result, require grading and retaining walls. We see no requirement in the Carroll County Code that the BZA find a certain number, or scale, of peculiarities in the property.

Therefore, under the deferential, "fairly debatable" standard of review, we find that the BZA properly found that Silverman's property possessed conditions peculiar to the property sufficient to satisfy the first factor in granting a variance.

b. Practical Difficulty or Unwarranted Hardship

The second part of the variance test has several unique iterations. The question is whether, due to the conditions peculiar to the property, literal enforcement of the regulations would result in "practical difficulty" or "unwarranted hardship." The BZA, in granting the variance applied the "practical difficulty" standard and granted the variance. The Commission argues that the BZA should instead have applied the "unwarranted hardship" standard, which is a higher standard than "practical difficulty," and that the BZA, therefore, erred in granting the variance.

Distinguishing between, and using the correct standard is important because "practical difficulty" is a less restrictive standard than "unwarranted hardship." Unwarranted hardship has been defined as the "denial of reasonable use" or the "denial of a reasonable return" from the property. *Belvoir Farms Homeowners Ass'n Inc. v. North*, 355 Md. 259, 278, 282 (1999) (holding that the "unwarranted hardship standard, and its similar manifestations, are equivalent to the denial of reasonable and significant use of the property). *See also Anderson v. Bd. of App.*, 22 Md. App. 28 (1974) (explaining that to satisfy the undue hardship test, the applicant must show that compliance with the ordinance would result in the inability to secure a reasonable return from or make any reasonable use of his property). Practical difficulty, by contrast, only requires that "compliance with the strict letter of the restrictions … would unreasonably prevent the owner from using the

property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Anderson*, 22 Md. App. at 39. Practical difficulty is, therefore, a less restrictive standard. *Belvoir Farms*, 355 Md. at 270.

The Carroll County Code requires the BZA to apply different standards of review depending on whether it is reviewing a variance request as an initial matter or on appeal from a prior decision by the Zoning Administrator. If the variance is decided first by the Zoning Administrator, the Zoning Administrator applies the less demanding "practical difficulty or unreasonable hardship" standard. Carroll County Code § 158.130(H). On appeal from that decision, the BZA is directed to use the same "practical difficulty or unreasonable hardship" standard. Carroll County Code § 158.130(I)(3). On the other hand, if the BZA is deciding a variance itself in the first instance, as it did here, because the variance application was filed in conjunction with a conditional use application, it applies a different standard—the "unwarranted hardship and injustice" standard. Carroll County Code § 158.133(B)(1)(c). Thus, the proper standard for the BZA to utilize, upon direct application, in granting a variance is the more rigorous question of whether enforcement of the provisions will result in "unwarranted hardship and injustice."

In its written opinion, the BZA applied the standard found in the general definition of variance in Carroll County Code § 158.002 (previously found at § 223-2) and granted "the requested variance to reduce parking to 120 parking spaces … to avoid this practical difficulty." Simply put, the "practical difficulty" test is the wrong standard for the BZA to apply in this situation.

In *Belvoir Farms*, in an analogous circumstance the Anne Arundel County Board of Appeals improperly applied the practical difficulties standard instead of the more restrictive unwarranted hardship standard. There, the Court of Appeals held that "when an administrative agency utilizes an erroneous standard and some evidence exists, *however minimal*, that could be considered appropriately under the correct standard, the case should be remanded so the agency can reconsider the evidence using the correct standard." *Belvoir Farms*, 355 Md. at 270 (emphasis added). The Court of Appeals explained that there may be unconsidered evidence before the Board, as the Board "may have considered only as much of the evidence before it as necessary … based upon the lesser practical difficulties standard." *Id.*

Here, as in *Belvoir Farms*, the BZA considered the evidence presented based upon the practical difficulties standard instead of the more stringent unreasonable hardship standard and, as a result, there may be evidence that was not considered by the BZA. We, therefore, vacate the judgment of the circuit court only as to the parking variance and remand the case with the instructions to vacate the decision of the BZA only as to the parking variance based on the BZA's failure to apply the unwarranted hardship standard. The circuit court is directed to remand the case to the BZA for further consideration of the parking variance to determine if building the required number of parking spaces will constitute an "unreasonable hardship and injustice" to Silverman. We express no opinion as to whether Silverman will be able to satisfy this higher standard.

i. Public Interest Considerations

The third factor of variance analysis is to ask whether the parking variance would be contrary to the public interest. The BZA and the Circuit Court both emphasized that the grant of a variance would be in the spirit of the ordinance and would be beneficial to the community. The Commission did not object below, or raise on appeal, this aspect of the BZA's findings, therefore, we will not disturb the BZA's finding that the parking variance is in keeping with public interest considerations.

CONCLUSION

Therefore, for the reasons set out above, we affirm the BZA's finding of consistency and the grant of the conditional use. We vacate solely as to the BZA's grant of the parking variance and remand for further consideration of that issue under the proper standard.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE PAID BY 75% BY APPELLANT AND 25% BY APPELLEE.