Circuit Court for Baltimore City
Case No. 24-C-22-004753

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 862

September Term, 2023

IN THE MATTER OF THE PETITION OF
HUNTER COCHRANE

Graeff,
Berger,
Albright,

JJ.

Opinion by Berger, J.

Filed: May 16, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms with Rule 1-104(a)(2)(B). Md. Rule 1-104.

This case is before us on appeal from an order of the Circuit Court for Baltimore City affirming the ruling of the Baltimore City Board of Municipal and Zoning Appeals (the "Board") with respect to the Board's unanimous approval of a conditional use and height variance in connection with the proposed development of a residential independent and assisted living facility in northwest Baltimore City near the corner of Falls Road and Northern Parkway. Appellants Hunter and Margaret Cochrane reside near the proposed development and oppose the project.[1]

The Appellants raise three issues for our consideration on appeal, which we have rephrased as follows:

> I. Whether the Board erred in approving the application because the application was not filed by the title owner of the property or an authorized agent of the owner.
>
> II. Whether the Board erred in approving the proposed conditional use.
>
> III. If not moot, whether the Board erred in approving a height variance for the proposed development.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

CR Properties Development, LLC (the "Developer") seeks to build a residential-care facility for elderly residents, including independent living, assisted living, and memory care (the "Project"), on a twelve-acre parcel located at the northwest corner of the

[1] As we shall explain further *infra*, this is not the first project proposed for this property in recent years, nor is it the first project the Cochranes have opposed.

intersection of Falls Road and Northern Parkway in Baltimore City, to the east of an existing apartment building known as the Falls at Roland Park (the "Falls").[2] The property upon which the Developer seeks to construct the Project is identified as "NS W Northern Pkway 306'7" E of Falls Rd" (the "Property") and is located in the North Roland Park/Poplar Hill area of Baltimore City.

In early 2017, the owners of the Property, Overlook Sub 1 LLC and Overlook Sub 2 LLC, sought to construct a multi-family residential development on the Property. That project required the Baltimore City Council to pass a Planned Unit Development[3] ordinance, which was passed by the City Council on June 19, 2017 as Ordinance 17-037 and signed by the Mayor on August 14, 2017 (the "PUD Ordinance"). The Cochranes and other residents of the neighborhood near the proposed development sought judicial review of the PUD Ordinance. The circuit court subsequently vacated the PUD Ordinance, after which two groups of residents appealed to this Court. The owner and the City cross-appealed. We affirmed.[4]

[2] The Falls was previously known as the Belvedere Towers.

[3] A Planned Unit Development, or "PUD", is "a local legislative response to the relative rigidity of Euclidian zoning . . . ." *Cnty. Council of Prince George's Cnty. v. Zimmer Development Co.*, 444 Md. 490, 515 (2015). PUDs are often used "to allow the development of specialized or mixed uses." *Id.* Once a parcel is qualified to be rezoned as a PUD, a legislative act amends the official zoning map. *Id.*

[4] At issue in that case was the effect of the adoption of a new zoning scheme known as TransForm Baltimore, which was adopted after the PUD application was submitted but before the PUD Ordinance was passed. *Hudson v. Mayor and City Council of Baltimore*, Ct. Sp. App. Case No. 2345, Sept. Term 2021 (unreported opinion filed September 16,

In September 2020, the Developer entered into a contract to purchase the Property. On April 21, 2021, the Developer filed an Application for Review (the "Application") seeking to develop the Property with a three-story structure to be used as a residential-care facility for elderly residents, including memory care. The Application proposed a facility with 120 residents in 110 rooms. On August 19, 2021, the Board approved the Application. The Appellants filed a Petition for Judicial Review.

The circuit court held a hearing on the Petition for Judicial Review on April 13, 2022, and, on the same date, the court issued an order vacating the Board's decision. The court remanded the matter to the Board and ordered that the Developer "submit a written statement with its application." The court further ordered that the Board "conduct a new hearing to correct the procedural defects and issues noted by the [c]ourt" and "comply with Maryland law requiring administrative agency final decisions to include specific findings of fact and conclusions of law."

Following the circuit court's remand order, the Developer submitted a Statement in Support of Application (the "Statement") in accordance with the circuit court's order. The Statement was a seven-page, single spaced document accompanied by thirteen exhibits. The Statement specifically set forth the relevant statutory criteria for a conditional use and height variance and explained how, in the Developer's view, the Project satisfied each of the statutory criteria.

2021), slip op. at 1. The owner had argued that it had a vested right under the old zoning code to construct an eighty-foot building, while the limit under the new code was thirty-five feet. *Id.* at 1-2. This issue is not implicated in the present case.

The Board held a full-day evidentiary hearing on August 24, 2022.[5] The Developer and the Appellants presented the Board with written and oral evidence in support and opposition, including expert testimony. The Developer presented testimony from its own representative, who testified about the Developer's reasons for selecting this particular site for the Project. The Developer also presented testimony from a civil engineering expert, Jared Barnhart, who presented a 14-page site plan that had also previously been presented to the City's Site Plan Review Committee. Mr. Barnhart described key features of the project, including the height of the proposed building, ingress and egress, parking, landscaping, and forest conservation. Licensed architect John Marc Tolson testified about the height of the proposed building, the scale of the proposed building in connection to the surrounding area, and the ways in which the Developer had worked with the community.

Representatives from nearby neighborhood associations spoke in support of the Project. One such representative, who spoke on behalf of the Lehr Stream Neighborhood Association, specifically referenced "promises and covenants that are perpetual that run with the land [and] are binding on their successors" that the Developer executed to gain community support.

Alfred Barry III testified as an expert in the field of zoning and planning on behalf of the Developer. He discussed the statutory criteria for conditional use approval, analyzed

[5] The Appellants had previously filed several preliminary motions, on which the Board held a hearing on July 5, 2022. The Board denied the Appellant's preliminary motions on August 2, 2022, finding that there was "substantial information in the [A]pplication for it to be considered complete."

the conditional use factors, and opined that there were no adverse effects above and beyond those inherently associated with such a conditional use. Mr. Barry also discussed the statutory criteria for a height variance and explained how, in his expert opinion, the Project satisfied the requirements.

The Appellants presented testimony from two neighbors: Betsy Boykin and Hunter Cochran, as well as expert testimony from James Patton. Ms. Boykin, a landscape architect, testified regarding the loss of trees that would result from the Project and the impact on her nearby residential property. She described the Property as "really a park" that "connects [with] Lake Roland" and expressed concerns about the loss of habitat for wildlife. Ms. Boykin further testified that she was concerned that the Project would negatively impact her property value. She explained that she was "really not thrilled about the prospect of any development up there at all." Mr. Cochrane testified, *inter alia*, regarding his concerns about traffic at the corner of Falls Road and Northern Parkway, as well as his concerns about the steep grade from the street level to the Project site and the challenges posed to pedestrians. Mr. Cochrane also expressed concerns about drainage and property values. James Patton, a civil engineer, testified as an expert in land planning, zoning, land development consulting, and site engineering. Mr. Patton expressed concerns about access issues, stormwater management and drainage, and compliance with the fire code.

The Board conducted their deliberations at a hearing on October 11, 2022. The Board specifically addressed the applicable legal standards for the granting of a height

variance and the approval of a conditional use and discussed the legal criteria in the context of the Project. The Board explained why it was persuaded to grant the Application with respect to both the height variance and the conditional use. The Board observed that "other signoffs would have to take place" from other City agencies, such as approval from the fire department, but reasoned that "all those things will have to be complied with before this construction can take place." The Board approved the Application by a unanimous 5-0 vote.

The Board subsequently issued its Resolution on November 1, 2022. The Resolution summarized the facts relevant to the Application, set forth the applicable legal standards for a height variance and conditional use, applied applicable legal standards to the Application at issue and the evidence presented before the Board, and set forth the Board's conclusion. The Board explained that it "finds sufficient evidence in the record to support the application . . . to use the Property as a residential-care facility, requiring conditional use approval and a maximum height variance." The Board determined, "as a matter of law, [the Developer] has established that the conditional use should be granted because the inherent adverse effects of the proposed residential-care facility will be no worse at this location than they would otherwise be at any other location in the zone." With respect to the height variance, the Board determined, "as a matter of law, [Developer] has established that the variance should be granted because the unique characteristics of the property, including its topography, large size, and irregular shape, create a practical

difficulty and unreasonable hardship for the developer in constructing a residential-care facility that complies with the 35-foot height limit under the Zoning Code."

The Appellants subsequently filed a Petition for Judicial Review in the Circuit Court for Baltimore City, which the circuit court addressed at a hearing on June 27, 2023. The circuit court affirmed the Board's approval of the proposed conditional use and height variance. This appeal followed.

DISCUSSION

I. Standard of Review

When reviewing "a local government's decision to approve a conditional use application, we look through the circuit court's decision, although applying the same standards of review, and evaluate the decision of the [local government]." *Brandywine*, *supra*, 237 Md. App. at 210. (cleaned up). The same standard applies when reviewing a local government's decision regarding a variance. *Dan's Mountain Wind Force, supra*, 236 Md. App. at 490.

We have explained:

> We review the [Board]'s decision, not the circuit court's decision. We are limited to evaluating whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions and to determining whether the administrative decision is premised upon an erroneous conclusion of law.
>
> The substantial evidence test is defined as whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. In applying the substantial evidence test we must review the agency's decision in the light most favorable to the agency, since decisions of administrative

> agencies are prima facie correct and carry with them the presumption of validity. Furthermore, not only is the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences.
>
> We review the [Board's] conclusions of law *de novo*, however, a degree of deference should often be accorded the position of the administrative agency. Although an administrative agency's interpretation of a statute that the agency administers should ordinarily be given considerable weight by reviewing courts, we owe no deference to an agency's erroneous conclusions of law. In contrast to administrative findings of fact, questions of law, including the proper construction of a statute, are subject to more plenary review by the courts. It is the appellant's burden, however, to establish that the agency erred as a matter of law.

Brandywine, *supra*, 237 Md. App. at 210-11 (cleaned up) (internal quotations and citations omitted).

II. The Ownership Status of the Developer is Not a Basis for Reversal

The Appellants first argue that the Board lacked authority to issue the Resolution because, in the Appellants' view, ZC § 5-201(b)(2) was not satisfied. We are not persuaded that this argument constitutes grounds for reversal.

Pursuant to ZC § 5-201(b)(2), "[a]n application for a variance [or] conditional use . . . must be filed by: (i) the owner of property to which the application applies; or (ii) a person expressly authorized by the owner in writing." The Appellants maintain that the Developer is not the title owner of the Property and did not have written authority from the owner to file that Application. Accordingly, the Appellants assert that ZC § 5-201(b)(2) was not satisfied. The Appellants contend that ZC § 5-201(b)(2) is a jurisdictional

requirement and that the Board lacked authority to approve the Application at issue in this appeal. [6]

The Developer presents several arguments as to why the Appellants' argument on this issue must fail. First, the Developer argues that this issue was waived because it was not raised until after the limited remand. The Developer further asserts that this argument was properly rejected by the Board and the circuit court because it was mentioned only in a passing reference at the evidentiary hearing before the Board and was not fully developed by the Appellants until their circuit court reply brief. The Developer further contends that the Application was signed by a representative of the owner and that the Developer satisfied the definition of "owner" under the zoning code. The Developer also maintains that this issue is, at most, a technical objection that does not warrant reversal. The Developer further argues that the Appellants cannot demonstrate any prejudice as a result of what it characterizes as a technical objection.

First, we observe that the original Application ultimately giving rise to this appeal was signed by Alfred W. Barry III, who declared, under penalty of perjury, that he "[is] the owner of the Property or h[as] specific approval of the owner to act as agent for this application." The Appellants argue that Mr. Barry submitted the Application on behalf of Developer, not on behalf of the title owners of the Property. In our view, however, the

[6] In support of their assertion that ZC § 5-201(b)(2) is a jurisdictional requirement, the Appellants point to an unreported 2017 circuit court opinion, which they attached in an appendix to their circuit court reply brief. We shall not address the substance of this opinion, except to note that the procedural posture of the 2017 case differed significantly from the case *sub judice*.

Board was entitled to rely on Mr. Barry's representation that he was acting with the approval of the owner.

Furthermore, we agree with Developer that any error was at best a technical objection that does not constitute grounds for reversal similar to that addressed by the Maryland Supreme Court in *Beall v. Montgomery County Council*, 240 Md. 77 (1965). In *Beall*, the Supreme Court addressed an application that was signed by only one property owner, who held only a seven-and-one-half percent interest in the subject property, and did not include co-owners as required by the zoning code. *Id.* at 87-88.[7] The Supreme Court rejected the argument that the failure to include co-owners on the application constituted reversible error. *Id.* The Supreme Court aptly observed:

> [Z]oning ordinances are concerned with the use of property, the height of buildings and the density of population. They are not concerned with the *ownership* of the property involved and title to real property is not tried in zoning cases . . . There was obviously no prejudice to the appellants from not listing the names and addresses of all the owners.

Id. at 88.

Furthermore, we note that the zoning code defines "owner" quite broadly and does not limit the definition to the title owner of a property. "Owner" is defined as "any person that: (i) has a legal or equitable interest in the property; (ii) is recorded in the land records as holding title to the property; or (iii) otherwise has control of the property, with or without accompanying possession of the property." ZC § 1-310(w). The Developer, who has

[7] Percentages of ownership for other property owners ranged from 30% to 5%.

entered into a contract to purchase the Property, "has a legal or equitable interest in the property" and "otherwise has control of the property."

For all of these reasons, we reject the Appellants' contention that the ownership status of the Developer constitutes the basis for reversal.

III. The Board's Approval of the Conditional Use was Proper

"A conditional use allows a particular use on a property that is not granted to a property owner by right." *Brandywine Senior Living at Potomac LLC v. Paul*, 237 Md. App. 195, 210 (2018). "Certain uses, designated conditional uses, are permitted only after a property owner obtains conditional use approval after a reviewing body, such as the [Board], has reviewed and approved an application seeking conditional use approval." *Id.* (citing Stanley D. Abrams, *Guide to Maryland Zoning*).

The conditional use applicant "has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements" but "does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community." *Schultz v. Pritts*, 291 Md. 1, 11 (1981). "The [conditional] use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid." *Id.* The Supreme Court of Maryland has explained:

> If [the conditional use applicant] shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the

> comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a [conditional] use is arbitrary, capricious, and illegal. These standards dictate that if a requested [conditional] use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied.

Id. (citations omitted).

The Appellants present several arguments as to why, in the Appellants' view, the Board's approval of the conditional use was improper. We shall address each in turn.

A. Public Hearing and Notice Requirement

The Appellants contend that the "public notice and hearing" requirement set forth in ZC 5-602(c) was not satisfied because the term "conditional use" was not included on the signage posted notifying the public about the Board's hearing. We are not persuaded.

Section 5-602 of the zoning code sets forth the requirements for notice of hearings on major variances and conditional uses. ZC § 5-602(a) provides that, "[f]or major variances and conditional uses," the Board or the City Council "must conduct a hearing at which … (1) the parties in interest and the general public will have an opportunity to be heard; and (2) all agency reports will be read." Pursuant to ZC § 5-602(b), "[n]otice of the hearing must be given by posting in a conspicuous place on the subject property."

The required contents of the notice are set forth in ZC § 5-602(c), which requires that the notice include:

> (1) the date, time, place, and purpose of the public hearing;
>
> (2) the address of the subject property or a drawing or description of the boundaries of the area affected by the proposed variance or conditional use;

(3) the name of the applicant; and

(4) how additional information on the matter can be obtained.

The signage posted on the Property notifying the public about the August 24, 2022 hearing contained the heading "NOTICE OF PUBLIC HEARING" and provided that the purpose of the hearing was "[t]o construct a new three-story structure to use as a residential-care facility with 120 residents (110) rooms. Height variance required." The notice included the date, time, and place of the public hearing, the address of the subject property, and provided a method for gaining additional information, informing the public that "[f]or more information," individuals could "contact the [B]oard of [M]unicipal and [Z]oning [A]ppeals at 410-396-4301."

We agree with the Developer that this notice sufficiently set forth the purpose of the hearing as required by ZC § 5-602(c). Although the phrase "conditional use" was not included, the notice clearly informed members of the public what the Developer sought to build on the Property. The zoning code does not expressly require that the notice use the phrase "conditional use," but, rather, that the "purpose of the public hearing" be included. In our view, the notice was sufficient when it provided that the purpose was "[t]o construct a new three-story structure to use as a residential-care facility with 120 residents (110) rooms. Height variance required."

Furthermore, the Appellants do not contend that they were actually unaware of the hearing, nor do they contend that they were unaware that the Application sought approval of a proposed conditional use. Even if we were to assume *arguendo* that the posting was in some way deficient, the Appellants cannot contend that they were inadequately

informed. "The law, in its majesty, is not designed to require futile action or idle gestures. It is well settled that notification purposed to inform may be replaced by actual knowledge . . . And this is especially so when the knowledge has been acted upon without reliance upon the notification's absence or its defects." *Clark v. Wolman*, 243 Md. 597, 600 (1966) (citation omitted). Accordingly, we reject the Appellants' contention that the absence of the phrase "conditional use" on the public notice constitutes reversible error.

B. The Falls Property

The next appellate argument advanced by the Appellants is that the Board erred in issuing the Resolution because the neighboring Falls apartment building property (the "Falls Property"), was not included in the Application. We are not persuaded.

The Appellants assert that the Falls Property is a "property to which the application applies," and, therefore, the Application was required to include the Falls Property pursuant to ZC § 5-201(b)(2). ZC § 5-201(b)(2) requires that an applicant for a variance, conditional use, use permit, or zoning appeal be filed by "the owner of property to which the application applies." The Appellants further emphasize that ZC § 5-602(c) requires that the notice posted on a property include "the address of the subject property or a drawing or description of the boundaries of the **area affected by** the proposed variance or conditional use." (Emphasis supplied.) The Appellants argue that the Falls Property was an "area affected by" the proposed conditional use because the access to the Property from Northern Parkway would be through the Falls Property, and the Falls Property would otherwise be affected by necessary modifications for drainage.

First, we observe that the Appellants concede that this issue was not raised until the Cochranes filed their post-hearing submission, in which they argued, *inter alia*, that the Board could not consider and approve the Project on an application that was for the Property only when the proposed development affected the neighboring Falls Property. Moreover, when the Appellants presented this argument in their post-hearing submission, they referenced only the application requirement of ZC § 5-201(b)(2), arguing that the application "applie[d] to" the Falls Property but did not include written authorization from the Falls Property's owner.

Moreover, the height variance and conditional use sought by the Developer was for a Project on the Property. The fact that the Falls Property may be impacted by the development does not require that the Falls Property's owner submit an application for conditional use and height variance for a project on a neighboring property. The only "property to which the application applies" is the Property adjacent to the Falls Property, not the Falls Property itself. Accordingly, we are not persuaded by the Appellants' assertion that the Board erred in issuing the Resolution because the Falls Property was not included on the Application.

C. The Board's Approval of the Conditional Use was Supported by Substantial Evidence and was Legally Proper

The Appellants argue that it would "be difficult to find a less appropriate site" for the Project than the Property and that the "[i]t would be difficult to imagine a [c]onditional [u]se approval Resolution less thorough or more biased." The Appellants assert that the Resolution's "sparse content does not accurately reflect a contested case that involved an

all-day remand hearing and post-hearing submissions." The Appellants further contend that the Resolution "largely ignores the opposition testimony and exhibits" and contains "boilerplate and unsupported" findings. The Appellants maintain that the required criteria set forth in ZC § 5-406(a) were not satisfied and that the Board failed to appropriately consider the City's Comprehensive Master Plan. The Appellants take further issue with the Board's conclusions regarding ADA accessibility, urban forest removal, emergency vehicle access, drainage, and site plan review. The Appellants argue that because the Developer did not satisfy the basic conditional use criteria, the Project could not earn the *Schultz v. Pritts*, 291 Md. 1, 11 (1981) presumption of compatibility, and that even if the presumption did apply, there was ample evidence of extraordinary adverse effects over and above those ordinarily associated with the establishment and operation of the use. Finally, the Appellants assert that the Board's approval was open-ended, rendering it arbitrary and capricious. As we shall explain, our review of the record leads us to conclude that the Board's approval of the conditional use was supported by substantial evidence.

Section 5-406(a) of the Zoning Code[8] sets forth specific findings the Board is required to make before approving a conditional use, providing that the Board "may not approve a conditional use" unless the Board finds that:

[8] ZC § 5-406 was amended as of January 21, 2023, but not substantively. Subsections (a) and (b) were flipped in that the criteria previously set forth in ZC § 5-406(b) are now found in ZC § 5-406(a), and the "limited criteria for denying" a conditional use previously set forth in ZC § 5-406(a) are now found in ZC § 5-406(b). Furthermore, the heading for the criteria now found in ZC § 5-406(a) was changed from "[r]equired considerations" to "evaluation criteria," and the word "further" was removed from the

> (1) the establishment, location, construction, maintenance, or operation of the conditional use would not be detrimental to or endanger the public health, safety, or welfare;
>
> (2) the use would not be precluded by any other law, including an applicable Urban Renewal Plan;
>
> (3) the authorization would not be contrary to the public interest; and
>
> (4) the authorization would be in harmony with the purpose and intent of this Code.

The Resolution includes the findings required by ZC § 5-406(a). The Board specifically found:

- [T]he requested residential-care facility conditional use is not detrimental to, nor does it endanger the public health, safety or welfare.
- There is "no urban renewal plan that affects this property."
- The requested residential-care facility conditional use is not contrary to the public interest and serves a vital need for senior housing in Baltimore City.
- The requested conditional use is in harmony with the purpose and intent of the Code by expanding housing choices for seniors.

introductory text to the current ZC § 5-406(a) so that instead of reading "[a]s a further guide to its decision . . .," the text now states "[a]s a guide to its decision on the facts of each case . . . ." The substance was not otherwise modified.

In this opinion, we cite the version of the Zoning Code as in effect at the time of the Board's decision.

We disagree with the Appellants' assertion that the Board's findings are unsupported or merely boilerplate recitations.[9] The Board's findings were made after careful consideration of the evidence presented and substantial evidence supports each finding.

Furthermore, the record reflects that the Board considered the criteria set forth in ZC § 5-406(b) and made specific findings as to several of the criteria relevant to the Project. Pursuant to ZC § 5-406(b), the Board was directed to consider fourteen criteria "[a]s a guide to its decision on the facts of each case . . . must consider . . . where appropriate." The criteria set forth in ZC § 5-406(b) are:

> (1) the nature of the proposed site, including its size and shape and the proposed size, shape, and arrangement of structures;
>
> (2) the resulting traffic patterns and adequacy of proposed off-street parking and loading;
>
> (3) the nature of the surrounding area and the extent to which the proposed use might impair its present and future development;
>
> (4) the proximity of dwellings, churches, schools, public structures, and other places of public gathering;
>
> (5) accessibility of the premises for emergency vehicles;
>
> (6) accessibility of light and air to the premises and to the property in the vicinity;
>
> (7) the type and location of adequate utilities, access roads, drainage, and other necessary facilities that have been or will be provided;

[9] Although we reject the Appellants' assertion that the Board's findings are merely boilerplate recitations, we note that the Board could have included more detail or explained its reasoning more fully, although it was not specifically required to do so.

> (8) the preservation of cultural and historic landmarks and structures;
>
> (9) the character of the neighborhood;
>
> (10) the provisions of the City's Comprehensive Master Plan;
>
> (11) the provisions of any applicable Urban Renewal Plan;
>
> (12) all applicable standards and requirements of this Code;
>
> (13) the intent and purpose of this Code; and
>
> (14) any other matters considered to be in the interest of the general welfare.

The Board was not required to specifically address each of the criteria set forth in ZC § 5-406(b) in the Resolution. Although specific findings were required by then-ZC § 5-406(a), the criteria listed in then-ZC § 5-406(b) were to be considered by the Board "as a guide to its decision on the facts of each case . . . where appropriate."

We have explained that the specific types of findings an agency is required to make are dependent upon the relevant statute or ordinance. In *Mid–Atl. Power Supply Ass'n v. Md. Pub. Serv. Comm'n*, 143 Md. App. 419, 438–39 (2002), we held that a statute that provided that an administrative agency "shall consider" various factors before issuing a decision did not require the agency to make specific factual findings or explain its reasoning with respect to each factor. Although then-ZC § 5-406(b) set forth criteria for the Board to consider various criteria when determining whether the proposed conditional use was appropriate, the Board was not required to make specific findings with respect to the criteria. As in *Mid–Atl. Power Supply*, *supra*, "[n]owhere does the [relevant ordinance] require that the [Board] state its findings as to each of these [criteria]." 143 Md. App. 438.

Our review of the Resolution and hearing transcript leads us to conclude that the Board considered the applicable factors prior to determining that the proposed residential-care facility was appropriate for the location for which it was proposed. Moreover, the Board expressly addressed several of the factors in the Resolution as follows:

> [T]he Board found that the proposed use is appropriate given the vacant, heavily wooded, large nature of the site as well as its location and position relative to other structures and properties adjoining Northern Parkway and Falls Road[.]
>
> The Board also found that a residential-care facility use is appropriate considering the nature of the surrounding residential area. Neighbors may continue to enjoy the dense vegetation north, east, and south of the proposed structure, and the establishment of a residential-care facility will have no impact on the existing commercial uses in the area. As Mr. Barry testified, the Proposed Development "preserves a tremendous amount of open space on the property." No future or current development will be impaired by the conditional use[.]
>
> The Board took note that the nearest place of public gathering such as a school or church is "thousands of feet away from this property." Mr. Barry's testimony established that there are "no other public gathering spaces that are anywhere proximate to this property" and, accordingly, none will be adversely affected by the conditional use[.]
>
> The proposed development will provide 48 off-street parking spaces, which is sufficient to meet the zoning requirements and to provide adequate parking for the "30 employees on the peak shift[.]"
>
> The Board found that there is adequate access for emergency vehicles, as confirmed by the Site Plan Committee, which includes representatives of both the Fire Department and the Department of Transportation, who have confirmed that the proposed layout meets all technical requirements[.] The Board

> also found that adequate utilities, access roads, and drainage will be provided as confirmed by the Site Plan Review Committee's review of the project[.]
>
> The Board also found that the proposed project would not be close enough to any other structures to obstruct light and air to any property in the vicinity. Under the Code, maximum lot coverage for an R-6 zoning district project is 45 percent; this project proposes only to cover 6.5% of the lot.
>
> The Board held that the conditional use will not affect the preservation of any cultural or historical landmarks in the surrounding area, because the site is not located in a historic district and there will be no demolition of structures. Further, the character of the surrounding area will not be impacted by the development, as the intersection of Northern Parkway and Falls Road contains both residential and commercial uses.
>
> The Board takes note of the fact that the North Baltimore area has among the greatest need for senior housing in the entire country, and that local community associations support the proposed use. Robert Williams and Aaron Levin also testified that the Applicant has agreed, in writing, to subject the Property to recorded covenants restricting the future use and development to protect the community.
>
> * * *
>
> For the reasons set forth above . . . it is this 1st day of November, 2022, by the Baltimore City Board of Municipal and Zoning Appeals, hereby
>
> RESOLVED, that the Board finds sufficient evidence in the record to support the application of [Developer's] request to use the Property as a residential-care facility, requiring conditional use approval and a maximum height variance;
>
> That, as a matter of law, [Developer] has established that the conditional use should be granted because the inherent adverse effects of the proposed residential[-]care facility will be no worse at this location than they would otherwise be at any other location in the zone, under the *Schultz v. Pritts* standard[.]

(Transcript references omitted.)

In our view, the Board's decision, which "ma[d]e meaningful findings of fact and conclusions of law," *see Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 63 (2002), provides a sufficient basis for meaningful judicial review. As such, we are "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Hamza Halici, et al. v. City of Gaithersburg*, 180 Md. App. 238, 248 (2008). When applying the substantial evidence test, we consider "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Layton v. Howard Cnty. Bd. of Appeals*, 399 Md. 36, 48-49 (2007). There is ample evidence in the record supporting the Board's decision, including expert testimony from civil engineering expert Jared Barnhart, licensed architect John Marc Tolson, and zoning and planning expert Alfred Barry III. The Board also heard testimony from the Appellants' expert witness James Patton, a civil engineer.

The Board was not required to explicitly resolve each and every instance of conflicting testimony offered by the Developer and the Appellants, nor was the Board required to summarize every piece of information presented before it. We have explained:

> That the [administrative agency] did not address the testimony of [certain witnesses] in the [written decision] does not mean that the [agency] acted arbitrarily or capriciously. The [agency] was free to accept or reject any witness's testimony. Nor can we conclude from the mere failure of the [agency] to mention a witness's testimony that it did not consider that witness's testimony.

Mid–Atl. Power Supply, *supra*, 143 Md. App. at 442. We cannot -- and will not -- assume that because the Board did not specifically mention certain testimony or specifically resolve certain conflicts in the testimony presented by each party, the Board did not consider the testimony presented.

The Board was entitled to consider the expert testimony presented both in support and in opposition to the Project and determine which testimony was entitled to more weight. Indeed, the Supreme Court has explained that "when there are differing opinions of two well-qualified experts and a zoning issue is fairly debatable," the Board "could 'quite properly' accept the opinion of one expert and not the other." *Md. Reclamation Assoc., Inc. v. Harford Cnty.*, 414 Md. 1, 29, 994 A.2d 842, 859 (2010) (quoting *Dundalk Holding Co. Inc. v. Horn*, 266 Md. 280, 292 (1972)). The Court explained that "'[c]ourts, under these circumstances, should not substitute their judgment on a fairly debatable issue for that of the administrative body'" and that the "Board was in the best position to evaluate the credible position of [competing] experts and it was within its bailiwick to give greater weight to the [one party's] expert's opinion." *Id.*

The Appellants specifically take issue with the Board's findings as to ADA access, urban forest removal, emergency access and site plan review, and drainage. We are not persuaded by the Appellants' arguments regarding any of these issues. With respect to ADA accessibility, the Appellants emphasize that pedestrian access to the Property itself is not ADA accessible because the Property is located at the top of a hill and the sidewalk along Northern Parkway is steep. They assert that the absence of accessible pedestrian

access to the site of the proposed residential-care facility indicates that the Project is detrimental to and/or endangers public health, safety, and welfare.

Notably, as Mr. Barnhart testified, and the Appellants do not dispute, the ADA does not require a Property owner to upgrade street accessibility to the Property. The Board specifically determined that "adequate . . . access roads . . . will be provided as confirmed by the Site Plan Review Committee's review of the project" and that the "proposed layout meets all technical requirements." This finding is supported by the evidentiary record. We reject the Appellants' assertion that the fact that the Property itself is not ADA accessible or easily accessible by pedestrians renders the Project detrimental to public health, safety, and welfare.[10]

With respect to urban forest removal, the Appellants contend that the Board failed to appropriately consider the loss of significant urban forest that would result from the construction of the proposed residential-care facility. The Appellants assert that the Board failed to consider the 2019 Baltimore Sustainability Plan with respect to the removal of urban forest. We disagree. The Board clearly addressed urban forest removal in the Resolution when it found that "[n]eighbors may continue to enjoy the dense vegetation north, east, and south of the proposed structure." The Board further credited the testimony

[10] The Appellants observe that many of Baltimore City's residents rely upon public transit to get to places of employment, and, as a result, the location of the Property would create a barrier to employment for City residents who need to walk uphill from a bus stop to the Property. We do not minimize these concerns, but, in our view, this is not dispositive of the Board's decision to approve the proposed conditional use. This was one factor among many for the Board's consideration.

of Mr. Barry, who testified that the Project "preserves a tremendous amount of open space on the property."

The Board further found that the Project proposes to cover only 6.5% of the lot, while the maximum lot coverage for the relevant R-6 zoning district project is 45 percent. The City Sustainability Plan does not require specific findings regarding urban forest preservation. Rather, the Sustainability Plan includes general goals and plans for the City as a whole. For example, the Sustainability Plan includes a "tree canopy" goal of 40%. The Sustainability Plan does not prohibit all disturbance of undeveloped area. The Board considered the Appellants' arguments regarding urban forest preservation and simply reached a different conclusion than that advanced by the Appellants. Nonetheless, the record reflects that the Board's findings as to this issue were supported by substantial evidence, and we shall not disturb them on appeal.

With respect to emergency access and site plan review, the Appellants assert that the Board erred in finding that the Property had "adequate access for emergency vehicles." The Appellants observe that the already congested intersection of Falls Road and Northern Parkway is "not suitable for the additional demand" from the Project. Notably, when a traffic study was conducted when the previously proposed significantly larger development within the proposed PUD was under consideration, the traffic study determined that that was "no degradation and overall intersection [loss of service] are anticipated due to the proposed 1190 Northern Parkway development." For this smaller Project, the City's Department of Transportation did not require the Developer to commission another traffic

study "because they didn't see it warranting that." This is sufficient substantial evidence to support the Board's conclusion that there was "adequate access for emergency vehicles, as confirmed by the Site Plan Committee, which includes representatives of both the Fire Department and the Department of Transportation, who have confirmed that the proposed layout meets all technical requirements."

The Appellants take issue with the Board's reference to the Site Plan Committee, arguing that the Board never reviewed or received the Site Plan Review Committee's report. The Board, however, was not required to wait for the Site Plan Review Committee's written report before proceeding. Indeed, ZC § 5-404(b)(iv) provides that "[i]f the Department of Planning or other City agency or official fails to timely submit its written report and recommendations, the Board of Municipal and Zoning Appeals may proceed without that report and recommendations." The Appellants cite no authority that requires the Site Plan Review process to have been completed prior to conditional use approval. Further, the Planning Department would have the opportunity to complete the Site Plan Review process after the conditional use determination. We, therefore, reject the Appellants' assertion that the Board erred by referring to the Site Plan Committee in its Resolution.

The Appellants take further issue with the Board's finding regarding drainage. Pursuant to ZC § 5-406(b)(7), the Board was required to consider the "type and location" of drainage. The Board did not describe its findings regarding drainage in detail, nor was the Board required to do so. The Board determined that the drainage was "adequate," and

this conclusion was supported by testimony from Mr. Barnhardt, who testified at length about the adequacy of the drainage at the evidentiary hearing. In addition to testifying that, in his professional opinion, the construction of the Project would not have any negative impact on drainage or runoff for neighboring properties, Mr. Barnhardt also explained that the Project would "have to go through a stormwater management review process" with the City. In our view, this testimony provided substantial evidence for the Board's conclusion on this issue.

Based upon our review of the record, we reject the Appellants' assertion that there is insufficient evidence to support the Board's finding under *Schultz v. Pritts.* A conditional use is a presumed valid use but "cannot be developed if at the particular location proposed they have an adverse effect above and beyond that ordinarily associated with such uses." *Schultz*, *supra* 291 Md. at 22–23. The Supreme Court has observed that "the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements," but the applicant "does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community." *Id.* The Supreme Court further explained:

> If [the applicant] shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the

> zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal.

Id.

In this case, the Board considered all of the evidence presented and determined that the adverse effects of the Project were not above and beyond that ordinarily associated with such uses in the zone. Our review of the record leads us to conclude that there was substantial evidence to support this conclusion, including the expert testimony of Mr. Barry, who testified that, in his professional opinion, there were no adverse effects above and beyond those inherently associated with such a conditional use. The Board reasonably found that there would be no "extraordinary effect" by granting the proposed conditional use for the Project.

The Appellants further assert that the Board's Resolution was arbitrary and capricious because it was "open-ended" and "not tied to a plan." The Appellants contend that the approval was not conditioned on any land preservation or covenant, nor did the Resolution approve an age-limited facility despite the Board's emphasis on the demand for senior housing in the area. For these reasons, the Appellants assert that the Board's approval was arbitrary and capricious. We are not persuaded by the Appellants' contentions. The text of the Resolution specifically provides that approval was granted to "Appeal No. 2021-095." The Application and accompanying seven-page Statement in Support of Application, which explained how, in the Developer's view, the Project satisfied each of the statutory criteria, contained the Project's detailed specifications. It is this

specific Application that the Board approved in its Resolution. We reject the Appellants' contention that the Resolution was impermissibly open-ended rendering it arbitrary and capricious.

The Board's Resolution approving the proposed conditional use included "meaningful findings of fact and conclusions of law," *see Mehrling*, *supra*, 371 Md. at 63. Accordingly, we are "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Hamza Halici, supra*, 180 Md. App. 248. In our view, "a reasoning mind reasonably could have reached the factual conclusion the agency reached," and, therefore, we shall affirm. *Layton*, *supra*, 399 Md. at 48-49.

IV. The Board's Approval of the Height Variance was Proper

Before the circuit court, the Developer asserted that the Appellants' argument that the Board's approval of the height variance was improper was moot in light of changes to ZC § 15-301, Measurement of Building Height, after the filing of the Petition for Judicial Review giving rise to this appeal. The Developer asserts that under the amended ZC § 15-301, no variance was necessary. The Appellants argued before the circuit court and this Court that the issue was not moot because the amendment to ZC § 15-301, which changed the methodology for calculating building height, was unlawfully enacted. The circuit court determined that this issue was not properly before it on judicial review, commenting that this was not the "right setting" or the "right time" to challenge the zoning amendment. As

we shall explain, in our view, assuming arguendo that the variance *was necessary* and the need for it was not obviated by the amendment to ZC § 15-301, the variance was properly granted by the Board. We, therefore, shall affirm.

A variance may be granted if the Board finds that, "because of the particular physical surroundings, shape, or topographical conditions of the specific structure or land involved, an unnecessary hardship or practical difficulty, as distinguished from a mere inconvenience, would result if the strict letter of the applicable requirement were carried out." Baltimore City Zoning Code ("ZC") § 5-308. This requirement for granting a variance is referred to as the required finding of uniqueness and unnecessary hardship and/or practical difficulty and has been embodied in Maryland's common law. *See Dan's Mountain Wind Force, LLC v. Allegany Cnty. Bd. of Zoning Appeals*, 236 Md. App. 483, 491 (2018). A variance will be permitted if the uniqueness of the property would cause unnecessary hardship or practical difficulty if held to a strict application of the Zoning Code as written. *Id.*

The Board determined that the height variance should be granted for several reasons, including that "physical surroundings and topographical conditions of the land . . . make any development on the proposed site difficult to carry out in strict compliance with the Code" due to the sharp rise in elevation. The Board noted "that the hardship in developing the proposed site is not due to any desire to increase the value of the property or the value of the development in that the increase in height of the building would be a 'benign' increase in total residential units overall." The Board further "found that the variance will

have negligible impact on the use and enjoyment of other property in the immediate vicinity, as the proposed structure is located at a significantly lower elevation than . . . nearly all other nearby homes, and, as a result, can barely be seen from most adjacent properties." The Board also observed that the Project "may improve property values by adding an amenity that will permit existing residents to age in place without leaving their community" and "[t]here was no evidence presented that the proposed height variance was in conflict with, or subject to, any Urban Renewal Plan, any Historical and Architectural Preservation District, nor is it precluded by the City Comprehensive Master Plan."

The Appellants assert that because the Resolution did not include a specific maximum height for the Project, the approval was arbitrary and capricious. We disagree. The Appellants do not identify any zoning code provision or other authority to support their position that the Board was required to condition its approval of the conditional use on a specific maximum height. Furthermore, as we explained *supra* in connection with the conditional use, the Board specifically approved "Appeal No. 2021-095." The Board's approval was of a specific Application and accompanying Statement in Support of Application that requested a ten-foot variance and set forth the elevation of the proposed structure as 333 feet and three and five-eighths inches. It is this specific Application that the Board approved in its Resolution. We reject the Appellants' contention that the Resolution was impermissibly open-ended rendering it arbitrary and capricious because it did not specifically condition approval on a specific maximum height for the project.

V. The PUD Application is Not Pending and has No Impact on the Application

Finally, the Appellants assert that the Board's approval of the height variance was improper because the PUD application for the Property remained pending. The Appellants maintain that under ZC § 5-302(c)(2), the Board may not consider an application for a variance if there is pending legislation before the City Council to grant the same ordinance. The Appellants argue that at the time of the Board's proceedings on this matter, the height of a new building on the Property remained a pending issue before the City Council after the City Council's 2017 approval of PUD Bill 17-0049 had been vacated and remanded to the City Council in Case No. 24-C-17-3734, as affirmed by this Court in *Hudson v. Mayor of Baltimore*, Ct. Sp. App. Case No. 2345, Sept. Term 2021 (unreported opinion filed September 16, 2021). We disagree.

ZC § 5-302(c)(2) provides that "[u]nless legislation has been introduced to approve a variance by ordinance, the Board of Municipal Appeals may grant or deny any application for a major variance." We agree with the Developer's interpretation of ZC § 5-302(c)(2). We read ZC § 5-302(c)(2) as providing that the Board is deprived of jurisdiction to consider an identical zoning variance if a zoning variance proceeding is simultaneously being considered by the City Council. Accordingly, we reject the Appellants' argument that this provision means that the Board is somehow deprived of jurisdiction if any proceeding under any section of the zoning code is pending before the City Council for the same property. We hold, therefore, that the Board had jurisdiction to consider and grant the variance at issue in this appeal.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.